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**THE JURIDIC CONDITION AND STATUS OF MINORS
ACCORDING TO THE CODE OF CANON LAW**

by
Victor George D'SOUZA

A dissertation submitted to the Faculty of Canon
Law, Saint Paul University, Ottawa, Canada, in partial
fulfillment of the requirements for the degree of
Doctor of Canon Law

Ottawa, Canada
Saint Paul University
1994



Victor George D'Souza Ottawa, Canada, 1994



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Biographical Note

Victor George D'Souza was born on 2 November 1959 in Bolkunje, Karnataka State, India. In 1975, he joined St. Joseph's Seminary, Mangalore, to pursue studies for priesthood for the diocese of Mangalore. During his seminary formation, he obtained B.A. (1981) and M.A. (History) (1983) degrees from Mysore University. At the completion of his theological studies, he was awarded B.Th. (1986) by the Pontifical Urbaniana University, Rome. He was ordained a priest on 30 April 1986.

After four years of priestly ministry in the diocese as a parochial vicar, the bishop sent him to undertake graduate studies in canon law. He commenced these studies in 1990 at Saint Paul University, and obtained Licentiate in Canon Law (Saint Paul University) and Master of Canon Law (University of Ottawa) in 1992.

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ABBREVIATIONS

| | |
|-------------------------------|---|
| <i>AAS</i> | <i>Acta Apostolicae Sedis</i> |
| <i>ASS</i> | <i>Acta Sanctae Sedis</i> |
| <i>CCEO</i> | <i>Codex canonum Ecclesiarum Orientalium</i> |
| <i>Corpus iuris civilis</i> | <i>Corpus iuris civilis</i> , vol. 1, ed. quinta decima, <i>Institutiones</i> , recognovit Paulus Krueger, <i>Digesta</i> , recognovit Theodorus Mommsen, 1928; vol. 2, ed. decima, <i>Codex Justinianus</i> , recognovit Paulus Krueger, 1929; vol. 3, ed. quinta, <i>Novellae</i> , recognovit Rudolphus Schoell, opus Schoelii morte interceptum absolvit Guilelmus Kroll, 1928; Berolini, Apud Weidmannos, 1928-1929. |
| <i>Corp.iur.can/FRIEDBERG</i> | <i>Corpus iuris canonici</i> , editio Lipsiensis secunda, post Aemilii Richteri curas ad librorum manu scriptorum et editionis Romanae fidem recognovit et adnotatione critica, instruxit Aemelius Friedberg, Lipsiae, Ex Officina Bernardi Tauchnitz, 1879. |
| <i>CIC/17</i> | <i>Codex iuris canonici</i> , 1917 |
| <i>CIC/83</i> | <i>Codex iuris canonici</i> , 1983 |
| <i>CLD</i> | <i>Canon Law Digest</i> |
| <i>CLSA Commentary</i> | J.A. CORIDEN, T.J. GREEN and D.E. HEINTSCHEL (eds.), <i>The Code of Canon Law: A Text and A Commentary</i> , New York, Paulist Press, 1985. |
| <i>CLSA Proceedings</i> | <i>Canon Law Society of America Proceedings of Annual Convention</i> |
| <i>CLSGBI Newsletter</i> | <i>Canon Law Society of Great Britain and Ireland Newsletter</i> |
| <i>DE</i> | <i>Il diritto ecclesiastico</i> |
| <i>EIC</i> | <i>Ephemerides iuris canonici</i> |
| <i>ETL</i> | <i>Ephemerides theologicae Lovanienses</i> |

| | |
|--------------|--|
| IC | <i>Ius canonicum</i> |
| IE | <i>Ius Ecclesiae</i> |
| LEF | <i>Lex Ecclesiae fundamentalis</i> |
| ME | <i>Il monitore ecclesiastico</i> (1[1876-1879]-60[1948]) <i>Monitor ecclesiasticus</i> (61[1949]-) |
| PCCICR | PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO |
| PG | <i>Patrologiae cursus completus: series graeca</i> |
| PL | <i>Patrologiae cursus completus: series latina</i> |
| 1980 Schema | PCCICR, <i>Schema Codicis iuris canonici</i> |
| 1981 Relatio | PCCICR, <i>Relatio complectens syntheses animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum schema Codicis iuris canonici exhibitarum cum responsionibus a secretaria et consultoribus datis</i> |
| 1982 Schema | PCCICR, <i>Codex iuris canonici: schema novissimum iuxta placita Patrum Commissionis emendatum atque Summo Pontifici praesentatum</i> |
| RDC | <i>Revue de droit canonique</i> |
| SC | <i>Studia canonica</i> |
| SRR Dec | <i>Sacrae Romanae Rotae Decisiones seu sententiae</i> (1[1909]-40[1948]) <i>Tribunal Apostolicum Sacrae Romanae Rotae Decisiones seu sententiae</i> (41[1949]-66[1974]) <i>Apostolicum Rotae Romanae Tribunal Decisiones seu sententiae</i> (67[1975]-) |

INTRODUCTION

Minors, by reason of their physical and mental immaturity need special safeguards and care including legal protection commensurate with their condition. The way a society treats them reflects not only its qualities of compassion and protective caring but also a sense of justice and commitment towards those who are weak, vulnerable, and incompetent to manage their affairs on their own. These days we are witnessing a growing legal and a moral awareness in regard to the well-being of minors both in the Church and in civil society. No doubt, there is in our society an unprecedented concern for the rights of minors.

The designation of the International Year of the Child, the International Year of the Youth, and now the Convention on the Rights of the Child by the United Nations Organization testifies to an increased international concern for children. In the midst of changing patterns in family life and values, civil society is grappling with the problems of providing adequate legal protection to minors. We also see minors enjoying special legal rights and privileges; they are treated as special persons before the law. Their rights and privileges cover not only adequate care and protection from parents or guardians but also include exemption or mitigation of penalties for violation of laws.

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The Church is no less concerned with the welfare of children. It vehemently defends the right of children to life and adequate care both before and after birth. The Holy See worked closely with the United Nations in drafting the "Convention on the Rights of the Child." Besides, the Pontifical Council for Family convoked a summit of experts on the rights of children in the month of June 1992.

"Let the little children come to me, do not stop them, for it is to such as these that the kingdom of God belongs" (*Mk. 10:14*).¹ The words of Jesus show his special concern and love towards children. The Church, whose master "put his arms around them, laid his hands on them and gave them his blessing" (*Mk. 10:16*) is bound to be specially concerned with the welfare of children in their human and Christian development. No doubt, the Church regards children, adolescents, and youth with high esteem. Vatican II and postconciliar documents are replete with statements that speak of the dignity of children, the importance of catechetical and sacramental formation, their education and relationship between parents and children. The conciliar and postconciliar documents, taken by themselves, do not reveal how much the Church cares for her minor children. These documents do not speak in terms of juridic condition and status of minors in the Church. Consequently, to understand this specific situation of minors we need to probe in a scientific manner the contents of the revised Code of Canon Law.

¹ All scripture quotations are taken from *The Jerusalem Bible*, Garden City, New York, Doubleday & Company, 1968, xi-1340; 358p.

INTRODUCTION

Reading through the many Church documents, one may easily get the impression that the Church while treating children with love and esteem, seems to consider them as the objects of protection, catechesis, and Christian formation rather than as the subjects of rights and obligations. This impression can be offset by a careful study of the condition and status of minors as affirmed in the Code of Canon Law. The basic question that needs to be answered is whether we can speak of children as subjects of rights and obligations in the Church. This will naturally lead to some other important questions, such as: What is the basis of such rights and obligations? Do minors have equal rights and dignity vis-à-vis those who have attained the age of majority? According to the law, only persons who have attained the age of majority enjoy the full exercise of their rights (can. 98 §1). Therefore, on account of their condition, minors face certain limitations in the exercise of rights. That being the case, who are the persons obliged to protect the rights of minors, and how are they appointed? What is the extent of the dependence of minors on such persons?

In addition to these questions, there are other significant issues relating to minors from a juridical perspective, such as norms governing their ascription and transfer to a Church *sui iuris*, their capacity to defect formally from the Church, their ability to stand in the court, their penal responsibility, etc. All these issues are intrinsically related to the question of the status and condition of minors in the revised Code.

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There is an abundance of scientific literature on infants, children, and adolescents in the area of religious psychology, pastoral catechetics, pedagogy, family life, and civil law. This is not so in the field of canon law. Nevertheless, it is encouraging to see some research in the area of the sacraments of initiation from a canonical perspective. While there is to date no major study on the situation of minors in the revised Code of Canon Law, some related studies must be noted. The unpublished doctoral dissertation of A. Andriekus in 1945 dealt with the situation of minors in regard to penal matters in Roman law and in the 1917 Code of Canon Law.² R. Metz has made a scholarly contribution to the study of the canonical condition of infants and minors during the medieval period.³ In 1945, C. F. O'Donnell did a doctoral dissertation on the marriage of minors from the perspective of the 1917 Code.⁴ A brief article by Cardinal Castillo Lara touched up on the juridic condition and status of minors in the revised Code.⁵ While this short study of Cardinal Castillo Lara does not provide an in-depth analysis of the substantive

² A. ANDRIEKUS, *De minoribus in iure poenali romano et canonico*, (unpublished J.C.D. diss.), Romae, Pontificio Ateneo Antonianum, 1945, xxi-197p.

³ R. METZ, *La femme et l'enfant dans le droit canonique médiéval*, London, Variorum Reprints, 1985, 342p.

⁴ C.F. O'DONNELL, *The Marriage of Minors: An Historical Synopsis and Commentary*, Canon Law Studies, no. 221, Washington, DC, The Catholic University of America Press, 1945, xii-268p.

⁵ R.I. CASTILLO LARA, "La condizione e lo statuto giuridico del minore nell'ordinamento della Chiesa," in *Salesianum*, 52(1990), pp. 257-275.

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canonical issues related to minors in the revised Code, it certainly provides insightful reflections for our research. This study hopes to address in detail the status of minors from a strictly canonical perspective.

The focus of our study is the juridic condition and status of minors in the revised Code of Canon Law. Its presentation is divided into four chapters. Chapter I deals with obligations and rights within the ecclesial context and establishes a broad theological and juridical foundation for the entire subject matter. It considers the theological foundation of human as well as ecclesial rights, their historicity, the relevant conciliar and postconciliar teaching, and in particular, obligations and rights within the general context of the revised Code of Canon Law. The thrust of this chapter consists in establishing the fact that obligations and rights are relationships of justice and responsibility. By determining the obligations and rights and the manner and condition of exercising them, the juridic order not only protects and promotes the welfare of persons but also the common good and mission of the Church.

It has been rightly said that "every norm is a child of history." This could be well applied to the canonical legislation on minors. In fact, the very notion of minor has undergone changes in the course of legislative history of the Church. The term *minor* as defined in law owes its formulation to socio-cultural influences. Therefore, the second chapter will concern itself with the legal history of the norms governing

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minors and with their juridic status according to Roman law and ecclesiastical law up to and including the 1917 Code.

Chapter III is devoted to an analysis of the doctrinal and juridic principles concerning minors. It focuses on minors in conciliar and postconciliar teaching; it traces the significant changes, if any, on the subject matter that were introduced during the process of the revision of the Code; and it identifies the juridic principles related to minors present in the revised Code. Particular attention is given to the notion of minor itself, the exercise of rights, the exemptions enjoyed by minors with regard to the law and parental authority, the acquisition of domicile and quasi-domicile, etc. These general principles play an important role in establishing the juridic capacity of minors for exercising their rights.

Finally, chapter IV identifies the specific obligations and rights of minors in the Code. It analyses all canons which have reference to the age of minority. The capacity of minors to exercise their rights is not the same throughout their age of minority; it differs in proportion to their maturity, and age is the determining factor. The chapter also illustrates where minors stand in relationship to those who have attained the age of majority. The dissertation includes an appendix, which presents a proposed draft of the charter of the rights of minors.

This study approaches the subject matter from two levels: theoretical and practical. From a theoretical point of view, it attempts to clarify important notions and juridic principles pertinent to the topic, such as rights and duties, minors, status,

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and condition. On the practical level, it strives to identify the specific rights which minors are entitled to exercise, either dependently or independently of their parents and guardians. The study will highlight the special pastoral concern publicly expressed by the Church in favour of minors by her affirmation of a profound esteem for their personal dignity and an unflinching support for their rights.

CHAPTER I

OBLIGATIONS AND RIGHTS IN ECCLESIAL CONTEXT

INTRODUCTION

Juridical status is the sum total of obligations and rights which a person enjoys within a determinate juridical order.¹ Since the central focus of our study concerns the juridical status of minors in the revised Code of Canon Law, this chapter undertakes to explore in general the contents of juridic status, namely, rights and duties. This will provide a general framework and foundation to the specific subject of rights and duties of minors.

In this chapter we will analyse the concepts of *right* and *duty* and discuss their divergent shades of meaning. We will also provide a brief excursus on the historicity of rights which has promoted the "right-consciousness" in our present world and in the Church. In the Church, rights and duties in the external forum are regulated by canon law. The Code of Canon Law is the Church's principal legislative document founded on the juridical-legislative heritage of revelation and tradition. To dissociate the question of obligations and rights from their biblical and magisterial perspectives would certainly impoverish both the nature of canon law and the Church and lead to

¹ See P. TOCANEL, *Compendium praelectionum de normis generalibus et de personis in genere*, Romae, Pontificium Institutum Utriusque Iuris, 1949-1950, p. 255. For more explanation on the concept of "juridic status", see pp. 266-270 in Chapter IV of this work.

juridicism and legal positivism. Consequently, we must situate obligations and rights within the ecclesial context and reflect on their theological foundation.

After having established the theological foundations of obligations and rights, we will focus on them in the 1983 Code. Here the analysis will concern primarily the subject, the source, and the context of rights in the Church. Following this analysis, we will discuss briefly the correlative nature of obligations and rights. During the course of this discussion, the meaning of some relevant canonical concepts and concerns will also be studied within the general framework of the chapter.

1.1 NOTION OF *RIGHT* AND *DUTY*

The importance of having a sound concept of *right* is evident from the fact that it is at the heart of philosophy, law, and other social sciences. This is perhaps the first moral and sociological concept that people have acquired or tried to analyze in the course of history. Besides, the rights-talk is becoming popular on account of an increasing awareness of human rights. Within the ecclesial life, particularly in the postconciliar era, we find a renewed consciousness and emphasis on human rights and the rights of Christians. A brief overview of the etymology and the concept of right will help us in understanding the context in which the vocabulary of rights has developed.

1.1.1 Etymology of *Right*

There are different opinions on the origin of the word *right*.² According to some, *right* derives from old English *riht*, akin to old Saxon *reht*, German *recht*, medieval Dutch *richt*, also to Latin *rectus*, straight, and Greek *orektos*, stretched (out), upright. Some others try to relate the origin of the term to Latin *rego*. In legal terminology, *right* often finds an expression in *ius*. The Latin words *ius* and *iustitia* are designated in Greek by the word *diké* which still belongs to the family of Greek juridical vocabulary. Presumably, *diké* takes its origin from the Sanskrit word *dik* which means to show or to indicate. Thus, *ius* acts as an index or rule of action. Some maintain that *ius* is derived from *iustitia* or *iustum*. Ulpian defined *ius* as *ars boni et aequi*.³ Isidore said that *ius* is so called because it is just.⁴ Some others say that it comes from *iussum* or *iubere*, "because *ius* means that which is commanded, namely, a law, an order, first called by ancients *joussa* and later *jura*."⁵

Philologists have tried to trace the derivation of the Latin word *ius* from other languages. Some hold that it comes from the Sanskrit root *yu*, which means a tie, a

² For a concise summary of different origins of the word *right*, see E. PARTRIDGE, *Origins: A Short Etymological Dictionary of Modern English*, 2nd ed., New York, Macmillan, 1959, pp. 561-562; P.N. ZAMMIT, "The Concept of Rights According to Aristotle and St. Thomas," in *Angelicum*, 16(1939), pp. 248-252; A.G. CICOGNANI, *Canon Law*, 2nd rev. ed., Philadelphia, The Dolphin Press, 1935, pp. 8-12; F. TERRÉ and R. SEVE, "Droit," in *Archives de philosophie du droit*, 35(1990), p. 43.

³ D. 1, 1, 1.

⁴ See ISIDORE, *Etymologiae*, Lib. 5, cap. 3, in *PL*, vol. 82, col. 199.

⁵ CICOGNANI, *Canon Law*, p. 8.

bond, a union, or a yoke. Others are of the opinion that it derives from the Vedic Sanskrit word *yos*, which signifies what is good and holy. This is because a right or law has a foundation in God.⁶

In modern languages *ius* is designated as *diritto* in Italian, *droit* in French, *derecho* in Spanish, *recht* in German. As in *ius*, these words are used to mean both "law" and "right." This is in harmony with the etymological derivation. *Ius*, on the one hand, means that which is just, equal, direct, and has a foundation in God; and on the other, it means an index, rule, and command. These two significations of *ius* can be summed up as: Whatever is just and right is the index or the rule of life and consequently it gives rise to a bond or a relationship of justice.

1.1.2 Concept of *Right*

It is generally recognized that there are various meanings and theories about the concept of right.⁷ The English critic, William Empson, once wrote that a complex word can contain a whole "compact doctrine."⁸ A word like *ius* is potent enough to convey several different doctrines - at one extreme, let us say, the doctrine of Thomas Aquinas which speaks of *ius* as the objectively just thing, and at the other

⁶ See *ibid.*, p. 9.

⁷ See P. CIPROTTI, "De vocabulorum usu ad ius subiectivum designandum in Codice iuris canonici," in *Acta congressus internationalis iuris canonici*, (Romae, in aedibus Pont. Universitatis Gregorianae, 25-30 septembris, 1950), Romae, Officium Libri Catholici, 1953, pp. 57-61; C. WELLMAN, "Offices, Duties and Rights," in *The Journal of Value Inquiry*, 22(1988), pp. 183-192; H.L. JOHNSTON, "Right and Rights," in *New Catholic Encyclopedia*, vol. 12, pp. 496-498; for rights in the Church, see J.H. PROVOST, "Ecclesial Rights," in *CLSA Proceedings*, 44(1982), pp. 41-62.

⁸ W. EMPSON, *The Structure of Complex Words*, London, Chatto & Windus, 1977, p. 39.

that of Thomas Hobbes which designates *ius* as a liberty to exercise a subjective power.⁹ We shall look into the three principal meanings of *ius*.

1.1.2.1 Objective right

Roman law defined justice as the "constant and perpetual disposition to render one's due."¹⁰ Influenced by this definition, Thomas Aquinas considered a right as the object of justice which seeks a balance or commensuration between equals.¹¹ By an act of justice, we bring about a proper adjustment and in so doing we give persons what is rightfully theirs or what is due to them, so that a correct balance is maintained. Over the past hundred years through the magisterial pronouncements on social doctrine, the Church has taught on the need of ordering and interrelating rights through the principles of justice. In the papal documents, we find three distinct

⁹ See B. TIERNEY, "Ius and Metonymy in Rufinus," in R.I. CASTILLO LARA (ed.), *Studia in honorem Eminentissimi Cardinalis Alphonsi M. Stickler*, Roma, Libreria Atenco Salesiano, 1992, p. 552.

¹⁰ "Iustitia est constans et perpetua voluntas ius suum cuique tribuens (*Institutiones*, 1, 1, pr., in *Corpus iuris civilis*, vol. 1, p. 1).

¹¹ *Summa theologica*, II-II, q. 57, art. 1. For Thomistic characteristics of the use, meaning and justification of rights language, see B.V. BRADY, "An Analysis of the Use of Rights Language in Pre-modern Catholic Social Thought," in *The Thomist*, 57(1993), pp. 97-121.

Thomas Aquinas makes a distinction between *ius* and *lex*. For him, law is the object not of justice but of prudence. Following Aristotle, Aquinas reckons legislative function as one of the parts of prudence, but right (*ius*) as the object of justice. The human mind, cognizant of the factors involved in bringing about equality, that is to say what is just, sets forth by way of some kind of promulgation, a prudential rule. This is called law. It is the mind's expression of what ought to be done in order to establish a proper balance. In other words, law is reason ordaining what must be done to bring about justice, i.e., the just or, the right. Law is not the same as right, but is an expression of right (see E.T. GELINAS, "Ius and lex in Thomas Aquinas," in *American Journal of Jurisprudence*, 15[1970], pp. 156-157).

modalities or types of justice.¹² These are complementary to the general notion of justice¹³ which is stated in the ancient principle of *suum cuique*, that is, to each his or her own. The division of the modalities of justice is no doubt based on the kinds of social interactions they govern. So we have:

Commutative justice: This is based on the ontological equality of all human persons in their direct and unmediated interaction with each other. This guarantees equal dignity of persons in interpersonal or private transactions. In other words, commutative justice demands fidelity to the agreements, contracts, and promises made between persons and groups (e.g., contractual agreements between employer and employee). The parties are equal in dignity and this personal equality implies that when persons freely enter into an agreement to exchange work for wages, the

¹² "These three modalities were, of course, not the invention of the modern papal tradition. The distinction between commutative justice and distributive justice has Aristotelian roots (see *Nicomachean Ethics*, 1131a-1134b). The tripartite division entered the modern Catholic tradition from a reconsideration of several passages from Thomas Aquinas, esp. *Summa Theologiae*, IIa-IIae, q. 58, art. 2, 5 and 6 and q. 61, art. 1-3" (D. HOLLENBACH, *Claims in Conflict: Retrieving and Renewing the Catholic Human Rights Tradition*, New York, Paulist Press, 1979, note 8, pp. 179-180).

¹³ A full analysis of the notion of justice is beyond the scope of this study. However, a reference is made to show that there is a connection between rights and justice. "The language of rights, therefore, focuses on dignity, liberty and needs of all persons regarded disjunctively or one at a time. The language of justice, on the other hand, focuses on dignity, liberty and needs of all persons regarded conjunctively or as bound by obligations and duties to one another. The principles of justice are not appealed to by tradition to resolve conflicts of rights according to an extrinsic standard. Rather, the intrinsic correlation of rights and justice reflects the fact that all genuine rights exist in an ordered relationship with each other. It is the task of the principles of justice to make this order explicit" (HOLLENBACH, *Claims in Conflict*, pp. 144-145).

agreement is equally binding on both parties. However, we must not forget the fact that commutative justice always exists within the social context.¹⁴

Distributive justice: This involves the recognition of the right of all individuals and groups to participate in and have access to public goods. This means equality of opportunity for entry into the social, economic, cultural, and political relationships which constitute the common good. This generates an obligation on the part of the State to guarantee the participation of all by creating institutions to help in implementing the demands of justice (e.g., police protection, social security, water supply, environmental safeguards).

Legal justice¹⁵: It is also called social justice. Aquinas wrote that legal justice is the virtue which directs the acts of all the other virtues to the common good.¹⁶ It orders or inclines persons to perform actions useful to another and to the community. In other words, social justice demands that the institutions of society be ordered in such a way that makes it possible to protect the social and personal rights of all. This complementary relationship between persons and society is an

¹⁴ See HOLLENBACH, *Claims in Conflict*, pp. 145-155; J.A. CORIDEN, "What Became of the Bill of Rights?" in *CLSA Proceedings*, 52(1990), pp. 50-52; J. FINNIS, *Natural Law and Natural Rights*, Oxford, Clarendon Press, 1980, pp. 161-197.

¹⁵ It was the intention of Aristotle "to introduce into academic discourse a technical distinction between two connotations of *dikaion*, the Greek word for that which is just - namely just *qua* lawful (conforming to standard) and just *qua* equal (taking no more than one's share) - the Aristotelian name for justice in this general sense is 'legal justice'" (FINNIS, *Natural Law and Natural Rights*, p. 165).

¹⁶ See *Summa theologica*, II-II, q. 58, art. 6.

aggregating principle of social justice.¹⁷ It consists in the exercise of every virtue having to do with one another by having the common good as its proper end. As a logical consequence, legal justice imposes obligations on individuals and groups, and therefore, it does not square well with the contemporary emphasis on rights which tends to neglect virtue and the common good.

Catholic social teaching over the past one hundred years has added an evangelical vitality to this rational analysis of justice. Generally speaking, the teaching on justice, especially from the time of Pope Leo XIII to the present day, has been in terms of relative rights and duties.¹⁸ The Thomistic and papal understanding of social justice enables one to understand the interrelation between the practice of virtue and the quest for justice.¹⁹ It rightly points out the object of right (or objective right).

1.1.2.2 Normative right

Ius signifies a *corpus* of what the objective right is. It is a sum of laws or a complete collection of laws and customs of one and the same character (e.g., the natural law, Roman law, canon law). It embraces the written and unwritten law. The *ius* is considered as a norm through which the object of justice is determined, measured, regulated, transmitted, and learned. It is the law, the *jussum*, that which

¹⁷ See HOLLENBACH, *Claims in Conflict*, pp.145-155; CORIDEN, "What Became of the Bill of Rights?" pp. 50-52; FINNIS, *Natural Law and Natural Rights*, pp. 164-165.

¹⁸ See CORIDEN, "What Became of the Bill of Rights?" p. 50.

¹⁹ For a concise study on this issue, see J.B. BENESTAD, "The Catholic Concept of Social Justice: A Historical Perspective," in *Communio*, 11(1984), pp.364-381.

has been decided. Romans understood *ius* in this sense as a norm, which regulates the relationships of people with each other.²⁰ We know that in many languages the same word is used for both, right and law. This is simply because the basis of every right must be some law, whether natural, human, or divine.²¹

1.1.2.3 Subjective right

A subjective right is an inviolable moral or legal faculty for regulating something for its proper purpose, of having, doing, or needing something. It is called a moral or legal faculty because it is conferred by law.²² According to T. Higgins:

A subjective right is a legitimate and inviolable power whereby one vindicates something for himself as his own. It is a power, that is, a faculty or capacity in virtue of which a person can do something in contradistinction to a duty in virtue of which a person ought to do something or owes something. Where duty constricts human freedom, right confirms or enlarges it.²³

It cannot be denied that these definitions in expressing a faculty or capacity to do something, overstress the active aspect, which is certainly not present in children and insane persons, who are also the true subjects of rights. However, if its intrinsic nature is considered, a subjective right represents the relationship of priority and of exclusivity grounded on the norms of objective law, and in virtue of which a

²⁰ See CICOGNANI, *Canon Law*, p. 10.

²¹ See T.J. HIGGINS, *Man as Man: The Science and Art of Ethics*, Milwaukee, Bruce, 1949, pp. 227-228.

²² See CICOGNANI, *Canon Law*, p. 11; see also W. ONCLIN, "Considerationes de iurium subiectivorum in ecclesia fundamento ac natura," in *EIC*, 8(1952), pp. 10-11.

²³ HIGGINS, *Man as Man: The Science and Art of Ethics*, p. 225.

person has priority, to the exclusion of others, to the things or actions determined by the objective law.²⁴

Hence, objective, subjective, and normative right are not three species of rights, but are three formal reasons (*rationes formales*) under which a right in general is considered. An objective and subjective right constitutes the *materia iuris* while a normative right forms the *forma iuris* in general.²⁵ There is a close link between these three concepts which can be put in an equation: the law (*ius* in its normative meaning) determines the object of the virtue of justice (*ius* in its objective meaning), and gives the individuals the power or faculty (*ius* in its subjective meaning), to claim what is just and due to them.

Rights exist or come into being in persons. By nature, they fall into a relational structure.²⁶ Hence, *right* can be defined as "a relation existing between a person and the action or omission of another, according to which the former may

²⁴ See ONCLIN, "Considerationes de iurium subiectivorum," pp. 10-11; R. SCHWARZ, "Circa naturam iuris subiectivi," in *Periodica*, 69(1980), pp. 191-200.

²⁵ See TOCANEL, *Compendium praelectionum de normis generalibus*, p. 11.

²⁶ The term *relative* is opposed to the term *absolute*. The *absolute* denies or at least prescind from a connection with the other, whereas the *relative* is that which is connected to the other. Right as a relational reality involves three elements: (i) a **subject**, (ii) a **term** and (iii) a **foundation**. In other words, there is a subject of rights =(i); there is someone else who is obliged =(ii) to the right holder; and there is a basis or a foundation =(iii) which is the reason why a given relation exists. This foundation consists of *ground* and *title*. The ground is the fundamental basis upon which a right rests (e.g., whoever legitimately buys a thing, owns that thing. This statement enunciates a general right). The title is some contingent particular fact which is the immediate cause why this particular right inheres in the person (e.g., Dick legitimately bought that car and so that is his). The law becomes a foundation (ground) of rights in the abstract or in a general manner, while the concrete fact becomes a title (see HIGGINS, *Man as Man: The Science and Art of Ethics*, pp. 235-241).

demand this action or omission as due to him on the strength of the equality of men, in virtue of the common good, and the goal of happiness toward which all men strive."²⁷

From the preceding analysis we can conclude that a right as an object of justice operates as a relationship on the basis of equality between persons. This equality provides all persons with an opportunity to participate in various private and social interactions which promote the common good. The norms help in maintaining equal and just relationships. They also grant power and protection to persons to have and exercise whatever is their own or whatever is just. Therefore, the very notion of right necessarily implies a reference to duty or obligation, which are operative in a relationship.

1.1.3 Notion of *Duty* and *Obligation*

The twin notions of duty and obligation occupy an important place in the history of moral and legal philosophical systems. The word "obligation" (from *obligare*) signifies a state of being bound around or encircled by some constraint, necessity, or force limiting the scope of free activity or perhaps safeguarding it. The word "duty" comes into English through the Anglo-French word *dû*, *dueté*, and ultimately from the Latin *debere*, which is composed of *de* and *habere*, meaning to have something from another, to be in possession of something that in reality belongs

²⁷ J.C. CALHOUN, *The Restraint of the Exercise of One's Rights*, Canon Law Studies, no. 432, Washington, DC, The Catholic University of America Press, 1965, p. 85; see L. BENDER, *Philosophia iuris*, 2a ed., recognita et aucta, Romae, Officium Libri Catholici, 1955, p. 67.

to another. *Duty*, as its etymology suggests, is something which is due, something which needs to be done either because it is assigned or because it owes its existence to a particular institutionalized position. Duties are commonly attached to jobs or roles. Indeed the Latin word for "duty" is *officium* which means "office." Hence, it should be carefully noted that "duty" and "obligation" although very closely related terms, are not synonymous.²⁸ They may be considered as the two faces of the one and the same reality. Duty indicates the objective reality which is to be realized and put into execution. Obligation indicates the necessity in which one's freedom finds itself when it comes to face to face with this reality.²⁹

The definition of *obligatio* as found in Justinian's *Institutes* states: "An obligation is a bond of law by which we are reduced to the necessity of paying something in compliance with the laws of our State."³⁰ Another classical definition in Roman law is: "The essence of obligations does not consist in that it makes some property or a servitude ours, but that it binds another person to give, do, or perform

²⁸ Can. 1095, 2° refers to *iura et officia* and can. 1095, 3° refers to *obligationes*. However, it is interesting to note that the corresponding can. 818 of *CCEO*, in both paragraphs 2 and 3 states *iura et obligationes* and *obligationes* respectively. The word *officia* is eliminated in favour of *obligationes*. The English translation of *CCEO* by the Canon Law Society of America has overlooked this change.

²⁹ See C. WILLIAMS, "Obligation, Moral," in *New Catholic Encyclopedia*, vol. 10, pp. 614-615; A.R. WHITE, *Rights*, Oxford, Clarendon Press, 1984, pp. 21-22.

³⁰ "Obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura" (*Institutiones*, 3, 13, in *Corpus iuris civilis*, vol. 1, p. 35).

something for us."³¹ Accordingly, an obligation is a legal relation, a tie, or a bond which holds persons together, creating both a duty and a right, the duty of the debtor to pay and the right of the creditor to be paid.

Even though the notions of duty and obligation are not synonymous, generally speaking, they are treated similarly in the law. Both the law and jurisprudence either use them interchangeably or explicitly make them synonymous.

1.2 HISTORICITY OF RIGHTS

Contemporary ontology would distinguish two components in concrete human reality: on the one hand, a constant, that is, human nature; on the other hand, a variable, that is, human historicity. Human nature differs from human historicity. To understand the human historicity one should have "historical mindedness"³² which enables one to distinguish between substantial principles themselves and the historical context in which they were formulated.

³¹ "Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitatem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum" (D. 44, 7, 3, in *Corpus iuris civilis*, vol. 1, pp. 764-765). The three words *dare*, *facere*, and *praestare* were symbolic words used in the formulas of Roman law to signify generally possible object of all obligation. *Dare* - to give, meant the transfer of ownership (D. 45, 1, 75, 10; 50, 17, 167); *facere* - to do, meant either a positive or a negative act, the actual performance of something or abstaining from doing something (D. 50, 16, 175; 50, 16, 218); *praestare* - to signify, meant to perform any other duty the agreement specified (see W.L. BURDICK, *The Principles of Roman Law and their Relation to Modern Law*, Rochester, New York, The Lawyers Co-operative Publishing Co., 1938, p. 386).

³² B. LONERGAN, "Natural Right and Historical Mindedness," in F.E. CROWE (ed.), *A Third Collection: Papers by Bernard J. F. Lonergan, S.J.*, New York, Paulist Press, 1985, pp. 170-171.

The enunciation and appropriation of particular rights in society is a historical phenomenon. Some of the classic enumerations of human rights include the English Petition of Right in 1628 and the English Bill of Rights in 1689, the Virginia Declaration of Rights (12 June 1776), the American Declaration of Independence (4 July 1776), the "Déclaration des droits de l'homme et du citoyen" of the French National Assembly (26 August 1789), the American Bill of Rights (25 September 1789) and the Universal Declaration on Human Rights of the United Nation's General Assembly (10 December 1948).³³ With the setting up of the European Commission for Human Rights and the European Court for Human Rights, following the convention for the protection of human rights and basic freedoms signed by the member states of the Council of Europe, the notion of human rights has become a recognized element of international and constitutional law.

Looking through the prism of history we see that there have been times when the Church adopted a critical and sometimes a negative attitude toward the rights movements because of their anticlerical and secularistic character.³⁴ Besides, the

³³ For all these documents, see W. LAQUEUR and B. ROBIN (ed.), *The Human Rights Reader*, Philadelphia, Temple University Press, 1979, pp. 104-201.

³⁴ During the eighteenth and nineteenth centuries, when there was an unprecedented zeal to claim independence and rights in the secular realm, the popes saw a mentality prevalent in history seeking a false autonomy and promoting a hostile attitude to the Church hierarchy. The French Revolution was the occasion of confrontation between the rights movement and the Catholic Church. Besides anticlerical activity, there was a movement to form a national church. Pius VI condemned absolute liberty as the foundation of individual rights, which in effect evolved into a condemnation of the rights of 1789. This condemnation was addressed to the inhabitants of the papal states seeking to join the French Revolution and rid themselves of papal rule. This situation had potential both for religious schism of a French national church, and a civil rebellion against the pope himself. Factors, such as

declarations of fundamental rights have taken shape within civil society as the result of revolutions, pacts, and claims arising from the tension between the State and the individual. The proclamation of specific rights in the Church should not be seen as a consequence of the tension between clergy and laity but as an outcome of a historic option made by the Church in her pilgrimage through time. This is linked to the principle of dynamic growth, that unceasing progress of the Church which Paul VI, in his encyclical *Ecclesiam suam*, called a "reflection on itself."³⁵ The Church acts according to the "signs of times." It is true that the 1917 Code did not delineate a list of specific rights as found in the revised Code. This development merely reflects the principle that every legal code bears the stamp of its time and "every legal norm is a child of history."³⁶ This includes the enumeration of rights and duties in the juridical order.

The ecclesial rights enshrined in the revised Code, are not self evident truths. They bear the marks of history. When one reads them with "historical mindedness," the novelty becomes evident.³⁷ Rights must be "placed in nature itself, in nature not

these, led the Church to adopt a dubious defensive stance towards the modern concept of human rights (see M. ELSBERND, "Rights Statements: A Hermeneutical Key to Continuing Development in Magisterial Teaching," in *ETL*, 62(1986), pp. 308-310; W. KASPER, "The Theological Foundations of Human Rights," in *The Jurist*, 50(1990), pp. 152-153).

³⁵ See P. LOMBARDÍA, "The Fundamental Rights of the Faithful," in *Concilium*, vol. 8, no. 5(1969), pp. 44-45.

³⁶ L. ÖRSY, *Theology and Canon Law: New Horizons for Legislation and Interpretation*, Collegetown, Minnesota, The Liturgical Press, 1992, p. 98.

³⁷ "Perhaps we can catch something of their 'novelty,' by reading these ecclesial rights back into historical situations. Did any one tell St Francis Xavier that the people he wanted

as abstractly conceived, but as concretely operating."³⁸ They are unfolded in history, because the concrete operation of nature takes place in history. The historical process has played an important role in the Church in the affirmation and formulation of specific human and ecclesial rights.³⁹ The content of rights declared

to convert had the right to follow their own conscience, to follow their own rite, to follow their own religion? Did any official inform St Ignatius, languishing three months in a cell in Alcalá, that he had the right to due process? When her confessors instructed St Teresa of Avila to write down all of her inner experiences so that they could judge their worthwhileness, were any one of them troubled by her right to privacy? Again, when Mary Ward wanted to establish a group of sisters responsible for educating girls in the 17th century and when she was excommunicated for her zeal, did any one inform her that she had the right of association and the right to work in the apostolate? Did any superior in the Church inform Teilhard de Chardin that he had the right to free inquiry in 1948?"(J.P. McINTYRE, *The Law of Persons: Clergy and Laity*, notes for the private use of the students, Ottawa, Faculty of Canon Law, Saint Paul University, 1991-1992, p. 22).

³⁸ LONERGAN, "Natural Right and Historical Mindedness," p. 171.

³⁹ The Church in medieval times, being comfortable in a monarchical political system, hardly spoke in terms of rights of the person. But it emphatically proclaimed the duties that a person owed to the king and the Church. No wonder that the law of the Church, which developed in large part during this historic period, placed emphasis on duty (see A.J. MAIDA, "Rights in the Church," in *Chicago Studies*, 15(1976), pp. 255). Political theories of the time have had a major impact on Church law and theology. Ecclesiology was susceptible to influences such as Church-State struggles, lay investiture conflicts in the Middle Ages, "perfect society" theory, and the use of political concepts in describing the Church as a monarchy (see J.H. PROVOST, "Promoting and Protecting the Rights of Christians: Some Implications for Church Structure," in *The Jurist*, 46(1986), pp.296-298). The ecclesiology prevalent during the formulation of the 1917 Code is different from that prevailing in the revised Code.

World War II heightened the consciousness of human rights based on human dignity. As a consequence, the Universal Declaration of Human Rights (1948) came into birth. Within the Church, voices began to be heard asking whether what the Church proclaims to the world in matters of human rights is applicable within the Church. A debate arose among the canonists whether there are subjective rights in the Church, and this occasioned a major international congress (for the acts of the congress, see *Acta congressus internationalis iuris canonici*, [Romae, in aedibus Pont. Universitatis Gregorianae, 25-30 septembris, 1950], Romae, Officium Libri Catholici, 1953, 224p). The Council too shifted the ecclesiological perspective emphasizing person rather than function, and consequently spoke of fundamental equality and functional diversity. Immediately after the Council there were various proposals for a listing of rights and duties in the Church somewhat similar to that of the Universal

in the encyclicals was determined by specific historical situations. In other words, a historical context shaped magisterial statements on rights.

As a variable component of a concrete human reality, historicity can certainly help in determining and understanding the content of rights. But rights need an immutable, constant, and universal foundation, which we shall examine in the following section.

1.3 THEOLOGICAL FOUNDATION OF RIGHTS

Human dignity rooted in the nature of the person is the foundation of rights. Human dignity has a theological foundation which is evident in the Bible and in the teaching of the Church. A brief review of the biblical data and the recent papal teaching should enable us to articulate the theological foundation of rights.

1.3.1 The Biblical Perspective

It would be anachronistic to try to match current discussion on human rights with the statements contained in different books of the Bible and thereby try to prove that the Bible recognises and protects human rights. We should not forget the fact that the Bible belongs to an entirely different historical period. Moreover, it would be an aprioristic apologetics to argue that every idea that sustains our interest now

Declaration of Human Rights. The proposal for a *LEF* bears good evidence of this. So, it cannot be denied that the Universal Declaration of Human Rights has in part influenced the listing of rights in the revised Code (see R.I. CASTILLO LARA, "Some General Reflections on the Rights and Duties of the Christian Faithful," in *SC*, 20(1986), pp. 10-11; J.H. PROVOST, "The Christian Faithful," in *CLSA Commentary*, pp. 134-135).

should be found in the Bible. The Bible indeed makes a substantial contribution to the discussion of rights and duties, but it belongs to a different and higher order. There is no doubt, however, that the basic principles underlying the modern teaching on social justice are found radically in the Bible.⁴⁰ While it is true that "the Bible does not use a twentieth century vocabulary, but it does supply premises from which a developed doctrine about the dignity and rights of human beings may be deduced."⁴¹

Old Testament: In the Old Testament *yashar*⁴² and *mishpath*⁴³ are the two

⁴⁰ B.M. AHERN, "Biblical Doctrine on the Rights and Duties of Man," in *Gregorianum*, 65(1984), p. 301.

⁴¹ INTERNATIONAL THEOLOGICAL COMMISSION, "Propositions on the Dignity and Rights of the Human Person," in M. SHARKEY (ed.), *Texts and Documents, 1969-1985*, San Francisco, Ignatius Press, 1989, p. 253. The document was approved by the Commission "in forma specifica." According to the definitive statute, *Motu proprio Tredecim anni*, 6 August 1982, in *AAS*, 74(1982), pp. 1201-1205, the approval of the documents of this Commission may assume two forms: (i) The formal approval (in specific form), conceded by absolute majority on the part of the members of the Commission present at the plenary session, concerns the entire text, including ideas, the wording, the presentation. (ii) The general approval (in generic form) implies only that the Commission accepts the principal ideas of the text, the rest remaining the responsibility of its author or authors.

⁴² The root *yashar* means to be smooth, level, straight, direct and thus to be right (e.g., *1 Sam.* 6:12; *Ps.* 107:7; *Jer.* 31:9). The one who walks on such a path is straightforward, just, upright (*1 Kings* 9:4; *Job* 1:1,8); doing what is "right" in God's sight (*Ex.* 15:26). The corresponding Greek word is *euthus*, a "straight" path or street (*Mt.* 3:3), the "right" way (*2 Pet.* 2:15), a heart "right" before God (*Acts* 8:21). See s.v. "right," in C. F. PFEIFFER, H. F. VOS and J. REA (eds.), *Wycliffe Bible Encyclopedia*, Chicago, Moody Press, 1975, vol. 2, pp. 1470-1471).

⁴³ The word *mishpath* derives from the root *shapat*, "to judge, to govern." It signifies what is legally or juridically right (*Gen.* 18:25; *Ps.* 140:12). It is the social justice which God requires of man.

In the New Testament, the Greek *dikaïos* carries the similar idea of being right or just: a fair wage (*Mt.* 20:4), judging what is right (*Lk.* 12:57), the law-abiding, righteous man (*1 Tim.* 1:9), doing what is ethically right (*Eph.* 6:1; *Rev.* 22:11). Usually, however, in the

important Hebrew words which have a juridical character. The word *mishpath* occurs over four hundred times in the Old Testament, specially in the context of "doing what is just" or that of justice. In essence, justice has to do with one's obligations and rights under law. Justice consists in doing what is in harmony with the divinely revealed norms of interpersonal behaviour.⁴⁴ Generally rights are established under the rule of God rather than by human custom.

The theological foundation⁴⁵ of rights in the Old Testament begins with creation theology. The Old Testament portrays the creation of man and woman in the image and likeness of God.⁴⁶ As a result the radiance of God is reflected on every human face. Every human being, irrespective of age, sex, condition, or status in the society, is the image of God. Accordingly, it is no accident that this becomes the starting point for the equality of all men and women. Besides, God entered into a covenant with the people. "This Covenant had its origin in the mercy of God and served to manifest the 'justice' (*sedaqa*) with which God sought to renew his image

New Testament the Greek adjective and its noun *dikaiosyne* bear the meaning of righteousness in a moral, religious or theological sense, based on the Hebrew terms *sedeq* and *sedaqa* (see PFEIFFER, VOS and REA, *Wycliffe Bible Encyclopedia*, vol. 2, pp. 1470-1471).

⁴⁴ See s.v. "Justice/Injustice," in L.O. RICHARDS, *Expository Dictionary of Bible Words*, Grand Rapids, Michigan, Regency Reference Library, 1985, pp. 368-369.

⁴⁵ See KASPER, "The Theological Foundations of Human Rights," pp. 148-166. A concise and indepth analysis of the various facets of the theological foundation of human rights is found in the working papers presented to the Plenary Assembly of the International Theological Commission held at Rome in December 1983, on the theme: "Rights and Dignity of the Human Person" and these are published in *Gregorianum*, 65(1984), pp. 231-481; see also G. CONCETTI (ed.), *I diritti umani: dottrina e prassi*, Roma, Editrice AVE, 1982, 919p.

⁴⁶ See *Gen.* 1: 26; 5:1; 9:6 and *Ps.* 8:5.

in the people of Israel and to restore the human dignity which he intended for mankind in its very creation.⁴⁷ And through the prophets God reminded them to be faithful to the covenant, and this faithfulness includes reverence for the rights of others, specially towards widows and orphans, poor people and strangers.⁴⁸

New Testament: The Greek word in New Testament which seems to convey the idea of right is *exousia*, often translated as "power." But the original thought expressed is *freedom of action*. Thus, a right denotes an area in which persons are free to act as they choose.⁴⁹ Paul explores the issue of personal rights in 1 Corinthians 9. As an apostle, he had a "right" to be supported by those whom he served, and he had a "right" to marry and travel with a wife, as the other apostles and Peter did.⁵⁰ But he did not use this right (1 Cor. 9:12). There were other rights which he chose not to use.

⁴⁷ AHERN, "Biblical Doctrine on the Rights and Duties of Man," p. 308.

⁴⁸ See J. LIMBURG, "Human Rights in the Old Testament," in *Concilium*, vol. 124, no. 4(1979), pp.20-26; A. PENNA, "I diritti umani nel vecchio testamento," in CONCETTI, *I diritti umani: dottrina e prassi*, pp. 61-95.

⁴⁹ See s.v. "Right/Rights," in RICHARDS, *Expository Dictionary of Bible Words*, p. 532.

⁵⁰ "Have we not every right to eat and drink? And the right to take a Christian woman around with us, like all the other apostles and brothers of the Lord and Cephas?" (1 Cor. 9: 4-5).

Some specific rights alluded to in the Bible are: the rights of priests (*Num.* 18:9-31; *Dt.* 18:3-8); the rights of widows, aliens and orphans (*Ex.* 22:20-21; *Dt.* 24:17); rights of the first-born (*Dt.* 22:15-17); the rights to asylum or sanctuary (*Num.* 35: 9-29); compensation for personal injury (*Ex.* 21: 18-22); property rights (*Ex.* 21:33-22:8); right as an apostle (*1 Cor.* 9:1-14; *1 Tim.* 5:17). See T.J. PAPROCKI, *Vindication and Defence of the Rights of the Christian Faithful Through Administrative Recourse in the Local Church*, Romae, Pontificia Universitas Gregoriana, 1991, pp. 99-114.

In the New Testament the theological foundation of rights goes deeper than creation theology by placing it at the christological level. The "image of God" is principally applied to Christ. Human beings are only an imperfect representation of the real image of God because of their fall from grace. Christ restores the damaged image of God in human beings, brings back incorruptibility and presents a perfect reflection of the image of God in the final resurrection.⁵¹ The moral duty of justice and mutual help seen from the theology of creation is deepened by Christ's revelation and the giving of the new commandment of the New Covenant: we are to love others not only as ourselves but in that fuller measure with which Christ loved each person and gave his life for each one of us (Jn 13:34; 15:12; Gal. 2:20). This christological foundation is complemented by a pneumatological dimension, which brings out the role of the Holy Spirit. According to W. Kasper:

Since salvation of Jesus Christ is transmitted to us by the Holy Spirit, we can also argue in pneumatological terms from the dignity of the human person given to us by the Holy Spirit and the freedom of the children of God. For in Jesus Christ all the natural differences that exist with mankind disappear [...]. There is neither Jew or Greek, there is neither slave or free, there is neither male or female (Gal. 3:28; 1 Cor. 12:13; Col. 3:11). To this universal dignity of the children of God all men and women are called.⁵²

⁵¹ See 2 Cor. 3:18; Rom. 8:29.

⁵² KASPER, "The Theological Foundations of Human Rights," p. 159.

Christ's teaching and example highlight and clarify the fundamental quality of each human person with every other: we are all brothers and sisters with one Father;⁵³ the "little ones" are his special concern and should be ours as well.⁵⁴

Therefore, it is apparent from the Bible that all human beings are created by God and bear the divine image. Christ died for all to unite every one under divine filiation. All this brings out oneness of human race which implies equality and basic rights for all. The foundation of dignity is the human nature itself - with reason, free-will. As created by God this nature is *capax Dei*. As a consequence, irrespective of being a child or an adult, every one possesses rights flowing from human dignity. And all are called to respect and protect the rights, specially of those whose human condition is vulnerable.

1.3.2 Teaching of the Popes of the Twentieth Century

The popes have spoken a great deal on rights and duties in their encyclicals dealing with social teaching. In response to the historical realities which led them to speak on social justice and defend human rights, the popes have situated the foundation of human rights in human dignity.

Leo XIII: The celebrated encyclical, *Rerum novarum* of Leo XIII ushered in a new era of modern Catholic teaching on human rights. "Man precedes the

⁵³ See *Mt.* 23:9; *Mt.* 6:9; *Mk.* 3: 34-35.

⁵⁴ See *Mk.* 9:33-37, 42; *Mt.* 11: 28-30; 12:17-21.

State⁵⁵ is his famous statement which clearly brings out the transcendental dimension of the human person which is not subordinate to any end. He also affirmed the equal dignity of all persons and defended the rights of workers. The attempt to relate the norms of human dignity to the concrete conditions of the time happily resulted in the formulation of specific rights and duties in the economic sphere.⁵⁶

The successors of Leo XIII, namely Pius X and Benedict XV made few notable advances in the doctrine on rights and duties. With Pius XI, however, the development which was started by Leo XIII resumed.

Pius XI: In his most influential encyclical, *Quadragesimo anno*,⁵⁷ Pius XI also focussed on economic matters. The historical background is the worldwide economic depression, which adversely affected the dignity of the human person. He denounced patterns of domination in the economic sphere which functionalized human persons and violated their personal dignity. His writings "contain a number of quite concrete and positive specifications of the moral claims of human dignity."⁵⁸ In the encyclical,

⁵⁵ LEO XIII, Encyclical, *Rerum novarum*, 15 May 1891, in *ASS*, 23(1890-91), no. 7, p. 644. Unless indicated otherwise, the English translation of the encyclicals from 1740-1981 is taken from C. CARLEN (ed.), *The Papal Encyclicals*, 1740-1981, [Wilmington, NC], McGrath Publishing Company, 1981, 5 vols; here at vol. 2, p. 243.

⁵⁶ The encyclical clarified the relative rights and mutual duties of the rich and the poor and spoke on capital and labour. It affirmed the existence of rights to adequate food, clothing, shelter, remuneration for work, a just wage, private property and labour unions or associations.

⁵⁷ PIUS XI, Encyclical, *Quadragesimo anno*, 15 May 1931, in *AAS*, 23(1931), pp. 177-228.

⁵⁸ HOLLENBACH, *Claims in Conflict*, p. 45.

Divini Redemptoris,⁵⁹ he provided a list of human rights which, though incomplete reveals the continuity with Leo XIII: the right to life, to bodily integrity, to the necessary means of existence, right to tend toward one's ultimate goal in the path marked out by God, right to association, and the right to possess and use property.

Pius XII: We will understand and appreciate better the teaching of Pius XII if we keep in mind that his writings and speeches were a response to the horrors of World War II and the repressive Stalinistic regime in the Soviet Union. Though he spoke of human rights as necessary conditions for the promotion of human dignity, he did not give a systematic treatment of rights as such in his statements.⁶⁰

John XXIII: The encyclical of John XXIII, *Pacem in terris*, is hailed as the central and classic document on the doctrine of human rights in the Catholic tradition. It begins with the necessity of human rights for the good order of the society. It provides "the most complete and systematic list of human rights in the modern Catholic tradition."⁶¹ In it the pope stated:

Any well-regulated and productive association of men in society demands the acceptance of one fundamental principle: that each individual man is truly a person. His is a nature, that is, endowed with intelligence and free will. As such he has rights and duties, which together flow as a direct consequence from his nature. These rights

⁵⁹ PIUS XI, Encyclical, *Divini Redemptoris*, 19 March 1937, in *AAS*, 29(1937), pp. 65-106.

⁶⁰ See HOLLENBACH, *Claims in Conflict*, pp. 56-59.

⁶¹ *Ibid.*, p. 66.

and duties are universal and inviolable, and therefore altogether inalienable.⁶²

According to J. Langan, this passage uses two key notions, which harmonize with each other, namely the personal character of the human being manifested in intelligence and freedom, and the nature which is the source of rights and duties. In doing so, the doctrine aims at being universal in its foundation and application.⁶³

Rights are to be protected by law and special mechanisms to ensure that the rights of all members of the community, particularly of those who are less able to defend their rights, are recommended.⁶⁴ It is deplorable that "sometimes 'human dignity' is considered as if the individual exists alone, and then placed in the community. We exist in the community; only by a second act of abstraction do we see ourselves as existing alone."⁶⁵ The pope, having placed rights within the context of human dignity, distinguished three ways in which rights relate to it. While personal rights are basic to human dignity, social rights or those conditions preserve human dignity; and instrumental rights, surpassing institutional conditions for human dignity

⁶² JOHN XXIII, *Pacem in terris*, in *AAS*, 55(1963), pp. 257-304; here at no. 9, p. 259; CARLEN, *The Papal Encyclicals*, vol. 5, p. 108.

⁶³ See J. LANGAN, "Human Rights in Roman Catholicism," in A. SWIDLER (ed.), *Human Rights in Religious Traditions*, New York, Pilgrim Press, 1982, pp. 25-26.

⁶⁴ See JOHN XXIII, *Pacem in terris*, nos. 56 and 79.

⁶⁵ PROVOST, "Ecclesial Rights," p. 46.

to be respected and preserved.⁶⁶ In short, human dignity is the cornerstone of rights and duties.⁶⁷

Paul VI: Human dignity is rooted in the image and reflection of God in each one of us. The integral development of persons is a manifestation of the divine image in them. The Church has grown more deeply aware of this truth and the promotion of these rights is required by the Gospel and is central to her ministry.⁶⁸ In his writings the pope has made use of phrases employed by John XXIII but still one senses in him a certain reserve.⁶⁹

John Paul II: The basic mindset of John Paul II had been revealed even before he became pope, particularly in his writings and in his interventions at Vatican II.⁷⁰ According to him, treating the *humanum* without reference to the *divinum*

⁶⁶ See *ibid.*, p. 46.

⁶⁷ The concept of *dignitas humanae substantiae* appeared as early as the Christmas oration containing the earliest collection of prayers in the Western Church, namely those in *Sacramentarium Leonianum*, and was included in the oration in the eucharistic celebration to be prayed after the offering. The phrase *dignitas humana* first appeared in papal encyclicals in the nineteenth century but it was not until *Pacem in terris* that the "human dignity" became the foundation of Roman Catholic social teaching (see R. TRAER, *Faith in Human Rights: Support in Religious Traditions for a Global Struggle*, Washington, DC, Georgetown University Press, 1991, pp. 35-36).

⁶⁸ See PAUL VI, "Human Rights and Reconciliation: Statement of Pope Paul VI and the Fathers of the 1974 Synod of Bishops (October 23, 1974)," in *The Pope Speaks*, 19(1974), p. 216-217.

⁶⁹ See DOCUMENTATION CONCILIUM, "Human Rights," in *Concilium*, vol. 8, no. 5(1969), p. 82.

⁷⁰ When John XXIII announced the Council on 25 January 1959, Karol Wojtyla was only thirty eight years old. He had been made auxiliary Bishop of Krakow in July 1958. Both as a bishop and professor (at the Catholic University of Lublin) he was invited to submit ideas for the agenda of the coming Council. He wrote a seven page text, in which he made it clear

gives an inadequate picture of a human being. A man or a woman as the "image of God" is a person, a being capable of acting in a deliberate and rational way, that is, capable of self-determination and self-realization.⁷¹ This freedom constitutes the condition and basis of human dignity.⁷² The dignity of human beings is founded on their being created in the image and likeness of God and redeemed by Christ.⁷³ According to this reasoning, therefore, human dignity itself becomes the part of the content of the proclamation of the Church.

1.3.3 Conciliar Teaching on Rights

Vatican II proclaimed that human dignity has foundational value. It is more fundamental than any specific human right. Even the Universal Declaration of Human Rights, which is formulated in a non-religious language, is still based on the recognition that rights derive from the inherent dignity of the human person.

among other things that the most important task facing the council would be to make a clear statement on the transcendence of the human person, because by being created in the image and likeness of God every human person has an absolute dignity. The Church must be a sign and safeguard of this transcendence of the human person (see *Acta et documenta Concilio Oecumenico Vaticano II apparando, Series I, Antepreparatoria*, cura et studio Secretariae Generalis Concilii Oecumenici Vaticani II, In Civitate Vaticana, Typis polyglottis Vaticanis, 1960, vol. 2, part II, pp. 741-748).

⁷¹ JOHN PAUL II, Encyclical, *Laborem exercens*, 14 September 1981, in *AAS*, 73(1981), pp. 577-647; here at no. 4, pp. 584-586.

⁷² See JOHN PAUL II, Encyclical, *Redemptoris hominis*, 4 March 1979, in *AAS*, 71(1979), pp. 256-326; here at no. 12, pp. 278-281.

⁷³ See JOHN PAUL II, Apostolic Exhortation, *Christifideles laici*, 30 December 1988, in *AAS*, 81(1989), pp. 393-521; here at no. 37, pp. 460-462; ID., Apostolic Letter, *Mulieris dignitatem*, 15 August 1988, in *AAS*, 80(1988), pp. 1653-1729; here at nos. 6-8, pp. 1662-1670.

The intrinsic connection between rights, equality, and dignity has been clearly noted by Vatican II in its Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, and in the Declaration on Religious Liberty, *Dignitatis humanae*. In *Gaudium et spes*, the rights of persons are mentioned at least thirty times.⁷⁴ *Dignitatis humanae* emphasizes responsible freedom which is linked to the dignity and rights of the human person in society. The document states that the Council "intends to develop the teaching of recent popes on the inviolable rights of the human person and on the constitutional order of society."⁷⁵ Indeed the Council has done it successfully by rooting human rights in human dignity, which stems not only from creation but also from redemption. No doubt, the Council awakened in the inner life of the Church a new consciousness of the meaning of human and Christian rights. The influence of the conciliar documents on the revision of the Code and particularly on the formulation of rights and duties of the Christian faithful is so great that the Council has become the interpretative criterion for the Code.

⁷⁴ VATICAN II, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, 7 December 1965, in *AAS*, 58(1966), pp. 1025-1120, nos. 26, 29, 41, 42, 52, 59, 65, 68, 73, 75, 76 and 87; see J.F. KINNEY, *The Juridic Condition of the People of God: Their Fundamental Rights and Obligations in the Church*, Rome, Catholic Book Agency, 1972, pp. 45-46.

⁷⁵ VATICAN II, Declaration on Religious Liberty, *Dignitatis humanae*, 7 December 1965, in *AAS*, 58(1966), pp. 929-946; here at no. 1, pp. 929-930. Unless indicated otherwise, the English translation of all the Vatican II documents is taken from A.P. FLANNERY (gen. ed.), *Documents of Vatican II*, Grand Rapids, MI, William B. Eerdmans Publishing Co., 1975, pp. 799-812; here at p. 800.

1.3.4 Synod of Bishops

The Synod of Bishops in 1971 turned its attention to the problem of justice and human rights. It stated that although the Church alone is not responsible for justice in the world, she has a "mission which involves defending and promoting the human dignity and fundamental rights of the human person."⁷⁶ The Synod affirmed the Church's mission to bear witness to justice and urged that within the Church rights must be preserved.⁷⁷ The Church knows from experience that her ministry of fostering human rights in the world requires a continued self-examination and revitalization of her laws, institutions, and policies. The 1971 Synod declared that those who venture to speak about justice must first be just. Paul VI taught that, "in the Church, as in other institutions and groups, purification is needed in internal practices and procedures, and in relationships with social structures and systems whose violations of human rights deserve censure."⁷⁸

From this overview of conciliar and papal teaching and of the synodal statements, it is evident that rights are founded in human dignity. This dignity of the human person stems from God's creative and redemptive activity. We have to admit that human dignity as a foundation for rights encompasses all persons, whether they

⁷⁶ SYNOD OF BISHOPS, *Convenientes ex universo*, 30 November 1971, in *AAS*, 63(1971), pp. 923-942; here at no. II, p. 932; English translation in A.P. FLANNERY (gen. ed.), *Vatican Council II: More Postconciliar Documents*, Grand Rapids, MI, William B. Eerdmans Publishing Co., 1982, pp. 695-710; here at p. 702.

⁷⁷ See *ibid.*, no. III.

⁷⁸ PAUL VI, "Human Rights and Reconciliation," p. 217.

are religious or not. The theological foundation has consequence for the interpretation and understanding of human rights. It helps us to discern their true meaning, and thus guard against their being exploited by competing ideologies and partisan politics.⁷⁹ They give universal validity to the rights of persons.

1.4 PONTIFICAL COMMISSION FOR THE REVISION OF THE 1917 CODE

On 25 January 1959, Pope John XXIII announced his decision to convoke a Council and revise the Code of Canon Law. He appointed the first members of the Pontifical Commission for the Revision of the Code of Canon Law on 28 March 1963. The Commission, in its initial plenary session held in November 1963, chose to suspend its activity until the completion of Vatican II, because the revision of the Code would necessarily depend on the direction and teaching proclaimed by the Council. The "canonical *aggiornamento*" was to depend essentially on the "pastoral *aggiornamento*" stimulated by the conciliar teachings.

1.4.1 Principles for the Revision of the Code

The Commission for the Revision of the Code considered it necessary to develop certain basic principles that would guide the process of revision of the Code in order to facilitate the task of transforming the pastoral decisions of the Council

⁷⁹ The specification of a particular right is embedded in the historical and sociological area (e.g., private property, slavery). The defence of human rights in the name of the Gospel must be based on the assertion that human dignity derives from the creation and redemption of the human person, and having confronted with evils which are contrary to human dignity one should oppose them as they are opposed to human rights. Here we see at work the historicity of the human person and of human knowledge.

into juridical norms. Therefore, the Commission developed ten fundamental principles to guide the revision of the Code which were approved by the Synod of Bishops in 1967.⁸⁰ Three of those principles directly refer to the question of rights and duties.

The first principle which deals with the preservation of the juridic character of the Code states that

the principal and essential object of Canon Law is to determine and safeguard the rights and obligations of each individual person with respect to the rights and obligations of others and of society at large, and certainly this can be done in the Church in all that pertains to the worship and the salvation of souls.⁸¹

In the Church, there is both a fundamental equality of all the faithful and diversity of offices and functions rooted in the hierarchical order. In this context, delineation of the fundamental as well as specific obligations and rights becomes essential to carry out the responsibilities. So, the sixth principle states:

A very important problem must be solved in the future Code of Canon Law, namely, how can the rights of persons be defined and safeguarded. [...] The rights of each and every faithful must be acknowledged and safeguarded, both the rights which they have by

⁸⁰ See *Communicationes*, 1(1969), pp.77-85. These principles were presented to the Synod of Bishops, which approved them with a few reservations after a week-long discussion (30 September to 4 October 1967). Before the final approval they were put to vote one by one and there were 187 voters. The results of this vote is reported in *Communicationes*, 1(1969), p. 56 and also on p. 100.

⁸¹ "Canonici quoque iuris obiectum praecipuum et essentielle est iura et obligationes uniuscuiusque hominis erga alios et erga societatem definire atque tueri, etsi eatenus fieri possit in Ecclesia quatenus ad Dei cultum et animarum salutem pertineant" (*Communicationes*, 1[1969], p. 79); English translation in J.F. HITE and D.J. WARD (eds.), *Readings, Cases, Materials in Canon Law: A Textbook for Ministerial Students*, rev. ed., Collegeville, MN, The Liturgical Press, 1990, p. 86.

natural law and the rights contained in the divine positive law, as also the rights which are duly derived from these laws because of the social condition which the faithful acquire and possess in the Church.⁸²

The proclamation of obligations and duties will be of no use without adequate provision in the law for their protection. Hence, the incorporation of ways and means for the administration of justice becomes a requisite for the Code. With this in view, the seventh principle states:

Nor is it enough to say that the safeguarding of human rights is adequately provided for in our legislation. We must also acknowledge the truly personal subjective rights, without which a juridically organized society cannot be imagined. In Canon Law we must, therefore, proclaim that the principle of juridical protection of rights applies with equal measure to superiors and subjects alike, so that any suspicion whatsoever of arbitrariness in Church administration may completely disappear.⁸³

This principle avoids the notion that rights are merely ecclesiastical, or something granted by the ecclesiastical authorities and subject to their arbitrary will. Rather, the principle recognises the rights and obligations whose foundation is membership in the church community.⁸⁴

⁸² "Questio eaque gravis in futuro Codice solvenda proponitur, videlicet, qua ratione iura personarum definienda tuendaque sint. [...] Unicuique christifidelium iura agnoscenda ac tuenda sunt, et quae in lege naturali vel divina positiva continentur, et quae ex illis congruenter derivantur ob insitam sociale conditionem quam in Ecclesia acquirunt et possident" (*Communicationes*, 1[1969], p. 82). English translation in *ibid.*, pp. 89-90.

⁸³ "Neque id sufficit ut tutela iurium in iure nostro convenienter vigeat. Agnoscenda enim sunt iura subiectiva vera et propria sine quibus ordinatio iuridica societatis vix concipitur. Proclamari idcirco oportet in iure canonico principium tutelae iuridicae aequo modo applicari superioribus et subditis, ita ut quaelibet arbitrariness suspicio in administratione ecclesiastica penitus evanescat" (*Communicationes*, 1[1969], p. 83); English translation in *ibid.*, p. 90.

⁸⁴ See J. BEYER, "De iuribus humanis fundamentalibus in statuto iuridico Christifidelium assumendis," in *Periodica*, 58(1969), pp. 29-58.

1.4.2 The *Lex Ecclesiae fundamentalis* and Fundamental Rights

One of the features of the *Lex Ecclesiae fundamentalis*⁸⁵ since its first drafts was that it received universal praise for its list of rights pertaining to all the faithful. The formulation of the canons, however, was far from satisfactory. The first draft itself presented so many restrictions in its presentation of rights that the restrictions appeared to be more important than the rights themselves. This criticism led the

⁸⁵ The fascinating *iter* of the *LEF* began on 20 November 1965 when Paul VI invited the assembled members and consultors of the Pontifical Commission for the Revision of the Code of Canon Law to consider the formulation of a document presenting the fundamental and constitutive laws of the entire Church, both Latin and Oriental (*AAS*, 57[1965], p. 985). The first schema of the *LEF* titled *Prima quaedam adumbrata propositio Codicis Ecclesiae fundamentalis* was discussed by the Central Committee of the Commission for Revision of the Code on 26-27 July 1966. On the basis of the suggestions and recommendations a second draft was prepared with the title *Lex Ecclesiae fundamentalis: altera quaedam adumbratio propositionis* and was discussed by the Central Committee on 3-4 April 1967 and was favourably received (*Communicationes*, 1[1969], pp.114-115). Then a special *coetus* was established which produced a third schema, referred to as the *textus prior* (1969) and sent to the cardinal members of the Commission, to the consultors of the Congregation for the Doctrine of the Faith and to the members of the International Theological Commission (*Communicationes*, 2[1970], pp.82-89). Their comments were used to produce yet a fourth text, the *textus emendatus* (1971) which was then sent to all the bishops of the world (see *Communicationes*, 2[1970], pp. 213-216; *ibid.*, 3[1971], pp. 50-69; *ibid.*, 4[1972], pp. 122-160). Though there was strong opposition to the project, the *coetus* continued to revise the draft of 1971, and a revised draft commonly known as *textus recognitus* was published in 1976 (the working text with objections and changes can be found in *Communicationes*, 8[1976], pp. 78-108; *ibid.*, 9[1977], pp.83-116 and 274-304). A final draft titled, *Lex Ecclesiae fundamentalis seu Ecclesiae catholicae universae lex canonica fundamentalis*, was submitted to the Pope in 1980 (the text is found in *Communicationes*, 12[1980], pp. 25-47; *ibid.*, 13[1981], pp. 44-110). At a meeting of the members of the Revision Commission in October 1981, it was announced that the *LEF* probably would not be promulgated and consequently a number of canons of *LEF* were to be incorporated into the Code itself (see *Communicationes*, 14[1982], pp. 121-122). The canons of *LEF* to be inserted into the Code if the former were not promulgated are found under the title "Appendix Canones 'Legis Ecclesiae fundamentalis,' qui in Codicem iuris canonici inserendi sunt, si ipsa 'Lex Ecclesiae fundamentalis' non promulgabitur," in *Communicationes*, 16(1984), pp. 91-99.

committee to drop the phrase "ad normam sacrorum canonum" in a considerable number of canons in the 1973 draft.

Originally two study groups worked on rights, one for the *Lex Ecclesiae fundamentalis* schema and the other for the *De populo Dei* schema. They seemed to have worked independently and came up with different approaches. The *De populo Dei* group had a very sophisticated organization for its listing of rights.⁸⁶ It distinguished the rights of Christians in the Church and their rights in the world. Rights within the Church were distributed according to a theological system: the right to communion came first; then came rights relating to the teaching, sanctifying, and ruling functions of the Church; these were followed by personal rights and provision for the protection of rights. Under rights of Christians in the world were included, the recognition of human rights, and the concern for justice and peace. In order to avoid duplication, during a meeting in 1977 this material was reviewed and the decision was made to scrap the entire project in favour of whatever the *LEF* group would develop.⁸⁷ When it was decided in 1981 not to promulgate the *LEF*, the canons on rights and duties were incorporated in Book II of the revised Code.

⁸⁶ See PCCICR, *Schema canonum libri II: De populo Dei*, Vaticano, Typis polyglottis Vaticanis, 1977, pp. 27-31.

⁸⁷ See the interesting discussion in *Communicationes*, 12(1980), pp. 77-91; also PROVOST, "Ecclesial Rights," p. 53.

1.5 OBLIGATION AND RIGHTS IN THE 1983 CODE

The Church is a complex reality consisting of human and divine elements.⁸⁸ The nature of civil society and that of the Church differ. The Church has the right to promote moral principles and "to make judgements on human affairs to the extent that they are required by the fundamental rights of the human person or the salvation of souls."⁸⁹ Though the Church promotes human rights in the world, the content of these rights within the Church is not the same.⁹⁰ Nevertheless, it goes without saying that human rights have validity within the Church in an analogical way.⁹¹

⁸⁸ See *LG*, no. 8.

⁸⁹ Can. 747 §2.

⁹⁰ The Church is in the world as a sign and an instrument of salvation. The human right of religious freedom may not hold good *within* the Church. The human right of religious freedom is necessarily relevant *for* the Church as no one can be forced to become a member of the Church. Similarly, the right to life is absolute within the human sphere. When it comes to defending the faith and giving witness to Christ through martyrdom, the right to life becomes relative before God. Hence, we can say that "in the ecclesial community and in civil society there is a difference not only of the content but also in the basis and manners of both exercising and defending fundamental rights and duties" (J. HERRANZ, "The Juridical Status of the Laity: The Contribution of the Conciliar Documents and the 1983 Code of Canon Law," in *Communicationes*, 17[1985], p. 296).

⁹¹ "The analogy is based on the fact that the Church's fundamental rights, in contrast to general human rights, do not precede the Church. While men exist before the State, Christians do not exist before, or independant of the Church. The Church is given the sphere of salvation for the individual Christian. The human right of religious freedom can therefore not hold good in the Church, which is the community of the faithful and hence the community in one faith. Nonetheless, human right of religious freedom is necessarily relevant for the Church, in so far that admission to the Church must be free from any kind of compulsion" (KASPER, "The Theological Foundations of Human Rights," note 48, p. 165). For a discussion on the various opinions on the analogous character of the Church law, see L. MÜLLER, *Kirchenrecht - Analoges Recht?: Über den Rechtscharakter der Kirchlichen Rechtsordnung*, St. Ottilien, EOS Verlag, 1991, xxvi-133p.

Lumen gentium verbalizes the distinction between human rights and the rights of Christians in the Church:

Because of the very economy of salvation the laity should learn to distinguish carefully between the rights and duties which they have as belonging to the Church and those which fall to them as members of the human society.⁹²

Rights in the Church are to be exercised according to her nature and purpose. The 1917 Code concentrated primarily on the rights of the hierarchy and did not list the rights of all the Christian faithful. The enumeration of rights and duties of all the faithful in the Church is a new feature of the revised Code. While cann. 208-223 are titled as "*The Obligations and Rights of All the Christian Faithful*", scattered throughout the Code are the rights and duties which belong to laity, clergy, and religious. The Code contains other lists of obligations and rights of juridical persons, associations, ecclesiastical offices, and a list of procedural rights. There are more than twenty canons in various parts of the Code which spell out what might be called "a bill of parental rights."⁹³

1.5.1 Ecclesial Foundation of Rights

The Church is a supernatural society, founded by Jesus Christ to be a sign and sacrament. As a supernatural reality, therefore, the means of incorporation into the Church would also have a supernatural character. Vatican II spoke of the

⁹² *LG*, no. 36, in FLANNERY, *Documents of Vatican II*, p. 394; see *GS*, no. 76.

⁹³ PROVOST, "The Christian Faithful," p. 137.

incorporation into the Church through baptism.⁹⁴ It holds the first place among all the sacraments because it is the principle of the spiritual life and through baptism we are made members of Christ and of the Church.⁹⁵ The Code also states that baptism, the gate to the sacraments,⁹⁶ by which men and women are incorporated into the Church, is validly conferred only by a washing⁹⁷ with true water together with the required form of words.⁹⁸

⁹⁴ *LG*, no. 11; see *AG*, no. 14.

⁹⁵ See *Summa theologica*, III, q. 73, art. 3; see also EUGENE IV, Constitution, *Exultate Deo*, 22 November 1439, no. 10, in P. GASPARRI and J. SERÉDI, *Codicis iuris canonici fontes*, Romae, Typis polyglottis Vaticanis, 1926-1939, vol. 1, p. 73-74.

⁹⁶ See can. 842 §1.

⁹⁷ Etymologically the latin term *baptismus* or *baptisma* comes from Greek word *baptizo* or *bapto* which means a dipping in water, a washing or a moistening. Thus the word baptism has a relation to water or washing. Clement of Alexandria used expressions which characterized baptism as a *lavacrum*, a washing (*Paedagogus*, Lib. 1, cap. 6, no. 25, in *PG*, vol. 8, col. 280), and Tertullian as a sacrament of water (*De baptismo*, 4, 20, in *PL*, vol. 1, col. 1197). The 1917 Code in can. 737 §1 used *ablutio* which has been replaced by *lavacrum* in can. 849 of the 1983 Code.

⁹⁸ Can. 849; see *CIC/17*, can. 737 §1. Baptism of desire and baptism of blood (i.e., martyrdom), no doubt, produce theological effects, but they do not produce canonical personality or effects in the Church. Only the sacrament of baptism conferred through the water and the appropriate words mark a person with indelible character and incorporate that person into the Church (see T.L. BOUSACREN, A.C. ELLIS and F.N. KORTII, *Canon Law: A Text and Commentary*, 4th rev. ed., Milwaukee, The Bruce Publishing Co., 1966, p. 76; G. MICHIELS, *Principia generalia de personis in Ecclesia: commentarius libri II juris canonici, canones praeliminares 87-106*, editio altera, Tornaci, Desclée et Socii, 1955, p. 14; J.A. ABBO and J.D. HANNAN, *The Sacred Canons: A Concise Presentation of the Current Disciplinary Norms of the Church*, St. Louis, MO, B. Herder Book Co., 1960, vol. I, pp. 124-125). Because baptism of desire and baptism of blood are incapable of constituting one a person in the Church, Cappello notes that the term "baptism" in these two cases is used only in a wide or metaphorical sense (see F.M. CAPPELLO, *Tractatus canonico-moralis de sacramentis*, Romae, Domus Editorialis Marietti, 1947-1961, vol. 1, pp. 96-97).

*By baptism one is incorporated into the Church of Christ and is constituted a person in it with duties and rights which are proper to Christians, in keeping with their condition, to the extent that they are in ecclesiastical communion and unless a legitimately issued sanction stands in the way.*⁹⁹

This is the foundational canon which provides answers to questions, such as,

(i) what is the source of duties and rights in the Church; (ii) who is the subject of these duties and rights; and (iii) what is the context of these duties and rights.

Baptism confers a twofold incorporation: into Christ and into the Church. However, this incorporation is one and indivisible because the Church is the Body of Christ. Canon 204 §1, which is drawn from *LG* no. 31, speaks of the baptized persons constituted as the people of God who are called to exercise the mission of the Church.¹⁰⁰ To sum up, cann. 96, 204 and 849 state that only baptism

⁹⁹ Can. 96. Emphasis added. English translation of the canons is from *Code of Canon Law*, Latin-English edition, translation prepared under the auspices of the Canon Law Society of America, Washington, DC, Canon Law Society of America, 1983.

¹⁰⁰ "Christifideles sunt qui, utpote per baptismum Christo incorporati, in populum Dei sunt constituti, atque hac ratione muneris Christi sacerdotalis, prophetici et regalis suo modo participes facti, secundum propriam cuiusque condicionem, ad missionem exercendam vocantur, quam Deus Ecclesiae in mundo adimplendam concedidit"(can. 204 §1).

Canons 96 and 204 §1 are different in their perspectives. Can. 96 refers to the incorporation into the *Church* of Christ and can. 204 §1 to the incorporation in *Christ*. While the former with its juridical slant refers to the baptised person as constituted *a person in the Church*, the latter with its theological perspective states that a person is constituted as a member of *the people of God*. The former attends to the individual and establishes a persons's juridic status, while the latter describes a person in terms of communion with the people of God. No doubt, there is an interplay of two ecclesiologies: one identifies the baptised as a *persona iuridica*, in terms of a juridical category coming from Roman law, the other as *christifidelis*, in terms of a theological category from Vatican II. In a way the Code reflects the Council, because there were two ecclesiologies working at the Council, as it has been pointed out in A. ACERBI, *Ecclesiologia giuridica ed ecclesiologia di comunione nella 'Lumen gentium'*, Bologna, Edizioni Dehoniane, 1975, 586p. It is worth remembering that "it is impossible to translate perfectly into *canonical* language the conciliar image of the Church" (JOHN PAUL II, Apostolic Constitution, *Sacrae disciplinae leges*, 25 January 1983, in

incorporates a person into the Church. Baptism remains the fundamental juridic event which separates the Christians from non-Christians. In as much as it is the means of incorporation into the Church, baptism provides also the foundation of ecclesial rights.

1.5.2 Person: Subject of Rights and Duties

The term *person* has a variety of meanings - philosophical, psychological, and juridical.¹⁰¹ In the juridic sense, a person is a subject capable of having rights and obligations. Every person possesses juridic personality or juridic capacity. This capacity is twofold: (i) *capacity to have*, which entitles a person to be the titular of juridic rights and obligations; (ii) *capacity to act*, which is the ability to exercise personally the rights and fulfil the obligations according to the stipulations of the law.

Code of Canon Law, p. xiv).

¹⁰¹ When Tertullian gave to the West a formula for expressing the Christian idea of God, by describing God as "*una substantia, tres personae*", the word "person" entered intellectual history with full vigour. The concept of person originated in "prosopographic exegesis." In the background stands the word *prosopon*, which is the Greek equivalent of *persona*. Prosopographic exegesis is a form of interpretation used by ancient scholars to give dramatic effect to events by placing the words in the mouth of the divine figures or other persons (see J. RATZINGER, "Concerning the Notion of Person in Theology," in *Communio*, 17[1990], pp. 440-441). So the roots of the word "person" are to be found in the Latin *persona*, which meant primarily a mask, or a role used by actors on the stage. Etymologically, *personare* means to sound or to speak through or to address. Since ancient tragedies and comedies revolved around divine figures and famous important men, the term *person*, carried with it a sense of dignity and worth.

Marcus Severinus Boethius (480-525) gave the famous classical definition of person as an "individual substance of a rational nature" - "*persona est naturae rationalis individua substantia*" (M.S. BOETHIUS, *Opera Omnia*, in *PG*, vol. 83, col. 33). Thomas Aquinas defined person as a "being subsistent in a rational nature" (*Summa theologica*, I, q. 29, art. 3). From a psychological point of view, a person is an individual who possesses a clear consciousness of self and acts accordingly (see ABBO and HANNAN, *The Sacred Canons*, vol. 1, p. 123). For a study on the concept of 'person', see P. SUDAR, *Il concetto di 'persona fisica' e l'ordinamento della Chiesa*, Roma, Pontificia Università Urbaniana, 1986, 60p.

The capacity to act can be *complete* or *incomplete*. The former enables persons to exercise all their rights on their own. The latter restricts or removes either some or all of their ability to exercise them personally, as in the case of minors, or those who habitually lack the use of reason, or those under sanctions, etc.¹⁰²

The general notion of *person* in a juridic sense has two species: *physical* and *juridic person*. In canon law, any *physical person* as a *juridic subject* is a human being, *baptized in the Catholic Church* or *received into it*. A *juridic person* on the other hand, is a creation of law comprising either persons or things.¹⁰³

Every human being, under the natural law is capable of enjoying fundamental human rights. These rights and corresponding duties flow from human dignity. Besides natural personality, a human being can have juridic personality. L. Chiappetta distinguishes a twofold aspect of juridic personality: *civil* (political) and *religious*. *Civil personality* comprises rights and obligations of a civil character; while *religious personality* comprises rights and obligations of a religious or ecclesial nature.¹⁰⁴

¹⁰² See P. SUDAR, "Solo i battezzati sono persone nella Chiesa," in *Euntes docete*, 39(1986), pp. 26-34; L. CHIAPPETTA, *Il Codice di diritto canonico: commento giuridico-pastorale*, Napoli, Edizioni Dehoniane, 1988, vol. 1, p. 113; MICHIELS, *Principia generalia de personis in Ecclesia*, pp. 5-6; TOCANEL, *Compendium praelectionum de normis generalibus*, pp. 254-255.

¹⁰³ Cann. 113-123 deal with juridic persons. The means of acquisition of personality, and the conditions for the preservation and extinction of it, are different from that of physical persons. Even though juridic persons are subjects of rights and duties, they are beyond the scope of our study.

¹⁰⁴ See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, p. 114.

A human being becomes a *person in the Church* through baptism.¹⁰⁵ Only human beings are capable of receiving baptism.¹⁰⁶ The word "constitutes" in cann. 96 and 204 §1 refers to a creation of ecclesial personality that is, as a person and as a member of the people of God (*christifidelis*).¹⁰⁷ Since baptism confers an indelible character, the *christifidelis* never ceases being a person in the Church except by death. This means that the *christifidelis* enjoys perpetually the *capacitas essendi*

¹⁰⁵ The non-baptised do not have *rights in the Church*, but they have a *right to the Church*. At the same time we cannot deny the fact that there are several canons in the Code which concern directly or indirectly the non-baptized as subjects of rights and duties (cfr. cann. 748 §1; 771 §2; 861 §2; 1142; 1476; 1549). The Code Commission did not address the issue of their juridic subjectivity (see the discussion in *Communicationes*, 12[1980], pp. 56-58). Though catechumens are joined to the Church in a special way and enjoy various prerogatives (cfr. cann. 206; 788; 1170; 1183 §1), not even they are strictly speaking subjects of rights and obligations in the legislation of the Church at least "ex iure condito" (see CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, pp. 116-117; also cfr. *Communicationes*, 17[1985], p. 167).

¹⁰⁶ "Baptismo *homo* Ecclesiae Christi incorporatur [...]" (can. 96). The English translations of the Code state: "By baptism *one* is incorporated into the Church of Christ." (Emphasis added to highlight the difference). Baptism presupposes human nature. Because human fetuses possess this nature or soul from the moment of conception, they are to be baptized if they are alive (see can. 871).

¹⁰⁷ For the discussion which emerged during the revision of the Code regarding the relationship between the concept of *person* and *christifidelis*, and the placing of canons in the Code, see *Communicationes*, 12(1980), pp. 54-58. Also see G. LO CASTRO, *Il soggetto e i suoi diritti nell'ordinamento canonico*, Milano, Dott. A. Giuffrè Editore, 1985, 54-60.

There have been discussions among canonists on can. 87 of *CIC/17* regarding concepts such as *person*, *subject* and *member* in the Church with reference to the status of the non baptized, baptised non-Catholics and Catholics who defect from the Church. For a summary, see SUDAR, *Il concetto di 'persona fisica' e l'ordinamento della Chiesa*, pp. 16-60; A.A. REED, *The Juridical Aspect of Incorporation into the Church of Christ*, Carthage, Ohio, The Messenger Press, 1960, pp. 42-91; P. LOMBARDIA, "Contribución a la teoría de la persona física en el ordenamiento canónico (nota preliminar de J. Hervada)," in *IC*, vol. 29, no. 57(1989), pp. 11-106.

for rights and duties, even though, the *capacitas agendi* is subject to alteration or limitation for the reasons given in can. 96.

1.5.3 Context of Obligations and Rights

According to the hermeneutical principle, when the context changes, so too does the meaning. In other words, context gives meaning. Rights and duties have to be understood and exercised within the broad ecclesial context of communion, mission, common good, *salus animarum*, and coresponsibility.

Communion: Belonging to the Church is not purely a formal juridical act, but an integration into a communion, without which there can be no ecclesial personality. According to Vatican II, the Church is a communion. In virtue of baptism there exists among all the Christian faithful a true equality with regard to their dignity and activity (can. 208). Therefore, *communio* brings out the fundamental equality of all the faithful in their responsibilities and participation in the Church. Rights are to be exercised within the ecclesial communion in order to build up the Body of Christ. In other words, *communio* "forms a general framework for the exercise of rights and duties."¹⁰⁸ In the words of Paul VI:

[...]the baptized cannot effectively exercise their fundamental rights unless they also acknowledge the duties which baptism brings and, especially unless they are convinced that these rights are to be exercised within the communion of the Church. Believers must understand that rights are given for the sake of building up Christ's

¹⁰⁸ P. VALDRINI et al., *Droit canonique*, Paris, Dalloz, 1989, no. 80, p. 53.

body, the Church, and must, therefore, be exercised in an orderly and peaceful way and may not be used to inflict harm.¹⁰⁹

Full communion in the Catholic Church, therefore, requires that a person is not only baptized but is also joined to the Church's visible structure by "the bonds of profession of faith, of the sacraments and of ecclesial governance" (can. 205). These bonds of communion are essential and inseparable. They are presumed in the case of those who are baptized in the Catholic Church or who are received into full communion after valid baptism.

Communion is required to undertake leadership roles and offices in the Church. So can. 149 §1 stipulates that "in order to be promoted to an ecclesiastical office, a person must be in the communion of the Church." One is removed from an ecclesiastical office by the law itself "who has publicly defected from the Catholic faith or from the communion of the Church" (can. 194 §1, 2°). Thus, failure to maintain communion has juridic effects relative to the exercise of obligations and rights.¹¹⁰ Communion becomes the operative medium or instrument for their exercise.

¹⁰⁹ PAUL VI, Address to the Roman Rota, 4 February 1977, in *The Pope Speaks*, 22(1977), p. 175; see also JOHN PAUL II, Address to the Roman Rota, 17 February 1979, in *The Pope Speaks*, 24(1979), p. 221.

¹¹⁰ See cann. 171 §1, 4°; 194 §1, 2°; 694 §1, 1°; 751; 1364-1369. The duty to maintain communion extends to the internal and external forum. But the absence of interior adhesion, if it is not manifested externally, does not bear on the juridical realm (as the dictum goes, "*Cogitationis poenam nemo patitur*" [D. 1, *de poenitentia*, c. 14, in *Corp.iur.can*/FRIEDBERG, vol. 1, col. 1161]), and hence, does not impinge upon rights and duties. To have juridic effect, the failure to maintain communion must be manifested in some way in the external forum. This must be declared as such by the law or by the competent authority (see VALDRINI, *Droit canonique*, no. 80, p. 53).

The Code recognizes various degrees of communion, such as, perfect and imperfect. The visible bonds expressed in can. 205 serve as a verifiable criterion to determine whether or not one is in full communion with the Catholic Church. This determination is essential: (i) to specify those who are responsible for carrying out the mission of the Church; and (ii) to determine the degree in which rights can be vindicated in the Catholic Church.¹¹¹

Mission: The Church is the "universal sacrament of salvation,"¹¹² and is "founded to spread the kingdom of Christ over all the earth for the glory of God the Father to make all men partakers in redemption and salvation."¹¹³ Therefore, the Church is "by its very nature missionary,"¹¹⁴ and all the Christian faithful have a duty and a right to participate in the mission of the Church.¹¹⁵ This is the basis for a variety of obligations and rights.¹¹⁶

In the Church, although not everyone marches along the same path, nevertheless, there exists true equality between all in regard to the dignity which is

¹¹¹ See PROVOST, "The Christian Faithful," pp. 128-129.

¹¹² *LG*, no. 48; *AG*, no. 1.

¹¹³ *AA*, no. 2.

¹¹⁴ *Ibid.*

¹¹⁵ See can. 211; *LG*, no. 33.

¹¹⁶ We list a few of the canons concerning rights and obligations related to evangelization and mission of the Church: right to association and assembly (can. 215), apostolic activity (can. 216), Christian education (can. 217), the role of laity in the mission (can. 225), religious education (can. 229), and the migration of clergy (can. 271).

common to all the faithful and to the activity of all the faithful in building up the Body of Christ and in the one mission of proclaiming his message of salvation.¹¹⁷ All share in the one mission marked by a diversity and plurality of ministries. The Spirit leads the faithful to make use of their charisms within the Church.¹¹⁸ These charisms are given for the building up of the ecclesial communion in which those in the hierarchy are the shepherds.¹¹⁹ As John Paul II says:

Communion and mission are profoundly connected with each other, to the point *that communion represents both the source and the fruits of the mission: communion gives rise to mission and mission is accomplished in communion.*¹²⁰

Therefore, the Church as a community does not exist for itself, rather exists for a mission in the world. *Missio* relates the Church to the world. Baptism is the radical foundation for every Christian's involvement in *missio*, which is constitutive of the Church itself.

¹¹⁷ See *AA*, no. 2.

¹¹⁸ See *LG*, nos. 4, 7 and 12; *AA*, no. 3; *PO*, nos. 6 and 9. During the revision of the Code proposal was made to include charisms in the section on rights in the *LEF*. However, it was agreed upon to mention them in the preamble, since in itself a charism is not something juridical (see *Communicationes*, 12[1980], pp. 43-44). As things turned out, neither the *LEF* was promulgated nor was the right to exercise charisms included in the Code. Given the ecclesial significance of charisms and the right to exercise them, the silence of the Code in this regard is rather unfortunate (see J. KOMONCHAK, "A New Law for the People of God: A Theological Evaluation," in *CLSA Proceedings*, 42[1980], pp. 25-27; T.J. GREEN, "Persons and Structures in the Church: Reflections on Selected Issues in Book II," in *The Jurist*, 45[1985], pp. 72-93).

¹¹⁹ "Those who have charge over the Church should judge the genuineness and proper use of these gifts, through their office not indeed to extinguish the Spirit, but to test all things and hold fast to what is good" (*LG*, no. 12; also see *Thess.* 5:12 and 19-21).

¹²⁰ JOHN PAUL II, *Christifideles laici*, no. 32; English translation in *The Pope Speaks*, 34(1989), p. 133.

Common Good: The concept of the "common good" has a long and complex history, which can be traced back to Plato, Aristotle, Cicero, Augustine, and medieval scholastics.¹²¹ The language of rights is compatible with that concerning the common good. John XXIII combined these two things when he wrote that "it is agreed that in our time the common good is chiefly guaranteed when personal obligations and rights are maintained."¹²² The concept of the common good has become a central feature of modern Catholic social teaching. Vatican II has borrowed its definition of common good primarily from *Mater et magistra* and *Pacem in terris*, the encyclicals of John XXIII. Among the conciliar documents which frequently speak of the common good, *Dignitatis humanae* gives a precise conceptual identification.¹²³ But only in the decree *Apostolicam actuositatem* reference is made to the Church.¹²⁴ The conciliar ecclesiology of the people of God has shed light on the "common good." Communion is the principle which promotes the common good.

¹²¹ See J.A. CORIDEN, "Reflections on Canonical Rights," in J.H. PROVOST and K. WALF (eds.), *Studies in Canon Law, Presented to P.J.M. Huizing*, Leuven, University Press, 1991, p. 27.

¹²² JOHN XXIII, *Pacem in terris*, no. 60.

¹²³ "The common good of the society consists in the sum total of those conditions of social life which enable men to achieve a fuller measure of perfection with greater ease. It consists especially in safeguarding the rights and duties of the human person" (*DH*, no. 6).

¹²⁴ "The hierarchy's duty is to [...] direct the exercise of the apostolate to the common good of the Church, and to see to it that doctrine and order are safeguarded" (*AA*, no. 24).

Understanding rights as rooted in communion is another way of locating rights within the social setting of the common good.¹²⁵ It is another way of emphasizing the basic principle that rights are not isolated claims but are claims in a community.¹²⁶ In D. Hollenbach's words:

Just as personality and community are mutually implicating, the notion of human rights and that of the common good are mutually implicated as well. Rights are not simply claims to pursue private interests or to be left alone. Rather they are claims to share in the common good of civil society, a good which is less than the full communion of the Kingdom of God, but analogous to it.¹²⁷

Within the Church communion, there is a corollary relationship between the person and the common good. The latter is a principle of inclusion, equality, and participation. As a principle of inclusion, it looks to the general welfare of the community as a whole, by considering the needs and interests of those "who are less able to defend their rights and to assert their legitimate claims."¹²⁸ In the context of the Church, common good "refers to those conditions within the Church by which

¹²⁵ Paul argued that the gifts of the Spirit must be used for the good of the Church community (1 Cor. 12:26; 14:12). Moreover, he gave an exemplary instance of application of human rights within a communal context when he instructed the Corinthian Christians about their dispute over eating meat used in pagan sacrifices. He told those who claimed a right to eat this meat that for the sake of other Christians who opposed this practice they should waive their right. This is a splendid example of the subordination of an individual right to the welfare of the community, which is freely chosen by weighing the individual right against a more important social responsibility.

¹²⁶ See J.H. PROVOST, "The Nature of Rights," in *CLSA Proceedings*, 53(1991), p. 10.

¹²⁷ D. HOLLENBACH, "The Common Good Revisited," in *Theological Studies*, 50(1989), p. 88.

¹²⁸ JOHN XXIII, *Pacem in terris*, no. 56.

persons can seek their perfection. The exercise of rights is to be limited not because of the institution's convenience, but only because such an exercise would harm the conditions within which Christians seek their perfection in the life of the Church."¹²⁹ Canon law is ordered towards the common good¹³⁰ of the Church, which expressed from the teleological perspective, is the salvation of souls.¹³¹

Salus animarum: Every obligation and right in the Church yields to the higher requirement of the *salus animarum*, which remains for the Church, the *suprema lex*.¹³² Obligations and rights are not ends in themselves but are for a supernatural end. The purpose of the Church is also the purpose of ecclesial legislation. This is clearly brought out in the third principle of the revision of the Code:

The sacred and organically structured nature of the Church as a community manifests that the juridic character and all the institutions of the Church exist for the purpose of promoting supernatural life.

¹²⁹ PROVOST, "The Christian Faithful," p. 158.

¹³⁰ The expression *bonum commune* is found in cann. 223 §1, 223 §2, 264 §2, 287 §2, 323 §2 and 795 (s.v. "Bonum commune," in X. OCHOA, *Index verborum ac locutionum Codicis iuris canonici*, Roma, Commentarium pro Religiosis, 1984, p. 57).

¹³¹ See can. 1752; see also *CCEO*, cann. 595 §2; 873; 1000 §2; 1397.

¹³² Can. 1752; also see, cann. 747 §2; 978 §1; 1452 §1 1736 §2; 1737 §3. This is a concept always upheld in canon law. It was already found in Ivo de Chartres (1040-1116), who wrote: "Cum ergo omnis institutio ecclesiasticarum legum ad salutem referenda est animarum [...]" (*Epistolae 60*, in *PL*, vol. 162, col. 74).

We must distinguish between *salus animarum* and *cura animarum*. The latter term appears in cann. 150; 151; 463 §1, 8°; 678 §1; 738 §2; 757; 771 §2; 922; 986 §1; 1003 §2. *Salus animarum* constitutes the supernatural end which the Church seeks to realize through those intermediary objects of *cura animarum*. Such *cura animarum* demands the active cooperation of the entire People of God and calls for interpersonal communion or bonds. On account of it, there emerge rights and duties for all the faithful (see G. DIQUATTRO, "Lo statuto giuridico dei 'christifideles' nell'ordinamento di diritto canonico," in *Apollinaris*, 59[1986], pp. 94-95).

Hence juridic ordering of the Church, with laws and precepts, rights and duties, which flow from it must be in accord with the supernatural end or purpose of the Church.¹³³

Coresponsibility: The Code contains the principle of coresponsibility. The third principle of revision of the Code suggested that the norms of canon law should not impose duties and obligations when instructions, exhortations, persuasion, and other pastoral means suffice for fostering a spirit of unity among the faithful. The good of the universal Church evidently demands that the norms of the Code should not be too rigid.¹³⁴ The Code should, therefore, leave ample scope for freedom, enhancing the individual and communitarian initiative and responsibility, and minimizing the legalistic observance devoid of proper spirit. And this principle of coresponsibility is one of the cornerstones of the canonical system.¹³⁵ According to O. Ter Reegan, "the basic equality of all the faithful, based on baptism, implies also the communal responsibility for all the Church, and its pastoral mission in the world."¹³⁶ Coresponsibility has close ties with *communio*. It emphasizes the contribution each one is called to building up the Church in its various realizations and promote the welfare of the Church. Everyone has a right to participate in the

¹³³ *Communicationes*, 1(1969), pp. 79-80. English translation in HITE and WARD, *Readings, Cases, Materials in Canon Law*, p. 86.

¹³⁴ See *ibid.*

¹³⁵ See R.I. CASTILLO LARA, "Some Reflections on the Proper Way to Approach the Code of Canon Law," in *Communicationes*, 17(1985), p. 285.

¹³⁶ O. TER REEGAN, "The Rights of the Laity," in *Concilium*, vol. 8, no. 4(1968), p. 10; see W. KASPER, "The Church as *Communio*," in *New Blackfriars*, 74(1993), pp. 236-242.

Church's mission according to one's conditions, talents, and degree of responsibility. Thus participation can be another word for coresponsibility. As L. Suenens says, the "primacy of baptism entails an immediate corollary the primacy of community. Each one must live and insert his personal responsibility in and with that of all other faithful. Vatican II asks us to accept all the consequences of the coresponsibility of Christians at every level."¹³⁷

Rights in the Church exist in the ecclesial context since they are founded in baptism and relate to the participation in the three-fold *munera* of Christ: priest, prophet, and king. Consequently, they are not claims in or against the Church, rather are a means of fostering communion, which is an obligation of all the faithful (can. 209 §1), and of promoting the mission of the Church. The common good helps in ordering obligations and rights towards the salvation of souls. Hence, obligations and rights are a mode of exercising coresponsibility in the Church according to one's condition.

Having examined the context of ecclesial rights, we now turn to an analysis of the fundamental nature of these rights.

1.5.4 Fundamental Rights in the Church

There have been several studies on the fundamental rights of the faithful.¹³⁸

¹³⁷ L.J. SUENENS, *Coresponsibility in the Church*, New York, Herder & Herder, 1968, p. 32.

¹³⁸ The Fourth International Congress of Canon Law, held in Fribourg, Switzerland, in October 1980 on the theme, "Fundamental Rights of Christians in the Church and in the Society" bears evidence to the interest present among canonists on the topic. For the acts of the congress, see E. CORECCO, N. HERZOG and A. SCOLA (eds.), *Les droits fondamentaux*

This is partly because the conciliar teaching on fundamental equality and dignity of all the people of God has promoted and strengthened the notion of fundamental rights. According to P. Lombardía, the "fundamental rights are those belonging to every single one of the faithful, simply in virtue of their being as such, simply by reason of their status within the Church, in other words, by reason of their dignity and liberty as the children of God."¹³⁹ Those rights which are common to all the baptized and which they possess irrespective of their condition or status in the Church are considered as fundamental rights.

Opinions differ concerning the existence of fundamental rights in the Church.¹⁴⁰ E. Corecco argues that the term "fundamental rights" originates in the modern states, therefore, he is of the opinion that the term is not appropriate within the context of canon law. He offers three reasons: (i) the primary end of the Church is not to guarantee the rights of the person rather to preserve and proclaim the message of salvation through its mediation, which is expressed concretely in its constitution; (ii) the specific rights of Christians do not precede the Church, but they

du chrétien dans l'Église et dans la société, actes du IVe Congrès internationale de droit canonique, Fribourg (Suisse), 6-11 octobre 1980, Editions Universitaires Fribourg, 1981, xxxvi-1328p. The fifth *colloquio giuridico*, held in March 1984 at the Pontifical Lateran University though more restricted in topic, still relates to fundamental rights. The acts of the *colloquium* are published in F. BIFFI (ed.), *I Diritti fondamentali della persona umana e la libertà religiosa*, atti del V colloquio giuridico (8-10 marzo 1984), Città del Vaticano, Libreria editrice Vaticana; Roma, Libreria editrice Lateranense, 1985, 794p.

¹³⁹ LOMBARDÍA, "The Fundamental Rights of the Faithful," p. 42.

¹⁴⁰ The reasons for and against the usage of the term "fundamental rights" in the Church are succinctly given in CORIDEN, "Reflections on Canonical Rights," pp. 32-34.

are acquired by baptism and the other sacraments; (iii) the concept of individual autonomy deriving from the fundamental rights is not applicable to the constitution of the Church. This does not imply that Christians do not enjoy a proper autonomy, but it means that the implications of the concept of the fundamental rights are not applicable within an ecclesial context.¹⁴¹

Cardinal Castillo Lara does not seem to be in favour of qualifying the rights as "fundamental." According to his argument, though the draft by the *De laicis* study group and that of the *LEF* contained a title *Christifidelium officia et iura fundamentalia*, sufficient doctrinal consensus was lacking on the issue of fundamental character not only of the rights but even of the concept of a *Lex fundamentalis* itself. When John Paul II decided in 1981 not to promulgate the *LEF*, the relevant canons were inserted into the Code and hence they lost their fundamental character. Moreover, the title containing the word "fundamental" is not found in the Code. With these reasons in mind, Castillo Lara concludes

that while the Legislator may have wanted to transfer the contents from the Schema of the *Lex fundamentalis* verbatim, as was said, he did not want to use the qualification that they had previously nor did he want to place them under the same title they formerly had. This seems to me an indication of his will not to qualify such rights as "fundamental," or at least not to make a pronouncement about their nature.¹⁴²

¹⁴¹ See E. CORECCO, "Considerazioni sul problema dei diritti fondamentali del cristiano nella chiesa e nella società," in *Les droits fondamentaux du chrétien dans l'Église et dans la société*, pp.1219-1221.

¹⁴² CASTILLO LARA, "Some General Reflections on the Rights and Duties of the Christian Faithful," pp. 15-16.

It is interesting to note, however, that after one month of the promulgation of the revised Code, the legislator spoke of the "fundamental" character of rights in the Church. In his allocution of 26 February 1983 to the Roman Rota, the Holy Father said:

The Church has always affirmed and promoted the rights of the faithful. In the new code, indeed, she has promulgated them as a "fundamental charter" (cfr. Canons 208-223). She thus offers opportune judicial guarantees for protecting and safeguarding adequately the desired reciprocity between the rights and duties inscribed in the dignity of the person of the "faithful Christian."¹⁴³

According to J. Hervada, the fundamental rights have these following characteristics: they are universal, proper to all the faithful because of their basis in the ontologic-sacramental character of Christians; they are perpetual as they last till the condition of the baptized lasts, and they are irrenunciabile or inalienable because they flow from the sacramental condition and the will of Christ.¹⁴⁴ Because they form the very meaning of being a Christian, no individual or group can transfer or surrender them, nor can the Church suppress them.¹⁴⁵ Canon 96 implicitly

¹⁴³ JOHN PAUL II, Address to the Roman Rota, 26 February 1983, "The Rights of the Christian Faithful," in *Origins*, 12(1982-1983), p. 631.

¹⁴⁴ See J. HERVADA, *Diritto costituzionale canonico*, Milano, Giuffrè Editore, 1989, p. 95.

¹⁴⁵ Rights are ordered to the supernatural good and are closely bound to the very structure of the Church. Those who are united with Christ through the sacrament of baptism are also united to the Church. It is the responsibility of the Church to recognise and safeguard what has been established by Christ and achieved by the person through the reception of valid baptism (see KINNEY, *The Juridic Condition of the People of God*, pp. 35-36).

recognises these fundamental rights and obligations which it states "are proper to Christians."

According to J. Coriden, "fundamental" means basic (foundational), primary, important and common to all. This does not mean that other rights are derived from these. And certainly this does not preclude future positive formulations of rights such as those found in the Code.¹⁴⁶ According to L. Örsy, in the Christian community we can speak of fundamental rights of natural and supernatural origin, even though the term does not have a universally accepted meaning.¹⁴⁷ The teaching of Vatican II seems to favour, though not expressly, a position in favour of fundamental rights. In fact, some of the rights recognized in the documents may be considered fundamental.¹⁴⁸ Moreover, all those obligations and rights which flow from baptism and from the status of the Christian faithful can be regarded as fundamental.

¹⁴⁶ See CORIDEN, "Reflections on Canonical Rights," pp. 32-34. He puts forward the arguments of those who affirm and deny the fundamental character of rights. He argues in favour of fundamental rights. See also his article, "A Challenge: Make the Rights Real," in *The Jurist*, 45(1985), pp. 1-23.

¹⁴⁷ See L. ÖRSY, "The Fundamental Rights of Christians and the Exercise of the 'Munus sanctificandi'," in *Les droits fondamentaux du chrétien dans l'Église et dans la société*, p. 211. He speaks of fundamental rights in three senses: (i) legal: legally defined rights either in general terms, e.g., can. 96 or in particular terms, e.g., can. 1058; (ii) moral: those grounded in moral relationships where there are rights and duties independent of any legal definition, e.g., the right to life, freedom of expression; (iii) ontological: refers to those rights embedded in nature, that is to the needs and potentialities which exist on the level of an individual, e.g., emotional and intellectual level, at the level of freedom and religious aspiration (*ibid.*, pp. 210-211). Though the terms moral and ontological sound different, their contents are overlapping. The ontological sense is imprecise. Because its content can be absorbed by moral rights, it seems to be redundant.

¹⁴⁸ For example, *AA*, no. 25; *SC*, no. 14; *LG*, no. 37.

Nevertheless, the canonists are not in agreement in qualifying rights in the Church as fundamental.

1.5.5 Interpretation of Right

Laws require interpretation. This is because sometimes the wording of the law is unclear, and at other times the application of the law to a particular situation is not evident. The right interpretation presupposes the need to place rights in the ecclesial context, because the nature of the society becomes the general context of interpretation. This being so, we cannot interpret civil and ecclesial rights univocally.

The proper understanding of the meaning of laws is a requisite for understanding the rights expressed in them. That is why "ecclesiastical laws are to be understood in accord with the proper meaning of words considered in their text and context" (can. 17). It is also necessary to find out the nuances of the words, the positioning of the canons (e.g. the book, title of the chapter, preceding canon and so on), and the type of right and duty that the Code is speaking of. The proper interpretation of various rights and obligations is not as simple as it might first appear. Not unlike the 1917 Code, different terms are used in the revised Code for what might be called "rights".¹⁴⁹ Besides, not every right in law is expressed in

¹⁴⁹ The Code does not define the term "right." This is in accord with a deliberate methodological determination to omit legal definitions. According to the Code Commission, definitions pertain to the function of teachers or professors rather than that of the legislator (see *Communicationes*, 2[1970], p. 101). Definitions are usually omitted, as the Code is not a scholastic manual and in law definitions themselves are dangerous (see *Communicationes*, 16[1984], p. 38). This reminds us of the Roman law axiom: "Omnis definitio in iure civili periculosa est, parum est enim, ut non subverti posset" (*D.* 50, 17, 202).

terms of a *ius*.¹⁵⁰ Therefore it is important to examine the Latin expressions in order to provide an accurate interpretation. The proper meaning of those expressions can be explored correctly within the context of each canon according to the principles of canonical interpretation.¹⁵¹ Terms such as *ius*, *integrum est*, *fas est*, *facultas*, *potestas* can be understood as a right in some sense, as also the verbal forms such as *licet* and *possunt*.¹⁵² In addition to this, other sources of rights must also be considered, such as, acquired rights, custom, particular law, etc.

The revised Code recognizes six different kinds of rights: human, civil, ecclesial, ecclesiastical, communal, and contractual. They differ from each other precisely because the *fundamentum* or the foundation for each one differs. Human nature and human dignity are the basis of human rights, citizenship of the civil rights, valid baptism of the ecclesial rights, office of the ecclesiastical rights, vows of

¹⁵⁰ In cann. 662-672, which are under "Chapter IV: The Obligation and Rights of Institutes and Their Members," we do not find the word *ius* even once. In these canons obligations are considered more fundamental than rights and are a source of identifiable rights (see E. McDONOUGH, "The Protection of Rights in Religious Institutes," in *The Jurist*, 46(1986), pp. 165-166).

¹⁵¹ See PROVOST, "The Christian Faithful," p. 137.

¹⁵² See CIPROTTI, "De vocabulorum usu ad ius subiectivum," pp. 57-61. J. Provost states: "Words such as 'ius,' 'fas est,' 'integrum est' refer to rights properly so called, stated as such, and clearly intended as a proper claim by the person of whom the right is predicated.

Terms such as 'habiles,' 'competit,' 'potest' relate to what persons may do under the law. Sometimes these seem to provide the basis for a right. If it is within a person's competency to do something, or they 'can' (*potest*) do it, then this may be something they are at liberty to do, have a right to do. 'Habiles' seems to deal more with what one can be called to do, a potency; it is not a foundation for a right as such. 'Libertas,' 'libere' and similar terms refer to a sphere of personal freedom which is guaranteed in the law; in that sense they deal with rights" (PROVOST, "Ecclesial Rights," p. 54).

communal rights, and contract of the contractual rights. These rights may be distinguished between "innate" and "acquired" rights. Innate rights include both human and ecclesial rights while civil, ecclesiastical, communal, and contractual rights are acquired rights.¹⁵³ We need to take into account the specific category of rights for their proper interpretation.

Canon 18 is the foundational canon which gives a rule of thumb for the interpretation of rights. It certainly illustrates the legislator's concern for human liberty and the rights of persons in the Church.¹⁵⁴ The canon states: "Laws which establish a penalty or restrict the free exercise of rights or which contain an exception to the law are subject to a strict interpretation."¹⁵⁵ Among other things, it speaks of the strict or narrow interpretation to be given to any law that restricts the "free exercise of rights." The rights here include both human and ecclesial rights. The strict interpretation of restrictive laws implies that maximum latitude must be given to the exercise of the underlying rights.

The purpose of these principles of interpretation is to resolve conflicts involving laws which restrict the free exercise of rights in favour of the least

¹⁵³ See McDONOUGH, "The Protection of Rights in Religious Institutes," pp. 165-166; J.P. McINTYRE, "The Acquired Right: A New Context," in *SC*, 26(1992), pp. 31-34; THOMAS, *Man as Man: The Science and Art of Ethics*, p. 241.

¹⁵⁴ See *CIC/17*, can. 19. The language of the canon can be traced to the Italian Civil Code of 1865 (see R.T. KENNEDY, "Canonical Tradition and Christian Rights," in J. A. CORIDEN (ed.), *The Case for Freedom: Human Rights in the Church*, Washington, DC, Corpus Books, 1969, p. 93.

¹⁵⁵ "Leges quae poenam statuunt aut liberum iurium exercitium coarctant aut exceptionem a lege continent, strictae subsunt interpretationi" (can. 18).

restriction placed upon human liberty. It is also to be borne in mind that the common good demands the free exercise of rights.¹⁵⁶ Among the administrative acts which are subject to strict interpretation are those dealing with lawsuits, those threatening or inflicting penalties, those which restrict the rights of a person, and those which injure the acquired rights of others.¹⁵⁷ Acquired rights usually prevail over administrative acts; therefore, before issuing a decree, the competent ecclesiastical authority must listen to those whose rights may be harmed by it.¹⁵⁸ This provides not only a guideline for prudent administration, but also a safeguard against injustice.

A penalty by its very nature restricts the rights and freedom of persons, and hence it is also subject to a strict interpretation. This principle derives from the *Regulae iuris*: "In penal matters, a more benign interpretation must be made,"¹⁵⁹ and "adverse laws are to be restricted, favourable ones amplified."¹⁶⁰

Even can. 14 can be regarded as favouring the rights and freedom of the subject of the law.¹⁶¹ Ecclesiastical laws, even if they be invalidating or

¹⁵⁶ See J.A. CORIDEN, "Rules for Interpreters," in *The Jurist*, 42(1982), p. 301.

¹⁵⁷ See can. 36 §1.

¹⁵⁸ See can. 50.

¹⁵⁹ "In poenis benignior est interpretatio facienda" (*Regulae iuris*, 49, in VI°).

¹⁶⁰ "Odia restringi et favores convenit ampliari" (*Regulae iuris*, 15, in VI°).

¹⁶¹ "Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti Ordinarii ab eis dispensare possunt, dummodo, si agatur de dispensatione reservata, concedi soleat ab auctoritate cui reservatur" (can. 14).

incapacitating, do not bind whenever a positive doubt exists concerning either the existence or the meaning of the law. Here again, the paramount concern is for human liberty. Law, in general, regulates and restrains the natural freedom of persons. It follows then, that such a restriction must be clear. It is not proper to restrain the natural liberty of individuals unless the obligation to obey the law is certain. No ecclesiastical law shall be regarded as restricting the freedom unless it clearly expresses the existence and the extent of obligation that it imposes. This had been already implicitly stated in the *Regulae iuris*: "Where the law giver could have spoken more clearly, the interpretation should be against him."¹⁶² The principle of natural freedom and the *Regulae iuris* coalesce in the legal maxim: "A doubtful law is no law." Therefore, it cannot restrict a right or impose an obligation on the subject.

There are a number of qualifiers used in the canons on rights such as, "in their own way," "according to their condition," "in accord with the norm of law," "with due regard for," etc. These act as built in principles of interpretation and limitation within the statements of rights themselves.

1.5.6 Restraints on the Exercise of Rights

The radical capacity, which is founded on baptism and full communion for possession of rights in the Church, is to be distinguished from the capacity to exercise

¹⁶² "Contra eum, qui legem dicere potuit apertius, est interpretatio facienda" (*Regulae iuris*, 57, in VI°).

those rights.¹⁶³ In other words, the possession of rights is different from the exercise of rights. The latter can be modified in various ways. The exercise of some rights can be voluntarily relinquished. In some cases the law itself may restrict the exercise by declaring certain person incapable of doing so. Canon 96 stipulates three general categories of modifiers of rights, they are, *condition*, *communion*, and *sanction*. The incapacity to exercise rights may be relative or conditional (e.g., age for marriage, profession, right to stand in court) or it may be absolute (e.g., requirement of being a male for ordination).

The canonical principle contained in can. 223 §2 provides the basis for various kinds of legal restraints on rights by the ecclesiastical authority to promote the common good. Thus, legitimate sanctions can be viewed as justifiable restraints on the free exercise of rights.¹⁶⁴ Moreover, in exercising rights, every Christian "must take account of the common good of the Church and of the rights of others as well as their own duties towards others" (can. 223 §1).

1.5.7 Protection of Rights

The seventh principle of revision of the Code declared that it was necessary to provide appropriate means and procedures to protect subjective rights. The

¹⁶³ See CALHOUN, *The Restraint of the Exercise of One's Rights*, pp. 75-104; see also cann.18; 36 §1; 1486 §2; 1499.

¹⁶⁴ The word *sanction* has a strict meaning in the context of penal law. Broadly speaking, it can be understood as a legitimate disposition of law or of a competent superior, as understood within the context of can. 96, since it refers to the observance of obligations and exercise of rights, and this exercise, according to can. 223 §2, is regulated by the ecclesiastical authority (see CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, p. 115).

principal goal of this principle is to promote a right administration of justice which reflects Christian dignity and freedom. In other words, the proclamation of a list of rights without an adequate mechanism to render them efficacious in life would be a travesty of justice and a sign of juridical inefficacy.

The Code states that when rights are violated the faithful must be able to vindicate them legitimately in the Church according to the norm of law (can. 221 §1). There are provisions in the Code for the vindication of rights.¹⁶⁵ The Supreme Tribunal of the Apostolic Signatura has the duty to exercise vigilance over the correct administration of justice.¹⁶⁶

Any violation of rights and duties harms the Christian community. Personal attitudes and a spirituality imbued with charity and justice are indispensable for the protection of rights. Every right and duty mentioned in the Code is not juridically enforceable, such as the right and duty to live a holy life and to promote the growth of the Church, rights and duties of parents towards their children, etc. The Code is intended as a source of discipline for people who are themselves committed to Christian discipleship. All external means and procedures can only assist in the protection of rights. Those in authority, whether holders of ecclesiastical office or

¹⁶⁵ See cann. 1400-1670 for the vindication of rights through judicial procedure; cann. 1732-1739 outline the procedure for making recourse against administrative actions that impinge on the rights; can. 1733 exhorts the resolution of conflict through mediation and arbitration. It also recommends that episcopal conferences and bishops, establish councils or offices to help in protecting and vindicating rights.

¹⁶⁶ See can. 1445 §3; JOHN PAUL II, Apostolic Constitution, *Pastor bonus*, 28 June 1988, in *AAS*, 80(1988), pp. 841-924; here at art. 121, p. 891.

parents in the family, have the primary responsibility to promote and protect the rights of persons subject to them.

Rights need to be understood within the framework of duties. Duties are as important as rights because both are indispensable for a well-ordered ecclesial life. The Code, which is an instrument in the ordering of ecclesial life states duties as well as rights. We shall now look at the various expressions of duty or obligation in the Code.

1.5.8 Canonical Expressions of Obligation

The Code has a juridical character in that it expresses rights and obligations. By their very nature, ecclesiastical laws must be observed by those who are bound by them. The Code contains various expressions of canonical obligations. These expressions are to be examined within their context, in order to bring out their real meaning, as words taken by themselves may signify a different reality.

The term *officium*, which occurs more than 270 times in the Code has different shades of meaning. It may mean an ecclesiastical office, a right, a service, a responsibility, or a duty. It appears about 80 times in the sense of duty and also functions as a synonym for obligation.¹⁶⁷ A conjunction is made between *obligatio* and *ius* and between *ius* and *officium*. The term *officium* used in the sense of an office involves a totality of rights and obligations (can. 145 §2). *Munus* is another

¹⁶⁷ For example, see cann. 96; 271 §1; 296; 339 §1; 628 §2; 747 §1; 793 §1; 794 §1-2; 823 §1-2; 911 §1; 957; 1003 §2; 1095, 2°.

During the codification of *CCEO*, the *coetus* decided to use the term *officium* in the sense of an ecclesiastical office. Consequently, *officium* in the sense of duty was substituted by *obligatio* (see *Nuntia*, 21[1985], pp. 75).

term which implies obligation or duty. *Munus* at the macro level refers to the mission of teaching, sanctifying, and governing and at the micro level it can be understood as a task or a function and, consequently, a responsibility and an obligation (e.g., can. 364; 775 §3; 1733 §2). The term *obligatio* appears 105 times in the Code. The words *obligatio* and *officium* (in the sense of "duty ") seem to have been used interchangeably, for example, can. 793 uses both words in the same sentence. We also find in the words *debere*, *prohibere*, *onus*, *requiritur*, *exigere*, *tenetur*, *standum est*, and *oportet* an expression of obligation or duty.¹⁶⁸

The norms of the Code with regard to what represents a duty or juridical bond are very limited, in order to reduce the legal obligations to the minimum. In many places, the Code has made use of exhortations. The observance of laws is not to be motivated merely by a juridical obligation but also by a sense of personal responsibility. Many of the obligations enumerated in the Code are also moral obligations. This is because the Code is not a compendium of merely ecclesiastical laws, rather it corresponds to the nature of the Church. The Code is built on the divine natural and positive laws, and therefore presupposes them. In other words,

¹⁶⁸ See P. ERDÖ, "Expressiones obligationis et exhortationis," in *Periodica*, 76(1987), pp. 10-22; ID., "Ministerium, munus et officium in Codice iuris canonici," in *Periodica*, 78(1989), pp. 425-432; PAPROCKI, *Vindication and Defense of the Rights of the Christian Faithful*, pp. 216-228.

the juridical sphere does not exhaust the moral sphere. In the Church, the juridical order is a part of the moral order.¹⁶⁹

1.6 CORRELATIVE NATURE OF OBLIGATIONS AND RIGHTS

Rights do not exist in a vacuum but in concrete legal relationships. Even a single relationship that creates a right creates a duty as well. Consequently, the issue of rights cannot be fully understood and appreciated without a proper understanding of duties.¹⁷⁰ Harmonious balance of these two brings about justice and promotes the common good. Duty or obligation brings out social responsibility which is a *sine qua non* condition for claiming one's rights.

1.6.1 Right-Duty Relationship

The Catholic tradition, in placing rights in a moral context which promotes the values of truth and virtue, connects rights and duties by relating the holder of rights to other persons who may affect or be affected by the exercise or non exercise of his

¹⁶⁹ "Quocirca ordo ethicus et ordo iuridicus non sunt duo ordines omnino distincti et separati, sed ordo moralis complectitur ordinem iuridicum sicut totum complectitur suam partem. Etenim non dantur actiones humanae quae exclusive pertineant ad ordinem iuridicum; leges quibus moderantur actiones ordinis iuridici sunt vel debent esse ethicae; auctor utriusque ordinis est Deus, fons moralitatis et iustitiae; subiectum utriusque ordinis est homo; finis ordinis iuridici est pars ordinis ethici" (TOCANEL, *Compendium praelectionum de normis generalibus*, pp. 6-7).

¹⁷⁰ See ÖRSY, "The Fundamental Rights of Christians," p. 211.

or her rights.¹⁷¹ John XXIII illustrates the correlation of rights and duties when he says:

[T]he right to live involves the duty to preserve one's life; the right to a decent standard of living, the duty to live in a becoming fashion; the right to be free to seek out the truth, the duty to devote oneself to an ever deeper and wider search for it.¹⁷²

The consequence of this relationship is that an individual is not in a condition of pure liberty and discretion with regard to these goods but remains under a moral obligation.¹⁷³ The correlation is also founded in the relationship of persons. To one person's right there is a corresponding duty in another person. When a duty is not fulfilled, then there is a likelihood of someone's right being violated.

Once this is admitted, it follows that in human society one man's natural right gives rise to a corresponding duty in other men; the duty, that is, of recognizing and respecting that right. Every basic human right draws its authoritative force from the natural law, which confers it and attaches to it its respective duty. Hence, to claim one's rights and ignore one's duties, or only half fulfill them, is like building a house with one hand and tearing it down with the other.¹⁷⁴

In principle, the 1983 Code always speaks of rights and duties as pairs. This brings out the correlative nature of rights and duties. The binomial, right/duty, is considered as the two faces of the same coin. The simultaneity of these juridical

¹⁷¹ In his encyclical *Beneficia Dei*, 4 June 1871, in *ASS*, 6(1870), pp. 269-273, Pius IX introduced the word pair "*ius et officium*" (no. 3, p. 270), apparently in an attempt to nuance the liberal meaning of *ius* (see ELSBERND, "Rights Statements," p. 310).

¹⁷² JOHN XXII, *Pacem in terris*, no. 29, in CARLEN, *The Papal Encyclicals*, vol. 5, p.110.

¹⁷³ See LANGAN, "Human Rights in Roman Catholicism," p. 29.

¹⁷⁴ JOHN XXIII, *Pacem in terris*, no. 30, in CARLEN, *The Papal Encyclicals*, vol. 5, p. 110.

situations is frequently expressed, for example, in cann. 210; 211; 213 and 214. In Cardinal Castillo Lara's words: "The *right* of the individual is correlated to the duty that others have to respect it. But at times even the individual has a duty to exercise his own right. It is not a facultative right but a right/duty."¹⁷⁵

1.6.2 Priority of Obligation over Right

Generally the Code mentions rights in connection with obligations, by using the phrase "obligations and rights." It must be pointed out that the revised Code has departed from traditional usage by changing the order of that phrase. The 1917 Code ordinarily used the phrase "right and obligations" whereas the revised Code has it in terms of "obligations and rights."¹⁷⁶ The question then arises as to the significance, if any, of such a change.¹⁷⁷ It was introduced in the 1977 schema *De populo Dei*, and remained unchanged in the subsequent *schemata*, including the *LEF*. The Code Commission was asked about the reason for this change. And its reply was that the change was insignificant, since both rights and obligations in the Church

¹⁷⁵ CASTILLO LARA, "Some General Reflections on the Rights and Duties of the Christian Faithful," p. 21.

¹⁷⁶ Compare *CIC/17*, can. 87 and *CIC/83*, can. 96.

¹⁷⁷ The phrase "obligation and rights" is never used consistently in the same order. However, it is used most of the time, for example, in cann. 113 §2; 145 §2; in titles II and III of Part I, in chapter IV of part III in Book II, cann. 224; 405 §1; 548 §1; 737. The phrase is found in the reverse order, that is, as "rights and obligations" in cann. 199, 1; 199, 3; 614; 685 §1; 685 §2; 701; 728; 743; 744 §1; 745. The phrase appears in both ways in can. 310. The Code makes use of "duties and rights" in cann. 96; 296; 305 §1; 555 §1; 747 §1; 810 §2; 823 §1; 911 §1; 1003 §2; 1035 and "rights and duties" in cann. 271; 339 §1; 628 §2; 654; 1095, 2°; 1486 §2 (see s.v. "Ius, iuris"; "Obligatio, onis," in OCHOA, *Index verborum ac locutionum Codicis iuris canonici*, pp. 248-250 and 311-312 respectively).

come from the sacraments.¹⁷⁸ Though the response in itself does not give any reason, it is very significant that it does not espouse any particular theory of rights in the Code.¹⁷⁹ Moreover, the Church recognizes human nature and the common dignity flowing from it as the basis for fundamental rights, and within the Church, baptism produces other rights that precede any differentiation by states in life.¹⁸⁰

An emphasis on rights is fraught with the danger of an unwarranted individualism leading to the development of a litigious attitude within the community. There is also a danger of misuse of the rights for selfish ends. An overemphasis on rights can lead to a "privatization" of rights to the detriment of the common good and ecclesial communion. The basic attitude of the Christian faithful should not be one of vindicating rights but of fostering communion. Rights, if considered purely in terms of power or as a claim against the Church, would naturally create an unhealthy tension detrimental to ecclesial communion. The hierarchy is not meant to be a

¹⁷⁸ "Loco 'de obligationibus et iuribus' dicatur 'de iuribus et obligationibus' quia est locutio traditionalis (cfr. Codex a. 1917) et melius fundata in ipsa constitutione sacramentali Ecclesiae (Exc. Bernardin)." The Secretary responded: "Potest recipi, sed non videtur necessarium re vera ex sacramentis profluunt sive iura sive obligationes" (1981 *Relatio*, p. 62).

¹⁷⁹ There was a discussion during the revision of the Code on the particular approach to be taken to rights. One approach was to place rights in obligations and thereby identify rights with obligations. The other view was to ground rights in human and Christian dignity (see PROVOST, "Ecclesial Rights," pp. 46-52). It has to be understood that both views have validity due to the hierarchy of rights. Hence, both approaches to the rights are complementary and not mutually exclusive. The difference is the emphasis placed in the scholastic axiom, "agere sequitur esse." If the duty or the doing (*agere*) is emphasized then we have a functional approach and if the being (*esse*) or the doer is emphasized then we have a personal approach.

¹⁸⁰ See PROVOST, "The Christian Faithful," pp. 137-138.

dominating power but an agent of leadership and service. The hierarchical dimension of the communion implies that there is no competition in the Church and that baptism and orders are correlative and coessential. In other words, clergy and laity alike are placed before God in filial obedience to continue the mission of Christ through his mystical body, the Church.¹⁸¹

The use of the term "right" in the Code is particularly significant because rights are mentioned in conjunction with obligations or as correlative to them. Every ecclesial duty may be construed as a right to the same object, activity, or possession. A person who has an ecclesial duty to do or have something likewise enjoys a right to it.

Cardinal Castillo Lara is of the opinion that in choosing the order - "duties and rights" - the legislator wanted to underscore the principle that the Christian is called by God to form a part of His people, and therefore, the fundamental duty of the Christian is to respond to that call. This necessarily entails active participation in the life and mission of the Church, which represents a duty before being a right. Yet the emphasis on duty should not be construed as a diminution of rights.¹⁸²

¹⁸¹ See E. CORECCO, "Theological Justifications of the Codification of the Latin Canon Law," in M. THÉRIAULT and J. THORN (eds.), *The New Code of Canon Law*, proceedings of the 5th International Congress of Canon Law, organized by Saint Paul University and held at the University of Ottawa, August 19-25, 1984, Ottawa, Faculty of Canon Law, Saint Paul University, 1986, pp. 93-94; CASTILLO LARA, "Some General Reflections on the Rights and Duties of the Christian Faithful," pp. 16-17.

¹⁸² See CASTILLO LARA, "Some General Reflections on the Rights and Duties of the Christian Faithful," p. 25.

E. Corecco also upholds the precedence of duties over rights when he says that this priority is founded on the fact that "all Christians, whatever their sacramental and canonical status, exist as Christians only by reason of their relation to the salvific vocation given by Christ, the vocation to accede to communion with the Father and with the rest of the faithful."¹⁸³

Individual rights are subservient to the rights of the Church. A person cannot be an authentic Christian while remaining isolated and apart from the Church. An individual member has rights in the Church to the extent that he or she remains in communion which is the fundamental obligation. The priority of duty over right should remind us that for the Christian, service is primary in imitation of Christ who came not to be served but to serve.

CONCLUSION

From the preceding discussion we may conclude that right and duty represent a relationship of justice, right being either a norm or a faculty to have, possess, or relinquish something; and duty or obligation being the state of being bound or surrounded by the dictates of law to do or to omit something. The "right-duty" talk falls within the bounds of law. This law can be human or divine.

¹⁸³ CORECCO, "Theological Justifications of the Codification of the Latin Canon Law," p. 93.

Rights and duties are correlative and exist in society as relationships ordered to the good of the individual as well as of the community. These relationships take place in history. As a result, historical situations and realities shape the specific content of rights and duties in legislation, both civil and ecclesiastical.

The source or foundation of rights and duties differs according to the nature of the society of which a human being is a member. In virtue of human nature and dignity, every human being possesses rights. From the Christian perspective, the dignity of the person is rooted in one's being created in the image and likeness of God and redeemed by the death and resurrection of Christ. The rights which are founded in human nature are called human rights and these are universal, inalienable and inviolable. Their exercise can be regulated according to the requirements of the common good. The Church has promoted and defended human rights, especially in favour of the marginalized in society. Besides, the Christian faithful also enjoy human rights in as much as they are human beings within the Church community.

By baptism a human being becomes a person in the Church, that is, a subject of ecclesial rights and duties, and also acquires the identity of *christifidelis*. In other words, baptism constitutes the foundation of rights in the Church. The baptized, as *christifideles* enjoy equal dignity irrespective of their age, sex, office, and other conditions. They have a common responsibility to participate in the mission of Christ according to their condition or status. Obligations and rights in the Church correspond to her nature, and communion, mission, common good and coresponsibility form the general context for their exercise.

While baptism makes one the subject of rights and duties, their exercise is governed by the norms of ecclesiastical law. The law determines a person's juridic status based on one's juridic condition. The capacity to possess or to be the titular of rights differs from the capacity to act or exercise the rights. Therefore, minors for example, are equal to those who have reached the age of majority as regards the rights they possess. But their capacity to act is unequal and restricted. Similarly, not every baptised person is obliged to observe merely ecclesiastical laws (can. 11). In short, the possession of rights and duties differs from one's ability to exercise them.

Due to their specific condition, when the law places certain persons under the authority of parents, guardians, or pastors in the exercise of their rights, what the law transfers is not the rights themselves but their exercise. Therefore, those persons, who have people under their authority, have the duty to exercise and protect their rights. Besides, rights and duties reflect relations which promote justice and charity. These are necessary to build the community. In the Church, where service is the primary mission, duties take precedence over individual rights and in certain instances rights may be understood as duties. All ecclesial rights exist to serve the communion and mission of the Church. In this sense, rights and duties express a manner of participation in the Church.

CHAPTER II

MINORS IN THE CANONICAL TRADITION

INTRODUCTION

In the development of human personality there are definite age-periods, such as infancy, childhood, puberty, and adulthood. Generally, these periods represent a certain level of physical and psychological development which enables a person to acquire gradually the requisite capacity to exercise one's rights and duties. On the basis of this human development, every society within its juridic structures endows its members with a capacity, corresponding to their developmental age, to exercise specific rights and duties.

In the Church, a human being is constituted a person by virtue of baptism and thereby acquires rights and duties. However, the exercise of these rights and duties depends on a person's ability or capacity. This capacity is closely linked to the age-factor and other conditions. Therefore, the Church has certain juridic norms determining definite age levels for the exercise of those rights and duties. These norms take into consideration the relevant objective and subjective aspects of the exercise of rights and duties.

In this chapter, the focus of our discussion will be the question of age insofar as it determines a person's capacity for the exercise of rights and duties. The treatment of the subject will be restricted to minors, and the legal concept of

"minority" will be examined within the context of its development in the canonical tradition.

The notion of minority has roots in Roman law which had in place institutions specifically meant to promote and protect the welfare of minors. There is no doubt that Roman law has had considerable influence on the development of ecclesiastical law. This influence is evident in specific areas of ecclesiastical legislation enacted from the earliest time until the promulgation of the first Code of Canon Law in 1917. Ecclesiastical law maintained the category of minors according to a specific age; it determined their juridic capacity for the reception of sacraments and for placing other juridic acts, including their delictual capacity. Therefore, in this chapter we will analyze the concept of minority in (i) Roman law, (ii) the pre-Code ecclesiastical legislation, and (iii) in the 1917 Code. Along with it, we will also study the juridic capacity of minors, their rights and duties, and the protection which they enjoyed in Roman law and in the Church till the promulgation of the revised Code. In other words, this chapter will portray the juridic status of minors in the canonical tradition.

2.1 MINORS IN ROMAN LAW

Any treatment of the juridical concept of age cannot and should not prescind from considering its presence in Roman law. Certain juridic institutions were well developed in Roman law when the early Church began to spread. Since the Church expanded rapidly within the socio-political culture of the Roman empire, it naturally adopted some of the current legal concepts and laws rooted in Roman law.

During the first nine centuries, traces of Roman law in ecclesiastical institutions remain very sparse. But at the dawn of the ninth century, the use of Roman law became increasingly frequent because that was the law in force on certain matters. As a result, from the middle of the ninth century, the influence of Roman law on the discipline of the Church was much greater. In addition to the numerous civil enactments incorporated into the canonical collections, Pope Lucius III (1181-1185) decreed, in his instruction to the Bishop of Padua, that civil laws were at times a true source of church legislation. These laws were meant to supplement deficiencies in ecclesiastical legislation.¹ Even as late as the Apostolic Constitution, *Providentissima Mater Ecclesia*, promulgating the 1917 Code, Benedict XV emphasized the role played by Roman law in ecclesiastical legislation. He stated:

¹ The use of civil laws was limited to cases: (i) where they confirmed or explained ecclesiastical law, (ii) where they supplied a norm when Church law was silent. See *Glossa ordinaria*, c. 1, X, *de novi operis nunciacione*, V, 32, s.v. "adjuvantibus"; see A. REIFFENSTUEL, *Ius canonicum universum complectens tractatum de regulis iuris*, Parisiis, Apud Ludovicum Vivès, 1864, vol. 1, pp. 53-54; A.F. LOEBACH, *The Age of Reason, Puberty, and Majority: A Historical Synopsis*, J.C.L. thesis, Washington, DC, The Catholic University of America, 1950, p. 16; G.E. KELLY, *The Years of Discretion for Confession*, Canon Law Studies, no. 466, Washington, DC, The Catholic University of America, 1968, pp. 7-8. For a study of the influence of Roman law on the 1983 Code, see A. GAUTHIER, "La part du droit romain dans le Code de droit canonique de 1983," in *The New Code of Canon Law*, pp. 131-140.

The relationship between *Ius canonicum* and the *Ius civile* was so intimate, that it was universally held that one law could not be understood properly without a sufficient knowledge of the other. This attitude was well expressed in the saying: *Canonista sine legibus nihil valet, legista sine canonibus parum valet* (A canon lawyer without civil law can do nothing, but a civil lawyer without canon law can do little). The works of the early decretists, decretalists, and commentators up to the time of the 1917 Code so abound in references to Roman law that one thought: *Ecclesia vivit lege romana* (The Church lives by the Roman law); see G.J. SESTO, *Guardians of the Mentally Ill in Ecclesiastical Trials*, Canon Law Studies, no. 358, Washington, DC, The Catholic University of America, 1956, pp. 20-22; B.F. DEUTSCH, "Ancient Roman Law and Modern Canon Law," in *The Jurist*, 27(1967), pp. 297-298.

[t]rusting in the assistance of the divine light, she [the Church] tempered the Roman law itself, that wonderful monument of ancient wisdom, which has been deservedly called "written reason," and, having corrected its defects, perfected it in a Christian manner to such a degree that, as the ways of public and private life tended to greater perfection, abundant materials were supplied for the making of new laws both in the Middle Ages and more recent times.²

This papal statement affirms the influence of Roman law on ecclesiastical legislation in general. As indicated earlier, Roman law contributed to the juridic notion of minor and gave a distinct place to minors in its juridic order. In addition to it, there is evidence to the fact that in Roman law, the Church found inspiration and guidance in the formation and application of her own laws.

2.1.1 Personality in Roman Law

In Roman jurisprudence, the term *persona* was synonymous with *homo*, a human being. This can be proven by the fact that there are no less than twenty seven passages in Roman legal writings, which speak of slaves as *personae*. There is no doubt, that even slaves, from this standpoint, were persons though they were also treated as chattels. The use of *persona* as a synonymous term for *homo* seems to

² "Neque enim solum barbararum gentium leges curavit Ecclesia abrogandas ferosque earum mores ad humanitatem informandos, sed ipsum quoque Romanorum ius, insigne veteris sapientiae monumentum, quod ratio *scripta est* merito nuncupatum, divini luminis auxilio freta, temperavit correctumque christiane perfecit, usque adeo ut, instituto rectius ac passim exposito privato et publico genere vivendi, sive aetate media sive recentiore materiam legibus condendis satis amplam paraverit" (BENEDICT XV, Apostolic Constitution, *Providentissima Mater Ecclesia*, 27 May 1917, in *Codex iuris canonici Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus*, Romae, Typis polyglottis Vaticanis, 1933, p. xxxix); English translation in P.C. AUGUSTINE, *A Commentary on the New Code of Canon Law*, St. Louis, MO, B. Herder Book Co., 1931, vol. 1, p. 65.

have been the regular practice of the Roman lawyers.³ Nevertheless, the word *persona* does not seem to have had a clear, technical meaning at the time because, strange as it may seem, the word plays no part in the early legal history of the notion of *personality*.⁴ In Roman terminology, the two terms, which most nearly correspond with the modern concept of personality are *status* and *caput*. *Status* signified the legal condition of a person as a free being, a freed man etc., and *caput* (literally a "head"), denoted the sum of rights, duties and powers vested in him by virtue of that condition. The *status* or legal position was composed of three elements: (i) freedom or personal liberty (*libertas*), (ii) citizenship (*civitas*), and (iii) family position (*familia*). To have full capacity in Roman law, a human being had to be free, a citizen, and *sui iuris* (that is, free from *patria potestas*). The concept of *status* in Roman law was intimately connected with the question of *capitis deminutio*, that is, the change of position of an individual in respect to the juridic order. Any change in *caput* resulted also in a change of *status*.⁵ In addition to *status*, the capacity of a person to exercise

³ See P.W. DUFF, *Personality in Roman Private Law*, Cambridge, University Press, 1938, p. 7; J.A.C. THOMAS, *Textbook of Roman Law*, Oxford, North-Holland Publishing Company, 1976, p. 387.

⁴ See DUFF, *Personality in Roman Private Law*, pp. 1-25. Here he discusses the various uses of the word *persona* which seem likely to throw light on the development of legal personality and he comes to the conclusion that it was a not a technical term.

⁵ Corresponding to the three *status*, there were three types of *capitis deminutio*: (i) *maxima*, when the free individual became a slave; (ii) *media*, when Roman citizenship was lost; and (iii) *minima*, when there was a change of condition in relation to one's family either through the change of *paterfamilias* or through emancipation (see J. FORNÉS, *La noción de 'status' en derecho canónico*, Pamplona, Ediciones Universidad de Navarra, 1975, pp. 26-31; THOMAS, *Textbook of Roman Law*, p. 387; C.P. SHERMAN, *Roman Law in the Modern World*, New York, Barker, Voorhis & Co., 1937, vol. 2, pp. 25-26).

rights, depended upon sex, age, birth, state of mind, and political circumstances. Roman law placed those persons who were considered minors under the *patria potestas* and guardianship.

2.1.2 *Patria potestas* and Emancipation

Patria potestas was an important institute in Roman law and was pivotal to the law applicable to parents and children.⁶ The sources of paternal power other than marriage were legitimation⁷ and adoption.⁸ In Roman law, all persons (young and

⁶ "Ius autem potestatis, quod in liberis habemus, proprium est civium Romanorum: nulli enim alii sunt homines, qui talem in liberos habeant potestatem, qualem nos habemus (*Institutiones*, 1, 9, pr., in *Corpus iuris civilis*, vol. 1, p. 4).

⁷ Legitimation is a legal provision put at the disposal of natural fathers, to acquire paternal power over children whom they have had outside lawful marriage. In Roman law there were three modes of legitimation:

(i) Legitimation by the subsequent marriage of the parents: There had to be a regular marriage, proven by a written contract with a settlement of dowry.

(ii) Legitimation by imperial rescript: This was an act of the emperor, obtainable through a petition, when the father had no legitimate children. It might be applied for and obtained even after the death of the father, who although not having petitioned during his life time for the rescript, had declared his will that his children should be legitimized.

(iii) Legitimation by presentation to the curia (*per oblationem curiae*): It was accomplished by making the son a member (*decurio*) of the city council (*curia*) of a municipality. It was simply a way, by which a rich father could buy legitimacy for his son (see SHERMAN, *Roman Law in the Modern World*, vol. 2, pp. 80-83; BURDICK, *The Principles of Roman Law*, pp. 242-244; H.F. JOLOWICZ, *Roman Foundations of Modern Law*, Oxford, Clarendon Press, 1957, pp. 197-201; B. NICHOLAS, *An Introduction to Roman Law*, Oxford, Clarendon Press, 1979, pp. 84-85).

⁸ By adoption a person came under the *patria potestas*. There were two kinds of adoption: (i) Adrogation (*adrogatio*) and (ii) adoption (*adoptio*). With regard to the former, a person who had been *sui iuris* came under the *patria potestas*, and in the latter case, a person who had been *alieni iuris* moved out from his *patria potestas* to that of the one adopting him (see SHERMAN, *Roman Law in the Modern World*, vol. 2, pp. 83-91; JOLOWICZ, *Roman Foundations of Modern Law*, pp. 194-196).

old), were normally subject to the paternal power of their family head.⁹ Only the family head (*paterfamilias*) was a person in the full sense of the word as it was known in the law. Every child under his authority was subject to his unfettered power over life and death. On account of the influence of Christianity and especially of the Christian Roman Emperors, there was a humanization of the legal relationship between parents and children. Eventually, the *paterfamilias* was deprived of his absolute power of life and death over his children.

The *paterfamilias* relinquished his authority over the child through emancipation.¹⁰ A decree of the magistrate granting *venia aetatis* was apparently

⁹ This power had different names descriptive of the condition of the various dependent members of the family: (i) *dominium*, over slaves; (ii) *patria potestas*, over children and descendants; (iii) *manus*, over his wife, and (iv) *mancipium*, over freedmen (see SHERMAN, *Roman Law in the Modern World*, vol. 2, pp. 91-92).

Commenting on parental power and filial devotion, W. L. Burdick observes that the "filial honor and respect originate in the divine law, or, at least, in the law of the *jus gentium*. The ancient Hebrew Law, as formulated in the Mosaic Code, 'Honor thy father and thy mother,' and as incorporated in the moral law of Christian nations, has had probably more influence in promoting filial duty than had the paternal power doctrine of the Roman Law" (BURDICK, *The Principles of Roman Law*, p. 262).

¹⁰ Besides the death of the *paterfamilias*, the *patria potestas* was dissolved (i) by emancipation which came through a *vindicta* (consisting in a fictitious sale by the father before the magistrate, performed three times for the son but once for the daughter or grandchild, whereupon the child was set free from parental authority; or through an imperial rescript which was called as *Anastasian emancipation*; or by a simple declaration of the father before the magistrate which was called *Justinianean emancipation*); (ii) by elevation of the person concerned to certain dignities such as that of a bishop, city prefect, or consul; (iii) by infliction of certain penal forfeitures on the *paterfamilias* for specific crimes, such as exposing the child to death, or handing a daughter over for prostitution (see SHERMAN, *Roman Law in the Modern World*, pp. 98-100; BURDICK, *The Principles of Roman Law*, pp. 259-261).

the equivalent of a grant of complete emancipation.¹¹ It seems clear that *venia aetatis* concerned only minors who were *sui iuris*. Roman law did not have a provision for emancipation through the attainment of the age of majority. Furthermore, emancipation from the *patria potestas* did not necessarily leave one free from all protective control, because the age and the condition of the person had to be considered. Persons who were *sui iuris*, that is, not subject to parental power were, nevertheless, classed either as persons subject to guardianship or persons not subject to guardianship.¹²

2.1.3 Guardianship

In Roman law, guardianship was of two kinds: (i) *tutela* (tutorship),¹³ and (ii) *curatio* (curatorship). Generally speaking, these terms connote the authority of the guardian over the person subject to guardianship.

¹¹ *Venia aetatis* was a Roman legal institution by which the privilege was given to minors *sui iuris*, to act as though they had attained the age of majority before their actual legal age. Constantine declared that only men of 20 and women of 18 years could apply for this privilege (C. 2, 44, 2). The minors who have been granted this, however, lost their right to petition for *restitutio in integrum* (C. 2, 44, 1).

The term *venia aetatis* was used also in ecclesiastical jurisprudence, but its usual application was more in the form of a dispensation from the requirement of certain age than a general grant of full juridic capacity (see LOEBACH, *The Age of Reason, Puberty, and Majority*, p. 39).

¹² See *Institutiones*, 1, 13, pr; BURDICK, *The Principles of Roman Law*, p. 262.

¹³ The word "tutor" derives from the Latin verb meaning "to protect". *Tutela* is a right and power over a free person authorized by the *ius civile* for the *protection* of the one who by reason of age is unable to *protect* oneself (see *Institutiones*, 1, 13, 1). In Roman law there were two kinds of *tutela*: one for persons under the age of puberty, which was called *tutela impuberum* and the other for women, which was known as *tutela mulierum*. We restrict our discussion to the former as it relates directly to our topic.

2.1.3.1 *Tutela impuberum*

The guardianship of children under the age of puberty was a very ancient doctrine of Roman law. It was intended not only for the care and protection of persons of tender years, but also for the protection of family's property rights. Justinian (527-565 A.D.) described guardianship as the authority and power over free persons, conferred or admitted by civil law, for the purpose of protecting those, who, on account of their age, are unable to protect and defend themselves.¹⁴ The guardianship of children under the age of puberty was known as *tutela impuberum*. This *tutela* was a guardianship of both, the person and the property of the child.¹⁵ A child, although *sui iuris* by the death of his *paterfamilias*, was placed under the tutorship of some other person. A ward under seven years could not perform any legal act. Above that age he could perform no act that might prove disadvantageous to him without the *auctoritas* or the sanction of his tutor. Transactions to his advantage were valid without the *auctoritas*. In obligations that were mutual, as in transactions of buying, selling, letting, and hiring, if the tutor did not give his

¹⁴ See *D.* 26, 1, 1.

¹⁵ "It must however be understood that there is never any question of guardianship of either sort except where the person concerned is *sui iuris*; a person who is *in potestate*, *in manu* or *in mancipio* can have no guardian, because the chief function (and in later law the only function) of guardian is to administer the property of the incapable person, and a person *alieni iuris* can have no property to be administered" (H.F. JOLOWICZ and B. NICHOLAS, *Historical Introduction to the Study of Roman Law*, 3rd ed., Cambridge, University Press, 1972, p. 121).

Orphanages were recognized as *quasi-tutores* or *quasi-curatores*. They functioned as guardians in the administration of the wards' patrimony, represented them in the judicial forum, and defended their rights (see *C.* 1, 3, 31).

authorization, the person dealing with the ward was bound to the obligations on his part, but the ward was not bound.¹⁶ Furthermore, *tutela* was not only a right, since it also created duties for which the tutor was responsible to fulfil. Consequently, guardianship was considered a *munus*, and it was designated a *munus publicum* (public service) to the degree that the protection of minors unable to manage their own affairs was also in the public interest.¹⁷

2.1.3.2 *Cura minorum*

On completing the age of fourteen, a young person had full legal capacity provided that he was freed from the *patria potestas*. Although a *sui iuris*, his age and his lack of experience in socio-economic life placed him in a position of disadvantage in adult society. As a result, it was possible for a minor to face unfair transactions with adults, and end up being taken advantage of by them because of youthful inexperience. A legal protection against this situation was gradually introduced. According to this provision, those between the ages of puberty and the twenty five could acquire a curator. This extended guardianship became known in law as *cura minorum*.¹⁸ With specific exceptions,¹⁹ a minor could request the authority for a

¹⁶ See NICHOLAS, *An Introduction to Roman Law*, pp. 90-93; BURDICK, *The Principles of Roman Law*, pp. 263-265.

¹⁷ See *D.* 26, 7, 12, 3; see also s.v. "Tutela impuberum," in A. BERGER, *Encyclopedic Dictionary of Roman Law*, Philadelphia, The American Philosophical Society, 1953, pp. 747-748.

¹⁸ In the early 2nd century B.C., the statute called the *Lex plaetoria* made it a criminal offense to defraud a person less than 25 years old, thus protecting such a minor against the injurious consequences of his act and permitting him to apply for a curator. Later, this provision was supplemented by an edict that declared the *praetor* would give *restitutio in*

curator to assist him in sealing a transaction with his consent. This legal institute of *cura minorum* became a matter of law during the time of Justinian, and it was assimilated into the institute of *tutela* in many respects.

The main distinction between a *tutor* and a *curator* was that the former was appointed to care and protect the ward and his property, and the latter was designated only to manage and protect his ward's property. Tutors were given to infants and *impuberes*, while curators were given to minors between the age of puberty and the age of majority (twenty five years complete).

A transaction of an *impubes* without the consent of the *tutor* was usually invalid from the outset, whereas, the action of a person between the age of puberty and the age of majority without his curator's consent was valid in itself, though voidable at some future time. In later law, there was a progressive blurring of the

integrum to a minor who claimed that he had been tricked into the matter and taken advantage of because of his lack of business acumen. In other words, the *praetor* could relieve the minor of all injurious transactions done because of inexperience due to his minority. The result of the new law was that it became very unsafe to deal with a minor, unless he had a curator. There was a danger of perfectly honest adults being accused of sharp practice by minors who repented their bargain. Legal dealings with the young became hazardous. Reluctance on the part of adults to transact business directly with minors compelled the latter to seek curators (see SHERMAN, *Roman Law in the Modern World*, vol. 2, pp. 112-113; J. HADLEY, *Introduction to Roman Law in Twelve Academical Lectures*, New York, D. Appleton and Company, 1904, pp. 151-153; THOMAS, *Textbook of Roman Law*, p. 467).

¹⁹ There were three specific cases where the minor must always secure a curator by judicial appointment: (i) to engage in a lawsuit (*Institutiones*, 1, 23, 2); (ii) to receive payment of a debt (*C.* 4, 4, 7, 2); (iii) to receive an account of administration from his tutor (*C.* 5, 31, 1, 7); see SHERMAN, *Roman Law in the Modern World*, pp. 112-113; THOMAS, *Textbook of Roman Law*, pp. 466-468.

distinction between these two institutes. As a result of this *cura minorum*, the age of puberty was no longer the age of full juridic capacity.²⁰

2.1.4 History of the Concept: *Minor*

The legal concept of *minor* has undergone changes in its historical development, and consequently, the computation of the period of minority has never been uniform. The term *minor* was used within the legal context for delineating the capacities and/or incapacities of those who had not yet reached the age of majority. Roman law divided persons into four principal age periods, namely infancy, impuberty (*impubertas*), puberty, and majority.

2.1.4.1 Infant

Etymologically the word *infans* is a combination of *in* (=not) and *fans* (=speaking) which means *qui fari non potest* (one who cannot speak). In Roman law infants were those who could not speak because of their tender age. There was no definite law defining the period of infancy. Generally speaking, in the pre-Justinian law, the period of infancy was considered to last from six to eight years. This, of course, does not imply that Roman children were so backward as not to begin talking before that age. It merely meant that children that young could not speak the language of law or business; they could not comprehend and pronounce the forms of expressions used in legal transactions. In both ancient and classical Roman law,

²⁰ See NICHOLAS, *An Introduction to Roman Law*, pp. 94-95; s.v. "Curator minoris," in BERGER, *Encyclopedic Dictionary of Roman Law*, p. 421; HADLEY, *Introduction to Roman Law*, pp. 152-153.

speech was a necessary condition for a valid business transaction. Therefore, only those who were able to pronounce or distinctly express the required formula before the magistrate could validly initiate a contract or legal transaction.²¹ Since the pre-Justinian law²² did not define a specific age for this, the magistrate determined in a concrete case whether a child could speak sufficiently well before being admitted to the *stipulatio*. Taking into consideration the custom of the time and the common opinion of the jurists, emperor Arcadius (at the beginning of the fifth century) stated that in matters of inheritance or right of succession, a child, even though able to speak before the age of seven, could not either petition for or express the intention to accept the claim, but it had to be done by the father. When the child completed the age of seven, then he or she had to claim personally the inheritance or the right of succession, however, only with the consent of the father or the tutor.²³

It was Justinian who definitively established the period of infancy to be seven years.²⁴ As a result, the term "infant" lost its old meaning, that is, those who could not "speak" any legal transactions, and acquired a new notion based on physical age.

²¹ See ANDRIEKUS, *De minoribus in iure poenali romano et canonico*, pp. 23-26; DEUTSCH, "Ancient Roman Law and Modern Canon Law," in *The Jurist*, 28(1968), p. 451; JOLOWICZ, *Roman Foundations of Modern Law*, pp. 114-115; MICHELS, *Principia generalia de personis in Ecclesia*, pp. 31-32.

²² According to the opinion of some scholars, the references to Ulpian (*D. 26, 7, 1, 2*) and Modestinus (*D. 23, 1, 14*) specifying as seven years the period of infancy are an interpolation by the Justinian compilers (see ANDRIEKUS, *De minoribus in iure poenali romano et canonico*, pp. 26-27).

²³ See *Codex Theodosianus*, 8, 18, 8.

²⁴ See *C. 6, 30, 18 pr.*

This new notion expressed a person's *capacitas agendi* with a negative connotation, that is, the incapacity for any legal transaction till the completion of seven years.²⁵ Hence, the first complete seven years of a person's life came to be regarded in law as the period of infancy.²⁶

2.1.4.2 *Impuberes*

Impuberes were young persons who had not yet attained puberty. The term *impubertas* had a strict and a broad meaning. In the broad sense, it indicated the period from birth till the person achieved puberty. This included the period of infancy. In the strict sense, *impubertas* signified the period from the completion of infancy till the attainment of puberty. The classification of persons into *impuberes* and *puberes* was based on the physical development of a person, and it is found in the earliest period of Roman law, even prior to the legal definition of infancy. This fact indicates that the law followed life and natural facts. The principal criterion underlying this main division was a person's capacity for generation, that is, the ability to procreate, which boys attained around the age of fourteen and girls around the age

²⁵ See ANDRIEKUS, *De minoribus in iure poenali romano et canonico*, pp. 23-30; HADLEY, *Introduction to Roman Law*, pp. 148-149.

²⁶ Why seven years? The lawmakers probably conformed to the prevailing facts of physical development and the corresponding psychological maturity which boys arrived at around the age of fourteen, and therefore, they fixed the legal age of puberty at fourteen. As a consequence, seven was chosen as making an equal division. This division may also have been made under a theory of ancient physicists, who regarded human life as a series of seven-year periods, each having its distinct characteristics. The age of twenty one years, taken in more modern times as the age of legal majority, was probably assigned under a similar influence (see HADLEY, *Introduction to Roman Law*, p. 149). Another inspiration may have been found in the fact that there are seven days in a week. We also know that number seven was greatly regarded in the ancient world, especially among the Hebrews.

of twelve. At the same time, there are also references made in the law to *impueribus infantiae proximis* and *impueribus pubertati proximis* as two subdivisions within the period of *impuertas*.²⁷

Impueribus infantiae proximis: The word *proximus* suggests nearness. It is the life period of the *impuer* closest to infancy. Gaius makes reference to this period;²⁸ yet we do not find a definite and uniform specification regarding this period. Nevertheless, some jurists computed it by dividing the period of *impuertas* into two equal parts, and the first half was called the *impueribus infantiae proximus*. This would be the age period from seven to ten and a half years for boys, and from seven to nine and a half years for girls.²⁹

Impueribus pubertati proximis: This age period was of great importance in Roman penal law concerning delictual capacity, and so there are many references made to *proximus pubertati*.³⁰ It signified the age period from ten and a half to fourteen years for boys, and from nine and a half to twelve years for girls. This period ended with the beginning of legal puberty.

²⁷ See ANDRIEKUS, *De minoribus in iure poenali romano et canonico*, pp. 36-38.

²⁸ An explicit mention is made in the *Institutes of Gaius*, III, 109; and an implicit reference is also made in the *D.* 44, 7, 1, 13, and *D.* 46, 6, 6.

²⁹ See ANDRIEKUS, *De minoribus in iure poenali romano et canonico*, pp. 39-41.

³⁰ See *D.* 4, 3, 13; 44, 4, 4, 26; 29, 5, 14.

2.1.4.3 *Puberes*

The age of puberty signified the physical development necessary for marriage and it was accepted as evidence of sufficient mental maturity for other legal acts. In other words, a person having attained puberty enjoyed full capacity to act and, therefore, was regarded as a major until the introduction of the *Lex plaetoria*.

Before the time of Justinian, the age of puberty was not specified in the law. In practice, the general approach was to determine it by a physical examination. Even this method did not go undisputed. The Sabinians and the Proculians disputed among themselves the best method of determining puberty. The former wanted a *de facto* determination, that is, ascertaining an individual's appropriate physical development by physical examination, while the latter argued in favour of the age factor alone without such an inspection. But Justinian settled the controversy by an imperial edict in 529 A.D., for he considered the physical examination indecent and immodest, and therefore decreed that females were considered *ipso facto puberes* when they completed their twelfth year and likewise with boys when they completed their fourteenth year of age.³¹

2.1.4.4 *Minor*

In Roman law, the term *minor* comes from the phrase, *minores viginti quinque annis* (those less than twenty five years old). In the context, *minor* means precisely

³¹ See *C. 5, 60, 3*. The physical examination to verify the fact of puberty was banned as contrary to Christian modesty (*D. 1, 22 pr.*); see also LOEBACH, *The Age of Reason, Puberty, and Majority*, pp. 9-11. In Roman law, there is also a reference made to "pubertas plena" which is 18 years in boys and 24 years in girls (*D. 31, 1, 14, 1*).

the one who is *less than* or one who is *below* the determined age. Conversely, the term *maior* suggests the one who is *more than* or *above* a certain age. As we know from Latin grammar, the terms *minor* and *maior* are adjectives of comparison.³² As we have seen earlier, the *terminus ad quem* of the age of minority was determined by the *Lex plaetoria*. Until that law, those who were below the age of puberty were regarded as minors, but after its promulgation, the term *minor* was understood in its strict juridical meaning, that is, a person between the age of puberty and the completion of the twenty-fifth year, known in the legal sources as *minor viginti quinque annis*.³³ On account of its frequent use, this long phrase was abbreviated to *minor* by omitting *viginti quinque annis*. In fact, the term was used also in a broad sense to indicate a person up to the age of twenty five years complete.³⁴ The age twenty five was probably chosen on the basis of daily experience and the general span of human life envisioned in Roman law as hundred years.³⁵ With the completion of a quarter century of human life and apprenticeship in human affairs, a person was presumed to be a mature and full adult.

³² See DEUTSCH, "Ancient Roman Law and Modern Canon Law," in *The Jurist*, 28(1968), pp. 449-450.

³³ See *D.* 4, 4; see also s.v. "Minores," in BERGER, *Encyclopedic Dictionary of Roman Law*, p. 583; BURDICK, *The Principles of Roman Law*, p. 393.

³⁴ See *D.* 26, 5, 13, 2; 1, 7, 15, 3; 4, 4, 3 pr; *C.* 2, 22, 8; 2, 25, 3; 2, 28, 1; 2, 32, 2; ANDRIEKUS, *De minoribus in iure poenali romano et canonico*, p. 4.

³⁵ The citation from the Digest suggests that the Romans assumed that the general life span of a human being was one hundred years: "[...] unde sequens dubitatis est, quousque tuendi essent in eo usufructu municipes: et placuit centum annos tuendos esse municipes, quia is finis vitae longaevis hominis est" (*D.* 7, 1, 56, in *Corpus iuris civilis*, vol. 1, p. 132).

2.1.5 Juristic Capacity of Minors

Infants did not enjoy any capacity in law and could not be a party to any legal act, either by themselves or with assistance. With the termination of infancy, their position with regard to legal acts changed radically. Provided that they had the authorization of the guardian, they were able to perform many legal acts.³⁶ Justinian declared that *impuberes* could not make a valid will; conversely, this implied that *puberes* were capable.³⁷ No age limit was prescribed to enter into *sponsalia*, but the law required the parties to know what they were doing.³⁸ With their tutor's authority, persons having completed the age of seven were capable of standing in court proceedings.³⁹ They could personally claim the estate left to them, needing only the consent of their guardians for legality.⁴⁰ Those who had attained the age of puberty were capable of contracting marriage.⁴¹

³⁶ See JOLOWICZ, *Roman Foundations of Modern Law*, pp. 116-117.

³⁷ See *Institutiones*, 2, 12, 1.

³⁸ See *D.* 23, 1, 14.

³⁹ See *D.* 26, 7, 2.

⁴⁰ See *C.* 6, 30, 18, 4.

⁴¹ See *Institutiones*, 1, 10 pr. In the pre-Christian era, to contract marriage in Mosaic law, a boy had to complete thirteen years and one day, and a girl had to be twelve years and one day. In fact, one usually did not marry before the eighteenth year. In Greece, the age for marriage was eighteen years for both boys and girls. Plato had suggested thirty years while Aristotle had preferred thirty seven years. The Egyptians also required the contractants to be thirty years of age (see J. DELMILLE, art. "Age," in R. NAZ, *Dictionnaire de droit canonique*, Paris, Librairie Letouzey et Ané, 1935, vol. 1, col. 342.

The *filius familias* (a son under the *potestas* of his *pater familias*) who had attained the age of puberty could freely choose a proper domicile, a *domicilium proprium voluntarium*.⁴² As regards adoption, it was held that a minor could not adopt anyone older than himself. Justinian laid down that since adoption imitates nature, it was therefore, a violation of nature that a son should be older than the father and he decreed that whoever adopted a son should be his senior by eighteen years.⁴³

No person could assume the function of guardianship before he had completed twenty five years of age. It was considered unreasonable that one is a guardian who himself is subject to guardianship or curatorship. Whoever had to function as a guardian or a curator had to attain the age of majority and have the capacity to manage his own affairs.⁴⁴

Legal capacity in connection with wills was known as *testamenti factio*, and the term was applied in three ways: the capacity to make a will; the capacity to witness a will, and the capacity to execute a will. A testator had to be a Roman citizen, of the age of puberty, who was *sui iuris* and of sufficient physical and mental ability.⁴⁵

⁴² See *D.* 50, 1, 3; see also J. COSTELLO, *Domicile and Quasi-domicile*, Canon Law Studies, no. 60, Washington, DC, The Catholic University of America, 1930, pp. 20-21, and p. 58.

⁴³ See *Institutiones*, 1, 11, 4.

⁴⁴ See *C.* 5, 30, 5.

⁴⁵ See *Institutiones*, 2, 12, 4; BURDICK, *The Principles of Roman Law*, p. 591.

A minor below the age of twenty five could obtain from the court a decree restoring him to the position he was in prior to entering a contract which he afterwards considered unjust. This was a measure adopted in compliance with the principles of natural equity, so as to safeguard the rights of minors.⁴⁶ Besides, the law protected minors from the losses suffered on account of unlawful negligence by their guardians. When the guardian entered suit on behalf of his ward and then through neglect of duty lost the right of action, the damage resulting from such negligence was to be exacted from the guardian himself and thus, the ward was entitled by law to the benefit of complete restitution for all of the loss that he had suffered.⁴⁷

Roman law also addressed the issue of custody of children in the event of divorce by their parents. The custody was provided for in the divorce itself. If one party was at fault, the children were given to the custody of the innocent party, and if the guilty party was the father, he had to support them. If neither party was at fault, the father generally took the boys, and the mother the girls.⁴⁸

2.1.6 Delictual Capacity of Minors

Infants were deemed incapable of committing delicts. As regards the others, Justinian declared that in the case of theft, even *impuberes* were subject to a penalty

⁴⁶ See *D.* 4, 4, 1 pr.

⁴⁷ See *C.* 3, 1, 13.

⁴⁸ See *C.* 5, 24, 1; see also SHERMAN, *Roman Law in the Modern World*, vol. 2, p. 79.

as long as they were *proximi pubertati*, and so knew what they were doing.⁴⁹ A minor above the age of twenty years, who fraudulently sold himself into slavery in order to share the price was granted no relief.⁵⁰ No minor could claim *restitutio in integrum* in the case of adultery and of some other aggravated delicts.⁵¹ A minor who misrepresented his age and declared that he has reached majority was also denied the privilege of *restitutio in integrum*, because *malitia* or intent to defraud proved that he actually possessed the intellectual capacity of a person in the age of majority.⁵²

In short, Roman law took into account natural human development, such as the ability to speak and understand and the physical signs of puberty in determining the capacity of a person who was *sui iuris*. Later, historical circumstances led to the specification of legal ages for *infancy*, *puberty* and *majority*. Until the promulgation of the *Lex plaetoria*, those below the age of puberty were considered *minors* and those above that age, but below the age of majority (twenty five years complete) were considered *majors*. The determination of the period of minority was supported by the establishment of legal institutions for promoting the interests of minors and for safeguarding their rights.

⁴⁹ See *Institutiones*, 4, 1, 15; LOEBACH, *The Age of Reason, Puberty, and Majority*, p. 12.

⁵⁰ See *Institutiones*, 1, 3, 4; *D.* 1, 5, 5, 1.

⁵¹ See *D.* 4, 4, 37, 1. We have here a legal trend very similar to the one that appears in canon law in later years namely that *malitia* or knowledge makes up for deficiency of age (*malitia supplet aetatem*).

⁵² See *C.* 2, 43, 3.

2.2 MINORS IN THE PRE-1917 CODE ECCLESIASTICAL LEGISLATION

The concern of the Church in regard to a person's age and development has theological and canonical implications. Historically, while theologians were preoccupied with a child's capacity to sin and to receive the sacraments, canonists were concerned primarily with the age at which a person was bound to follow the law, was capable of assuming certain responsible roles and was subject to delictual imputability. We will examine now the development of age norms in relation to minors from the canonical perspective.⁵³

St. Augustine can be considered as one of the Church's earliest writers who dealt with definite legal age norms.⁵⁴ Still, in patristic literature the notion of the age of minority is vague and indefinite. In their writings, the Fathers of the Church mentioned different age categories, but they seem to have adopted this division from Hippocrates.⁵⁵ The periods of infancy and puberty are constantly mentioned in the

⁵³ We need to be aware that ecclesiastical documents used various expressions without precision to designate children who had not reached the age of majority: "Pour désigner les jeunes qui n'ont pas encore atteint la majorité, on trouve les expressions suivantes: *infans, puer, puella, parvulus, iuvenis, adolescens, adultus, grandiusculus, impubes, pubes*. La variété des termes n'est pas moins grande pour désigner l'âge correspondant à cette même étape de la vie: *puerilis aetas* ou *aetas pueritiae, minor aetas, aetas proxima infantiae, aetas proxima pubertati, aetas tenera, nubilis aetas, legitima aetas, perfecta aetas, plena aetas, aetas rationabilis, aetas discretionis*" (METZ, *La femme et l'enfant dans le droit canonique médiéval*, p. 12).

⁵⁴ In a letter to Bishop Renatus, written at the end of 419 A.D., Augustine (354-430) stated that a young person at the age of seven years was capable of speaking the truth or falsehood. In short, a person of seven years was capable of sinning (AUGUSTINE, *Epistola ad Renatum, De anima et ejusque origine*, Lib. 1, cap. 10, in *PL*, vol. 44, col. 481).

⁵⁵ "Prima aetas infantia est, secunda pueritia, tertia adolescentia, quarta juvenus, quinta virilis aetas, sexta aevi maturitas, septima senectus. Est ergo infans, puer, adolescens, juvenis, vir, veteranus, senex" (AMBROSE, *Epistola* 44, no. 12, in *PL*, vol. 16, col. 1139-1140); see also

early patristic and conciliar literature, the former in reference to baptism and the latter in reference to marriage. According to Tertullian (160-222) the discernment of good and evil begins at about the age of fourteen. The sensation of shame brought Adam and Eve to the knowledge of good and evil. The period of life in which the sensation of shame appears is to be considered as the time in which the knowledge of good and evil begins. Tertullian calls that period "the puberty of the soul" which coincides with "the puberty of the body."⁵⁶

In his letter written around the year 375 A.D., Basil the Great wrote that those who made their profession when they were below the age of puberty did not become professed religious and their profession had no force until they reached the age at which they would be eligible to marry.⁵⁷ This principle came to be upheld in the later legislation, because the attainment of puberty was a sign of physical and intellectual development and because this period was considered as an age of perfection, discretion, adulthood etc. Rightly then, at this stage a person enjoys a greater capacity for the exercise of personal rights and duties.⁵⁸

AUGUSTINE, *De genesi contra manichaeos*, Lib. 1, cap. 23, nn. 35-47, in *PL*, vol. 34, cols. 190-193; see also ANDRIEKUS, *De minoribus in iure poenali romano et canonico*, p. 79.

⁵⁶ See TERTULLIAN, *De testimonio animae*, cap. 4, in *PL*, vol. 1, cols. 613-614; ID., *De virginibus velandis*, cap. 11, in *PL*, vol. 2, cols. 904-906; KELLY, *The Years of Discretion for Confession*, pp. 24-25.

⁵⁷ See BASIL, Epistola 199, no. 17, in *PG*, vol. 32, col. 719.

⁵⁸ See LOEBACH, *The Age of Reason, Puberty, and Majority*, p. 22.

The early ecclesiastical writers, such as, Isidore (ca. 636) follow the age periods set in the patristic time. In his *Liber etymologiarum*, Isidore states that there are six periods in life,⁵⁹ of which, the first is infancy and it ends at the age of seven. The second is puberty, and in referring to it he writes:

The term *puberes* is derived from *pubes*, that is, from the embarrassing parts of the body when there is the first growth of hair in those places. Some determine puberty by years, namely by considering a person *pubes* at the completion of the fourteenth year even if there should be considerable delay in a person's pubescence. We are quite certain that a *pubes* is a person who manifests both the physiological form and the capacity to generate.⁶⁰

This definition of puberty by Isidore has been accepted in ecclesiastical law and has been incorporated into the decretals.⁶¹

⁵⁹ "1. Gradus aetatis sex sunt, infantia, pueritia, adolescentia, juvenus, gravitas, atque senectus. 2. Prima aetas *infantia*, est pueri nascentis ad lucem, quae porrigitur in septem annis. 3. Secunda aetas, *pueritia*, id est, *pura*, et necdum ad generandum apta, tendens usque ad decimum quartum annum. 4. Tertia, *adolescentia*, ad gignendum adulta, quae porrigitur usque ad vigessimum octavum annum. 5. Quarta, *juvenus*, firmissima aetatum omnium, finiens in quinquagesimo anno. 6. Quinta aetas, *senioris*, id est, *gravitas*, quae est declinatio a juventute in senectutem [...]. Quae aetas quinquagesimo anno incipiens, septuagesimo terminatur. 7. Sexta aetas, est *senectus*, quae nullo annorum tempore finitur, sed post quinque illas aetates quantumcunque vitae est, senectuti deputatur" (ISIDORE, *Etymologiae*, Lib. 11, cap. 2, nn. 1-7, in *PL*, vol. 82, cols. 415-416).

⁶⁰ "*Puberes* a *pube*, id est, a pudendis corporis nuncupati, quod haec loca tunc primum lanuginem ducunt. Quidam autem ex annis pubertatem existimant, id est, eum puberem esse qui quattuordecim annos expleverit, quamvis tardissime pubescat. Certissimum autem puberem esse, qui et ex habitu corporis ostendat, et generare jam possit" (ISIDORE, *Etymologiae*, Lib. 11, cap. 2, no. 13, in *PL*, vol. 82, col. 416).

⁶¹ See W. ONCLIN, "L'Age requis pour le mariage dans la doctrine canonique médiévale," in S. KUTTNER and J.J. RYAN (eds), *Proceedings of the Second International Congress of Medieval Canon Law*, (Boston College, 12-16 August, 1963), E Civitate Vaticana, S. Congregatio de Seminariis et Studiorum Universitatibus, 1965, p. 241.

2.2.1 Age of Reason and Age of Discretion

The notions of *age of reason* and *age of discretion* are important in canonical doctrine. The acquisition of the use of reason and of discretion enables a person to exercise certain rights and obligations, even though the full exercise of rights is accorded to those who have reached the age of majority. These concepts assume an important role in relation to minors. A specific class of minors who do not enjoy the use of reason is exempt from merely ecclesiastical laws, and is also incapable of legal acts. This is based on the principle that human acts cannot be posited without the use of intellect and will.

The phrases *age of reason* and *age of discretion* have been used extensively in canonical literature. J. A. McCloskey maintains that "certain councils enacted canons in which such phrases as the use of reason, the age of reason and the age of discretion were employed, but as far as can be determined, none of them gave even a precise definition of what the phrase implied. It seems that most of these councils presupposed that this was generally known."⁶² St. Augustine affirmed that the faculty of reason was present in infants but that its operation remained dormant.⁶³ But he did not indicate at which age the faculty became operative, that is, when the person enjoys the use of reason. Popes and councils decided on the requirement of

⁶² J.A. McCLOSKEY, *The Subject of Ecclesiastical Law According to Canon 12: An Historical Synopsis and Commentary*, Canon Law Studies, no. 165, Washington, DC, The Catholic University of America, 1943, p. 56.

⁶³ See AUGUSTINE, Epistola 98, no. 4, in *PL*, vol. 33, col. 361.

age seven for a person to be capable of giving consent for *sponsalia*.⁶⁴ St. Thomas explained that there are three stages in the gradual development of reason. The first stage is marked from birth until the seventh year and a person during this period is unfit to enter any contracts. The second stage begins with the completion of the seventh year and continues to the end of the fourteenth year. As there is a sufficient development of reason concerning oneself during this stage, a person can make promises for the future, such as betrothals. The third seven year stage commences with the completion of the fourteenth year and ends with the completion of the twenty first year. During this period, a person can bind himself or herself to perpetual obligations, such as, religious life and marriage.⁶⁵

Until the twelfth century, the expressions, "age of reason" and "age of discretion" were used interchangeably, without assigning a specific meaning to them. During the classical period, however, the terms were not synonymous. The age of discretion was considered to be much higher than the age of reason. The canonists of this period designated the age of discretion according to the specific act to be performed. Thus, for example, for the *sponsalia* the age of discretion was fixed at seven years, and for marriage it was puberty.⁶⁶ That is why Hostiensis said that

⁶⁴ See McCLOSKEY, *The Subject of Ecclesiastical Law*, pp. 57-59; LOEBACH, *The Age of Reason, Puberty, and Majority*, pp. 16-20; G. E. KELLY, *The Age of Reason: A Historical Synopsis of Roman Private Law and Ecclesiastical Law up to the Thirteenth Century*, J.C.L. thesis, Washington, DC, The Catholic University of America, 1967, pp. 23-26.

⁶⁵ See *Summa theologica*, Suppl., q. 43, art. 2.

⁶⁶ See METZ, *La femme et l'enfant dans le droit canonique médiéval*, pp. 20-21.

there are three kinds of discretion: (i) to make one's confession and receive a penance; (ii) to make a vow or contract marriage; and (iii) for administration (which required a higher age).⁶⁷

After the Fourth Lateran Council, the discussion regarding the ages of reason and discretion assumed a greater intensity. Canon 21 of the Council (1215) had used the phrase, *postquam ad annos discretionis pervenerint* (after they have reached the age of discretion),⁶⁸ and this phrase needed interpretation. The gloss on the word *discretionis* explained it as the age at which a child is *capax doli*, that is, has the capacity to commit sin.⁶⁹ After the promulgation of this decree, many bishops and particular councils interpreted and applied the term differently even to the extent of fixing the age of discretion at fourteen for boys and twelve for girls.⁷⁰ The Council of Trent (1545-1563) did not settle the issue but simply reiterated the phrase of the

⁶⁷ "Annos igitur discretionis sunt tria genera. Primum quoad confessionem faciendam et penitentiam recipiendam [...] Secundum, quoad votum emittendum, vel matrimonium contrahendum [...] Tertium, quoad administrandum [...]" (H.S. HOSTIENSIS, *In quintum Decretalium librum commentaria*, Venetiis, Apvd Ivntas, 1581, [Torino, Bottega D'Erasmus, 1965], tit. 38, cap. 12, no. 2, p. 101A).

⁶⁸ c. 12, X, *de poenitentiis et remissionibus*, V, 38, in *Corp.iur.can./FRIEDBERG*, vol. 2, col. 887.

⁶⁹ See *Glossa ordinaria*, c. 12, X, *de poenitentiis et remissionibus*, V, 38, s.v. "discretionis".

⁷⁰ See McCLOSKEY, *The Subject of Ecclesiastical Law*, p. 60.

Lateran Council.⁷¹ In the 1917 Code, the phrase, *annos discretionis* of the Lateran Council was equated with the phrase, *idest ad rationis usum*.⁷²

2.2.2 Capacity for Public Acts

The capacity of minors in ecclesiastical legislation can be identified through an analysis of the public acts of which they were capable. When they were granted the right to exercise certain acts, the law either presumed or made sure that they had sufficient maturity. The following is an inquiry into the historical development of the age norms concerning public ecclesiastical acts which minors could place in the Church.

Oblature and religious life: The status of children in the legislation on religious life depended on whether they embraced religious life spontaneously or whether they were offered by their parents (these latter were called *oblati*). The practice of children entering the monastery or convent at an early age or their parents placing them there, gave rise to serious problems regarding an individual's freedom in choosing to be a virgin or a celibate.

Pope Marcellus (304-309) stated that anyone who was offered to a monastery while yet under age and who had been tonsured or had received the veil still retained

⁷¹ See COUNCIL OF TRENT, Sess. 14, *De poenitentia*, cap. 5. The Congregation for the Sacraments, in the decree *Quam singulari*, dated 8 August 1910 (in *AAS*, 2[1910], pp. 577-583), spoke of the age of discretion relative to the reception of Penance and Holy Communion. The decree explains that *annus discretionis* means the age at which a child begins to reason, which occurs around the age of seven when the child is obliged to receive both Penance and Communion annually.

⁷² See *CIC/17*, cann. 859 §1; 906.

the right to choose in his or her fifteenth year, upon interrogation by the superior, whether he or she wished to remain or to leave. If they chose to remain, this was equivalent to a profession which became irrevocable. The fifteenth year was decided upon because before this age they were considered to be lacking in the use of discretion necessary for choosing this way of life.⁷³

The Councils of Toledo (in 633) and Tribur (in 895) upheld the view that parents could make profession in the place of their children, and this profession had an irrevocable character.⁷⁴ The paternal will was made equivalent to a personal profession. Therefore, children before the age of seven were engaged in religious life. Even Huguccio held that a person who was *capax doli* or *capax peccati*, even though not having reached the legitimate age of puberty, could enter the monastery either of his or her own accord or as one offered by the parents provided that there was no use of force.⁷⁵

⁷³ See c. 10, C. XX, q. 1, in *Corp.iur.can./FRIEDBERG*, vol. 1, col. 845; see also LOEBACII, *The Age of Reason, Puberty, and Majority*, p. 30. One may be puzzled by this text which speaks of the offering of sons to a monastery in the early fourth century. This is a text that is falsely attributed to pope Marcellus, and Friedberg indicates this fact when he says that it is a *caput incertum*.

⁷⁴ See c. 3, C. XX, q. 1, in *Corp.iur.can./FRIEDBERG*, vol. 1, col. 844 and c. 6, C. XX, q. 1, in *Corp.iur.can./FRIEDBERG*, vol. 1, col. 844 respectively; see also METZ, *La femme et l'enfant dans le droit canonique médiéval*, pp. 52-56.

⁷⁵ According to Huguccio, in either case, that is, whether the person entered the monastery of his own free will or was offered by the parents, that person could not leave the monastery. Huguccio's reasoning was that if a person could obligate himself or herself to the devil, that is, commit sin, then he or she most certainly could consecrate himself or herself to God (see *Glossa ordinaria*, c. 1, C. XX, q. 1, s.v. "coeperit"; KELLY, *The Age of Reason*, p. 21).

Generally, the popes of the medieval period pronounced on the side of liberty for *impuberes* who had made their religious profession before the age of fourteen. They said that such professions did not have any value unless they were ratified after the fourteenth year. The popes also accorded freedom to those children offered to the monastery by their parents, even in those cases where the profession had been already made by the parents in the place of their children. The practice of oblature, though protected, encouraged, and corrected when abused, still went contrary to the human freedom of children. The Church tried her best to reconcile the institution of oblature with the liberty of children by granting them the right to ratify or retract the profession made. Martin V officially abolished the practice of child oblature in 1430.⁷⁶ The Council of Trent decreed that only those men and women who had completed their sixteenth year were to be admitted to religious profession.⁷⁷ The Council also took care to safeguard the freedom of those virgins above the age of twelve, who were due to be dedicated to God.⁷⁸

Clerical life: With the reception of tonsure, a person became a cleric. In 813 A.D. the Council of Mayence decreed that no one should be tonsured unless he was of *legitimate age* and was seeking the clerical life freely. The *glossa ordinaria* explains

⁷⁶ For more sources from medieval canon law about the entry of minors to religious life, see METZ, *La femme et l'enfant dans le droit canonique médiéval*, pp. 50-58; 189-199.

The practice of oblature was often abused. The nobles frequently offered all their sick and disabled children to a monastery. Oblature became a method of child abandonment (see DELMAILLE, "Age," cols. 323-324).

⁷⁷ See COUNCIL OF TRENT, Sess. 25, *De regularibus et monialibus*, cap. 15.

⁷⁸ See COUNCIL OF TRENT, Sess. 25, *De regularibus et monialibus*, cap. 17.

that the term *legitima aetate* implies that a man after his seventh year can become a cleric because then he is *capax doli*, which is equivalent to saying that he has the use of reason.⁷⁹ According to R. Metz, there are several instances in the early Church, of minor orders being conferred on infants. He is of the opinion that it was Boniface VIII (1294-1303), who definitively fixed the age of tonsure by law. Moreover, the *Pontificale romanum*, printed in the year 1582, in the general rubrics under *De ordinibus conferendis*, stated that tonsure and minor orders were not to be conferred before completion of the seventh year. The Council of Trent did not declare anything on this matter, but it established certain requirements on the part of the candidates, such as, basic knowledge of the faith, the reception of confirmation, the ability to read and write, and evidence of their freedom in choosing this way of life to serve God.⁸⁰ However, Benedict XIV (1740-1758) instructed that only those who had attained the age of seven could receive the tonsure to be admitted to the rank of cleric.⁸¹

⁷⁹ See *Glossa ordinaria*, c. 1, X, *de regularibus et transeuntibus ad religionem*, III, 31, s.v. "legitima aetate"; LOEBACH, *The Age of Reason, Puberty, and Majority*, p. 18.

⁸⁰ See METZ, *La femme et l'enfant dans le droit canonique médiéval*, pp. 41-42.

⁸¹ See BENEDICT XIV, Instruction, *Eo quamvis tempore*, 4 May 1745, no. 19, in GASPARRI and SERÉDI, *Codicis iuris canonici fontes*, vol. 1, p. 895; s.v. "Rationis usus," in F. L. FERRARIS, *Bibliotheca canonica iuridica moralis theologica necnon ascetica polemica rubricistica historica*, editio novissima mendis expurgata et novis additamentis locupletata, Romae, Ex typographia polyglotta, S.C. de Propaganda Fide, 1885-1892, vol. 6, p. 531; McCLOSKEY, *The Subject of Ecclesiastical Law*, p. 62.

The pope disapproved the opinion of those who held that one attained the use of reason at the age of twelve (see BENEDICT XIV, Epistle, *Postremo mense*, 28 February 1747, no. 32, in GASPARRI and SERÉDI, *Codicis iuris canonici fontes*, vol. 2, p. 76).

Marriage: The early Church adopted the stipulations of the civil law of the time concerning the precise age for marriage. Certain abuses and customs, led the Church to determine gradually an appropriate age, the necessity of consent, and the role of parents in the matrimonial contract, in order to claim her authority over Christian marriage. The early Councils insisted on the requirement of the age of puberty for contracting marriage.⁸² Gratian has a long tract on marriage in the second part of the *Decretum*, where the requirement of age is explicitly mentioned. Following Roman law, he maintained that one cannot contract *sponsalia* before the age of seven. But for Gratian, the *sponsalia* was more than betrothal as understood by Roman law, but rather was a true *matrimonium initiatum*, which is perfected in *matrimonium consummatum*.⁸³ Therefore, puberty was necessary for a perfect marriage.

The *Decretals* of Gregory IX, particularly *De desponsatione impuberum*, offer many insights into the issues of the age of marriage and parental consent. As we

⁸² See ONCLIN, "L'Age requis pour le mariage dans la doctrine canonique médiévale," pp. 237-239.

⁸³ "Apparet ergo, hanc non fuisse coniugem, cui uiuente sponso alteri nubendi licentia non negatur. Quomodo ergo secundum Ambrosium et reliquos Patres sponsae coniuges appellantur, et his omnibus argumentis coniuges non esse probantur? Sed sciendum est, quod coniugium desponsatione initiatur, conmixtione perficitur. Unde inter sponsum et sponsam coniugium est, sed initiatum; inter copulatos est coniugium ratum" (c. 34, C. XXVII, q. 2, in *Corp.iur.can./FRIEDBERG*, vol. 1, col. 1073; italics in the original). See also METZ, *La femme et l'enfant dans le droit canonique médiéval*, pp. 23-27; J.C. O'DEA, *The Matrimonial Impediment of Nonage: A Historical Synopsis and Commentary*, Canon Law Studies, no. 205, Washington, DC, The Catholic University of America Press, 1944, pp. 9-10.

We may note that Gratian devoted ten of the thirty six *Causae* of the second part to marriage, that is, *Causae* 27 to 36.

read in it, Nicholas I (858-867) strictly forbade marriages when one or both the parties had not reached the age determined by the laws and canons, except for a most serious reason, such as the promotion of peace.⁸⁴ One can also find in it an excerpt from Isidore's *Etymologiae*, which defines and explains puberty as a condition for marriage.⁸⁵ Several papal responses concern the age and impediments for marriage. For example, Alexander III (1159-1181) in a letter to the bishop of Norwich states that a girl is *proxima pubertati* when she is in her eleventh or near her twelfth year, and that if she has lived with her husband, she should not be separated from him. In the particular case presented to him, the Pope held that the marriage was valid in spite of the lack of age because the husband of the girl swore that he had had sexual intercourse with her and that she was approximate to the age of marriage. Sexual intercourse and the proximity to the legal age were considered sufficient to make up for the lack of age.⁸⁶ Alexander III distinguished *sponsalia de*

⁸⁴ "Ubi non est consensus (*Et infra:*) *Huius ergo decreti auctoritate* Districtius inhihemus, ne *de cetero* aliqui, quorum uterque vel alter ad aetatem legibus vel canonibus determinatam non pervenerit, coniungantur, nisi forte aliqua urgentissima necessitate interveniente, utpote pro bono pacis, talis coniunctio toleretur" (c. 2, X, *de desponsatione impuberum*, IV, 2, in *Corp.iur.can./FRIEDBERG*, vol. 2, col. 673).

⁸⁵ See c. 3, X, *de desponsatione impuberum*, IV, 2, in *Corp.iur.can./FRIEDBERG*, vol. 2, col. 673.

⁸⁶ See c. 6, X, *de desponsatione impuberum*, IV, 2, in *Corp.iur.can./FRIEDBERG*, vol. 2, cols. 674-675; J. MANSI, *Sacrorum conciliorum nova et amplissima collectio*, Parisiis, Welter, 1927, vol. 22, cols. 288-289; O'DEA, *The Matrimonial Impediment of Nonage*, p. 7; LOEBACH, *The Age of Reason, Puberty, and Majority*, p. 25.

The principle, *malitia supplet aetatem*, was used in the cases of marriage. Here the phrase meant that a person was capable of marriage before the legal age. Even though marriage was forbidden before the legal age of puberty, it was permitted to continue *post factum* if puberty had been demonstrated. Carnal relations between the parties seemed to

futuro, which is bethrotal (promise to marry), from *sponsalia de praesenti*, which is marriage itself. These two became separate categories with distinct requirements and juridical consequences.⁸⁷ In principle, in the medieval period, the age of seven was required for bethrotal, and for marriage, the age of twelve and fourteen for girls and boys respectively was necessary. Everything else notwithstanding, being *pubes* automatically rendered one capable of matrimonial consent because the *aetas apta nuptiis*, the *tempus discretionis*, and the *tempus consentiendi* merged at puberty. Consequently, one can note in the *Corpus iuris canonici*, a relationship between procreative ability and consensual capacity for marriage.⁸⁸

There were efforts at the Council of Trent to raise the age for marriage to eighteen for boys and sixteen for girls. Some council fathers even advocated the age of twenty for girls and twenty five for boys, while others opposed any raise in the age for fear of providing an occasion for fornication, and they also felt that such a raise

indicate sufficient maturity and made up for the defect in years (see c. 8, X, *de desponsatione impuberum*, IV, 2, in *Corp.iur.can./FRIEDBERG*, vol. 2, cols. 675-676; c. 10, X, *de desponsatione impuberum*, IV, 2, in *Corp.iur.can./FRIEDBERG*, vol. 2, col. 676; O'DEA, *The Matrimonial Impediment of Nonage*, pp. 54-60).

⁸⁷ See DELMAILLE, "Age," cols. 343-344; ONCLIN, "L'Age requis pour le mariage dans la doctrine canonique médiévale," p. 240; METZ, *La femme et l'enfant dans le droit canonique médiéval*, pp. 28-30.

⁸⁸ See F.T. WALLACE, *The Canonical Age for Marriage*, J.C.L. thesis, Washington, DC, The Catholic University of America, 1978, pp. 25-28; ONCLIN, "L'Age requis pour le mariage dans la doctrine canonique médiévale," pp. 237-247.

would be contrary to the apostolic tradition.⁸⁹ In other words, the Council ultimately upheld the age of puberty.

Other sacraments: Until the thirteenth century, children who had not yet reached the use of reason were allowed to receive Holy Communion. It was considered their right to receive the Body and Blood of Christ in virtue of their baptism. In the Western Church, this custom had disappeared by the time of the Fourth Lateran Council; the Council introduced a new practice according to which children were not allowed to receive Holy Communion until they had attained the age of discretion. All those who had attained this age were also obliged to make their Confession prior to receiving First Holy Communion. The decree, *Quam singulari*, issued by the Congregation for the Sacraments on 8 August 1910, confirmed this practice by stating that the age of discretion for the reception of Holy Communion and for the reception of sacramental absolution is the same.⁹⁰ In the case of the Sacrament of the Sick (then known as Extreme Unction), there were instances where an age beyond the use of reason was required on the part of the recipient. According to C. Renati:

The Code of St. Martin of Tours and Bishop Durantis (1237-1296) too prescribed that the recipient must be at least eighteen years old. A

⁸⁹ See O'DEA, *The Matrimonial Impediment of Nonage*, pp. 4-6.

⁹⁰ "Unam tamen eandemque aetatem ad utrumque Sacramentum requirit Lateranense Concilium, quum coniunctum Confessionis et Communionis onus imponit" (CONGREGATION FOR SACRAMENTS, *Quam singulari*, in *AAS*, 2(1910), p. 580. For a historical synopsis on the age for Holy Communion, see M.M. CROTTY, *The Recipient of First Holy Communion*, *Canon Law Studies*, no. 247, Washington, DC, The Catholic University of America Press, 1947, pp. 1-52.

Synod of Paris of the twelfth century admonished pastors to give the sacrament especially to those who had reached their fourteenth year, though it also allowed all who had reached the age of discretion to receive it. In 1748 Benedict XIV quoted and condemned the practice of synods and particular rituals that had called for the deferring of the sacrament until the fourteenth year or until the subject had received Holy Communion.⁹¹

Even though the age of majority was twenty five years, all minors below this age were capable of exercising their rights to the sacraments, with due regard for the particular age and maturity demanded for each sacrament. For example, candidates for ordination to the presbyterate were to complete their age of twenty five years.

Other functions: As a consequence of the canonical doctrine underlying the notion of clerical state, a pre-adolescent (*impuber*) cleric was competent in principle to receive ecclesiastical benefices. However, Alexander III declared it improper and absurd to entrust the administration of churches to subjects who are not able to govern themselves.⁹²

The Council of Carthage (419 A.D.) allowed *puberes*, that is, those who had completed the age of fourteen, to give testimony in civil cases while this provision was denied to those below that age.⁹³ This was because a witness had to take an oath

⁹¹ C.G. RENATI, *The Recipient of Extreme Unction*, Canon Law Studies, no. 419, Washington, DC, The Catholic University of America Press, 1961, p. 101; see DELMAILLE, "Age," col. 332; METZ, *La femme et l'enfant dans le droit canonique médiéval*, p. 66.

⁹² "Indecorum est *admodum et absurdum*, ut hi debeant ecclesias regere, qui non noverunt gubernare se ipsos, quum ad ecclesiarum regimen tales personae sint admittendae, quae discretionem praemineant, et morum fulgeant honestate" (c. 3, X, *de aetate et qualitate*, I, 14, in *Corp.iur.can./FRIEDBERG*, vol. 2, col. 126); see METZ, *La femme et l'enfant dans le droit canonique médiéval*, p. 45.

⁹³ See MANSI, *Sacrorum conciliorum nova et amplissima collectio*, vol. 4, col. 438.

which required sufficient understanding and discretion. As a result, minors could not be forced to take an oath until the age of puberty. Boniface VIII (1294-1303) granted *puberes* the right to act and defend themselves in court, not only in spiritual matters, but also in those things which flow from or are dependent upon such matters, even without the consent of their parents.⁹⁴ Later canonists were of the opinion that minors who had reached the age of puberty (*impuberes puberes facti*) could testify about facts which they had perceived before puberty, especially if what they had witnessed happened close to that age.⁹⁵ *Impuberes* were neither admitted to participate in ecclesiastical elections nor permitted to cast votes.⁹⁶ However, concerning the capacity to act as witnesses in courts, *puberes* below the age of twenty years could act as witnesses in civil cases, but not in criminal cases.⁹⁷

⁹⁴ "Si annum quartum decimum tuae peregrasti aetatis, in beneficialibus et aliis causis spiritualibus, nec non et dependentibus ab eisdem, ac si maior XXV. annis existeres, ad agendum et defendendum per te vel per procuratorem, quem ad hoc constituendum decreveris, admitti debebis. Si vero infra XIV. annum existas, per te agere aut defendere non poteris super ipsis; sed vel per tuum episcopum vel per officialem eiusdem tibi curator dabitur ad lites huiusmodi exercendas, aut tu ipse, si maior infante fueris, cum auctoritate alterius eorundem procuratorem ad eas poteris deputare. Delegatus etiam apostolicae sedis et subdelegatus ab eo tibi, si non habebas, curatorem dare valeant, vel auctoritatem constituendi procuratorem praefuerint ventilandae. In huiusmodi quoque litibus sive causis, quanquam in potestate patris existas, nec alias eius, quum de his se intromittere non habeat, nequaquam requiri debet assensus" (c. 3, *de iudiciis*, II, 1, VI^o, in *Corp.iur.can./FRIEDBERG*, vol. 2, col. 996).

⁹⁵ See F. SCHMALZGRUEBER, *Ius ecclesiasticum universum*, Romae, Ex typographia Rev. Cam. Apostolicae, 1843, vol. 2, part 2, tit. 20, no. 7, pp. 63-64.

⁹⁶ See s.v. "Electio," in FERRARIS, *Bibliotheca canonica iuridica*, vol. 3, p. 268.

⁹⁷ For more information on the capacity of minors to act as witnesses, see s.v. "Testis," in FERRARIS, *Bibliotheca canonica iuridica*, vol. 7, pp. 464-465. Referring to the Council of Trent, Sess. 24, *de reformatione matrimonii*, cap.1, Ferraris points out that as the canon does not speak about the quality or age of the two or three witnesses required for marriage, even

2.2.3 Protection of Minors

The great concern of the Church for the well being of minors is evident in her efforts to protect the rights of the children and their safety, particularly in matters pertaining to religion and education. Certainly, the Church never denied the State authority over matters belonging to its own domain. Nevertheless, in mixed matters, such as child custody where the safeguarding of the discipline and faith of children was at stake, the popes sometimes intervened.⁹⁸ The letter of Gregory IX (dated 16 May 1229) to the bishop of Strasbourg illustrates this point. In reply to the bishop who had proposed the case to him, the pope writes:

From your letter We have learned that a question of this nature has been brought forward in your Synod. - A certain man, who has been drawn from out the dark error of Judaism to Christ, the true Light and the way of Truth, while his wife remained in error, has asked in court and with a certain urgency, that the four year old son of their marriage be given to him to be reared in the Catholic faith, which he himself has embraced, asserting that this is to the favour of the Christian religion, and that, the boy is under the age of reason and should follow him and his religion rather than the mother and her error. To this the mother has replied that, since the boy is still an infant, he needs maternal solace more than paternal care. Before birth he was burdensome to her; in birth he caused her sorrow and after birth he has been the

impuberes can function as witnesses provided they have sufficient use of reason to understand what is taking place. When the law does not distinguish between *puberes* and *impuberes*, we must not distinguish either (see *ibid.*, p. 464).

⁹⁸ The legal arguments used in litigation were largely based on Roman law principles, even though they seem to be quite incidental to the principal cause. The Church took Roman law principles to their logical conclusion and made sure that the best interest of the child especially in matters of Christian faith was safeguarded. For more details on the principles applied by the popes to the issue of child custody, see P.J. MURRAY, *The Custody of Children in Marriages Dissolved or Declared Invalid and in the Cases of Separation: A Historical Treatise*, J.C.L. thesis, Washington, DC, The Catholic University of America, 1954, iv-66p.

cause of much labour. For this reason, indeed, the legitimate union of man and woman was called matrimony rather than patrimony. This boy then, she alleges, would more fittingly be entrusted to his mother than his father to be brought up in the Christian faith into which he had been received, or at least to follow no religion until he had attained legitimate age. Many other arguments were brought forward on both sides; you, however, have held meanwhile this child in your custody, while you consulted Us as to what you should do in the circumstances.

Since, indeed, a child should be in the custody of the father, whose family it follows, rather than that of the mother, and, since at such an age a child should not be committed to the care of persons concerning whom there might be a suspicion that they might injure him temporarily or spiritually; and since, after the age of three years, a child should remain with and be supported by the father, who is above suspicion, while in the case of the mother, if it should happen that the child should remain with her, could easily lead him into the error of infidelity, We reply to you that the child is to be awarded to the father, especially by reason of the Christian faith, the interests of which are here involved.⁹⁹

⁹⁹ "Ex literis tuis accipemus, [perlatam fuisse ad synodum tuam huiusmodi quaestionem], quod quidam de Iudaicae caecitatis errore ad Christum verum lumen [et viam veritatis] adductus, uxore sua in Iudaismo relicta, in iudicio postulavit instanter, ut eorum filius quadriennis assignaretur eidem, ad fidem catholicam, quam ipse susceperat, perducendus. Ad quod illa respondit, quod, quum puer adhuc infans existat, propter quod magis materno indiget solatio quam paterno, sibi que ante partum onerosus, dolorosus in partu, [ac] post partum laboriosus fuisse noscatur, ac ex hoc legitima coniunctio maris et feminae magis matrimonium quam patrimonium nuncupetur, dictus puer apud eam debet convenientius remanere, [quam apud patrem ad fidem Christianam de novo perductum transire debebat, aut saltem neutrius sequi, priusquam ad legitimam aetatem perveniat. Hinc inde multis aliis allegatis: tu autem praedicto puero medio tempore in tua potestate retento, quid tibi faciendum sit in hoc casu nos consulere voluisti.] Quum autem filius in patris potestate consistat, cuius sequitur familiam, et non matris, et in aetate tali quis non debet apud eas remanere personas, de quibus possit esse suspicio, quod saluti vel vitae insidientur illius, et pueri post triennium apud patrem non suspectum ali debeant et morari, materque pueri, si eum remanere contingeret apud eam, [facile] posset illum adducere ad infidelitatis errorem: [fraternitati tuae] in favorem maxime fidei Christianae respondemus, patri eundem puerum assignandum" (c. 2, X, *de conversione infidelium*, III, 33, in *Corp.iur.can./FRIEDBERG*, vol. 2, cols. 588-589); English translation in MURRAY, *The Custody of Children*, pp. 5-6.

Minors were also protected against the coercion of their parents, in choosing freely their state of life. The Council of Trent declared that every one who unjustly impeded persons from contracting marriage, or who forced them to enter the married state incurred excommunication.¹⁰⁰ In the instances, where minors were abused by their parents for marrying against their will, the popes asked ecclesiastical judges to move them from their parents' home to a safe place.¹⁰¹

There are several instances where the Church took an interest in the legal protection of minors and those equivalent to them, although it regarded guardianship and curatorship as institutes of particular concern to the civil forum. In a letter to Bishop Anastasius, Pope Gelasius I (492-496) strongly urged him to provide for the guardianship of two minor children destitute of the assistance of parents and relatives.¹⁰² Canon 20 of the Synod of Pavia (850 A.D.) urged the ecclesiastical authorities to protect and defend persons neglected by their civil guardians. This

¹⁰⁰ See COUNCIL OF TRENT, Sess. 24, *de reformatione matrimonii*, cap. 9. For a brief discussion on whether parents incurred an excommunication if they interfered with the freedom of marriage, see O'DONNELL, *The Marriage of Minors*, pp. 59-61.

¹⁰¹ See O'DONNELL, *The Marriage of Minors*, p. 25.

¹⁰² "Desolatis propriae defensionis auxilio, et qui suis actibus prodesse pro etatis infirmitate non possunt, exoratum decet pontificem subuenire, quia pupillis tuicionem etiam diuinitas iussit impendi. Et ideo Maximo et Ianuario clericalis officii (qui se solatiis parentum uel propinquorum asserunt destitutos) auxilium ex nostra delegatione prestabis, ut aduersus inprobitates aduersariorum suorum protecti tuae executionis annisu noxia commenta non sentiant" (D. 87, c. 2, in *Corp.iur.can./FRIEDBERG*, vol. 1, col. 305).

indicates that the Church exercised a certain vigilance over the activity of guardians.¹⁰³

2.2.4 Parental Consent

From the time of Gratian there was much discussion whether parental consent was necessary for the validity of the marriages of minors.¹⁰⁴ Boniface VIII had declared that the *sponsalia* contracted by parents in the name of their children who, though present did not object, were to be considered valid because of the presumed consent of the children.¹⁰⁵ This presumption was based on the assumption that parents knew and did the best for their children; and the silence of the children when they were obliged to speak out was presumed to be consent. During the Council of Trent some Fathers insisted that the lack of parental consent for minors be declared as an invalidating impediment for marriage. The Council did not yield and anathematized those who held that the parental consent was necessary for validity. It stated:

Hence those are worthy of condemnation, and the holy council condemns them under anathema, who deny that they are true and valid, and falsely assert that marriages contracted by children still at home

¹⁰³ SESTO, *Guardians of the Mentally Ill in Ecclesiastical Trials*, p. 27.

¹⁰⁴ For a discussion relating to this issue in the *Corpus iuris canonici*, see O'DONNELL, *The Marriage of Minors*, pp. 9-69.

¹⁰⁵ See c. 1, *de desponsatione impuberum*, IV, 2, in *Corp.iur.can*/FRIEDBERG, vol. 2, cols. 672-673.

without the consent of their parents are null, and that the parents can make them either valid or invalid.¹⁰⁶

Even though the Council seems to have resolved the problem of parental consent, canonists continued to raise questions on the matter. They were grappling with the question of marriages contracted by parents in the name of their children who were present at the time and did not object. Schmalzgrueber was one among those authors who disagreed with this presumption of parental consent. He stated that the right enjoyed by the parents to engage their children was something exceptional and cannot be extended to include their marriage. He clearly distinguished between *sponsalia* and marriage. He argued that because the marriage effected the assumption of grave obligations and established an indissoluble status, complete freedom was necessary on the part of the contracting parties. This freedom was not necessary for a *sponsalia* which could be dissolved for many reasons. Hence, the marital consent should not be presumed by silence, but it must be expressed by some external sign.¹⁰⁷

The Sacred Congregation of the Council declared that children of legitimate age can be baptized if they ask for it, even against the wishes of their parents.

¹⁰⁶ "[...] et proinde iure damnandi sint illi, ut eos sancta synodus anathemate damnat, qui ea vera ac rata esse negant quique falso affirmant, matrimonia, a filiis familias sine consensu parentum contracta, irrita esse, et parentes ea rata vel irrita facere posse [...]" (COUNCIL OF TRENT, Sess. 24, *de reformatione matrimonii*, cap. 1); Latin text and English translation in N.P. TANNER (ed.), *Decrees of the Ecumenical Councils*, London, Sheed & Ward; Washington, DC, Georgetown University Press, 1990, vol. 2, p. 755.

¹⁰⁷ See SCHMALZGRUEBER, *Ius ecclesiasticum universum*, vol. 4, part 1, tit. 1, nn. 246-247, p. 110.

Children are generally considered to have reached the legitimate age on completing their seventh year.¹⁰⁸ As regards entry into religious life, Celestine III (1191-1198) taught that children who had attained and completed their fourteenth year were considered emancipated from parents as regards their choice of state in life.¹⁰⁹

2.2.5 Condition of Legitimacy

Whether children are born legitimate or illegitimate has some juridic consequences, affecting the capacity to exercise certain rights. Legitimacy is a juridic quality conferred on a child born in a valid or putative marriage, producing definite effects in law. On the other hand, legitimation is an institute of the positive law or a concession by a lawful authority which attributes to a child born out of marriage the juridic effects of legitimacy.¹¹⁰

It can be said that during the first ten centuries, the Church did not forbid illegitimate children entry into the clerical state. However, the reception of orders by such children was looked upon as unbecoming. In addition to it, local councils enacted particular laws against illegitimate children. Some councils went to the extent of declaring that the illegitimate children of clerics be condemned to perpetual servitude in the church of their progenitor, and they should be considered incapable

¹⁰⁸ See CONGREGATION OF THE COUNCIL, Response, 16 July 1639, in GASPARRI and SERÉDI, *Codicis iuris canonici fontes*, vol. 5, p. 285; LOEBACH, *The Age of Reason, Puberty, and Majority*. p. 43.

¹⁰⁹ Celestine III used the phrase, *ad annos discretionis* which the glossator settled for fourteen years complete (see c. 14, X, *de regularibus et transeuntibus ad religionem*, III, 31).

¹¹⁰ See ABBO and HANNAN, *The Sacred Canons*, vol. 2, p. 372.

of inheritance.¹¹¹ Neither did the Church consider children responsible for their illegitimacy, nor did it limit children's rights in order to punish them. However, these limitations were introduced with the sole purpose of combatting abuses against the dignity of the clerical state and Christian marriage. The grant of legitimation to illegitimate children was evidence of the Church's concern for them.

2.2.6 Delictual Capacity

It was generally admitted in ecclesiastical discipline that infants were not subject to any censures. However, J. Delmaille documents two exceptions to this general rule: (i) under certain conditions infants could incur a censure if they violated the monastic cloister, and (ii) if they dealt a blow to, that is, struck a cleric. But the crucial question concerned until what moment was a person to be considered an infant. Were *impuberes proximi infantiae* still regarded as infants? While some canonists held that ecclesiastical law does not apply to *impuberes, ex indulgentia iuris*, others said that *impuberes* were exempt only because of the presumption that they are incapable of *dolus*. Many authors believed that *dolus* was always possible even in the case of infants. The Church, in fact, always taught that at the age of reason an infant was able to sin. During the Middle Ages due to the influence of Roman law, *impuberes* were considered incapable of all public delicts. For faults of a private

¹¹¹ See G.J. McDEVITT, *Legitimacy and Legitimation: An Historical Synopsis and Commentary*, Canon Law Studies, no. 138, Washington, DC, The Catholic University of America Press, 1941, pp. 37-39.

nature, a distinction was made between *impuberes proximi infantiae* and *proximi pubertati*. Only the latter were held culpable.¹¹²

In a seventh century Irish penitential handbook, the *Penitentia of Cummean*, a special chapter was devoted to specifying penances for the misdemeanours of boys.¹¹³ Two periods of boyhood were designated in this particular collection: the years before age ten, and those between the ages of ten and twenty. The older boys received sharper warnings and harsher penances than their younger colleagues. The penances prescribed for children were less severe than the penances given to adults.¹¹⁴

¹¹² See DELMAILLE, "Age," cols. 319-320. It is interesting to note that the possibility of sin on the part of young children was highlighted by Gregory the Great who related a case of a child of five years of age, who, due to a bad family environment, had been accustomed to blaspheme. Though all the baptized dying in infancy were believed to enter heaven directly, this child, upon his death at this young age, could not be believed to have entered directly into heaven (see GREGORY I, *Dialogiae*, Lib. 4, cap. 18, in *PL*, vol. 77, col. 349; KELLY, *The Years of Discretion for Confession*, p. 28).

¹¹³ For the Latin and English version of *Penitential of Cummean*, see L. BIELER (ed.), *The Irish Penitentia*, Dublin, The Dublin Institute for Advanced Studies, 1963, pp. 109-135; the special chapter that deals with penances for children known as, "Ponamus nunc de ludicis puerilibus priorum statuta patrum nostrorum" refers to twenty one misdemeanours and the corresponding penances (pp. 126-129).

¹¹⁴ See P.A. QUINN, *Better Than the Sons of Kings: Boys and Monks in the Early Middle Ages*, New York, Peter Lang, 1989, p. 160.

Most of the misdemeanours mentioned in the penitentia are of sexual nature. We find that even boys innocently drawn into a sexual act by adults were subjected to penance, and were treated as if they too had sinned. Although the rationale for this is not found in the penitential, P.A. Quinn sees in the discipline, certain benefits for the abused child: "[...] confessing the act provided the child with the opportunity to verbalize the experience, [...] performing the penance gave him a ritualized and guaranteed method whereby he could expiate the evil done to him. Such a release from guilt would have been especially important to one who resided in a society that valued chastity so highly. To view penance in this manner, as a psychological pressure valve for guilt, rather than as a purely punitive device, provides one with an explanation more consistent with other aspects of monastic treatment

Those who had attained the use of reason were considered as *capax doli* and were regarded as able to disobey the law. As a result *impuberes* were not exempt from penalties.¹¹⁵ Gregory VII (1073-1085) said that theft, lying, and perjury were possible for a person below the age of fourteen (*pueri*), though not the sins of the flesh. *Puerilis aetas* was sufficient for these acts however; they were treated more leniently than those who had passed the age of puberty.¹¹⁶ Alexander III (1159-1181) also held that children should not be punished severely as if they were

of children. By submitting to penance's cleansing ritual, a young person might disengage himself more effectively from the shock of sexual violation or the guilty pleasure of sexual initiation" (p. 164).

¹¹⁵ Gregory IX allowed the diocesan bishops to absolve *impuberes* from penalties ordinarily reserved to the Holy See (c. 60, X, *de sententia excommunicationis*, V, 39, in *Corp.iur.can./FRIEDBERG*, vol. 2, cols. 912-913). Alexander III exempted clerics from the obligation of coming to Rome to seek absolution when the delinquents were below the age of puberty (c. 1, X, *de sententia excommunicationis*, V, 39, in *Corp.iur.can./FRIEDBERG*, vol. 2, cols. 889-890). The glossator contends that the *impuberes* who are *capax doli* can sin in everything except the sins of the flesh. He also admits that the principle of "malitia supplet aetatem" applies in the case of delicts (see *Glossa ordinaria*, c. 1, X, *de delictis puerorum*, V, 23); see LOEBACH, *The Age of Reason, Puberty, and Majority*, p. 35.

¹¹⁶ "Pueris grandiusculis peccatum nolunt attribuere quidam, nisi ab annis XIV., quum pubescere coeperint. Quod merito crederemus, si nulla essent peccata, nisi quae membris genitalibus admittuntur. Quis vero audeat affirmare, furta, mendacia et periuria non esse peccata? At his plena est puerilis aetas; quamvis in eis non ita, ut in maioribus, punienda videantur" (c. 1, X, *de delictis puerorum*, V, 23, in *Corp.iur.can./FRIEDBERG*, vol. 2, col. 824); see KELLY, *The Age of Reason*, p. 18.

responsible adults.¹¹⁷ This goes to prove that minors were protected from the unreasonable punishments and the exploitation of their parents.

We may conclude that in the history of ecclesiastical legislation minors received a great deal of attention with regard to specific functions and the reception of sacraments. Indeed, they enjoyed several rights like those enjoyed by persons who had attained the age of majority, that is, those who had completed their twenty five years of age, provided that they were *sui iuris*. In some cases, they needed the assistance of parents or guardians to exercise their rights, and in other cases, they did so independently of them. In comparison with majors (persons who had attained the age of majority), minors received a favourable treatment of law in protecting their rights and it was less severe in holding them responsible for their delicts.

¹¹⁷ Alexander III wrote to the bishop (Hermenensi episcopo): "Referente nobis H. latore praesentium intelleximus, quod, quum filius eius, qui decennis erat, cum aliis pueris sagittaret, quidam nepos eiusdem H. sagitta percussus interiit, quod idem filius eius, quum inter alios luderet, fortuito casu dicitur peregisse, licet id habeatur incertum. Propter quod dilectus filius noster abbas sancti Remegii a praefato H. secundum consuetudinem illius terrae centum solidos instantius requirebat. (Et infra:) Unde, quoniam in pueris relinqui solet inultum quod in aliis provectoris aetatis humanae leges dicunt severius corrigendum, fraternitati tuae per apostolica scripta praecipiendo mandamus, quatenus rem ipsam diligentius inquiras, et, si tibi constiterit, filium praedicti H. infra XIV. aetatis suae annum eundem excessum commisisse, memoratum abbatem moneas et auctoritate nostra appellatione remota compellas, ut ab eodem H. praedictos centum solidos propter illam consuetudinem non exigat, nec ab ipso pro temporali poena requirat. Quodsi praenominatus abbas eum super hoc post commonitionem tuam duxerit impetendum, tu Haide et filium suum ab eius impetitione sublato appellationis remedio auctoritate nostra fretus absolvas" (c. 2, X, de delictis puerorum, V, 23, in *Corp.iur.can*/FRIEDBERG, vol. 2, cols. 824-825).

2.3 MINORS IN THE 1917 CODE

The Church from the beginning gave responsible offices and functions to those subjects who were able to exercise them responsibly. She administered the sacraments to those who had sufficient maturity, ability, and proper disposition. It is true that the pre-Code legislation spoke of age in an incidental manner, such as the age required for marriage, ordination, and ecclesiastical benefices.

The *Ius decretalium* did not have any prescriptions on these matters, and in general it adopted and applied the norms prevalent in Roman law. Hence canonical collections have only a few norms on them, but prior to the Code, canonical doctrine applied the norms prescribed by Roman law. The 1917 Code had its own norms on these issues, because neither Roman law nor civil law could be considered as supplementary sources of canon law; besides, civil laws differed widely in determining the capacities of persons. The principles of canon law mostly conformed to Roman law and ancient canonical doctrine, but in a few instances, such as age, the canonical norms were adapted to contemporary civil laws.¹¹⁸

¹¹⁸ "Ius Decretalium non habebat de iisdem praescripta, et in genere ad capacitatem personarum admisit et applicavit praescripta quae in iure romano vigeant. Unde iuris canonici antiqui monumenta pauca tantum de iisdem habuerunt praescripta, sed universa doctrina ante Codicem applicavit quae ius romanum de hac materia praescripta edixit.

Codex I.C. e contra propriam habet legislationem. Ratio est quia in iure Codicis nec ius romanum nec iura civilia sunt fontes iuris canonici suppletivi, et quia differunt varii ordines civiles in determinandis personarum capacitatibus. Principia Codicis I.C. sunt plerumque iuri romano et doctrinae canonicae antiquae conformia, sed in paucis, uti v.g. quoad aetates, ordinationes canonicae sunt legibus civilibus hodiernis accommodatae" (*Communicationes*, 21[1989], pp. 36-37).

2.3.1 Concept of *Minor*

Until the 1917 Code, the Church did not have a separate chapter on age in general. When Roman law ceased to be considered as a supplementary source of canon law, the Church had to formulate her own principles for classifying persons according to their age. Because of the differences in the civil laws of various nations concerning this matter, the Church had to determine for her own subjects the age of majority and minority and their juridic capacity.¹¹⁹ Therefore, for the first time in the history of canon law, the Church offered in two canons of the 1917 Code, namely, cann. 88 and 89, universal legislation on classification of persons on the basis of age.

Canon 88 stated:

§1. A person who has completed the twenty first year of age, has attained majority; below this age, a person is a minor.

§2. A minor, who is a male is considered to have reached puberty when he completes his fourteenth year; and a female when she completes her twelfth year.

§3. A child before completing seven years is called an infant, *puer, parvulus* and is considered incapable of personal responsibility; on completion of the seventh year, the minor is presumed to have the use of reason. Persons habitually devoid of the use of reason are considered as equivalent to infants.¹²⁰

¹¹⁹ See MICHIELS, *Principia generalia de personis in Ecclesia*, p. 37.

¹²⁰ "§1. Persona quae vicesimum primum aetatis annum explevit, maior est; infra hanc aetatem, minor.

§2. Minor, si masculus, censetur pubes a decimoquarto, si femina, a duodecimo anno completo.

§3. Impubes, ante plenum septennium, dicitur infans seu puer vel parvulus et censetur non sui compos; expleto autem septennio, usum rationis habere praesumitur. Infanti assimilantur quotquot usu rationis sunt habitu destituti" (can. 88).

The Code considered as a full adult (*major*) the person who had completed the twenty first year. Thus, after having withdrawn from the influence of Roman law and having rejected the proposal to canonize the civil laws in this area, there was for the first time, a truly canonical legislation defining the age of majority and minority.¹²¹

Canons 88 and 89 counter-positioned minors vis-à-vis majors. Within the age bracket of minority, can. 88 classified persons as either *puberes* or *impuberes*; the latter were further categorized into *impuberes* and *infantes*, according to their specific age. In other words, the Code distinguished three decisive moments in human life: (i) the moment where requisite reason appears; (ii) the moment of puberty when marriage is possible; and (iii) the moment of full adulthood, when a person is fully mature so as to be master of oneself and one's destiny. In other words, the Code established four basic legal periods: infancy, impuberty, puberty, and majority.¹²²

Canon 88 §3 gave different terms, such as *infans*, *puer*, and *parvulus* for minors who had not yet completed the age of seven years. While on the one hand, the canon uses these different terms synonymously, on the other hand, the use of these terms in the Code is not coherent with the technical meaning provided in the canon.¹²³ A. Blat opined that although these terms are used interchangeably in

¹²¹ See A. BAUMER, "De iure poenali pro delinquentibus minoris aetatis in Codice iuris canonici et novissimo schemate Codicis poenalis helvetici," in *Apollinaris*, 6(1933), p. 469.

¹²² See DELMAILLE, "Age," cols. 315-316.

¹²³ Cf. cann. 336 §2; 447 §1, 1°; 1185; 1331; 1354 §2; 1373 §2; see K. MÖRS DORF, *Die Rechtsprache des Codex iuris canonici*, Paderborn, F. Schöningh, 1967, pp. 115-117.

ordinary usage, philologically they have a distinct meaning: *infans* refers to the inability to speak intelligibly, *puer* to the small age, and *parvulus* to the small stature of physique or body.¹²⁴ According to D. Narbona, an erudite Rotal auditor who authored a voluminous work on the ages required for specific human acts, the term *parvulus* was too generic. In his opinion:

Therefore, we should note that the term *parvuli* is applicable to children of different ages. Sometimes it signifies the very tender age of the fetus which is still in the womb [...] and more frequently, it denotes the age of a nursling [...] hence, it is often used for children who are crawling [...] the term is also accepted for those who are able to talk and babble. But in order to be guided by better enlightenment in a such a doubtful and unclear investigation, one must be permitted to consider the term in a generic way so that it contains all little children between the age of one to fourteen years complete.¹²⁵

The category of *minores infantiae proximi* and *pubertati proximi*, though not explicitly mentioned in the canon, had been implicitly retained in can. 2204.¹²⁶

¹²⁴ "Dicitur in §3. *Impubes, ante plenum septennium, dicitur infans seu puer vel parvulus; sic revera promiscue in usu comuni, etsi possit philologicè distinctio significationis assignari: 'infans' ob loquelae defectum, 'puer' proptem aetatem, 'parvulus' ob corporis parvitatem*" (A. BLAT, *Commentarium textus Codicis iuris canonici*, Romae, Libreria editrice Religiosa, 1921, vol. 2, p. 9).

¹²⁵ "Quocirca animadvertendum est, parvuli nomen diversis applicari aetatibus, aliquando enim illam tenerrimam significat, quam foetus obtinet, cum vulva circumcluditur [...] necnon saepe saepius lactentis aetatem denominat [...] unde frequenter pro vagientibus sumitur [...] licet etiam pro iam loquentibus et verbigerantibus parvuli accipiantur. Sed in tam dubia, salebrosaque investigatione, ut qualesquales melioris lucis scintillas eruamus, praemittendum erit, parvuli vocem adeo genericam esse, ut aetatas omnes a primo ad decimumquartum annum inclusive contineat" (D. NARBONA, *Annales tractatus iuris de aetate ad omnes humanos actus requisita*, Romae, Sumptibus Iosephi Corbi, 1669, p. 202).

¹²⁶ "Minor aetas, nisi aliud constet, minuit delicti imputabilitatem eoque magis quo ad infantiam propius accedit" (can. 2204); see C. PIONTEK, "De acephalis in iure canonico," in *Jus pontificium*, 17(1937), p. 70; MICHIELS, *Principia generalia de personis in Ecclesia*, p. 50; TOCANEL, *Compendium praelectionum de normis generalibus*, pp. 262-263. For a contrary opinion on the retention of the category of the *minores infantiae proximi*, see DELMAILLE,

Since the pre-Code law did not contain any general legislation on the computation of age or time,¹²⁷ the 1917 Code, in can. 34 supplied for this deficiency.

In the eighteenth century the more common opinion was that those who had attained the use of reason before the age of seven were bound by those ecclesiastical laws which were accommodated to their age.¹²⁸ In the nineteenth century, the opposite opinion was thought to be probable and was generally held as common. The 1917 Code, due to its special concern for the minors who were too young, stated in can. 12, that baptized persons who have not yet completed the seventh year of age, even though they had attained the use of reason, were not bound by purely ecclesiastical laws, unless stated otherwise.¹²⁹

2.3.2 Parental Authority on Minors

Having made the division of persons into those in the age of majority and the age of minority, the Code logically proceeded to give the foundational principle of their juridic condition in can. 89, according to which:

"Age," col. 319.

¹²⁷ There were of course, some general principles which were used in this regard, such as that age must be counted not from the day of baptism but from the day of birth, that the years must be enumerated according to the solar calendar and not the lunar one; and that civil year and not the ecclesiastical (liturgical) one, is to be taken into account in the computation of time and age (see MICHIELS, *Principia generalia de personis in Ecclesia*, p. 50).

¹²⁸ See SCHMALZGRUEBER, *Ius ecclesiasticum universum*, vol. 1, p. 207.

¹²⁹ "Legibus mere ecclesiasticis non tenentur qui baptismum non receperunt, nec baptizati qui sufficienti rationis usu non gaudent, nec qui, licet rationis usum assecuti, septimum aetatis annum nondum expleverunt, nisi aliud iure expresse caveatur" (can. 12); see McCLOSKEY, *The Subject of Ecclesiastical Law*, p. 196-197.

A person who has reached the age of majority has the full exercise of one's rights; minors remain subject to their parents or guardians in the exercise of their rights, except in matters in which the law holds them exempt from the paternal power.¹³⁰

The canon concedes complete juridical autonomy to those who have attained the age of majority. Minors, on the other hand remain under the authority of parents¹³¹ or guardians for determined areas. However, the Code grants them certain exemptions. These exemptions are contained either explicitly or implicitly in the Code.

The Code enjoined upon parents the gravest obligation to seek the well-being of their minor children. It clearly stated the responsibility of parents to provide religious, moral, physical, and civil education to their children, and also to provide for their temporal welfare.¹³² The obligation of children to respect their parents finds a basis in the duty of the parents themselves towards their children.

Canon 89 stated the consequence of attaining the age of majority. The emancipatory effect of the age of majority which the canon articulated was foreign to Roman law, therefore, seems to have been borrowed from the secular law as it developed in a number of European countries from the Middle Ages to the

¹³⁰ "Persona maior plenum habet suorum iurium exercitium; minor in exercitio suorum iurium potestati parentum vel tutorum obnoxia manet, iis exceptis in quibus ius minores a patria potestate exemptos habet" (can. 89).

¹³¹ Generally speaking, the Code subjects the minor primarily to the father (see can. 1648 §3; O'DONNELL, *The Marriage of Minors*, p. 81).

¹³² See can. 1113. As regards some of the specific obligations of parents, see can. 770 (in regard to baptism); can. 788 (confirmation); can. 854 (Holy Communion); can. 542 (entry into the novitiate); can. 1034 (marriage of minor children); can. 1335, 1372-1374 (catechetical instruction and education of children).

nineteenth century. The norm contained in the canon is identical to the norm of the Napoleonic Code and the Codes influenced by it. Therefore, it does appear that the modern secular Codes have been the sources of can. 89 of the 1917 Code.

2.3.3 Specific Rights of Minors

According to the 1917 Code, minors had the capacity for certain acts in the Church. For example, even though they had not attained the age of puberty, minors could acquire their own quasi-domicile (can. 93 §2).¹³³ After puberty they were free to choose a church for their funeral services and a cemetery for their burial (can. 1223 §1-2). Unless they were forbidden by law, those who had the necessary use of reason were capable of making a vow (can. 1307 §2), which could be annulled by the father, guardian, or mother if made by a minor still under parental control. In cases which directly involved spiritual matters or connected with spiritual matters, minors enjoyed full procedural capacity after completing their fourteenth year of age. Also in similar matters those who enjoyed the use of reason before fourteen years of age, could plead and respond in court without the consent of their parents or guardians

¹³³ Minors could not acquire a proper domicile, even though having passed infancy, but they were able to obtain a proper quasi-domicile. According to can. 93 §1 they necessarily retained the domicile of their parents or guardians.

In Roman law, a minor (*filius familias*) did not necessarily retain the domicile of his father. The early canonists followed Roman law and it was not until the eighteenth century that the present teaching came into prominence. The unanimous opinion of canonists on the necessary domicile was confirmed by the practice of the Roman curia, and it found a way into the 1917 Code (see COSTELLO, *Domicile and Quasi-domicile*, p. 165).

but they had to do it through a procurator. They had the option to designate their own proxy, provided they obtained the approval of the Ordinary (can. 1648 §3).¹³⁴

Besides these cases, the Code had a number of other instances where minors could exercise the rights independently of their parents. Minors could enter a religious institute after they had completed their fifteenth year of age (can. 555 §1); and after their sixteenth year, they could make a valid temporary profession (can. 573). Minors who were considered fit for the clerical state enjoyed the right to receive tonsure and other minor orders without the consent of their parents (cann. 973-974). Persons exempted from parental authority in exercising their right to enter the religious or clerical state were also exempt in exercising the rights proper to their new state. Thus, novices, before taking temporary vows, could freely dispose by a last will all goods actually in their possession or subsequently acquired (can. 569 §3). Minors of legal age could marry validly, and in certain circumstances licitly, even against the knowledge and wishes of their parents (can. 1034).¹³⁵ However, one must note that the Code disqualified illegitimate children from clerical and religious life.¹³⁶

¹³⁴ See P. GILLET, "De exemptione a patria potestate," in *ETL*, 11(1934), pp. 788-789; ID., "De effectibus iuridicis aetatis juxta Codicem juris canonici," in *Collectanea mechlinensia*, 22(1933), pp. 663-664; O'DONNELL, *The Marriage of Minors*, p. 93.

¹³⁵ See O'DONNELL, *The Marriage of Minors*, pp. 93-94.

¹³⁶ Here are some of the canonical effects of illegitimacy mentioned in the 1917 Code: unless legitimized, a man was irregular for the reception of orders (can. 984, 1°); legitimacy was a condition for admission into a seminary (can. 1363 §1); even though subsequently legitimized a person could not accept the cardinalatial dignity (can. 232 §2, 1°); legitimacy was one of the requirements for the office of major superior of a religious

The right to vote in ecclesiastical elections was granted only to those who had reached the age of puberty (can. 167 §1, 2°). We may also note that the Code raised the age of marriage from fourteen and twelve to sixteen and fourteen for boys and girls respectively (can. 1067 §1). By determining these ages, the Code severed the direct relationship between the age of marriage and age of puberty which was the basis for the pre-Code law. It also rejected the principle *nisi malitia supplet*.

As for the reception of minor orders, the Code indirectly determined a higher age than the age of seven (can. 976). Because of this change, henceforth, minors could not become clerics.¹³⁷

Prior to the Code, the necessary and sufficient age to act as a sponsor at baptism was the age of reason, unless the one to be baptised was older than the sponsor. The Code prescribed that for validity it was required that the sponsor possess the use of reason, that is, must complete the age of seven, and have the intention of performing that function.¹³⁸ Unless there was a just reason for the

institute (can. 504).

¹³⁷ In 1972 Paul VI brought about a change in the very concept of cleric and minor orders. He abolished the tonsure and joined entrance into the clerical state to the diaconate, and decreed that those who aspire to the transitional diaconate should have completed at least their twentieth year. Thus, in principle a minor who has begun his twenty first year could receive diaconate and become a cleric; in practice, however, the age of majority was preferred. Furthermore, Orders which had been called "minor," henceforth came to be known as "ministries" (see PAUL VI, Motu proprio, *Ministeria quaedam*, 15 August 1972, in *AAS*, 64(1972), pp. 529-534; ID., Motu proprio, *Ad pascendum*, 15 August 1972, in *AAS*, 64(1972), pp. 534-540).

¹³⁸ See can. 765, 1°; DELMAILLE, "Age," col. 329; R. KEARNEY, *Sponsors at Baptism According to the Code of Canon Law*, Canon Law Studies, no. 30, Washington, DC, The Catholic University of America, 1925, pp. 78-79.

minister to judge otherwise, those who had reached the fourteenth year of age could be lawfully admitted as sponsors at baptism.¹³⁹

Canon 1757 §1 declared the *impuberes* and the mentally weak as incapable of testifying in court. On the other hand, it held that those who had attained legal puberty, that is, boys on completing fourteen and girls twelve, were capable. Although the canon estimated that those who had not arrived at the age of puberty were not suitable as witnesses, nevertheless, can. 1758 permitted them to be heard and their testimony had the value of auxiliary proof.

In addition to specific rights, the Code also granted minors special protection on account of their age and vulnerability. *Restitutio in integrum*, a Roman law institution, originally instituted to protect the rights of minors was accepted into the Code. Minors were the principal beneficiaries of the legal remedy of *restitutio in integrum*, and they had a right to apply to the court for this relief even if some other remedy were available, provided that the minor had suffered injury from some juridic act, and that the act was valid but rescindable (can. 1687 §1). The Code granted them the benefit of demanding restitution within four years (reckoned as continuous time), after they had completed the age of minority (can. 1688 §1).¹⁴⁰

¹³⁹ See can. 766, 1°.

¹⁴⁰ Although the Code extended the privilege of *restitutio in integrum* to those in their age of majority, minors were of course, the principal beneficiaries of this legal remedy. This can be seen from the fact that: (i) minors could avail themselves of the *restitutio*, even if another remedy were available to them, whereas, majors could not (can. 1687); (ii) after hearing the promoter of justice, the judge could *ex-officio* grant *restitutio* to minors (can. 1688 §2), whereas, he could not do so for majors; (iii) the statute of limitation began to run for minors at the point when they reached the age of majority. For majors, it began to run either on

In contentious trials, minors enjoyed the right to have an advocate appointed by the judge (can. 1655 §2). When certain crimes were committed against minors (even though with their consent in specific cases), the offenders were punished with special penalties. For example, can. 2353 imposed penalties upon those, who, for the purpose of marriage or of satisfying lust, abducted by force or fraud a woman who was unwilling, or abducted in any way a *woman of minor age even though she was willing* while her parents were either ignorant of the fact or did not consent. The canons specifically distinguished between lay persons, clerics in minor Orders, and clerics in major Orders in their crimes against minors and stipulated appropriate penalties for each category including the penalty of legal infamy on those condemned by due process (cann. 2354; 2357 §1; 2358; 2359 §2).

2.3.4 Delictual Capacity

In those cases where minors were guilty of crime, the law prescribed that the imputability of the delict was to be lessened in proportion to the minors' age (can. 2204).¹⁴¹ Minors who had not attained puberty were excused from *latae sententiae* penalties, and they were to be corrected by educative penalties rather than by censures or grave vindictive penalties. As regards minors who had attained puberty, those who had induced the *impuberes* to violate a law, or cooperated with them in a crime according to can. 2209 §1-2, incurred the penalty established by law (can.

the date of injury or on the date on which the obstacle to their seeking relief had been removed (can. 1688 §1). See J.G. JOHNSON, "Making Restitution in Marriage Cases: Can it be Done?" in *The Jurist*, 51(1991), pp. 163-166.

¹⁴¹ See O'DONNELL, *The Marriage of Minors*, p. 80.

2230), although the *impuberes* who were coaxed into the crime were free from any *latae sententiae* penalty. Because the legal age of puberty differed for boys and girls, some authors contended that the age in penal matters for both the sexes must be considered as fourteen.¹⁴²

In short, the 1917 Code clearly stated that those who had not completed their twenty first year of age were minors. Although, in principle, they were subject to parental authority for the exercise of their rights, the Code either explicitly or implicitly exempted them from their authority in several instances.

CONCLUSION

Roman law relied on the law of nature in deciding when a child attained the use of reason. The test depended on the ability to speak and understand. It was Justinian who definitively decided that children at the age of seven are presumed to have the use of reason. Similarly, the ancient law determined puberty through the verification of physiological signs, that is, by means of corporal examination. Because Justinian considered this method as indecent, he specified the legal age of puberty, that is fourteen for boys and twelve for girls. According to the Roman law prior to

¹⁴² See BOUSCAREN, ELLIS and KORTH, *Canon Law: A Text and Commentary*, p. 881; ABBO and HANNAN, *The Sacred Canons*, vol. 2, p. 812.

200 B.C., those who were *sui iuris* and who had attained the age of puberty were considered as majors, that is, they had the full capacity to exercise their rights and duties. In other words, puberty became the dividing line between the age of majority and minority. Later, as the socio-economic situation became complex, even those who were *puberes* needed some legal protection for specific transactions. Therefore, the institute of *cura minorum* came into existence which raised the age of minority to twenty five years. Moreover, Roman law also recognized the gradual development of human beings and accorded the minors *sui iuris* more rights and duties till they reached the age of majority. Infants did not have any legal capacity, *impuberes* had to act through their guardians and minors between puberty and the age of twenty five had almost the full exercise of their rights. All minors had better protection of the law by means of the *restitutio in integrum*. In short, the notion of minority differed according to the historical periods and, along with it, the legal status of minors.

Prior to the 1917 Code, ecclesiastical legislation did not give a juridic definition of minor. Nevertheless, we find in the legislation mention of the diverse stages of life and specific age-norms for the determination of juridic capacities or incapacities. There is no doubt that the Church relied on the experience of Roman law in these matters. Most of the material dealing with the position of minors revolved around the sacraments, the choice of the state of life, and the capacity for sin and *dolus*. There were many instances where the popes intervened in regard to parents and customs restricting the rights of minors in the areas of marriage and religious life. The Church also defended the right of minors to place specific acts, where they could

act independently of their parents' consent, with due regard for their age and the specific matter. The norms for elections, patronage, choice of sepulchre, oaths, standing in court, witnesses, tonsure, religious life, delictual capacity etc., were formulated in favour of minors.

For the first time in the legal history of the Church, the 1917 Code of Canon Law clearly defined the ages of majority and minority. Every one who had not completed the age of twenty one years was a minor. Minors were divided into three categories, namely, *puberes*, *impuberes*, and infants. The Code also stated generically that all minors in the exercise of their rights remained subject to the authority of their parents or guardians. With regard to determined acts, the Code implicitly and explicitly exempted minors from the authority of their parents and guardians. No doubt, certain restrictions placed on minors were due to their tender age, insufficient ability, and human maturity. These restrictions in a way are to be regarded as privileges bestowed on minors, because in these areas the Code exempted them from the obligations that were linked to these rights, since minors could not undertake such obligations. Though the Code in harmony with the secular legislation of the time stipulated the age of minority from twenty five to twenty one years, we find a general tendency in the Code to raise the age for some important areas, such as marriage and clerical life.

In short, the legal concept of minor which gradually evolved from Roman law and particularly from modern civil Codes took a definite meaning in the 1917 Code. Minors were not only protected by the law, but were also granted the exercise of

rights and duties appropriate to their development. The juridic status of minors in the canonical tradition displays a sound canonical balance between the protection of their rights and the protection of institutions for the common good of the Church.

CHAPTER III

MINORS IN THE REVISED CODE: DOCTRINE AND PRINCIPLES

INTRODUCTION

Doctrine and juridic principles constitute the basis of formulation and interpretation of the Code. While doctrine provides theological and pastoral perspective to the Code, juridic principles determine its juridic character and the distinctive canonical language. As Pope John Paul II has expressed so clearly in his constitution promulgating the present Code, Vatican II is its doctrinal source and inspiration.¹ Besides, fidelity to the legislative-juridical tradition of the Church is an important hallmark of the Code. Therefore, "the Code requires for its correct understanding and interpretation, not only recourse to Vatican II but also to the Pio-Benedictine Code, and to the whole rich canonical tradition of the Church, especially to that which is rightly called *ius classicum*."²

In the preceding chapter, we examined the position of minors in the juridic tradition of the Church. In this chapter, we will review the conciliar and postconciliar papal teaching on children and youth. The doctrinal principles identified in this

¹ See JOHN PAUL II, *Sacrae disciplinae leges*, par. 8, in *AAS*, 75/II(1983), pp. viii-ix.

² R.I. CASTILLO LARA, Discourse given on 3 February 1983 on the occasion of the official presentation of the 1983 Code, in *Communicationes*, 15(1983), pp. 31-32.

review will provide basis for the development of juridic principles applicable to the subject matter of this study.

The principal canons on minors have been revised in light of conciliar insights. Therefore, it is important to trace the process of their revision reflected in the appropriate changes found in the present Code. Moreover, we will analyse in this chapter the important juridic principles on minors in the 1983 Code. The main questions that will be subjected to a critical analysis in this chapter are: According to the present Code, who are minors? What is the exact position in regard to the exercise of their rights and duties acquired in virtue of their baptism? To what extent are minors subject to the authority of their parents and guardians? What juridic capacity do minors possess in regard to the acquisition of domicile, quasi-domicile, as well as ascription and transfer to a Church *sui iuris*?

3.1 MINORS IN VATICAN II AND POSTCONCILIAR TEACHING

The concern of the Church for the well being of children is based on Jesus' love of children. No charter of rights of children can out-do Jesus' sublime words: "Let the little children come to me; do not stop them; for it is to such as these that the kingdom of God belongs."³ Evidently, he proposed neither a constitutional

³ *Mk.* 10:14. Scripture contains many references to children. The New Testament uses different Greek words for children, which offer some insights: **Népios**, the classical Greek word for an infant, stresses the weakness or helplessness of a child in contrast to the powers of an adult. **Paidion** is the "young child" and the "little child" of the Gospels. In Jewish culture, the young child was not responsible to keep the Mosaic Law. The child accepted this responsibility when he reached the age of twelve, when he became *bar mitzvah* (a "son of the covenant"). **Pais** identifies a boy or girl between seven and fourteen. At times the

charter, nor provided a list of their rights and duties. He certainly taught children: "Honour your father and mother", which affirms a natural duty of children towards their parents.⁴ Jesus gave to children his own personal example as the Scripture says, he "lived under their authority" (*Lk.* 2:51).⁵ The Church has indeed followed the Master in reaffirming his concern for children and youth which is evident in her own teaching.⁶

3.1.1 Children and Youth in Vatican II Documents

The Council described young people as "the hope of the Church."⁷ On the occasion of its solemn conclusion, the Council proclaimed to the young people, that

word is also translated as "servant". *Technon* is used to signify a child in relation to his or her parents or family. The child is placed in a relational context (see s.v. "Children," in RICHARDS, *Expository Dictionary of Bible Words*, pp. 156-159).

⁴ See P. FELICI, "De iuribus infantium," in *Communicationes*, 11(1979), pp. 164-165.

⁵ For more details on Jesus and children in the Bible, see S. LÉGASSE, *Jésus et l'enfant: 'enfants', 'petits' et 'simples' dans la tradition synoptique*, Paris, J. Gabalda, 1969, 375p; H. LOCKYER, *All the Children of the Bible*, Grand Rapids, MI, Zondervan Publishing House, 1977, 287p; J. M. LAMBERT, *Les jeunes gens du Nouveau Testament*, 2nd ed., Paris, V. Lecoffre, 1904, xxii-408p; R. VOELTZEL, *L'enfant et son éducation dans la Bible*, Paris, Beauchesne, 1973, 124p.

⁶ The juridical term "minor" is found neither in the conciliar documents nor in papal teachings. Therefore, for our purpose, we may consider all children as minors, and some youth or young people come within the category of minors.

⁷ VATICAN II, Declaration on Christian Education, *Gravissimum educationis*, 28 October 1965, in *AAS*, 58(1966), pp. 728-731; here at no. 2, p. 731.

the Church looks to them with confidence and love.⁸ It also acknowledged that they "contribute in their own way to the sanctification of their parents."⁹

Christian parents have a right and a duty to protect the rights of their children. The formation of their children according to Christ's teaching is their primary apostolate. They are called upon to educate their children in a Christian manner. They are to collaborate with other people of good will in seeing that children's rights are adequately safeguarded in civil legislation.¹⁰

The Council called on the young people to become first apostles of the young. In their own way they are to be true living witnesses of Christ among their peers.¹¹ The training for the apostolate should begin from the very start of a child's education. This training must enable children, adolescents and youth to go beyond the confines of their family and to enter into an active apostolate in both ecclesial and secular communities.¹²

The declaration on Christian education, *Gravissimum educationis*, provides some fundamental principles concerning Christian education, and it reminds parents, pastors, and teachers of their right and duty to educate the children and the youth. The declaration states that

⁸ See VATICAN II, Message to the Youth, 8 December 1965, in *AAS*, 58(1966), pp. 17-18.

⁹ *GS*, no. 48; FLANNERY, *Documents of Vatican II*, p. 951.

¹⁰ See *AA*, no. 11.

¹¹ See *AA*, no. 12.

¹² See *AA*, no. 30.

children and young people have the right to be stimulated to make sound moral judgements based on a well-informed conscience and to put them into practice with a sense of personal commitment, and to know and love God more perfectly. Accordingly it earnestly requests all those in charge of civil administration or in control of education to make it their care to ensure that the young people are never deprived of this sacred right.¹³

Parents, because they have given birth to their children, have the greatest obligation of educating them.¹⁴ In the decree, *Christus Dominus*, the Council calls on bishops to be concerned about the catechetical instruction of children, adolescents and the young.¹⁵ In imparting this education not only suitable methods but also the ability, age,¹⁶ and lifestyle of their audience need to be taken into account.

¹³ *GS*, no. 1; FLANNERY, *Documents of Vatican II*, p. 727.

¹⁴ See *GE*, no. 3. The declaration also speaks of the liberty of the parents in regard to the choice of the school in accordance with their conscience and the duty of the State to safeguard the right of children to an adequate education in schools (see *GE*, no. 6).

¹⁵ See *CD*, no. 14. Although liturgical, and especially eucharistic celebrations, of their very nature have an educative value, they were scarcely effective where children were concerned. In order to help children to take part actively in the liturgy, the Congregation for Divine Worship prepared a directory concerned with children who have not yet reached the age of "pre-adolescence" (see CONGREGATION FOR DIVINE WORSHIP, *Directory on Children's Masses, Pueros baptizatos*, 1 November 1973, in *AAS*, 66[1974], pp. 30-46); for the English translation, see FLANNERY, *Documents of Vatican II*, pp. 254-270.

¹⁶ The Catechetical Directory in Part 5, states that the catechesis has to be adopted to the varying age levels and instructs that the national directories ought to distinguish between pre-adolescence, adolescence and early adulthood. The directory also speaks of infancy, early childhood, childhood, preadolescence, adulthood and old age as the different age levels for catechesis. The directory is not clear with regard to the exact specification of the periods from infancy till adulthood (see CONGREGATION FOR CLERGY, *General Catechetical Directory, Ad normam decreti*, 11 April 1971, in *AAS*, 64[1972], pp. 145-156).

3.1.2 Postconciliar Papal Teachings

The postconciliar popes, on several occasions, in their addresses, homilies and encyclicals, have referred to the rights of children and young people, and have reminded parents and pastors of their responsibility towards minors. We shall briefly review the teaching of each pope.

3.1.2.1 Paul VI

Pope Paul VI taught that every child is a human person and has a right to the integral development of his or her personality. The role of the family is irreplaceable in attaining this end, since the child cannot be understood and brought up apart from the family. He also called on the world and the international organizations to promote the inestimable value of the child in today's world: the child as a child, as a human person, and not simply as a potential adult. Childhood is an essential phase of human life, and every child has the right to live childhood to the full and contribute to the well-being of the Church and of the world. For the Church, service to children is not a transitory goal but a permanent task, that is, the continuous protection of their rights and the promotion of their dignity.¹⁷

Children and young people have a special role in the Church and in the world. The pope said that there are no better apostles to the young than the young themselves and they, "once properly formed in faith and in prayer, should increasingly

¹⁷ See PAUL VI, Address to the Executive Director of UNICEF, "The Rights of the World's Children," 28 June 1978, in *The Pope Speaks*, 23(1978), pp. 233-235.

become apostles to their fellows."¹⁸ Therefore, he urged every young person "to take part in the parish activities of the various communities for the young and to become intelligent, generous workers within the pastoral plan of [their] diocese."¹⁹

3.1.2.2 John Paul I

John Paul I had a special love for youth. In his first radio message to the world he made special mention of the young people, saying:

We greet youth and young men and women. They represent our hope of a future that will be purer, sounder and more constructive. We urge them to learn how to distinguish between good and bad and to promote the good with the fresh energies that are theirs. Let their aim be to lend vital strength to the Church and the coming age of the world history.²⁰

Likewise, the pope said that "among the rights of the faithful, one of the greatest is the right to receive God's word in all its entirety and purity, with all its exigencies and power."²¹ Therefore, the best and the first ones to actualize and protect this right of children are their parents. Because the family is a domestic church, and some families can easily fulfil the role of being a *primum seminarium* (initial seeding place), parents have an important role with regard to the formation of their children. All

¹⁸ PAUL VI, Apostolic Exhortation, *Evangelii nuntiandi*, 8 December 1975, in *The Pope Speaks*, 21(1976), p. 41.

¹⁹ PAUL VI, Address to the Catholic School Students of Rome, "The Apostolic Role of the Young," 25 February 1978, in *The Pope Speaks*, 23(1978), p. 139.

²⁰ JOHN PAUL I, Radio Message *Urbi et orbi*, "The Aims of a New Pontificate," 27 August 1978, in *The Pope Speaks*, 23(1978), pp. 291-298, here at p.297.

²¹ JOHN PAUL I, Address to the Bishops of the Philippines during their *ad limina* visit, "The Great Duty of Evangelization," 28 September 1978, in *The Pope Speaks*, 23(1978), p. 337.

the efforts of parents to instil God's love into their children and to support them by the example of faith constitute their most important apostolate.²²

3.1.2.3 John Paul II

In his apostolic exhortation *Familiaris consortio*, Pope John Paul II states: "In the family, which is a community of persons, special attention must be devoted to the children, by developing a profound esteem for their personal dignity, and a great respect and generous concern for their rights."²³ By fostering and exercising a tender and strong concern for every child, the Church fulfils her fundamental mission by revealing the example of her Master who placed the child at the centre of the Kingdom of God. Besides, the Church upholds the right and duty of parents in the education of their children as essential, original, and primary. This right and duty is irreplaceable and inalienable, and therefore incapable of being delegated entirely to others or usurped by others.²⁴

Moreover, the pope focused on the obligation of families, of the Church, and of society to foster the rights and to promote the well being of children. In doing this, he is certainly "not endorsing the so called 'children's rights movement' in which

²² See JOHN PAUL I, Address to the American Bishops during their *ad limina* visit, "The Christian Family," 21 September 1978, *The Pope Speaks*, 23(1978), pp. 334-336.

²³ JOHN PAUL II, Apostolic Exhortation, *Familiaris consortio*, 22 November 1981, no. 26, in *AAS*, 74(1982), p. 111; FLANNERY, *Vatican Council II: More Postconciliar Documents*, p. 835. For a theological and catechetical commentary on the apostolic exhortation, see M. J. WRENN (ed.), *Pope John Paul II and the Family*, Chicago, Franciscan Herald Press, 1983, xxx-286p.

²⁴ See JOHN PAUL II, *Familiaris consortio*, nn. 26 and 36.

children's autonomy is asserted against the authority of parents. Rather, he is concerned that the basic dignity of children is being overlooked and even denied both in the family and by society at large.²⁵ According to the pope's teaching, respect for the human rights of the child, and concern for his or her well-being from the moment of conception is the fundamental test of parental relationship with the child.

The pope also spoke of infants, children, adolescents, the young, and adults in the context of catechesis and the preparation for the commitments of adult life.²⁶ Speaking on the need for minor seminaries and other forms of fostering vocations, the pope acknowledged the influence of tender age. He said that "as long experience shows, a priestly vocation tends to show itself in the preadolescent years or in the earliest years of youth. [...] The Church's history gives constant witness of calls which the Lord directs to people of tender age."²⁷

At the World Youth Day celebrations held in Denver, U.S.A., on 11-15 August 1993, the pope explained the role of youth in the Church and in the world.²⁸ When he visited Mount St. Vincent's Home, in Denver, he appealed to national and international leaders to protect the rights of children. The pope said:

²⁵ J. M. BOYLE, "The Role of the Christian Family, Articles 17-27," in WRENN, *Pope John Paul II and the Family*, p. 66.

²⁶ See JOHN PAUL II, Apostolic Exhortation, *Catechesi tradendae*, 16 October 1979, in *AAS*, 71(1979), pp. 1277-1340, here at nn. 35-45, pp. 1307-1314.

²⁷ JOHN PAUL II, Apostolic Exhortation, *Pastores dabo vobis*, 25 March 1992, no. 63, in *AAS*, 84(1992), p. 768; English translation from *Origins*, 21(1991-1992), p. 748.

²⁸ All the papal speeches, addresses and homilies given during this World Youth Day Celebrations are found in *Origins*, 23(1993-1994), pp. 177-200.

There exists the Convention on the Rights of the Child, adopted at the United Nations in 1989 and already signed by many states, including the Holy See. I hope that more and more states will ensure the juridical force and practical application of the convention, so that no child on earth will be left without the legal guarantee of his or her fundamental rights.²⁹

Children and young people, therefore, constitute an important part of the Church, and they must not be considered simply as an object of pastoral concern but, in fact, as leading characters and participants in the evangelization and renewal of society.³⁰

3.1.3 Charter of Family Rights and Children

The Charter of the Rights of the Family has its origins in the request formulated by the Synod of Bishops held in Rome in 1980 on the theme: "The Role of the Christian Family in the Modern World." In his apostolic exhortation, *Familiaris consortio*, John Paul II approved the request of the synod for a Charter and consigned the work to the Holy See. This Charter, released by the Holy See on 24 November 1983 is addressed principally to governments, to intergovernmental organizations and, of course, to the families themselves.³¹

The defence of the fundamental rights of the child and of the adolescent, which are absolutely necessary for the harmonious development of the personality,

²⁹ JOHN PAUL II, Message, "A Visit with the Children," in *Origins*, 23(1993-1994), p. 199.

³⁰ See JOHN PAUL II, *Christifideles laici*, nn. 46-47; ID., Apostolic Letter for the "International Year of Youth," 31 March 1985, in *AAS*, 77(1985), pp. 579-628.

³¹ For the full text of the Charter, see *Origins*, 13(1983-1984), pp. 461-464. For a detailed study, see D.J. DILLABOUGH, *The Vatican Charter of Rights of the Family 1983: A Study of the Charter and the Historical Traditions of Family Rights*, Romae, Pontificia Universitas Lateranensis, Academia Alfonsiana, 1987, xiii-388p.

conforms to the dignity of the children of God and pertains primarily to parents. This human development takes place best in the proper family environment.³² As a result, article 4 of the Charter expounds some specific rights of children, such as special care, assistance, and social protection. It also speaks of the rights of the orphans, neglected children, and handicapped children to receive particular protection from society and an environment suitable to their human development.³³ Article 5 states that the parents have the original, primary, and inalienable right to educate their children in conformity with their moral and religious convictions. The well-being and dignity of the child must be considered in the parental decisions made on their behalf.³⁴

Among the many important international documents which advocate and legislate on childrens' rights, *The United Nations Convention on the Rights of the Child*,

³² See CONGREGATION FOR CATHOLIC EDUCATION, *Guidelines for Sex Education, Educational Guidance in Human Love*, 1 November 1983, in *Origins*, 13(1983-1984), pp. 449-460, here at no. 107, p. 460.

³³ "[...] d) Children, both before and after birth, have the right to special protection and assistance, as do their mothers during pregnancy and for a reasonable period of time after childbirth.

e) All children, whether born in or out of wedlock, enjoy the same right to social protection, with a view to their integral personal development.

f) Orphans or children who are deprived of the assistance of their parents or guardians must receive particular protection on the part of the society. The state, with regard to foster care or adoption, must provide legislation which assists suitable families to welcome into their home children who are in need of permanent or temporary care. This legislation must at the same time respect the natural rights of the parents.

g) Children who are handicapped have the right to find in the home and school an environment suitable to their human development" (*Charter of the Rights of the Family*, 28 November 1983, art. 4, in *Origins*, 13[1983], p. 463).

³⁴ See *ibid.*, p. 463.

is one of the greatest human rights documents of this century.³⁵ The Holy See was one of the major drafters of this document, and it was among its first signatories despite its reservations relative to the rights of unborn children and family planning services.³⁶ In his address at the First World Congress on Family Law and Children's Rights, held in Sydney, Australia, on 4-9 July 1993, Alfonso Cardinal Lopez Trujillo, President of the Pontifical Council for the Family said:

The Holy See acceded to the Convention on the Rights of the Child (20 April 1990). By that act the Holy See expressed its profound concern not only for the physical welfare of children, but also for their spiritual and moral growth. This concern takes a particular form, because the Catholic Church understands the rights and welfare of the child within the context of the rights of the family.³⁷

³⁵ For the document, see S. DETRICK (ed.), *The United Nations Convention on the Rights of the Child: A Guide to the 'Travaux préparatoires'*, London, Martinus Nijhoff Publishers, 1992, pp. 3-18.

The term "child" as used in the document is similar to the notion of "minor". Article 1 of the Convention states: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier" (*ibid.*, p. 4).

³⁶ The Convention was signed by Archbishop Renato Martino, the Vatican's permanent observer to the United Nations (see *Catholic International*, 4[1993], p. 473).

For specific information on the participation of the Holy See in the drafting of the document, see DETRICK, *The United Nations Convention on the Rights of the Child*, pp. 102, 103, 106, 108, 118, 121-122, 241, 242, 246-247, 248, 271, 281, 348, 374, 394, 407, 416, 421, 435-436, 444, 453, 514, 516, 534, 556, 575, 634, 636.

³⁷ A. LOPEZ TRUJILLO, "The Church and the Rights of the Family and the Rights of the Child," in *Catholic International*, 4(1993), p. 468. In the same address, the cardinal said that "the pope has entrusted the rights of the child to the Pontifical Council for the Family, a dicastery of the Roman Curia" (*ibid.*).

It appears from the report of the activities of the Pontifical Council for the Laity it is also concerned with adolescent and young people. The Council has three separate offices or sections: *Sezione I: Contatti con le conferenze episcopali e i continenti* (for the relations with the Episcopal Conferences and the Continents); *Sezione II: Contatti con la conferenza delle organizzazioni internazionali cattoliche* (for the relations with the Conference of the

In other words, the Holy See considered the convention as the proper and laudable instrument aimed at protecting the rights and the interests of children. By signing it, it gave renewed expression to Church's constant concern for the well-being of children and families.

3.2 MINORS IN THE REVISION PROCESS OF THE CODE

3.2.1 *Coetus "De quaestionibus specialibus libri II"*

Among other matters, the task of studying and revising can. 88-89 of the 1917 Code was assigned to the *coetus studiorum "De quaestionibus specialibus libri II."*³⁸ The first session of this *coetus* took place on 5-6 May 1967. It discussed whether or not the above canons required any change. As regards can. 88, the *coetus* decided on the following:

Firstly, the distinctions between the age of majority and of minority mentioned in can. 88 §1 must be retained. Secondly, the distinction between *impuberes* and *puberes* must be abolished. While this categorization had no great juridic consequences in the 1917 Code, the puberty norm created difficulties in interpreting

International Catholic Organizations); and *Sezione III: Giovani* (the young or the youth). The Council conducts and promotes many programmes for the children and the youth. In addition, it has yearly publications concerning them (see *L'Attività della Santa Sede nel 1991*, Città del Vaticano, Libreria editrice Vaticana, [1992], pp. 1361-1371).

³⁸ The *Coetus studiorum de quaestionibus specialibus libri II* in sessions III-VII received the name, "*Coetus studiorum de personis physicis et moralibus*," and later in sessions VIII-XII worked under the name "*De personis physicis et iuridicis*." Eventually, this and the *coetus "De normis generalibus"* were combined under the new name, "*De normis generalibus deque personis physicis et iuridicis*." In the 1977 *Schema* this *coetus* was renamed as "*De normis generalibus*" (see *Communicationes*, 23[1991], pp. 300-301).

can. 2230. Besides, the distinction between *puberes* and *impuberes* does not exist in civil codes. Thirdly, the puberty norm with the different age specification for boys and girls must be eliminated. Fourthly, the norm concerning infants must be retained. The sentence which states that those who lack the use of reason are to be likened to infants should be treated in a different canon. This deals with the mental state, rather than the physical age.³⁹ Finally, as there was no canon governing the constitution of tutors or guardians for minors, provision for the same must be made by ceding to the civil laws of respective nations unless canon law for a specific situation states otherwise. Because a guardian plays an important role in religious and spiritual matters, a suggestion was made to the effect that the diocesan bishop should be able to constitute or select another guardian in specific cases.⁴⁰ These suggestions were accepted.⁴¹

Another meeting of the same *coetus* convened on 9-12 December 1967, deliberated on questions concerning the revisions to the proposed schema of the previous session and canonical personality. It did not propose significant changes.⁴²

³⁹ See *Communicationes*, 21(1989), pp. 37-38; 6(1974), pp. 56-57; 9(1977), p. 238.

⁴⁰ See *Communicationes*, 21(1989), pp. 38-39 for details of this discussion.

⁴¹ The canons, which were drafted by the *coetus* after taking into consideration the proposed changes, are found in *Communicationes*, 21(1989), pp. 52-55.

⁴² See *Communicationes*, 21(1989), pp. 119-120.

3.2.2 *Coetus "De personis physicis et juridicis"*

The *coetus studiorum "De personis physicis et juridicis"* which met on 4-8 October 1971, discussed the proposed text of can. 2 §2. One consultor was not happy with the immediate recourse to the civil law in matters relating to the appointment of the guardians of minors and exemption from the *patria potestas*. Another consultor suggested the addition of a phrase to the canon: *iis exceptis in quibus ius canonicum minores a patria potestate exemptos habet*. According to this opinion, such an inclusion would not only respond to the suggestion of the previous consultor, but it would also demonstrate that civil law is only subsidiary to canon law. The Secretary agreed to the addition of the new phrase.⁴³

3.2.3 *1977 Schema*

The revised draft of the canons was added on to the *Schema canonum libri II: De populo Dei*, under Part I (*De personis in genere*), Chapter I, *De personarum physicarum statu canonico*. Canon 2 (CIC/17, can. 88) of this schema stated:

§1. A person who has completed the twenty one years of age is an adult, below this age a person is a minor.

§2. Before the completion of the seventh year a minor is called an infant or little one (*parvulus*) and is held to be incompetent (*non sui*

⁴³ "Post disceptationem Rev.mus Secretarius Ad. formulam quae sequitur proponit: 'iis exceptis in quibus minores lege divina aut iure canonico a patria potestate exempti sunt; ad constitutionem tutorum eorumque potestatem quod attinet, servantur praescripta...'. Placet omnibus propositio" (*Communicationes*, 22[1990], pp. 45-46).

compos); with the completion of the seventh year one is presumed to have the use of reason.⁴⁴

It is worth noting that after several sessions, there was no proposal to reduce the age of minority.

3.2.4 *Coetus "De populo Dei"*

The *coetus studiorum "De populo Dei"* assembled on 15-20 October 1979 discussed the observations made by the episcopal conferences and other bodies. These observations were gathered and synthesized. These observations were directed to the schema, its general structure, title and individual canons. The *coetus* deliberated on the juridical and ecclesiological importance of the schema in relation to the title of the book. The Secretary noted that the canons on *De personarum physicarum statu canonico* and *De personis iuridicis*, if transferred to Book I, the schema *De populo Dei*, could acquire a better ecclesiological configuration.⁴⁵

At the discussion of the same *coetus*, the *relator* said that many organisms consulted had proposed lowering the age of majority to eighteen years in conformity with the general tendency in civil legislation. As there was no reason to oppose this proposal, it was accepted. In the same discussion the Secretary affirmed that the age of majority was an important issue in the Code, particularly in the penal and

⁴⁴ "§1. Persona quae vicesimum primum aetatis annum explevit, maior est; infra hanc aetatem, minor.

§2. Minor, ante plenum septennium, dicitur infans seu parvulus et censetur non sui compos; expleto autem septennio, usum rationis habere praesumitur"(PCCICR, *Schema canonum libri II: De populo Dei*, Romae, Typis polyglottis Vaticanis, 1977, p. 23; see also *Communicationes*, 21[1989], pp. 119-120).

⁴⁵ See *Communicationes*, 12(1980), pp. 48-54.

procedural sections. He informed this *coetus* that the *coetus studiorum* "*De processibus*" had deliberated on canons relating to penal matters, and they had agreed that a person could be punished with a canonical penalty after the age of sixteen. This being the case, the Secretary preferred having the age of majority determined at eighteen years complete.⁴⁶

During the discussion on can. 2 §2, the *relator* reported to the *coetus* about the suggestion to adopt the expression, *sui compos*, in the place of, *non sui compos*. But the *relator* thought that within the context of the canon the two expressions were identical, and therefore, the suggested change would be superfluous. Moreover, at the suggestion of one episcopal conference, the Secretary proposed to suppress the words, *seu parvulus*, and the proposal was accepted by all. They also agreed to retain the expression, *usum rationis habere praesumitur*.⁴⁷

⁴⁶ See *ibid.*, p. 62. One of the consultors was not in agreement with the proposal to change the age from 21 to 18. He preferred the age to be determined at twenty years complete, because this age takes into account the evolutionary growth of the young person. Therefore, it would be an exaggeration to establish the age of majority below the age of twenty years.

⁴⁷ See *Communicationes*, 12(1980), p. 63.

Remarking on can. 3 (*CIC/17*, can. 89) of the schema,⁴⁸ the Secretary proposed accepting the observation made by a bishop who preferred the phrase, *ab eorum potestate* in the place of *patria potestate* in the second paragraph. The suggestion was accepted.⁴⁹

3.2.5 1980 Schema and 1982 Schema

The *1980 Schema* of the Code stated that a person attained the age of majority on completing the age of eighteen years. In other words, he or she became a major.⁵⁰ With the exception of this change, the canons remained unchanged from the *1977 Schema canonum libri II*. The *1982 Schema novissimum* made some stylistic changes in the canon on parental authority and guardianship.⁵¹ The revised Code contains these canons of the *Schema novissimum* without modification.

⁴⁸ The text of the can. 3 in the schema states: "§1. Persona maior plenum habet suorum iurium exercitium.

§2. Persona minor in exercitio suorum iurium potestati obnoxia manet parentum vel tutorum, iis exceptis in quibus minores lege divina aut iure canonico a patria potestate exempti sunt; ad constitutionem tutorum eorumque potestatem quod attinet, servantur praescripta iuris civilis respectivae nationis, nisi ius canonicum de tutore vel de eiusdem potestate aliud praescriptum pro ceteris causis statuerit, aut Episcopus diocesanus in certis casibus iusta de causa per nominationem alius tutoris providendum aestimaverit" (*PCCICR, Schema canonum libri II: De populo Dei*, 1977, pp. 23-24).

⁴⁹ See *Communicationes*, 12(1980), p. 63.

⁵⁰ See can. 96 §1 in *PCCICR, 1980 Schema*, p. 19.

⁵¹ The stylistic changes in can. 98 §2 are concerning the constitution of the minor's guardian: "[...] ad constitutionem tutorum eorumque potestatem quod attinet, servantur praescripta iuris civilis, nisi iure canonico aliud caveatur, aut Episcopus diocesanus in certis casibus iusta de causa per nominationem alius tutoris providendum aestimaverit" (*PCCICR, 1982 Schema*, p. 14).

3.3 GENERAL PRINCIPLES ON MINORS IN THE 1983 CODE

3.3.1 Juridic Relevance of Age

Etymologically, the English word "age" is a derivation from the Latin, *aetas*. The latter was derived from the old French, *aäge, eäge, edage*, which may have come from the Greek. *Aetas* is a derivation of *aevum* which means life time.⁵² The word "age" has many meanings. H.C. Black describes age as:

The length of time during which a person has lived. The time at which one attains full personal rights and capacities. In law the term signifies those periods in the lives of persons of both sexes which enable them to do certain acts which, before they had arrived at those periods, they were prohibited from doing.⁵³

Age is an involuntary juridic fact which inheres in persons independently of their will. The positive determinations of law has endowed it with particular juridic effects. As a juridic fact,⁵⁴ age: (i) has an external dimension, for it can be known and be

⁵² See LOEBACH, *Age of Reason, Puberty, and Majority*, p. 1. Isidore tells us that *aetas* is like *aevum* which means perpetual age: "[...] Et dicta *aetas*, quasi *aevitas*, id est similitudo aevi. Nam aevum est aetas perpetua, cujus neque initium neque extremum noscitur quod Graeci [...] vocant; quod aliquando apud eos pro saeculo, aliquando pro aeterno ponitur. Unde et apud Latinos est derivatum" (*Etymologiae*, Lib. 5, cap. 38, nos. 3-4, in *PL*, vol. 82, col. 223).

⁵³ s.v. "Age," in H.C. BLACK, *Black's Law Dictionary*, 5th ed., St. Paul Minn., West Publishing Co., 1979, p. 57.

⁵⁴ Juridic facts are those facts which, when they happen, give rise to rights according to the norms of law, or modify them or suppress them, and thus bear certain juridic consequences. These can be divided into involuntary juridic facts and voluntary juridic facts: Involuntary juridic facts operate independently of the will of the subject. When these facts occur, there are inevitable juridic effects. Some examples of involuntary juridic facts are: age, sex, blood-relationship, domicile, quasi-domicile, and mere disposition of law (presumptions of law and juridic fictions).

Voluntary juridic facts depend on the free will of a person. These are placed freely by the person according to the norms of law, and they produce juridic effects of acquisition, change and loss of rights only insofar as they are human or voluntary. These are properly

measured; (ii) is natural, because every person grows and matures; and (iii) is involuntary, in as much as it operates outside the sphere of will. This involuntary fact as a juridic quality in a person, can give birth to specific rights and duties, modify them according to the age or even suppress them. In any juridical order, age is one of the conditions to place juridic acts. Consequently, age is one of the barometers of gauging the capacity or incapacity of persons in the juridic structure of both societies, civil and ecclesiastical.

Every legal order must determine the rights and duties of persons according to their capacity. The actual capacity varies according to various juridic circumstances. Among these, quite often it is the age which determines the capacity of individual persons and regulates the exercise of rights and duties. Age intervenes in law not for itself but as an objective sign of the development of the human person. In other words, there is a strict relationship between a normal person and his or her physiological, intellectual, and volitional development. This development or maturity is gradual and takes place in the course of time. When we take cognizance of human development in reference to age, it becomes evident that infants in general are not capable of taking care of themselves. The Church with due regard to natural law and equity does not impose juridic obligations on them which outweigh their general capacity. Therefore, the Code rightly determines that the exercise of rights and

called juridic acts (see MICHIELS, *Principia generalia de personis in Ecclesia*, pp. 568-571; M. PETRONCELLI, *Diritto canonico*, 8a ed. aggiornata con il nuovo Codice, Napoli, Jovene, 1983, pp. 97-101; G. GHIRLANDA, *Il diritto nella Chiesa: mistero di comunione: compendio di diritto ecclesiale*, Milano, Edizioni Paoline, 1990, pp. 104-105).

duties be in proportion to the person's age and other conditions.⁵⁵ Moreover, the Code stratifies persons into minors and majors on the basis of their age.

3.3.2 Notion of *Minor*

As a matter of principle, the law does not provide definitions. For the sake of juridic certitude concerning the application of the law and the protection of persons and institutions, it provides in exceptional situations at least a descriptive definition of certain terms.⁵⁶ In can. 97, however, we find a canonical definition of a minor, major, and an infant. The canon states:

§1. A person who has completed the eighteenth year of age is an adult, below this age, a person is a minor.

§2. Before the completion of the seventh year a minor is called an infant and is held to be incompetent (*non sui compos*); with the completion of the seventh year one is presumed to have the use of reason.⁵⁷

⁵⁵ See DELMAILLE, "Age," col. 315; O'DONNELL, *The Marriage of Minors*, pp. 78-79. W. AYMANS, *Kanonisches Recht: Lehrbuch aufgrund des Codex iuris canonici*, Paderborn, Ferdinand Schöningh, 1991, vol. 1, pp. 285-288; 296.

⁵⁶ In the *relatio* of 1981, referring to can. 7 of the 1980 *Schema*, Cardinal König suggested suppression of the definition because it was too general. The response was: "Aliqua requiritur definitio, securitatis iuridicae causa. Determinare oportet quandonam vere habeatur lex" (1981 *Relatio*, pp. 21-22; *Communicationes*, 14[1982], p. 131).

⁵⁷ "§1. Persona quae duodevigesimum aetatis annum explevit, maior est; infra hanc aetatem, minor.

§2. Minor, ante plenum septennium, dicitur infans et censetur non sui compos, expleto autem septennio, usum rationis habere praesumitur."

For the Oriental Catholics, the age was already reduced to eighteen years in 1957 with due regard for particular law: "Persona quae duodevigesimum aetatis annum explevit, maior est, firmo iure particulari proveciore aetatem assignante; infra hanc aetatem minor" (PIUS XII, Motu proprio, *Cleri sanctitati*, 11 June 1957, can. 17 §1, in *AAS*, 49[1957], p. 440; see also V. J. POSPISHIL, *Code of Oriental Canon Law: The Law on Persons, Rites, Persons in General, Clergy and Hierarchy, Monks and Religious, Laity*, English translation and differential

The age of majority begins when a person has already completed eighteen years, in contrast to the 1917 Code which stipulated twenty one years complete. All those who have not completed their eighteenth year of age are considered minors. The revised Code has taken into account the general tendency of the civil laws in various countries to lower the age of majority. It is evidently a welcome development that canon law and civil laws have the same understanding of majority and minority.⁵⁸

commentary, Ford City, PA, St. Mary's Ukrainian Catholic Church, 1960, pp. 43-44). However, during the process of codification of *CCEO*, the Commission decided to delete the clause which provided for particular laws to determine different age of majority and minority. It stated: "Ex canone 1 (CS 17) aufertur clausula 'firmo iure particulari proveciore aetatem assignante'. Nam consultoribus necesse visum est unicam regulam de maiore aetate in omnibus Ecclesiis Orientalibus constituere [...]" (*Nuntia*, 13[1981], p. 4). Canon 97 of *CIC/83* is same as can. 909 §1 and §2 of *CCEO*.

A note on translation: The CLSA has translated *maior* as *adult*, which is inaccurate as a technical term within the context of the Code. In the Code *adultus* (adult) is a fluid term, and has a different meaning than *maior*, and it appears in cann. 776; 777, 5°; 851, 1°; 852 §1; 857 §2; 863; 865 §1; 865 §2; 866; 869 §2; 869 §3; 872; 876; 1063, 1° (s.v. "Adultus, a, um," in OCHOA, *Index verborum ac locutionum Codicis iuris canonici*, p. 18).

⁵⁸ It seems that J. Gaudemet is not in favour of the Code's having broken the old tradition which existed before the 1917 Code. That is, the church law always in principle deferred to the civil law in determining who is a major or a minor. He thinks it is more prudent to leave the age of majority to the civil laws of the respective countries as the Code has done in some canons. According to him: "Mais, à fixer l'âge de la majorité dans un article d'un code de portée universelle et dont on doit espérer une longue application, on s'expose à se trouver en présence de telles divergences soit parce que tous les pays n'adoptent pas le même âge de majorité, soit parce que les législations séculières modifieront cet âge alors que le droit canonique en restera à l'article 97 §1. Aussi peut-on se demander s'il n'aurait pas été plus prudent de renvoyer, comme le Code l'a fait dans d'autres cas, à la majorité telle qu'elle est fixée par les diverses législations séculières?" (J. GAUDEMET, "Réflexions sur le livre I: 'De normis generalibus' du Code de droit canonique de 1983," in *RDC*, 34[1984], p. 104).

The terms *puber* and *impuer* do not appear either in this canon or in the vocabulary of the revised Code. Puberty, which was mentioned in can. 88 §2 of the 1917 Code has been suppressed as a legal category; however, there is one reference to puberty in can. 1096 §2 of the revised Code.⁵⁹ Although absent in can. 97 §2, the terms *puer*,⁶⁰ *parvulus*,⁶¹ and *iuvenis*⁶² are still retained in the Code.

Infants are those who have not completed their seventh year of age. They are considered (*censetur*) to be *non sui compos*.⁶³ When they complete their seventh

⁵⁹ "Haec ignorantia post pubertatem non praesumitur" (can. 1096 §2). *CCEO* does not have this clause in can. 819. The reasons regarding the omission are found in *Nuntia*, 27(1988), p. 8.

⁶⁰ *Puer* is used in cann. 528 §1; 776; 777, 2°; 795; 913 §1; 913 §2; 914(twice).

⁶¹ *Parvulus* is found in can. 1183 §2.

⁶² *Iuvenis* is used in cann. 234 §2(twice); 235 §1; 236, 1°; 528 §1; 776; 777, 5°; 795; 799; 819; 1063, 1°; 1072.

⁶³ There are diverse translations of the phrase *non sui compos*:

- (i) "incapable of personal responsibility" in *The Code of Canon Law in English Translation*, prepared by the Canon Law Society of Great Britain and Ireland, in association with the Canon Law Society of Australia and New Zealand and the Canadian Canon Law Society, London, Collins; Ottawa, Canadian Conference of Catholic Bishops, 1983, p. 14.
- (ii) "incompetent" in *Code of Canon Law*, Washington, DC, Canon Law Society of America, 1983, p. 29.
- (iii) "sin uso de razón" in *Código de derecho canónico*, edición bilingüe y anotada a cargo del Instituto Martín de Azpilcueta, 4a edición revisada y actualizada, Pamplona, Ediciones Universidad de Navarra, 1987, p. 111.
- (iv) "seiner nicht mächtig" in *Codex des Kanonischen Rechtes*, Lateinisch-deutsche Ausgabe, Mit Sachverzeichnis, Kevelaer, Verlag Butzon & Bercker, 1984, p. 35.
- (v) "ne pouvoir se gouverner lui-même" in *Code de droit canonique*, texte officiel et traduction française par La Société Internationale de Droit Canonique et de Législations Religieuses Comparées avec le concours des Faculté de droit canonique de l'Université Saint-Paul d'Ottawa, Faculté de droit canonique de l'Institut catholique de Paris, Ottawa, Editions de la C.E.C.C., 1984, p. 14.

year of age, the law presumes that they have the use of reason.⁶⁴ Thus, can. 97 provides the *termini a quo* and *ad quem* for that period of minority during which the use of reason is presumed. The canon contains presumptions as evidenced by the words, *censetur* and *praesumitur*.

3.3.2.1 *Censetur* and *praesumitur*

The word *censetur* contained in can. 97 §2 has provoked serious discussion among canonists. In the present Code, this word appears in about thirty two canons.⁶⁵ The same canon has the word *praesumitur* and besides, there are many presumptions stated in the Code.⁶⁶ Since they are found even in the treatment on minors, a brief explanation concerning them is relevant.

The Code defines presumption as "a probable conjecture about an uncertain matter" (can. 1584). It is "a procedural tool through which the operation of the law is simplified and expedited. Presumption is the favor of the law attached either

Among these, "sin uso de razón" seems to be the most appropriate translation.

⁶⁴ According to J. Gaudemet, can. 97 §2 contains vestiges of the medieval canonical tradition in reference to the age seven. It is a new fidelity to an old tradition which had fixed the age seven for *sponsalia*, and even for marriage. But he wonders: "Mais quelle place une meilleure connaissance de la psychologie de l'enfance accorde-t-elle aujourd'hui à cet 'âge de raison'?" (GAUDEMET, "Réflexions sur le livre I: 'De normis generalibus' du Code de droit canonique de 1983," p. 105).

⁶⁵ Cann. 38; 97 §2; 99; 270; 560; 695 §1; 697; 697 §3; 961 §1 2°; 1074; 1079 §4; 1143 §2; 1215 §2; 1330; 1345; 1452 §2; 1508 §2; 1540 §2; 1552 §2; 1559; 1565 §2; 1602 §1; 1603 §2; 1635; 1637 §2; 1645 §2; 1718 §3; 1720; 1727 §2; 1738; 1742 §1; 1750 (s.v. "Censeo, ere," in OCHOA, *Index verborum ac locutionum Codicis iuris canonici*, pp. 74).

⁶⁶ There are about 21 presumptions in the Code. They are stated in cann. 13 §1; 15 §2; 57 §2; 78 §1; 97 §2; 124 §2; 143 §3; 510 §4; 1061 §2; 1096 §2; 1101 §1; 1107; 1138 §2; 1152 §2; 1267 §1; 1321 §3; 1431 §2; 1526 §2,1; 1594, 2; 632 §1; 1637 §4.

conditionally or absolutely to a situation, a stance, or a proposition that has a legal effect."⁶⁷

There are two kinds of presumptions, one is a *presumption of law*, another is *human presumption*.⁶⁸ On the basis of their probative force, the 1917 Code subdivided the presumptions of the law into: (i) *praesumptiones juris tantum seu simpliciter*, and (ii) *praesumptiones iuris et de iure*.⁶⁹ The former is a rebuttable or conditioned presumption which allows proofs to the contrary. The latter is an absolute and a non rebuttable presumption which does not allow proofs to the

⁶⁷ L. ÖRSY, "Ecclesiastical Laws," in *CLSA Commentary*, p. 33.

⁶⁸ "[...] eaque alia est iuris, quae ab ipsa lege statuitur; alia hominis, quae a iudice conicitur" (can. 1584).

Even prior to the 1917 Code, the authors spoke of these presumptions: "Praesumptio juris (seu canonis, aut legis) dicitur illa, quae in jure habetur expressa: hoc est, quae a lege nominatim fit, aut ab ea approbatur.[...] Praesumptio hominis e contra dicitur, quae nullo jure scripta reperitur, sed iuxta rerum, circumstantiarumque exigentiam, et varietatem prudentis hominis, puta iudicis, arbitrio concipitur" (REIFFENSTUEL, *Ius canonicum universum*, Lib. 2, tit. 23, nos. 19-29, vol. 3, p. 140; for an extensive treatment on presumptions by Reiffenstuel, see *ibid.*, pp. 137-155).

⁶⁹ See *CIC/17*, can. 1825 §2. According to F. L. Ferraris, "praesumptio iuris tantum est illa, cui ius tandiu innititur, donec contrarium probetur; contra hanc enim praesumptionem probatio in contrarium admittitur [...]. Praesumptio *iuris et de iure* est illa, cui ius adeo fortiter innititur, ut eam plene pro veritate habendam decernat; unde haec praesumptio in foro iudiciali tantum operatur, quantum veritas. Et contra hanc praesumptionem regulariter non admittitur probatio in contrarium [...]. Nisi de contraria veritate aperte constet, quia tunc omnis praesumptio cessat, et cedit veritati" (s.v. "Praesumptio," in FERRARIS, *Bibliotheca canonica iuridica*, vol. 6, p. 385; see also NAZ, art. "Présomption," *Dictionnaire de droit canonique*, vol. 7, cols. 200-203).

The *CIC/17* had a canon to distinguish between these presumptions: "Contra praesumptionem iuris simpliciter admittitur probatio tum directa tum indirecta; contra praesumptionem iuris et de iure, tantum indirecta, hoc est contra factum quod est praesumptionis fundamentum" (can. 1826).

contrary. In this case, the favour of the law is permanent and remains unchallenged.⁷⁰

However, during the process of revision a suggestion was made to delete *praesumptiones iuris et de iure*, and this was accepted. As a consequence, the present Code contains only the *praesumptio iuris tantum*, that is, a presumption which admits proof to the contrary.⁷¹ Therefore, that part of can. 97 §2 which states that "with the completion of the seventh year one is presumed to have the use of reason" is a *praesumptio iuris tantum*. On the other hand, the first part of can. 97 §2 says: "Before the completion of the seventh year a minor is called to be an infant and is held to be (*censetur*) incompetent." How should we understand this canon? There is a

⁷⁰ In *CIC/17* there was only one direct mention of *praesumptionis iuris et de iure* in can. 1904, and one indirect reference in can. 1972, where it did not use the word *presumption*.

The concept of *presumption* and *fiction of law* (juridic fiction) are not the same. *Presumption* rests on certain facts, founded on the common experience which the law holds as real or true, until the contrary is proven. In other words, the law grants juridic effect to a common fact, considering it to be true unless proved otherwise. Whereas, in juridic fiction (*fictio iuris*), the law grants juridic effects to a non-existent reality as though it were true, and without the possibility of rebuttal. An example of *fictio iuris* would be the retroactive effect of *sanatio in radice* (can. 1161 §2) which operates *ex tunc*, that is, from the moment the apparently valid marriage was contracted (see CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, pp. 283, 288, 670; NAZ, "Présomption," col. 200; J. FARRAS BURDO, *Efectos jurídicos de la edad: Estudio interpretativo del can. 88 §3*, [Comillas, Universidad Pontificia de Comillas], Vich, 1959, pp. 17-25).

⁷¹ See *Communicationes*, 11(1979), pp. 126-127. During the revision of can. 1904 of *CIC/17*, the *coetus* thought that the section was too solemn and pretentious (see *Communicationes*, 8[1976], p. 191). The canon was rephrased to delete the mention of "*presumptione iuris et de iure*" (see *Communicationes*, 11[1979], pp. 155-156); and has become can. 1642 §1 in *CIC/83*.

controversy among the canonists whether the verb *censetur*, used here with a particular setting, is a presumption or an absolute prescriptive norm.⁷²

For some canonists, the statement that infants are considered (*censetur*) to be *non sui compos* does not seem to be a *praesumptio iuris tantum* but a determination of the positive law. The reasons for this opinion may be summarized as follows: Firstly, the norm is justified for the juridical certainty.⁷³ The age of seven years complete "marks the threshold of public accountability within the church community."⁷⁴ Secondly, according to the general tenor of the Code, infants do not enjoy the *capacitas agendi*.⁷⁵ Besides, we can draw a parallel with can. 11 which states that among other things, those who have not completed the age of seven are exempted from the obligations of the merely ecclesiastical laws, unless expressly provided otherwise. This is because the law considers them as incapable of personal

⁷² For a lengthy discussion on this topic, see FARRAS BURDO, *Efectos juridicos de la edad*, pp. 26-79.

⁷³ "*Revera seu naturaliter infantia, ideoque incapacitas juridice agendi durat usquedum usus rationis fuerit de facto acquisitus. Cum autem momentum illud pro unoquoque individuo plus minusve diversum sit, et in praxi non raro difficile sit cum certitudine omnimoda determinare an momentum illud de facto necne advenerit, legislator, ne locus detur ambiguitatibus et anxietatibus frequentibus, juxta illa quae communiter contingi solent auctoritative definivit quod in iure, quod attinet scilicet ad conditionem iuridicam in Ecclesia, 'infans' intelligitur omnis 'impubes ante plenum septennium' et 'censere non sui compos', seu sufficienti usu rationis, qui ad moraliter et juridice agendum ex ipso jure naturae requiritur, destitutus ac proinde nulla obligatione mere ecclesiastica ligatus et, quod attinet ad jura praecisive ecclesiastica, omni capacitate personaliter agendi orbatus; [...]" (MICHIELS, *Principia generalia de personis in Ecclesia*, p. 46).*

⁷⁴ E. KNEAL, "Physical and Juridic Persons," in *CLSA Commentary*, p. 72.

⁷⁵ According to Chiappetta, infants are incapable of placing juridic acts within the context of can. 124 §1 (see CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, p. 120).

responsibility. Thirdly, in the traditional legal usage the word *censere* in Roman law and in the *Corpus iuris canonici* meant "to establish and to ordain."⁷⁶ Fourthly, both the verbs *censetur* and *praesumitur* are employed in the same canon. They are placed in opposition to one another and they appear to be complementarily distinct. Thus, they intend to bring out the contrast in regard to the types and effects of the assumptions set forth in the canon. Therefore, the word *praesumitur* is not the extension or explanation of *censetur*.⁷⁷ Moreover, when the legislator has used two distinct words in the same material it may be understood that he intended them to give different meanings. In cases where a presumption has been proposed in the Code, it has been stated explicitly, even in the canon under our consideration. In addition, the canon deals with two distinct situations: (i) minors before completing their seventh year of age, and (ii) minors who have completed their seventh year of age. In other words, the Code makes infants a distinct category of minors. It follows logically, then, if the same meaning is given to *censetur* and *praesumitur*, then, either there would not be a need to make these distinct categories or these two categories

⁷⁶ See *D. 50*, 16, 111. According to the Rotal auditor: "Sed contra dicendum est verba illa significare praescriptum legis et non admittere contrariam probationem. Qua in re meminisse iuvat locum Digesti: 'Censere est constituere et praecipere'" (Decision *coram MORANO*, 12 August 1929, in *SRR Dec*, 21[1929], p. 456).

The same meaning may be attributed to the word "censere" found in the decretal of Clement V: "Si furiosus, aut infans dormiens hominem mutilet vel occidet: nullam ex hoc irregularitatem incurrit. Et idem de illo censemus, qui, mortem aliter vitare non valens, suum occidit vel mutilat invasorem" (c. 1, X, *de homicidio voluntario vel casuali*, V, 4, in *Corp.iur.can/FRIEDBERG*, vol. 2, col. 1184).

⁷⁷ See MICHIELS, *Principia generalia de personis in Ecclesia*, pp. 47-48; FARRAS BURDO, *Efectos juridicos de la edad*, pp. 37-38.

would become juridically identical. Therefore, in the context of the canon, plurality of terminology indicates a diversity of meaning. Finally, can. 99 supports the view that *censetur* is not a simple presumption. According to this canon: "Whoever habitually lacks the use of reason is held (*censetur*) to be incompetent (*non sui compos*) and is equated with infants." In this context, *censetur* is used as a legal determination and admits no evidence to the contrary.⁷⁸ Those who habitually lack the use of reason are equated to or regarded as infants. This equation seems logical when the infants are also held to lack habitually the use of reason, but only until they complete their seventh year of age. Then, their juridical position becomes similar and generally whatever is prescribed for one category can be similarly applied to the other as well, unless otherwise provided. On this basis, the word *censetur* in cann. 97 §2 and 99 can be said to have the same meaning. Therefore, these canonists conclude that the word *censetur* in can. 97 §2 is a prescription or determination of the law. In the terminology of the 1917 Code, it is a *praesumptio iuris et de iure*. R. Castillo Lara also holds that the Code does not intend to settle on a presumption, but establishes a positive norm in the sense that in the canonical order, the Church

⁷⁸ See V. DE PAOLIS, "Le persone fisiche e giuridiche," in PONTIFICIUM INSTITUTUM UTRISQUE JURIS, *Il diritto nel mistero della Chiesa*, a cura del gruppo italiano docenti di diritto canonico, 2a ed., Roma, Pontificia Università Lateranense, 1988, vol. 1, p. 335; A. DE FUENMAYOR, "The Canonical Status of Physical Persons," in E. CAPARROS, M. THÉRIAULT and J. THORN (eds.), *Code of Canon Law Annotated*, Latin-English edition of the *Code of Canon Law* and English-language translation of the 5th Spanish-language edition of the commentary prepared under the responsibility of the Instituto Martín de Azpilcueta, Montréal, Wilson & Lafleur Limitée, 1993, p. 125.

regards infants as *non sui compos*, without considering the fact, whether or not they enjoy the use of reason in concrete cases.⁷⁹

There are other canonists who hold the contrary opinion. According to their view, *censetur* is a *praesumptio iuris tantum*.⁸⁰ In support of their view they present following reasons. Firstly, the word *censere* has various meanings. It can mean: to put forward or hold as one's considered opinion; to think, presuppose, imagine; to estimate, recommend; to decide or decree. The Code has never attached one particular meaning to the word.⁸¹ As a result, there is no reason why in can. 97 §2 it cannot be understood as a presumption. To understand the term *censere* as a juridic determination which does not admit proofs to the contrary is to give a restricted meaning to the word. Determination of the attainment of the use of reason only at the completion of seven years of age would deprive many children of their right to receive the Holy Communion before this age, even though they have

⁷⁹ See CASTILLO LARA, "La condizione e lo statuto giuridico del minore nell'ordinamento della Chiesa," p. 259.

Among other canonists who hold that the word *censetur* of can. 97 §2 is not a *praesumptio iuris tantum*, but a prescriptive determination of the law, a *praesumptio iuris et de iure* are: VALDRINI, *Droit canonique*, p. 34; DE FUENMAYOR, "The Canonical Status of Physical persons," p. 123; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, p. 120; *Il diritto nel mistero della Chiesa*, vol. 1, p. 334; KNEAL, "Physical and Juridic Persons," p. 72; MICHELIS, *Principia generalia de personis in Ecclesia*, pp. 46-49.

⁸⁰ Some of the canonists who hold that the word *censetur* of can. 97 §2 is a *praesumptio iuris tantum* are: F.J. URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, Romae, Pontificia Universitas Gregoriana, 1983, p. 61; AUGUSTINE, *A Commentary on the New Code of Canon Law*, vol. 2, pp. 10-11; McCLOSKEY, *The Subject of Ecclesiastical Law*, pp. 199-202; J.M. HUELS, "'Use of Reason' and Reception of Sacraments by the Mentally Handicapped," in *The Jurist*, 44(1984), p. 216.

⁸¹ See MÖRS DORF, *Die Rechtssprache des Codex iuris canonici*, pp. 342-343.

sufficient knowledge, understanding, faith, and devotion as required by can. 913. As the legal axiom suggests: "In cases of ambiguity, such an interpretation should always be made that what is inconvenient and absurd may be avoided."⁸² In the case of conflicting interpretations, a favourable view is to be preferred. To consider *censere* as a simple presumption is to attribute a favourable and benign meaning among the two conflicting interpretations. Secondly, the word *censetur* has been used also for an editorial and stylistic purpose in order to avoid repetition of the word *praesumitur* in the same sentence. The same canon contains the expressions, *sui compos* and *usum rationis habere*, which are identical in meaning, but the two are used for stylistic purpose. Thirdly, the interpretation of *censere* as a juridical determination of the attainment of the use of reason only on the completion of seven years of age goes counter to developmental psychology, and no psychologist could accept an absolute, metaphysical concept of the age of reason that one suddenly attains at a certain point in time.⁸³ Interpretation of *censere* as a simple presumption, that is, one which would directly yield to truth, seems to be a more realistic approach, and it also

⁸² "Interpretatio talis in ambiguis semper fienda est ut evitetur inconveniens et absurdum" (taken from BLACK, *Black's Law Dictionary*, p. 734). Among other related legal axioms are: "Quotiens idem sermo duas sententias exprimit, ea potissimum excipiatur, quae rei gerendae aptior est" (D. 50, 17, 67). "In obscuris inspici solere, quod verisimilius est aut quod plerumque fieri solet" (D. 50, 17, 114).

⁸³ See J.M. HUELS, "Select Questions for Eucharistic Discipline," in *CLSA Proceedings*, 47(1985), pp. 62-63.

The intellectual functioning is a continuous and a growing process. For a succinct summary of opinions by some famous developmental psychologists on the age of reason, see U.T. HOLMES, *Young Children and the Eucharist*, New York, The Seabury Press, 1972, pp. 21-38.

respects the dignity of persons who have *de facto* attained the use of reason.⁸⁴ Fourthly, although two presumptions are mentioned in can. 97 §2, nevertheless, they are not the same, and neither is their rebuttal. One of them presumes the absence of the use of reason, and the other presumes its presence. These simple presumptions are sufficient to safeguard the values behind the juridic norms and also to ensure juridic certainty. Fifthly, "use of reason" and "those who have not completed the seven years of age" (or "infants") are not identical juridic categories. Canon 11, by stating "who enjoy sufficient use of reason and, unless the law expressly provides otherwise, have completed seven years of age", admits that persons can acquire the use of reason even before the completion of seven years of age. That is why it adds the phrase "have completed seven years of age" to exempt all infants from the obligation of merely ecclesiastical laws, even though, they may have the use of reason. Consequently, understanding *censere* as an absolute presumption does not reflect the mind of the legislator.⁸⁵ Furthermore, on the one hand, can. 99 does not help much in interpreting *censere* as a juridic determination within the context of the

⁸⁴ Canon law intends to uphold the dignity of human persons and Christian values. If the text of the law is broad enough to allow several interpretations, the one which comes closest to truth or reality and which promotes human dignity and Christian values should be chosen (see ÖRSY, *Theology and Canon Law*, p. 80).

⁸⁵ The decree, *Quam singulari* explains that the age of discretion is that when the child begins to reason, that is, about the seventh year, either more or less (see AAS, 2[1910], p. 582). The General Catechetical Directory, *Ad normam decreti*, also repeats the same understanding of the notion of the use of reason and admits that the age limit should not be too rigid taking into account the research in pastoral psychology which acknowledges the gradual evolution of the age of reason (see AAS, 64[1972], p. 173).

revised Code;⁸⁶ on the other, one should not invoke can. 11 to interpret the *censere* in can. 97 §2. Canon 11 is concerned with determining those persons who are obliged to merely ecclesiastical laws. As this canon deals with the restriction of the free exercise of rights, the legislator has given a restrictive formulation. But can. 97 is general in its content and application, and, therefore, it qualifies for a broad interpretation. Sixthly, during the revision process, there was an instance where the word *censere* had been considered insufficient to introduce juridical determination because *censere* also means *praesumere*. Wherever juridic determination has been introduced, the legislator has tried to use the proper words in order to remove ambivalent meaning.⁸⁷ Besides, with the suppression of *praesumptio iuris et de iure* in the revised Code, it is reasonable to conclude that the word *censere* implies a simple presumption.

Those who interpret the word *censere* as a *praesumptio iuris et de iure* or as a juridic determination heavily rely for support on the Roman law and the traditional usage in procedural law. However, where a cogent interpretation can be made from the text and context of the Code, the mind of the legislator, the process of revising

⁸⁶ Urrutia maintains that can. 99 contains a *praesumptio iuris simpliciter* as regards the use of reason. He bases his argument on the fact that in *CIC/17*, can. 88 §3 infants were equated to those who habitually lacked the use of reason, whereas in *CIC/83*, can. 99 those who habitually lack the use of reason are equated to infants (see URRUTIA, *De normis generalibus*, pp. 62-63).

⁸⁷ "Cum verbum 'censetur' possit ita intelligi ut idem valeat ac verbum 'praesumuntur' in *CIC* can. 2201, §2 adhibitum, nonnulli proposuerunt ut vel 'sunt' vel 'habentur' dicatur. Consultoribus placet verbum 'habentur'" (*Communicationes*, 8[1976], p. 177). Therefore, *CIC/83* in can. 1322 states: "Qui habitualiter rationis usu carent, etsi legem vel praeceptum violaverint dum sani videbantur, delicti incapaces *habentur*." Emphasis added.

the Code as well as the data derived from subsidiary sciences, an appeal to Roman law and the traditional usage would seem to undermine the spirit⁸⁸ of the revised law and the *novus habitus mentis*. Therefore, in light of the interpretation based on the context, it seems reasonable to consider the word *censetur* of can. 97 §2 as parallel to *praesumitur*. In other words, according to can. 97 §2 before the completion of the seventh year a minor is called an infant and is presumed to be *non sui compos*. In the revised Code, this is a *praesumptio iuris tantum*.

3.3.2.2 Computation of age

Canon 97 defines the age of majority, minority and infancy in terms of specific duration of time in years. Time-limits specified in the Code must be computed according to the canonical norms.⁸⁹ Age comes within the category of continuous time which is subject to no interruption and it runs whether the person is aware of it or not (can. 201 §1). Since the age is computed as a continuous time, the years specified are always to be taken as they appear in the calendar (can. 202 §2). The *dies a quo* is not counted in the total, unless its beginning coincides with the beginning of the day or unless the law expressly provides otherwise (can. 203 §1). Conversely,

⁸⁸ The law needs to be interpreted "in its spirit, beyond the *nudus cortex verborum* [...]" (JOHN PAUL II, Address to the Roman Rota, 4 February 1980, in *AAS*, 72(1980), p. 177; English translation in *Origins*, 9[1980], p. 700).

⁸⁹ See can. 200. This canon admits exceptions as it states "unless otherwise expressly provided by law." Where civil law has been canonized and within the specified area of law times or age limits are prescribed, then, those time or age limits are to be computed according to the civil law (see can. 22).

unless the contrary is prescribed, the *dies ad quem* is counted in the total, which will end when the last day of the prescribed period ends.

The application of these principles to the computation of the age of majority and minority is: persons reach majority the day after their eighteenth birthday. On their eighteenth birthday they are still minors (unless the birth of a person coincided with the beginning of the day, that is, exactly at 12.00 midnight or at 24.00 and not a second later!). Persons cease to be infants the day after their seventh birthday, and from thence are presumed to have the use of reason and they are bound by merely ecclesiastical laws.

3.3.3 Obligation of Minors to Merely Ecclesiastical Laws

Canon 11 establishes the criteria to determine the subjects of merely ecclesiastical laws. The canon is important in reference to minors. It states:

Merely ecclesiastical laws bind those baptized in the Catholic Church or received into it and who enjoy sufficient use of reason and, unless the law expressly provides otherwise, have completed seven years of age.⁹⁰

"Merely ecclesiastical laws" are human laws enacted by a competent ecclesiastical legislator. They must be distinguished from natural and divine positive laws. However, ecclesiastical laws that articulate, interpret, or declare divine laws should

⁹⁰ "Legibus mere ecclesiasticis tenentur baptizati in Ecclesia catholica vel in eandem recepti, quique sufficienti rationis usu gaudent et, nisi aliud iure expresse caveatur, septimum annum expleverunt" (can. 11).

be classed as divine laws.⁹¹ Everyone who has the use of reason irrespective of his or her age is bound by natural and divine positive laws.

According to can. 11, three conditions are necessary for a person to be bound by merely ecclesiastical laws. They are: the baptism, the sufficient use of reason, and the age of seven complete years. The first condition is of divine positive law, the second is of natural law, and the third is of ecclesiastical law.⁹²

The canon employs the phrase, "the sufficient use of reason." The phrase "use of reason" refers directly to the faculty of intelligence and therefore appears to display an over-rational approach to personal development. L. Örsy cautions canonists to use this norm wisely, stating:

The Scholastic theologians, under the leadership of Aquinas, assumed that the child comes to the "use of reason" instantaneously and that, from the moment of this enlightenment, he or she is able to appropriate and observe laws and precepts. But modern psychology sees a human person as being in the process of dynamically developing from an early age well into the adulthood. Hence, no precise moment can be detected when a child "receives" the use of reason and begins to make judgements. If this is so, the age of seven is arbitrary. Children should be taken for what they are - creatures gradually growing in knowledge and responsibility.⁹³

⁹¹ See ÖRSY, "Ecclesiastical Laws," p. 31; ABBO and HANNAN, *The Sacred Canons*, vol. 1, p. 23.

⁹² See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, pp. 23-25. The criteria are said to be ecclesiological (baptism), psychological (use of sufficient reason) and chronological (seven years complete). See *Il diritto nel mistero della Chiesa*, vol. 1, p. 255.

⁹³ ÖRSY, "Ecclesiastical Laws," p. 32. It is doubtful, if any scholastic theologian has ever taught that a child comes to the age of reason instantaneously. At any rate, the assertion of Örsy regarding Aquinas is erroneous. In fact, Aquinas does not propose the view that a person attains the use of reason instantly at the moment he or she reaches the age of seven years; rather he states: "[...] And since reason develops in man by little and little, in

Despite of giving an impression of incorporating a concept of the use of reason which sees it akin to a "light" given instantly to a person at the moment of the completion of the seventh year of age, the Code prescribes different ages well above seven for special requirements. Thereby, it takes into account the gradual development of rationality which matures over the years. This approach reflects the principles of natural law. Besides, law itself is an ordinance of reason for the common good.⁹⁴ Only those who are endowed with the use of reason can be directed by laws in a human manner. At one time canonists equated the full use of reason to the capacity to commit a grave sin. This was purely a negative description. Today, instead we prefer to characterize the use of reason according to the principle of natural law, according to which a person obliged to the ecclesiastical laws must also have the possibility of knowing the existence of law, necessary intelligence to understand it, and the freedom to implement it.⁹⁵ The adjective "sufficient" makes

proportion as the movement and fluctuation of the humours is calmed, man reaches the first stage of reason before his seventh year; [...] he begins to reach the second stage at the end of his first seven years, wherefore children at that age are sent to school" (*Summa theologica*, Suppl. q. 43, art. 2).

It is interesting to note that the scholastic influence is apparent in the Code, particularly in its exhortation to take St. Thomas as the teacher in the theological formation (can. 252 §3).

⁹⁴ See *Summa theologica*, I-I, q. 90, art. 4.

⁹⁵ See P. V. PINTO (ed.), *Commento al Codice di diritto canonico*, Roma, Pontificia Università Urbaniana, 1985, pp. 11-12.

The traditional expression, *use of reason* "seems to imply a cognitive capacity (or incapacity); the jurisprudential approach in the Church's courts suggests an additional dimension of executive capacity or incapacity - the inability *to carry out* what may be clearly understood cognitively" (KNEAL, "Physical and Juridic Persons", p. 72).

it clear that all those who are exempted may have *some* use of reason, but not enough to meet the requirements for subjection to them. J. A. McCloskey defines the "sufficient use of reason" in relation to ecclesiastical laws as follows:

That exercise of the intellect and free will which enables a baptized person to understand an ecclesiastical law in such away, even if not completely, that he can place the actions that will fulfil the purpose of that law.⁹⁶

Accordingly, the canon exempts those who have not completed the age of seven, even though they may have sufficient use of reason from the obligations of merely ecclesiastical laws. It is obvious then, the canon is concerned only with the obligations of the ecclesiastical law and not with the rights that flow from baptism and from incorporation into the Church. The exemption really applies to preceptive, prohibitive, and penal laws and does not extend to laws which grant rights. This is because these persons are capable of enjoying rights even if they may have to exercise them through their parents and guardians.⁹⁷ But as regards the incapacitating and invalidating laws, even though they may be merely ecclesiastical laws, by their very nature apply also to infants who have not completed their seven years of age.

⁹⁶ See McCLOSKEY, *The Subject of Ecclesiastical Law*, pp. 179-181. According to this author, a person is said to be subject to a law in *actu primo* when he is habitually subject to it, and he is said to be subject to a law in *actu secundo* when he is actually subject to it. To illustrate, all are subject to natural law. Infants are subject to it in *actu primo* because they are human beings, and because they are bereft of the use of reason, they are not bound by it in *actu secundo* (p. 182).

⁹⁷ See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, p. 26; McCLOSKEY, *The Subject of Ecclesiastical Law*, p. 184.

On the basis of can. 11 infants are held not responsible for their acts because they lack the capacity for sufficient use of reason. As far as their subjection to merely ecclesiastical laws is concerned, this consideration is of *iuris et de iure*. In other words, they are simply not subject to those laws. On the other hand, this principle does not apply as regards divine law.⁹⁸

3.3.4 Juridic Subjection of Minors

Canon 98 §2 states the principal norm that establishes the specific juridic position of minors vis-à-vis those who have attained the age of majority. This norm is "based on the natural lack of judgement or capacity that is anticipated in minors in varying degree as well as the necessity - gradually diminishing - of submitting such judgement to the supervision of guardians whether they be natural, or appointed."⁹⁹

The canon states:

A minor person remains subject to the authority of parents or guardians in the exercise of his or her rights, with the exception of those areas in which minors by divine law or canon law are exempt from their power; with reference to the designation of guardians and their authority, the prescription of the civil law are to be followed unless canon law determines otherwise or unless the diocesan bishop in certain cases for a just cause has decided to provide otherwise through the designation of some other guardian.¹⁰⁰

⁹⁸ See DE PAOLIS, "Le persone fisiche e giuridiche," p. 334.

⁹⁹ KNEAL, "Physical and Juridic Persons," p. 73.

¹⁰⁰ "Persona minor in exercitio suorum iurium potestati obnoxia manet parentum vel tutorum, *iis exceptis in quibus minores lege divina aut iure canonico ab eorum potestate exempti sunt; ad constitutionem tutorum eorumque potestatem quod attinet, servantur praescripta iuris civilis, nisi iure canonico aliud caveatur, aut Episcopus dioecesanus in certis casibus iusta de causa per nominationem alius tutoris providendum aestimaverit*" (can. 98 §2). Emphasis added to highlight the parallel changes in the corresponding can. 910 §2 of CCEO.

We can understand this principle better in contrast to can. 98 §1 which states: "An adult person enjoys the full use of his or her rights." That is to say, adults, besides being subjects of rights and duties or having juridic capacity, also have the capacity to act on their own in exercising their rights. This is because all rights are linked to persons, but their full exercise is restricted to the age of majority.¹⁰¹

3.3.4.1 Reason for the subjection of minors

Minors enjoy the same rights as the majors. They are only restricted in the exercise of their rights because they are dependent on their parents or guardians. This restriction should not be regarded as a penalty or a privation, rather a privilege or a favour which prevents minors from hurting themselves through their own acts. Because minors are supposed to lack full maturity of mind, this provision of law is intended to help them make use of their rights to their best advantage.¹⁰²

According to G. Michiels,

The principle stated in this canon [can. 98 §2, *CIC/83*] is a dictate of natural reason and is demanded unquestionably by the right administration of the society. Minors are persons who are not yet

They are: (i) *eis*; (ii) *iure divino vel canonico*; (iii) *nisi aliter iure communi vel iure particulari propriae Ecclesiae sui iuris cavetur et firmo iure Episcopi eparchialis tutores, si opus est, per se ipsum constituendi* (see also *Nuntia*, 27[1988], pp. 60 and 77).

¹⁰¹ We need to pay attention to the words *suorum iurium* in can 98 §1. All those who have attained the age of majority have *the full exercise of only those rights which the law acknowledges to be theirs*. All those who have reached their age of majority do not have and do not exercise the same rights. There are laws which require a higher age for certain acts, invalidating and incapacitating laws, laws which restrict the exercise of rights and the laws which stipulate other conditions.

¹⁰² See ABBO and HANNAN, *The Sacred Canons*, vol. 1, p. 129; AUGUSTINE, *A Commentary on the New Code of Canon Law*, vol. 2, p. 11.

sufficiently developed and schooled in the experience of life so as to take on the task of personally exercising their rights wisely and happily. Therefore, in order to enable them not to use their rights unwisely or to hurt themselves by their abuse, it is necessary to have others, such as parents and guardians, who are invested with necessary power by competent authority, so that they may provide protection during the tender age of minors, and, through diligent intervention, protect them against the schemes of others and equally against their own inexperience.¹⁰³

By the limitation of the exercise of rights by minors, that is making it dependant on parents or guardians, the legislator has also in mind the common good of society. Free and complete exercise of some rights by immature minors might at times jeopardize or harm the public good.¹⁰⁴

3.3.4.2 Persons to whom the minors are subject

The canon places minors under authority of parents or guardians. "Parents" and "guardians" - these are two different terms. The term "parents" includes natural and adoptive parents, since according to can. 110, "children who have been adopted according to the norm of civil law are considered as being the children of person or persons who have adopted them."¹⁰⁵ The adoption effected in conformity with the

¹⁰³ "Principium in hoc canone statutum naturalis ratio profecto dictat et recta societatis administratio invecte postulat; cum enim minores nondum satis sint evoluti et experientia vitae edocti ut in iuribus suis exercendis per seipsos discrete et feliciter procedant, ne iis male uti vel proprio cum nocumento abuti valeant, requiritur ut alii, ad hoc ab ipsa natura vel a competenti auctoritate necessaria potestate donati, parentes scilicet vel tutores, imbecillem minorum aetatem tuentur seduloque interventu contra aliorum insidias aequae ac contra propriam inexperientiam protegant" (MICHIELS, *Principia generalia de personis in Ecclesia*, p. 55).

¹⁰⁴ See O'DONNELL, *The Marriage of Minors*, p. 81.

¹⁰⁵ "Filii, qui ad normam legis civilis adoptati sint, habentur ut filii eius vel eorum qui eos adoptaverint" (can. 110).

norms of civil law constitutes the foundation of the legal parentage (*cognatio legalis*) mentioned in can. 1094. Therefore, persons legitimately adopted are juridically held to be children of the adopting parent or parents.¹⁰⁶

Parents have authority (*potestas*) over their children. The present canon has deliberately dropped the term *patria potestas* in referring to the parental authority, although it was present in the corresponding can. 89 of the 1917 Code. The revised Code clearly upholds the juridical equality and responsibility of spouses towards their children.¹⁰⁷

The *parentum potestas* in canon law is different from the *patria potestas* of the Roman law. The *parentum potestas* calls on both parents to assume grave responsibility for their children by means of "affectionate sharing of thought and common deliberation as well as eager cooperation" (GS, 52). It is a *munus*, a service, a totality of duties rather than of rights, and it is a relationship of charity. This

¹⁰⁶ See *Communicationes*, 6(1974), p. 97.

The canon applies to a single adopting parent as well as to a couple. It must be noted that can. 110 canonizes only the adoption constituted according to the conditions and forms prescribed by the civil law and does not canonize the effects that follow civilly. For the canonical effects it is necessary to conform to the disposition of canon law. For example, can. 1094 gives one of the canonical effects of adoption. All the canons which concern the rights and duties of parents apply also to the adopting parents (see CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, pp. 131-132).

According to can. 877 §3, in the case of baptism of an adopted child, the names of the adopting parents are to be registered and, at least if this is done in the local civil registration, the names of the natural parents, subject however to the rulings of the Episcopal Conference. "Prima facie, therefore, the child is to have access to knowledge of his or her natural parents. Civil law may forbid this. Episcopal Conferences can make rulings" (M. HUGHES, *Persons in General and Juridic Acts*, notes for the private use of the students, Ottawa, Faculty of Canon Law, Saint Paul University, 1989-1990, p. 52).

¹⁰⁷ For more details on this matter, see pp. 207-208 in Chapter IV of this work.

renewed concept of the primacy of duty, mutual collaboration, and charity indicates the diaconal function of the *parentum potestas*, and it constitutes a general directive of the legislation on the relationship between parents and children. To demonstrate the character and the function of the *officium* of this *potestas* in the Code, it is opportune to remember that Vatican II has called the family as the "domestic church" (LG, 11) and the parents are the its "priests".¹⁰⁸ According to St. Augustine, they have a religious duty to educate, counsel, exhort and correct their children with benevolence and with authority. Thus, their function is a priestly one similar to that of a bishop.¹⁰⁹

When the parents are dead, or are impeded from exercising their parental function on account of absence, sickness, or other incapacity, minors cannot be left to themselves deprived of necessary support and direction. These are provided to minors through other persons to whom are legally entrusted all or some of the functions of the *parentum potestas*. These persons stand in the place of parents (*in*

¹⁰⁸ See R. BACCARI, "La patria potestà nel diritto canonico con riferimenti civilistici," in *Diritto, persona e vita sociale: Scritti in memoria di Orio Giacchi*, Milano, Vita e Pensiero, Pubblicazioni della Università Cattolica del Sacro Cuore, 1984, vol. 1, pp. 338-339.

¹⁰⁹ "Pro Christo et pro vita aeterna, suos omnes admoneat, doceat, hortetur, corripiat, impendat benevolentiam, exercent disciplinam; ita in domo sua ecclesiasticum et quodammodo episcopale implebit officium, ministrans Christo ut in aeternum sit cum ipso" (AUGUSTINE, *In Joannes Evangelium*, Tract. 51, no. 13, in *PL*, vol. 35, cols. 1768-1769).

loco parentis). There are two such figures in the Code: one is the *tutor* and the other is the *curator*.¹¹⁰

Having stated the principle that "a minor person remains subject to the authority of parents or guardians in the exercise of his or her rights [...]" (can. 98 §2), the Code does not describe or explain the institute of *tutela*.¹¹¹ Besides, in other places, the Code also speaks of *curatela*.¹¹² According to M. Petroncelli, canon law, like various civil laws, does not make a clear distinction between the two terms, *tutor* and *curator*. The church law prior to the 1917 Code maintained the distinct meanings present in Roman law. But the Code uses these terms indiscriminately because it wants to leave open to civil laws the concrete application of these institutes. This is because the civil laws of the various countries do not maintain a uniform terminology.¹¹³

The Rotal auditor A. Stankiewicz also agrees that the Code does not use the terms *tutor* and *curator* in a precise manner, and he elucidates further:

¹¹⁰ Can. 98 §2 does not mention the *curator*. Whereas, *Schema canonum de normis generalibus et de bonis Ecclesiae temporalibus* of the Oriental Code, did contain the phrase "tutorum vel curatorum" in can. 2 §2 (*Nuntia*, 13[1981], p. 13). However, during the revision of the schema it was decided to drop the term *curator* (see *Nuntia*, 18[1984], p. 6).

¹¹¹ The word *tutor* appears in cann. 98 §2; 105 §2; 1478 §1; 1478 §2; 1478 §3; 1479; 1508 §3; 1521; 1524 §2 and *tutela* in cann. 105 §2; 1448 §1 (s.v. "Tutela, ae,"; "Tutor, oris," in OCHOA, *Index verborum ac locutionum Codicis iuris canonici*, p. 499).

¹¹² The word *curatela* can be found in cann. 105 §2; 1448 §1 and *curator* in cann. 1478 §3; 1478 §4; 1479; 1508 §3; 1521 (s.v. "Curatela, ae,"; "Curator, oris," in OCHOA, *Index verborum ac locutionum Codicis iuris canonici*, p. 122).

¹¹³ See PETRONCELLI, *Diritto canonico*, p. 82.

However, for the same reason, that is because this matter has been remitted to the civil legislator, the indiscriminate use of the words "guardian" and "curator" continues also in the new Code as in the preceding Code. For example, it has been stated therein that in spiritual cases connected with spiritual matters a curator, and not a guardian, is to be constituted by the judge for a minor, who has attained the use of reason, before the completion of the fourteenth year of age (can. 1478 §2).

Similarly, when the rights of minors are in conflict with the rights of parents, guardians or curators, or when the latter cannot satisfactorily safeguard the rights of the former, then the minors are to stand in trial "through a guardian or a curator" appointed by the judge (can. 1748 §2), even though only a curator is to be appointed for minors (can. 98 §2), not however "a guardian or curator."¹¹⁴

Another reason for the mixed usage of the terms is that the Code uses the term *minors* with two meanings: firstly, for all those who have not completed their eighteenth year of age; secondly, for those persons to whom the law requires a *curator* for determinate or indeterminate cases.¹¹⁵

¹¹⁴ "Sed ex eadem ratione, videlicet propter remissionem huius materiae ad legislationem civilem, perstat quoque in novo Codice, sicut in illo praecedenti, promiscuus usus verborum tutor et curator, cum verbi gratia inibi statuitur quod curator et non tutor, a iudice constitui debet pro minore usu rationis pollente ante decimum quartum aetatis annum expletum in causis spiritualibus et cum spiritualibus connexis (can. 1478 §3).

Similiter in conflictu iurium minorum cum iuribus parentum vel tutorum vel curatorum, aut quotiens hi non satis tueri possunt illorum iura, ad legis praescriptum minores stare debent in iudicio 'per tutorem vel curatorem' a iudice datum (can. 1478 §2), etiamsi pro minoribus tutor tantum constitui debeat (can. 98 §2), non vero 'tutor vel curator' (A. STANKIEWICZ, "De curatoris processualis designatione pro mente infirmis," in *Periodica*, 81[1992], pp. 500-501).

¹¹⁵ Generally speaking, a *tutor* is given to a minor on account of his or her age, whereas *curator* represents three types of persons, namely, (i) the *rationis usu destituti*, (ii) the *minus firmae mentis*, and (iii) the *bonis interdicii* mentioned in can. 1478 §4.

While L. Chiappetta holds that the terms *tutor* and *curator* are often used without clarity, he seems to understand the terms in a different way. He states: "Manca nell'ordinamento canonico, come in vari ordinamenti civili, una chiara distinzione fra tutore

Broadly speaking, *tutela* may be understood as the protection or care of those persons who are incapable of protecting and taking care of themselves.¹¹⁶ In the context of can. 98 §2, tutors or guardians may be described as those persons who represent or look after the interests of minors (in the sense of can. 97 §1) as well as the administration of their goods, on account of the lack (absence) of parents or their incapacity. These guardians could be physical persons or juridical persons who have accepted the responsibility according to the law.¹¹⁷

3.3.4.3 Appointment of guardians

The Code gives various criteria for the determination of guardians and their authority. First, it defers to the disposition of the civil law of the respective nation, for it does not want to create an unnecessary discrepancy and conflict between the two legal ambits in this regard. When the appointment of the guardian takes place

e curatore, e due termini sono spesso usati promiscuamente. Sembra che il **tutore** si dia alle persone che, per la loro età o per la loro condizioni, manchino del tutto di capacità di agire: il minore non emancipato, il maggiorenne incapace, l'interdetto in stati d'incapacità assoluta. Il **curatore**, invece, si dà alle persone che hanno una capacità di agire limitata, non piena: il minore emancipato e quindi non più soggetto alla potestà dei genitori, il maggiorenne che non si trovi in un stato di sufficiente sanità mentale, il semplice inabilitato" (CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, note 1, p. 601).

¹¹⁶ See PETRONCELLI, *Diritto canonico*, p. 82.

¹¹⁷ "*Tutores, sunt personae quae curam et representationem personae minoris, eiusque bonorum administrationem, habent, in defectu parentum, sive physico sive iuridico iuxta mandatum a lege acceptum*" (URRUTIA, *De normis generalibus*, p. 62).

according to the regulations of the civil law, the same law determines the nature, extent, modification, and termination of the authority of that guardian.¹¹⁸

Although the canon remits to civil law the appointment of guardians, it gives priority to its own law by stating "unless canon law provides otherwise." Moreover, given the positivistic nature of many civil laws and the possibility that the civilly appointed guardians may respect neither the interest of the Church nor the pastoral welfare of the person under them, the Church displays a certain diffidence towards civil law. Therefore, it also offers other criteria. Canon law may provide for the appointment of a guardian either through universal law or particular law. Finally, the diocesan bishop has the power to nominate another guardian besides the civil guardian. This criterion, nevertheless, is placed with circumspection: if, in fact, a guardian has been nominated by civil law, then canon law prescribes that the diocesan bishop can nominate another, only in *determinate cases* and for a *just reason*.¹¹⁹

¹¹⁸ The term *potestas* used in reference to guardians in can. 98 §2, is to be understood as a synonym for *rights and obligations*. The juridical relationship established between guardian and minor is not principally one of power, but that of protection, which implies reciprocal rights and duties. The term refers to the exercise of the *tutela* and to the relationship that emanates from it. In contrast to this canon, *CCEO*, can. 910 §2 does not mention the *potestas* of guardians in conjunction with their appointment (see J. MIÑAMBRES, *La remisión de la ley canónica al derecho civil*, Roma, Ateneo Romano della Santa Croce, 1992, note 381, p. 171).

¹¹⁹ See DE PAOLIS, "Le persone fisiche e giuridiche," p. 334; AYMANS, *Kanonisches Recht*, vol.1, p. 298; MIÑAMBRES, *La remisión de la ley canónica al derecho civil*, pp. 170-171.

The canon uses the term "diocesan bishop." According to can. 134 §3, whatever is attributed to the diocesan bishop in the context of executive power, is understood to belong only to the diocesan bishop and to those others in can. 381 §2 who are equivalent to him, to

In the realm of an ecclesiastical process, an ecclesiastical judge can appoint a guardian or a curator for the minor in specific cases.¹²⁰ In other words, "the appointment of guardians for a minor, and the determination of their powers are governed by the prescriptions of the secular law of the minor. Canon law establishes provisions applicable in certain cases; these provisions complement the general rule and prevail in cases of conflict."¹²¹ It is abundantly clear that the Church reserves the right to appoint another guardian, whenever deemed necessary.

However, can. 98 §2 is not without some practical difficulties. According to J. Miñambres: (i) It is difficult to imagine a minor with two tutors, one "canonical" and the other "civil". Besides, when the civil law has been canonized, the same person is both, the civil and ecclesiastical guardian. (ii) If another canonical guardian is nominated, then there would be two guardians named according to the prescription of the Code. (iii) There can be a situation where the bishop may have a case in which the guardian has a domicile in his diocese, the minor (ward) has a quasi-domicile in another diocese, and the appointment of the guardianship was undertaken in a third. (iv) The bishop would be obliged to follow the civil law in instituting the guardianship, particularly when he has no specific law regarding this institution. Therefore, as a practical option and in consideration to the civil law, it is advisable

the exclusion of the vicars general and the episcopal vicars except by a special mandate. *CCEO*, with the addition of the word "himself" (*per se ipsum*) in can. 910 §2, manifests a strong preference for the eparchial bishop making the appointment.

¹²⁰ See cann. 1478 §2; 1479.

¹²¹ DE FUENMAYOR, "The Canonical Status of Physical Persons," p. 124.

that the bishop does not appoint another guardian, but only a curator in a particular case, when the civil guardian is inadmissible in the ecclesiastical forum.¹²²

According to R. Castillo Lara, although can. 98 §2 does not mention curator, it is the common opinion that the norm also applies to the curator. This is clear from the fact that in can. 1478 which speaks of the procedural rights of minors they are mentioned along with the tutors. Then, the function of curator demands subordination to that of the tutor.¹²³

3.3.4.4 Object and extent of subjection

The statement in can. 98 §2, that "a minor remains subject to the authority of parents or guardians in the exercise of his or her rights, with the exception of those areas in which minors by divine law or canon law are exempt from their power" sets the rule for the object and extent of subjection. The phrase "in the exercise of his or her rights" delineates the object of subjection and the rest of the phrase refers to the extent of subjection. Canon 89 of the 1917 Code did not specify the extent clearly but simply mentioned "ius" (*iis exceptis in quibus ius minores a patria potestate exemptos habet*) without further specification. Therefore, many canonists debated and disagreed among themselves concerning the extension of the term, that is, whether

¹²² See MIÑAMBRES, *La remisión de la ley canónica al derecho civil*, pp. 171-173.

¹²³ See CASTILLO LARA, "La condizione e lo statuto giuridico del minore nell'ordinamento della Chiesa," p. 268.

the "ius" included only ecclesiastical law or divine natural and positive law.¹²⁴ The present canon has put an end to the conflicting interpretations of canonists as regards the exemption.

The exemption of minors from the authority of parents or guardians must be expressed in the Code. Otherwise, presumption would rule in favour of their subjection to their parents or guardians. The exemption can be stated either explicitly or implicitly. It is done explicitly, when in conceding a right to the minor, it declares in unmistakable terms that the minor may use this right independently of parents or guardians; and implicitly, when the exemption may be deduced from the canons.¹²⁵

The words, *obnoxia manet* in can. 98 §2 are rather vague and general as they simply state that minors remain subject to their parents or guardians. They do not delineate the nature or degree of dependence. Nonetheless, the canon affirms that the minors are in a relationship of juridical dependence on their parents or guardians. This dependence might range from the parents having to act for the minors (during infancy) to the minors needing to obtain parental consent to act or to having to

¹²⁴ For a discussion on the understanding of the term by various canonists Blat, Gillet, Michiels, Beste, Coronata, Oesterle, Vermeersch-Creusen, see O'DONNELL, *The Marriage of Minors*, pp. 83-92.

¹²⁵ See *ibid.*, pp. 92-93.

consult them before acting. Minors can act alone only if so authorized by divine or canon law.¹²⁶

With respect to parental authority, minor children have a corresponding submission and a duty to obey their parents. Otherwise, it would be an empty power incapable of realizing its end. The duty of children to obey their parents is not explicitly formulated in the Code, for it is not a book on moral theology or a catechism. The reason for the absence of a specific canonical formulation on this is the existence of the commandment of the Decalogue which has a universal value and is sufficiently well-known in as much as it is the direct expression of the natural law. Therefore, its specific formulation within the ambit of canon law seems redundant. However, this duty of obedience and respect is implied in can. 98 §2. Because, remaining "subject to the authority of parents or guardians" signifies precisely an obligation of obedience. It also means remaining in submission to them, that is, acting with the necessary permission or consent.¹²⁷

As for the extent of the subjection of minors to the authority of parents and guardians, the Code grants a certain autonomy to minors in determinate juridic acts. The Code does not have an institute of emancipation as such. However, in general, we find in the Code, a progressive grant of autonomy, that is, with the increase in the

¹²⁶ See HUGHES, *Persons in General and Juridic Acts*, p. 21; MICHIELS, *Principia generalia de personis in Ecclesia*, pp. 60-61.

¹²⁷ See CASTILLO LARA, "La condizione e lo statuto giuridico del minore nell'ordinamento della Chiesa," p. 266.

age of minors their juridic dependence on parents and guardians decreases.¹²⁸ The only possibility available for the minors for full canonical exemption from the authority seems to be when they contract marriage.¹²⁹ Then, what about the institute of civil emancipation of minors?

3.3.5. Emancipation of Minors

Emancipation is purely a civil institution which puts an end to the parental power over minors. The term *emancipation* derives from *mancipium*.¹³⁰ The latter meant "possession; right of ownership; to come under one's hand or authority." Similarly, *e(=ex) + mancupare* would mean "to transfer; declare free and independent; to go out of one's hand or authority." Therefore, emancipation means freeing someone from the power of another. To the extent that it confers on minors a certain juridic capacity to act, the modern concept of emancipation derives from the *venia aetatis* of the Roman law. According to H.C. Black,

¹²⁸ The specific rights and duties of minors and the nature of their exercise in relation to the parents or guardians is treated in Chapter IV.

¹²⁹ See NAZ, art. "Émancipation," in *Dictionnaire de droit canonique*, vol. 5, col. 252-255.

¹³⁰ *Mancipium* is formed from two words, *manus* and *capio*, which means a taking by the hand. This refers to a form of legal purchase under the Roman law.

Manus or *mancipium* seems to be the original word used for the undifferentiated power exercised by the *paterfamilias* over those human beings and animals which help him in his work and his battles. With the development of the idea of property, the free subordinate members of the family came to be excluded from the category of *res mancipi*, though continuing to be the objects of emancipation, and eventually the idea of *mancipium* was swallowed up in *dominium*. The root meaning of *mancipium* seems to revolve round the act of taking with the hand which occurs in *mancipatio* (see H.F. JOLOWICZ and B. NICHOLAS, *Historical Introduction to the Study of Roman Law*, 3rd ed., Cambridge, University Press, 1972, note 2, p. 138).

The term [emancipation] is principally used with reference to the emancipation of a minor child by its parents, which involves an entire surrender of the right to care, custody, and earnings of such child as well as a renunciation of parental duties. [...] The emancipation may be express, by a voluntary agreement of parent and child, or implied from such acts and conduct as import consent, and it may be conditional or absolute, complete or partial. Complete emancipation is entire surrender of care, custody, and earnings of child, as well as renunciation of parental duties. And a "partial emancipation" frees a child for only a part of the period of minority, or from only a part of the parent's rights, or for some purposes, and not for others.¹³¹

The 1917 Code did not have any norm on emancipation. On the basis of a decision of the Rota, commentators accepted that in this matter the civil laws of the country are to be followed. Emancipation produces some effects in the ecclesiastical domain. In the words of Wynen, the Rotal auditor:

Emancipation is neither a pre nor a post Code canonical institution, rather it is an institute exclusively of civil law. Persons who are learned in our law admit that when emancipation first occurred, the *patria potestas* ceased even in the ecclesiastical forum and with it ended the legal domicile as such of minor children. In our times, however, a person becomes emancipated not according to the dispositions of Roman law, but according to the prescriptions of modern civil law, and after such emancipation a child is considered to be and is independent of the father's power.¹³²

It may be noted that, in affirming that a minor child retains as a necessary domicile the domicile of his or her parents, the same Rotal decision declares that this is true

¹³¹ s.v. "Emancipation," in BLACK, *Black's Law Dictionary*, p. 468.

¹³² "Emancipatio neque ante neque post Codicem Iuris Canonici est institutio canonica, sed est institutum exclusive iuris civilis, quo, cum primum locum habuit, fatentibus Doctoribus nostri iuris, cessat patria potestas etiam in foro ecclesiastico et cum ea finitur filiorum minorum domicilium legale qua tale. Iamvero nostris temporibus aliquis emancipatus fit non iuxta dispositiones iuris romani, sed secundum dispositiones hodierni iuris civilis, et post eiusmodi emancipationem filius consideratur et est independens a patris potestate" (Decision *coram* WYENEN, 8 April 1930, in *SRR Dec*, 22[1930], p. 220).

only as long as the child is under the parental authority. The decision then indicates the manner in which this authority ceases:

Hence, *fili familias* of minor age, even if they do not live with their father, retain their legal domicile as long as they are subject to their father's power; they lose it as soon as that power ceases. According to the unanimous teaching of canonists, the father's power ceases, besides on the death of the father, when the child becomes independent (*sui iuris*). And this happens either through the *emancipation* of the child or through the attainment of the *age of majority*.¹³³

During the revision of the Code, a reference was made to the suggestion of an episcopal conference regarding the "maioritas limitata" (*emancipatio*). The secretary of the *coetus "De populo Dei"* thought that the suggestion was not acceptable because it would be introducing into the Code an institute that is unnecessary.¹³⁴ But the revised Code expressly recognizes the civil institute of emancipation in can. 105 §1. However, it gives explicit canonical effect only to the acquisition of a proper domicile for a minor. Moreover, the civil emancipation does not produce in canon law the capacity for the emancipated person to act as one who has reached the age

¹³³ "*Filii familias* proinde aetate *minores*, etsi de facto non habitent apud patrem, domicilium suum legale qua tale conservant, quousque sunt sub potestate paterna, illudque amittunt, ut primum cessat haec potestas. Iamvero paterna potestas, si abstrahatur a morte patris, iuxta unanimen doctrinam canonistarum cessat, quando filius fit sui iuris, quod accidit aut per filii *emancipationem* aut per adeptam *maioritatem*" (*ibid.*, p. 217).

¹³⁴ "Mons. Segretario pensa che il suggerimento di una Conferenza Episcopale circa la 'maioritas limitata' (*emancipatio*) non sia accettabile, perché introdurrebbe nel Codice un altro istituto che non necessario poiché già nel diritto processuale c'è una norma che prevede l'incapacità ad agire per coloro che non hanno pieno uso di ragione" (*Communications*, 21[1989], p. 64).

of majority.¹³⁵ In other words, civil emancipation does not produce all its effects within the canonical realm.¹³⁶

3.3.6 Domicile and Quasi-domicile of Minors

The relationship between a person and place has juridic implications. The Code recognizes a twofold relationship: (i) place of origin, and (ii) place of residence. The place of origin is not simply the material place where the actual birth takes place, but the one legally determined by the law.¹³⁷ The place of origin does not have much relevance in the Church.¹³⁸

One's relationship to place of residence provides the following personal qualifications: resident (*incola*), tenant (*advena*), visitor or traveler (*peregrinus*) and a wanderer (*vagus*).¹³⁹ This canonical relationship between person and place is

¹³⁵ "[...] Però, la sua capacità di agire non è così ampia come quella del maggiorenne, ma limitata, può compiere solo atti di ordinaria amministrazione" (P. TOCANEL, "Le persone fisiche e giuridiche nella Chiesa: Novità, motivazioni e significato," in *Apollinaris*, 56(1983), p. 414).

W. Aymans states that even though a declaration of an early majority (similar to *venia aetatis*) is not foreseen in canon law, the pope can grant it: "Eine vorzeitige Volljährigkeitserklärung ist im kanonischen Recht vorgesehen; sie könnte jedoch durch den Papst erfolgen" (AYMANS, *Kanonisches Recht*, vol. 1, pp. 295-296).

¹³⁶ Because marriage brings about a civil emancipation there are instances where minors have simulated marriage to achieve civil emancipation and to be out of the authority of their parents and guardians (see Decision *coram* FIORE, 17 June 1981, in *SRR Dec*, 73[1981], pp. 326-333; Decision *coram* SERRANO, 11 December 1981, in *ibid.*, pp. 623-630).

¹³⁷ Canon 101 determines the place of origin of a child taking into consideration various situations on the part of the child and the parents.

¹³⁸ During the revision process, there was a question whether to retain or suppress can. 90 of *CIC/17* Code. See *Communicationes*, 6(1974), p. 95.

¹³⁹ See can. 100.

important not only in relation to the acquisition and exercise of rights and obligations, but also in regard to the operation or application of the law itself.¹⁴⁰ The determination of domicile or of quasi-domicile and the enactment of norms concerning the residence of physical persons are necessary for providing *stable* pastoral care in the Church.¹⁴¹

The domicile and quasi-domicile of a minor is governed by can. 105 §1.¹⁴² The canon speaks of two types of domicile or quasi-domicile which are important to our treatment on minors. They are: (i) voluntary or elective or proper (also called *domicilium facti*), and (ii) necessary or legal or mandatory (also called *domicilium iuris*). The former is acquired, changed, or abandoned by the free will of the

¹⁴⁰ According to can. 13 §1, particular laws are presumed to be *territorial*, unless otherwise evident. Canon 12 also states the principles about the application or non application of the universal law in particular territories.

¹⁴¹ See *Communicationes*, 6(1974), pp. 95-96.

The juridical consequences of domicile or quasi-domicile are manifold: (i) domicile and quasi-domicile determine a person's proper parish priest, proper parish, proper parish church, proper Ordinary and proper diocese; (ii) it has further effects in relation to faculty for confessions (cann. 967 §2; 975); diaconal ordination (can. 1016); celebration of marriage (can. 1115); competence over marriage cases not reserved to the Holy See and cases of separation of spouses (cann. 1673, 2° and 3°; 1694); competent bishop to accept the petition for dispensation "super rato" (can. 1699). Canon 1115 speaks also of a month-long residence in a parish, but this refers only to the celebration of marriage (see CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, pp. 127-128; DE FUENMAYOR, "The Canonical Status of Physical Persons," pp. 127-128).

¹⁴² "Minor necessario retinet domicilium et quasi-domicilium illius, cuius potestati subicitur. Infantia egressus potest etiam quasi-domicilium proprium aquirere; atque legitime ad normam iuris civilis emancipatus, etiam proprium domicilium" (can. 105 §1).

resident, and the latter is constituted without the intervention of the will of the resident and maintained by the very disposition of law.¹⁴³

The canon states the general principle with regard to the domicile of minors: Minors necessarily keep or retain (*retinet*)¹⁴⁴ the domicile or quasi-domicile¹⁴⁵ of the one to whose power they are subject. From this principle we can deduce that if the parents or guardians have multiple domiciles or quasi-domiciles, so do the minors who are subject to them. Having stated the principle, the canon distinguishes three cases of minors: (i) infants, (ii) minors who are no longer infants, and (iii) civilly emancipated minors.

¹⁴³ See MICHIELS, *Principia generalia de personis in Ecclesia*, pp. 117-118.

¹⁴⁴ The word *retinet* no doubt, broadly understood also means *habet*; for, to *retain* first one should *have*.

Canon 93 §1 of *CIC/17* stated: "Uxor, a viro legitime non separata, necessario retinet domicilium viri sui; amens, domicilium curatoris; minor, domicilium illius cuius potestati subiicitur." In this formulation, domicile of minors and *amentes* was placed in the subsequent phrase, the introductory sentence determining the domicile of the wife who had not legitimately separated from her husband. In this context the word *retinet* was appropriate.

However, can. 105 §1 of *CIC/83* is concerned only with minors (on the basis of age). Therefore, in the new context, *habet* would have been the more appropriate word to use; and indeed, can. 105 §2 uses it with regard to persons who are equivalent to minors.

¹⁴⁵ *CIC/17*, can. 93 §1 mentioned only a legal domicile. It made no mention of a legal quasi-domicile. The silence of the Code gave rise to a controversy on this matter. Some canonists denied a legal quasi-domicile by applying the axiom, *Legislator quod voluit expressit, quod noluit tacuit*. Some others admitted a legal quasi-domicile under certain circumstances. They said that if there is no provision for a legal quasi-domicile, then in those cases where parents or guardians do not have a proper domicile, but only a quasi-domicile then the minors under them would be *vagi* (for more on this debate, see COSTELLO, *Domicile and Quasi-domicile*, pp. 174-177; ABBO and HANNAN, *The Sacred Canons*, p. 136).

CIC/83, can. 105 §1 mentions both legal *domicile* and *quasi-domicile* for minors. The English and French translations have rendered "*domicilium et quasi-domicilium*" into "domicile or quasi-domicile" and "le domicile ou le quasi-domicile" respectively.

Infants have only the legal domicile and quasi-domicile of their parents. Minors, who are no longer infants,¹⁴⁶ that is, who have completed their seventh year of age, can obtain a proper quasi-domicile according to the stipulations of can. 102 §2. According to Michiels, the reason behind this principle is because,

on the one hand, the intention to stay in a place for the greater part of the year can perfectly coexist with the ordinary dependence of the will which is proper in the cases of minors, while on the other hand, it was necessary to provide minors who often had to leave their father's domicile in order to pursue studies or to learn skills (or for some other reason) with the means of acquiring their own Ordinary and parish priest, lest they should suffer harm in spiritual matters. In acquiring a voluntary quasi-domicile, a minor is exempt from parental power.¹⁴⁷

P. Gillet states that "the residence by which a quasi-domicile is acquired is subject to the parental power. They can legitimately prohibit it, but not the effects of the residence, even if it has been acquired against the wishes of the parents, provided that other conditions necessary to acquire a voluntary quasi-domicile are present."¹⁴⁸

¹⁴⁶ Canon 10 §1 in the *Schema 1977* of the *De populo Dei* stated: "Minor necessario retinet domicilium et quasi-domicilium illius cuius potestati subiicitur. Infantia egressus potest etiam quasi-domicilium proprium acquirere; atque legitime ad normam iuris civilis emancipatus etiam proprium domicilium." The relator noted the terms "infans" in the place of "minor" in the second statement in the same canon brought about a confusion. But the secretary noted that the first norm refers to minors and not to infants. Therefore, the suggestion was not accepted (see *Communicationes*, 12[1980], p. 68).

¹⁴⁷ "[...] quia ex una parte intentio alicubi manendi ad majorem anni partem optime consistere potest cum ordinaria dependentia voluntatis, quae est minorenni propria, ex altera parte vero necesse fuit dare minoribus, qui saepe ad studia prosequenda vel ad artem addiscendam (aliamve ob causam) exire debent ex domicilio patris, modum obtinendi Ordinarium et parochum proprium, ne detrimentum capiant in spiritualibus. In quasi-domicilio voluntario acquirendo minor eximitur a potestate patria" (MICHIELS, *Principia generalia de personis in Ecclesia*, p. 176).

¹⁴⁸ "Ipsa tamen commoratio, qua obtinetur quasi-domicilium, potestati parentum subiacet, qui legitime eam prohibere possunt, non vero effectus commorationis, etiamsi contra voluntatem parentum commoratio obtineatur, modo adsint aliae conditiones ad quasi-

Moreover, it is possible for minors to obtain multiple proper quasi-domiciles. On obtaining a proper quasi-domicile, they do not lose their legal domicile.

Can minors acquire a proper domicile? According to can. 102 §1 which is a constitutive canon on domicile, there are two ways of obtaining a domicile. One is by residence within a territory of a parish or at least of a diocese joined with the intention of remaining there permanently unless called away. The other is, when residence within the territory has been in fact protracted for five complete years. With regard to the first option, minors (with the exception of emancipated minors) may not be capable of such an intention owing to their dependence on parents or guardians. As long as they are under the authority of parents, any intention on the part of minors of remaining independent of this control, and of residing in another place either permanently or unless called away would seem juridically impossible.

What about minors acquiring a domicile through the second option? With due regard for the civilly emancipated minors, the Code does not grant minors the capacity to acquire a proper domicile. The exclusion of a proper domicile for minors may be deduced from the positive silence of the Code. The Code does not recognize the residence in a place which is in fact protracted for a full five years as proper domicile by persons who are given a necessary or legal domicile. In addition, can. 106 clearly states that the prescription regarding the loss of domicile and quasi-

domicilium voluntarium adquirendum necessariae" (GILLET, "De exemptione a patria potestate," note 9, p. 789; see also MICHIELS, *Principia generalia de personis in Ecclesia*, p. 176).

domicile by departure from the place with the intention of not returning cannot be applied to the provisions of can. 105. As a result, domicile is conferred on minors by the disposition of law. The disposition of the law is that minors cannot acquire a domicile by residence, intention or both, but by juridic relationship to the person to whose authority the minor is subject. By the same disposition of the law, this domicile is necessarily retained, as long as the state or condition to which it is annexed. Therefore, minors cannot acquire a proper domicile until they are civilly emancipated.

Minors, who are emancipated according to the norms of civil law, can acquire a proper domicile. Although the canonists unanimously agreed on this principle, it was not contained in can. 93 of the 1917 Code. Therefore, it is an addition in the revised Code.¹⁴⁹ E. Kneal assumes "that the civil legislation pertinent here is that of the place in which the newly emancipated minor wishes to establish the domicile (rather than the residence of the parents). Parallel principles of law do not require a minor to be bound *only* by the legislation of the place where the parents have their own domicile."¹⁵⁰ Do civilly emancipated minors who acquire proper domicile lose

¹⁴⁹ This addition was introduced during the first session (5-6 May 1967) of the *Coetus studiorum* "De quaestionibus specialibus libri II" when proposing the changes to can. 93 of CIC/17 Code: "Proponit ultra Rev.mus Secretarius Ad. ut de minore addatur legitime, si est emancipatus, posse etiam habere domicilium proprium. Quod omnes admittunt" (*Communicationes*, 21[1989], p. 48).

¹⁵⁰ KNEAL, "Physical and Juridic Persons," p. 76. C. O'Donnell states that besides civil emancipation, there is another possibility, "that is with the consent of their parents and guardians minors may acquire their own domicile, as was commonly taught in the pre-Code era. In fact a decision of the Sacred Congregation of the Council of February 21st, 1835 expressly confirmed this teaching, and the Rota admitted this teaching as certain [Decision

their legal domicile? If one were to examine closely the tenor of can. 105 §1, it would seem that they retain their legal domicile. The word "also" (*etiam*) could be interpreted to mean that emancipated minors can, in *addition* to their legal domicile, acquire a proper domicile. This would be certainly contrary to the very notion of emancipation.¹⁵¹ Therefore, some canonists maintain that with the civil emancipation and the acquisition of proper domicile, they lose the legal domicile of their parents or guardians, because they are no more subject to their authority.¹⁵² However, should persons continue to stay with their parents even after attaining the age of majority, their former legal domicile would naturally transform into their proper domicile.

Legal domicile of minors who are not civilly emancipated is not lost by departure even with the intention never to return. It is lost only when the subjection

coram SINCERO, 28 August 1911, in *SRR Dec*, 3(1911), pp. 445-446]. Moreover, since canon 93 [CIC/17] repeats the old law, the rule of interpretation set forth in canon 6, 2°, 3° bids us to interpret this canon from the authority of the old law and to respect the interpretation advanced by the approved authors of the time. Therefore, even after the promulgation of the Code of Canon Law [1917] a minor child with the consent of his parents and guardians may acquire his own domicile. This opinion is also upheld by post-Code authors as Wernz-Vidal, Ferrers, Michiels and Browne" (O'DONNELL, *The Marriage of Minors*, p. 119).

¹⁵¹ For example, Urrutia observes: "Si post infantiam quasi-domicilium acquirit, domicilium legale non amittit. Idem videretur ex tenore si, emancipatus, domicilium acquirit, quod est contra sensum emancipationis (iam sub iure CIC 1917, v.g. OJETTI, p. 55: '*cessante facto subiectionis potestati patris, ... nec patris domicilium retinet*')" (URRUTIA, *De normis generalibus*, p. 66).

¹⁵² See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, p. 125; DE PAOLIS, "Le persone fisiche e giuridiche," p. 338.

to the authority of parents or guardians ceases either by contracting marriage while a minor¹⁵³ or by reaching the age of majority.

3.3.7 Minors: Ascription to a Church *sui iuris* and Transfer

Membership in the Catholic Church arises out of the reception of valid baptism and in the case of non-Catholic baptism, entrance into full communion with the Catholic Church. There cannot be a "Catholicus vagus" because no one is ever "at large" in the Catholic Church, and everyone necessarily belongs to a Catholic Church *sui iuris*. The enrollment of a person in a specific autonomous Church is determined according to the provision of the law. Membership is a very important factor because it determines the hierarchy and the laws to which a person is subject.¹⁵⁴

3.3.7.1 Minors and ascription to a Church *sui iuris*

The position of minors with regard to membership is based on two general principles:¹⁵⁵ (i) Before they complete fourteen years of age, minors have no option

¹⁵³ Spouses have the obligation and right to maintain their common conjugal life, unless a lawful reason excuses them (can. 1151). Consequently, can. 104 states that spouses are to have a common domicile or quasi domicile. By reason of lawful separation or for some other just reason, each may have personal domicile or quasi-domicile.

¹⁵⁴ See A. MENDONÇA, *Interecclesial Legislation*, notes for the private use of the students, Ottawa, Faculty of Canon Law, Saint Paul University, 1992-1993, p. 43; J.D. FARIS, *Eastern Catholic Churches: Constitution and Governance According to the Code of Canons of the Eastern Churches*, New York, Saint Maron Publications, 1992, pp. 153 and 165; M. THÉRIAULT, "Canonical Questions brought about by the Presence of Eastern Catholics in Latin Areas in the Light of the 'Codex canonum Ecclesiarum Orientalium'," in *IE*, vol. 3, no. 1(1991), p. 208.

¹⁵⁵ As our focus is on minors, our comments will be restricted only to those matters in cann. 111 and 112, which are applicable to them.

but to belong to the Church of their parents as provided for in the canons.¹⁵⁶ (ii) Those to be baptized who have completed fourteen years of age can freely choose to be baptized in the Latin Church or another ritual Church *sui iuris*, and in this case they belong to that Church which is chosen.¹⁵⁷

3.3.7.2 Minors and transfer to another Church *sui iuris*

1. Transfer to another Church *sui iuris* (*Ecclesia rituali sui iuris*)¹⁵⁸ before the

¹⁵⁶ "A child of parents who belong to the Latin Church is ascribed to it by baptism, or if one or the other parent does not belong to the Latin Church and both parents agree in choosing that the child be baptized in the Latin Church, the child is ascribed to it by reception of baptism; but, if the agreement is lacking, the child is ascribed to the Ritual Church to which the father belongs" (*CIC/83*, can. 111 §1).

Canon 29 of *CCEO* is more detailed than *CIC/83*. It states: "§1. By virtue of baptism, a child who has not yet completed his fourteenth year of age is enrolled in the Church *sui iuris* of the Catholic father; or the Church *sui iuris* of the mother if only the mother is Catholic or if both parents by agreement freely request it, with due regard for particular law established by the Apostolic See.

§2. If the child who has not yet completed his fourteenth year is:

1° born of an unwed mother, he is enrolled in the Church *sui iuris* to which the mother belongs;

2° born of unknown parents, he is to be enrolled in the Church *sui iuris* of those in whose care he has been legitimately committed are enrolled; if it is a case of an adoptive father and mother, §1 should be applied;

3° Born of non-baptized parents, the child is to be a member of the Church *sui iuris* of the one who is responsible for his education in the Catholic faith."

¹⁵⁷ "Anyone to be baptized who has completed the fourteenth year of age can freely choose to be baptized in the Latin Church or in another Ritual Church *sui iuris*, and in this case the person belongs to that Church which is chosen" (*CIC/83*, can. 111 §2).

"Anyone to be baptized who has completed the fourteenth year of age can freely select any Church *sui iuris* in which he or she then is enrolled by virtue of baptism received in that same Church, with due regard for particular law established by the Apostolic See" (*CCEO*, can. 30).

¹⁵⁸ In the midst of the vehement dispute regarding the term (see *Communicationes*, 8[1976], pp. 81-84), the *Coetus specialis studii "De lege Ecclesiae fundamentalis"* decided to adopt the term *Ecclesia ritus sui iuris* (see *Communicationes*, 9[1977], p. 299;

age of fourteen years complete: Children ascribed to the Latin Church who have not yet completed the fourteenth year of age transfer automatically when both parents transfer to another Church *sui iuris*, or when the Catholic parent transfers in the case of a mixed marriage (can. 112 §1, 3°). In the case of Oriental Catholic children who have not yet completed fourteen years of age, where only one parent transfers to another Church *sui iuris*, such children transfer with the parent in question only if both parents agree (CCEO, can. 34); otherwise, the children continue to belong to the Church *sui iuris* in which they were ascribed. Thus, when parents transfer to another Church *sui iuris*, their children who have not completed their fourteenth year transfer *ipso iure* to the Church of their parents according to the provision of the Codes applicable to them.¹⁵⁹

This principle for the transfer of children below the age of fourteen years is meant to promote family unity and facilitate the religious education of the children. When the parents request permission to transfer they should include in the petition,

Communicationes, 12[1980], p. 31). However, CCEO has dropped *ritualis* from the term. During the drafting process of CCEO, the *coetus centralis* decided to adopt the expression *Ecclesia sui iuris*, because the word *ritualis* was found superfluous (see *Nuntia* 19[1984], p. 5). In the final analysis, the expression *Ecclesia ritualis sui iuris* in CIC/83 and *Ecclesia sui iuris* in CCEO signify the same reality.

¹⁵⁹ We can envisage exceptions to the norm of children following the Church *sui iuris* of their parents. For example, a minor below the age of fourteen years receives baptism and becomes a member of the Latin Church, while his parents are not yet baptized. Should his parents receive baptism subsequently and ascribe themselves in another Church *sui iuris*, their minor child does not transfer automatically his membership to the Church of his parents, either at this time, or in the future if parents transfer to some other Church *sui iuris*. Such a minor, it seems, would have to follow the procedure set out in the Code, if he intends to transfer to the Church *sui iuris* of his parents.

the names, dates of birth, reception of first Holy Communion, and confirmation, of all children under the age of fourteen years.¹⁶⁰

Those children who were automatically transferred to another Church *sui iuris* because of the transfer of their parents may return to their original Church any time after they have completed the fourteenth year of age.¹⁶¹ It seems that they need not follow the procedure for transfer. However, since returning to the original Church has juridic implications, this has to be done through a declaration before the pastor and two witnesses. This fact of return should also be noted in the baptismal register.¹⁶²

¹⁶⁰ See FARIS, *Eastern Catholic Churches: Constitution and Governance*, p. 172.

¹⁶¹ See *CIC/83*, can. 112 §1, 3°; *CCEO*, can. 34.

During its second session (9-12 December 1967) the *coetus* "De questionibus specialibus libri II" formulated the canon allowing minors below the age of fourteen years to transfer automatically with their parents to another Church *sui iuris* and permitting them to revert to their original Church only after they reached the *age of majority* (see *Communicationes*, 21[1989], pp. 125-126). However, the *coetus* "De populo Dei" in its meeting (18 October 1979), decided on the age of fourteen years complete for return to the original Church *sui iuris*, instead of the age of majority (see *Communicationes*, 12[1980], p. 76).

¹⁶² The following authors are of the opinion that the return to the original Church can be done through declaration:

"When the child who transferred membership by virtue of the transfer of parent(s) attains the age of fourteen, he or she is free to return to the original church at any time. (See also 83*CIC*, c. 112, §1, 3°).

Because it is a public act, a clear expression and record of the intention to transfer membership should be made (cc. 36-37)" (FARIS, *Eastern Catholic Churches: Constitution and Governance*, pp. 172-173).

"[...]when or after the child completes 14 years of age, the child can revert to its original Church, upon declaration (*CIC/83*, c. 112, §1, 3°; *CCEO*, cc. 34 and 36; the declaration is implied in the Latin Code but nevertheless necessary, because of the requirement of annotating the baptismal register of the child, cf. *CIC/83*, c. 535, §2; *CCEO*, can. 296, §2)" (DE FUENMAYOR, "The Canonical Status of Physical Persons," pp. 132-133).

2. Transfer to another ritual church after the age of fourteen years complete:

Children who have already completed their fourteenth year of age at the time of transfer of the parent or parents are governed by the norms of can. 112 §1, 1°, that is to say, they do not automatically transfer along with their parents and the law requires them to make the decision personally.¹⁶³ If they, do not make any decision, they are held not to have transferred to the Church to which their parents have moved. In other words, minors who have completed the age of fourteen years "may transfer with their parents if they wish, but they must sign the petition of declaration of acceptance of transfer together with their parent. If such children did not transfer with their parents, they may do so later by presenting a petition of their own with the annotation that they wish to transfer to the new Rite of their parents; they must go through all the formalities prescribed for transfer to another Rite."¹⁶⁴

"Compiuti tuttavia i 14 anni, hanno facoltà di ritornare liberamente alla Chiesa latina. A norma del can. 535, §2, il cambiamento di rito dev'essere debitamente annotato nel registro dei battesimi" (CHIAPPETTA, *Il Codice di diritto canonico*, p. 135).

¹⁶³ Prior to *CIC/83* and *CCEO*, children who had attained *legal puberty* could petition for transfer on their own. In other words, boys who had completed their fourteenth year and girls their twelfth year could present personally signed petitions for themselves (see *Cleri sanctitati*, can. 10; POSPISHIL, *The Law of Persons*, pp. 37-38; NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *Guidelines for the Transfer of Rite Cases*, approved by the Congregation for Oriental Churches on 19 December 1978, p. 2).

¹⁶⁴ MENDONÇA, *Interecclesial Legislation*, p. 61. According to *CIC/83*, can. 112 §1, 1° and *CCEO*, can. 32 §1, the only way to transfer validly to another Church *sui iuris* is with the consent of the Holy See. However, unlike *CIC/83*, *CCEO*, can. 32 §2 has a special provision for lawfully presuming the permission of the Holy See, which could be applied only to the members of the Eastern Churches and not to the members of the Latin Church.

The Pontifical Council for the Interpretation of Legislative Texts studied the *dubium* posed by *CIC/83*, can. 112 §1, 1° in relation to *CCEO*, can. 32 §1 (see *Communicationes*, 24[1992], p. 14). This *dubium* has been resolved through a rescript from the Supreme Pontiff which has determined that permission can be presumed as often as one of the Christian

Another possibility for minors to transfer to another Church *sui iuris* occurs when they contract marriage. The transfer requested at the time of or during the marriage through a legitimate declaration takes place by law itself.¹⁶⁵ In this situation, the intervention of the Holy See or the Ordinary is not necessary.¹⁶⁶

3.3.8 Legitimacy and Illegitimacy

The notion of legitimacy has a direct relationship between children and the marital status of their parents. This relationship has been mentioned in can. 1137, which states that children who are conceived or born of a valid or a putative marriage are legitimate. The canon speaks of two distinct moments: conception and birth. Similar to many civil laws, can. 1138 §2 provides a presumption with regard to conception and birth.¹⁶⁷

faithful of the Latin Church has petitioned for himself or herself the transfer to another ritual Church *sui iuris* which has its eparchy within the same territory, provided that the diocesan bishops of both dioceses agree with each other about it in writing (see *AAS*, 85[1993], p. 81). For a study on this receipt, see J. CANOSA, "La presunzione della licenza di cui al can. 112 §1, 1° del Codice di diritto canonico," in *IE*, vol. 5, no. 2(1993), pp. 613-631.

¹⁶⁵ Compare *CCEO*, can. 33 with *CIC/83*, can. 112 §1, 2°. According to *CCEO*, it is only the wife who is at liberty to transfer to the Church of her husband at the celebration of or during marriage. The husband belonging to an Oriental Church does not have this right. In contrast, in the *CIC/83*, either spouse enjoys the right.

¹⁶⁶ See THÉRIAULT, "Canonical Questions brought about by the Presence of Eastern Catholics in the Latin Areas," p. 212.

Before the marriage ceremony, the spouse wanting to change his or her rite signs the declaration of transfer to become effective at the time of exchange of marriage vows. The signing of the declaration must be witnessed by the pastor *ad quem* and two other witnesses. All three witnesses sign the document. The transfer becomes effective with the exchange of marriage vows (see MENDONÇA, *Interecclesial Legislation*, pp. 59-60).

¹⁶⁷ For short studies on legitimacy and legitimation in the revised Code, see E. GARCIA, "Legitimacy of Children in the New Codex," in *Philippiniana sacra*, 22(1987), pp. 242-269; *Id.*, "Legitimation of Children in the New Codex," in *ibid.*, pp. 383-402.

During the process of revision the question concerning the retention of the notion of legitimacy and illegitimacy was discussed at length. Some consultors suggested the retention of the distinction, while others favoured its suppression. The latter opinion argued that children should not be discriminated against on account of the faults of their parents, and that such discrimination does not reflect the Christian sentiments of justice and charity. Furthermore, whereas the civil laws of many countries do not accord any civil effects to illegitimacy and prefer to describe the offspring of unmarried parents as natural children, retention of the distinction between legitimate and illegitimate children in the Code would certainly create confusion and bewilderment. Moreover, it would adversely affect the reputation of children.¹⁶⁸

The revised Code does not acknowledge any juridic effect of illegitimacy, and thus avoids either depriving or diminishing the rights and capacities of illegitimate children. However, the Code retains the notion of illegitimacy, leaving the option open for particular laws to determine its application if there is a need.¹⁶⁹ Furthermore, the notion has been retained in order to emphasize the sanctity of marriage and to reiterate the moral distinction between legitimate marriage and illegitimate or irregular unions.

¹⁶⁸ See *Communicationes*, 5(1973), pp. 76-78; 10(1978), pp. 106-107; 22(1990), pp. 22-30.

¹⁶⁹ See *Communicationes*, 15(1983), p. 240; *1981 Relatio*, p. 264.

The notion of legitimacy and illegitimacy does have juridic relevance, because the Code provides the possibility of legitimation. According to can. 1139, illegitimate children can be legitimated either by the subsequent marriage of their parents, whether valid or putative, or by a rescript of the Holy See. As a result of legitimation, as far as the canonical effects are concerned, legitimated children are equivalent to legitimate children in all respects.¹⁷⁰ It is possible for the canonical notion of illegitimacy to have civil effects.¹⁷¹

Although the revised Code does not discriminate between legitimate and illegitimate children with regard to their capacity to exercise their rights, canonically they are distinct. The notion of illegitimacy, however, has the potential for affecting the reputation as well as the exercise of rights in the Church, should particular law within the Church give canonical effects to illegitimacy.¹⁷² In the case of parents

¹⁷⁰ See can. 1140. The notion of illegitimacy is not included in the *CCEO* and has no juridic relevance in the common law of the Eastern Catholic Churches. For the changes made during the revision process, see *Nuntia*, 10(1980), pp. 54-55; 15(1982), p. 89; 27(1988), pp. 9-10.

¹⁷¹ Princess Caroline of Monaco had invalidly contracted marriage. Consequently, the three children born of such an invalid marriage were illegitimate. Although illegitimacy has no effect on a child's standing in the Church, under Monaco's laws a child who is illegitimate according to Church law is ineligible for royal succession. The princess requested from the Holy See for a rescript of legitimation for her three children. On 23 February 1993, Pope John Paul II signed the rescript (see C. WOODEN, "Pope Deems Princess' Offspring Legitimate," in *National Catholic Reporter*, 16 April 1993, vol. 29, no. 24, p. 9).

¹⁷² In a diocese, where many couples live in invalid marriages, or cohabit, the diocesan bishop can make laws prohibiting illegitimate children from exercising certain offices in the parish, from membership in the parochial or diocesan associations, or from admission to the seminary, etc. Here, the law is not enacted to punish the innocent children, rather to act as a teacher of right conduct, a deterrant for deviant behaviour, and a guardian and promotor of common good.

failing or even refusing to enter a valid union, the only way the children can remedy the situation is through recourse to the Holy See for a rescript of legitimation, which could declare them equivalent to legitimate children as far as canonical effects are concerned. In these cases, the Holy See has an opportunity to show sensitivity and pastoral solicitude towards innocent children who might be otherwise burdened with the "stigma" of illegitimacy.

CONCLUSION

Vatican II and the postconciliar papal documents express a strong concern for the well-being of children and youth and for their right to proper education and religious upbringing. They clearly emphasize the role of parents, pastors, and teachers in the formation of minors, so that they can truly become the hope of the Church and of the world. On their part, children and youth have much to contribute to the sanctification of families and the mission of the Church. The effort to draw up and present a *Charter of the Rights of the Family* to all nations and the international organizations and her support to the *United Nations Convention on the Rights of the Child*, bears good testimony of the Church's solicitude for the interests of minors.

The question regarding the minors did not go untouched during the process of the revision of the Code. The *coetus* commissioned to deal with the relevant canons agreed to lower the period of minority in accordance with the general tendency of the civil codes. Besides, it proposed some changes to the canon on parental authority and the constitution of guardians. There was also some discussion on minors in relation to the age required for entering marriage, for voting in elections, and for being bound by penal sanctions, which we will be considering in the following chapter under particular issues.

The revised Code, in stating that all those who have not completed their eighteenth year of age are minors, has changed the definition of minor as expressed in the 1917 Code. In providing a new concept of minor, it has taken into account the prevalent tendency of civil legislations on the age of majority and minority. It expresses in clearer terms than the previous Code the norms regarding the exercise of rights and duties of minors, their subjection to the authority of parents and guardians, the appointment of guardians, the domicile and quasi-domicile with express reference to civil emancipation, and the ascription and transfer to another Church *sui iuris*. Moreover, by removing all the juridic effects from illegitimacy, it has not placed restrictions on the exercise of the rights of children born illegitimate and thus has demonstrated a pastoral sensitivity towards innocent children.

The revised Code grants a general status to minors, that is, they are subject to the authority of parents or guardians in the exercise of their rights with due regard for the exemptions provided for them by divine law and canon law. However, the

Code does not have a specific title on the obligations and rights of minors. Nevertheless, there are many canons scattered throughout the Code which allude to them in a specific manner. These specific rights and duties, the nature of their exercise has a relationship to their juridic status. Consequently, in the following chapter we will be looking into these rights and duties.

CHAPTER IV

OBLIGATIONS AND RIGHTS OF MINORS

INTRODUCTION

Every person baptized in the Catholic Church or received into it is bound by the obligations and enjoys rights proper to Christians (can. 96). These obligations and rights are a means of participation in the life and mission of the Church. They have both a personal and an ecclesial dimension, insofar as they contribute to the good of the individual and of the Church. Although everyone possesses equal obligations and rights, the capacity of each person to exercise them differs according to one's condition.

In the preceding chapter, we discussed how the Code differentiates physical persons according to their condition, principally in reference to age. On the basis of age, the Code classifies persons as minors and majors. Minors exercise their rights under the authority of their parents or guardians, with the exception of those rights which minors are entitled to exercise personally in virtue of canon law and divine law. In the same chapter, we analysed the general principles relating to minors, particularly those found in Book I of the Code.

In this chapter, our focus will be on those canons in the Code which specifically relate to the obligations and rights of minors. These canons refer to specific ages within the duration of minority, the capacity to exercise rights, the

manner of exercising them, exemptions from the authority of their parents or guardians, and the persons primarily responsible for the Christian formation and protection of the rights of minors.

First, the obligations and duties of minors will be considered within the context of the family. This will enable us to see who has the primary obligation and rights towards minors as well as the extent and the basis of their involvement. Second, the remainder of the chapter will be divided into sections according to the Books of the Code with an analysis of the canons which have immediate reference to our topic, particularly those which expressly refer to minors or to their age. The specific obligations and rights dealt with in the canons and the manner of exercising them will form the juridic content of their specific status. The chapter will conclude with a discussion on the question whether minority is a status or a condition.

4.1 MINORS WITHIN THE CONTEXT OF THE FAMILY

The Church situates the rights and welfare of each child in the context of the family. This means that "the Church cannot separate the rights of the family from the rights of the child. This reflects a distinctive philosophical and juridical position: a total ethical vision of child, family and marriage [...]"¹ Therefore, we need to take into account the intrinsic relationship between the rights and obligations of parents and those of children within the broader context of the family. Rights and duties are

¹ LOPEZ TRUJILLO, "The Church and the Rights of the Family," p. 468.

a kind of relationship, and they have a social dimension which finds a primary expression in the family.

Parental rights are a particular part of the rights of the family. But, they are inseparable from the rights of children, because they are directed to the good of each child. [...] Parents enjoy rights, but these rights have corresponding responsibilities. Parental responsibility for decisions and actions is essential in a natural law perspective.²

The Christian family has an important role to play within the Church. During the 1980 Synod of Bishops, it was with this in mind that a number of bishops asked specifically for a Charter of the Family which could be incorporated into the revised Code. During the revision of the Code, there were suggestions to include a separate section on family law. In response to these suggestions, during his address delivered to the *plenarium* on 21 October 1980, the President of the Commission, Cardinal Felici explained that despite the lack of a formal codified treatment of the family, the Code has many canons which deal directly or indirectly with the family and that these canons could be found throughout the Code with the exception of Book V. He also said that a separate section on the family would not be in harmony with the character of the Code and that there is no place for it in its systematic structure.³

² *Ibid.*, p. 471.

³ For a full text of the talk, see P. FELICI, "De iure familiae in schemate C.I.C.," in *Communicationes*, 12(1980), pp. 225-233. This talk was prepared by the President with the help of the Secretary, Castillo Lara.

Despite this explanation, E. Corecco deplors the fact that the family as the "domestic church" (a conciliar notion) does not appear in the Code.⁴ Although the Code does not provide a separate section on family law for the reasons explained during the revision process, the role of the family in the life of minors cannot nevertheless be discounted.⁵

4.1.1 Juridic Equality of Parents

Canon 1135 affirms the equality of rights and duties between the spouses in those matters which pertain to the partnership of conjugal life. Unlike can. 1111 of the 1917 Code which acknowledged the equality of spouses only in relation to their

⁴ See CORECCO, "Theological Justifications of the Codification of the Latin Canon Law," in *The New Code of Canon Law*, vol. 1, p. 75.

⁵ In its letter dated 19 October 1981, prot. no. 255/81, to the Commission for the Revision of the Code, the Pontifical Council for Family stated that the family needed to be given an adequate place in the Code, and so it proposed additions to cann. 1088, 1089 and 1090 of the *1980 Schema*. The *plenaria* discussed these suggestions on 26 October 1981. The Secretary, however, responded that without referring to the word "family" the Code has treated it adequately in its references to parents, spouses, children and marriage. Moreover, the word "family" is juridically imprecise as it is difficult to state what precisely comes under the term "family." Concerning the proposal to include the words, *ex quo procedit familia christiana tanquam Ecclesia domestica* in can. 1088, he added that this was not a juridic norm. The phrase, *ecclesia domestica*, can be understood only analogically, and therefore, would be ambiguous in the Code, a document in which words need a precise meaning (for a full discussion on this matter, see PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Acta et documenta Pontificiae Commissionis Codici iuris canonici recognoscendo: congregatio plenaria, diebus 20-29 octobris 1981 habita*, Città del Vaticano, Typis polyglottis Vaticanis, 1991, pp. 480-485).

A. Casiraghi claims that while marriage has been given a complete and systematic presentation, the term "family" appears only in two canons, and that too in relation to matrimony, that is, in cann. 1063 and 1152 (see A. CASIRAGHI, "Il diritto di famiglia nel nuovo Codice di diritto canonico," in *The New Code of Canon Law*, vol. 2, p. 844). Contrary to her finding, the word "family" in fact appears twenty times in the Code (see s.v. "Familia, ae" and "Familiaris, e" in OCHOA, *Index verborum ac locutionum Codicis iuris canonici*, p. 192).

right and obligation to acts proper to conjugal life, the revised Code emphasizes their equality in all aspects of the partnership of conjugal life. The principle of legitimate equality between spouses expressed in can. 1135, which can be deduced from cann. 1055-1056, concerns also the care of minors.⁶ The very nature of the task of bringing up children requires a harmonious cooperation and unity between the parents. As a consequence, this principle finds expression in canons relating to the domicile of spouses, as well as in the canons on the ascription and transfer to a Church *sui iuris*. Since parents are the common principle of generation and education of their offspring, the Code regards them as having common, yet equal obligations and rights towards their children.⁷

4.1.2 Foundation of Parental Obligations and Rights

The revised Code draws its inspiration from the conciliar document *Gaudium et spes* in providing the foundation of the obligations of parents.⁸ Canon 226 §2 echoes the teaching of the Council:

Because they have given life to their children, parents have a most serious obligation and enjoy the right to educate them; therefore Christian parents are especially to care for the Christian education of their children according to the teaching handed on by the Church.⁹

⁶ See *Communicationes*, 8(1978), p. 105; see also CHIAPPETTA, *Il matrimonio*, p. 346; CASIRAGHI, "Il diritto di famiglia nel nuovo Codice di diritto canonico," pp. 861-862.

⁷ See CASTILLO LARA, "La condizione e lo statuto giuridico del minore," p. 265.

⁸ See *GE*, no. 3.

⁹ "Parentes, cum vitam filiis contulerint, gravissima obligatione tenentur et iure gaudent eos educandi; ideo parentum christianorum imprimis est christianam filiorum educationem secundum doctrinam ab Ecclesia traditam curare" (can. 226 §2).

From the fact of generation there arises for the parents an obligation to take complete care of their children until they are capable of providing for themselves. This is a natural prolongation of generation, which goes beyond a merely biological act. Therefore, the continued assistance and help of parents is indispensable in the conservation and development of the human life that is born.¹⁰ This fact is illustrated in an expressive metaphor by St. Thomas: At first the child is not distinct from its parents as to its body, so long as it is enfolded within its mother's womb; and later on after birth, until it has the use of its free will, it is enfolded in the care of its parents which is like a spiritual womb.¹¹ This metaphor points out the intrinsic connection between generation and ongoing total care of children. The latter may be seen as the completion of the former.

4.1.3 Children's Rights Vis-à-Vis Parents' Rights

In a case of conflict between the rights of parents and those of their children, generally the latter are to be upheld. C. Lockhart and G. Franzwa rightly consider that life is not a voluntary experience from the perspective of children. Children's rights flow from a voluntarily assumed obligation on the part of parents. And this obligation restricts parental freedom to act in a manner that jeopardizes the healthy development of children.¹²

¹⁰ See CASTILLO LARA, "La condizione e lo statuto giuridico del minore," p. 265.

¹¹ See *Summa theologica*, II-II, q. 10, art. 12.

¹² See C. LOCKHART and G. FRANZWA, "Liberalism and the Rights of Children," in *Public Affairs Quarterly*, vol. 4, no. 2(1990), p. 169.

Sometimes there may be instances where parents may have to choose between two rights so as to favour the best interest of their children. For an example, take a situation of conflict between a minor's right to privacy and his or her right to be cared for by parents. In this example, there is another question concerning the right to privacy of minors vis-à-vis the obligation of parents or guardians to protect their minor children from harm. When we affirm that children have the right to be cared for by their parents with the corresponding obligation on the part of parents to take care of their children, we must recognize that in the fulfillment of their duty, parents or guardians may sometimes "invade their children's privacy. When such paternalistic invasions are permissible, however, this is not simply because children are deficient to act rationally. In part it is because children have certain rights which may be violated if their privacy is *not* invaded."¹³ In a conflict of rights, certain rights take precedence over others.

The Church has addressed situations where there is a conflict between children's rights and the individual rights of their parents, such as in the case of a parental separation or a declaration of nullity of a marriage. The welfare of the child can be a ground for a legal separation of the parents. Therefore, in the best interests of children, can. 1153 §1 states that, in the event of grave danger of soul and body to the children from one of the parents, the spouses may separate legitimately. This separation may last as long as the reason lasts. Besides, can. 1154 declares that when

¹³ P. MONTAGUE, "A Child's Right to Privacy," in *Public Affairs Quarterly*, vol. 2, no. 1(1988), p. 30.

a separation of spouses has taken place, appropriate provision must be made for the care and upbringing of children. This canon deals with the obligation of parents to look after the welfare of their children not only during their common life but also during their separation.

The sensitivity of the Code towards minors is apparent in the introduction of a new canon within the norms governing matrimonial processes. Canon 1689 demands that the judicial sentence must remind the parties of their moral and even civil obligations towards each other and towards the support and education of their children. Because the children have the right to appropriate support and education, the parents remain duty-bound to this fundamental right of their children, even in cases where the marriage has been declared null. As an instrument of justice, the judicial decision should uphold the rights of minor children by reminding the parents of their obligation.¹⁴ Even procedural law takes into consideration the protection of minor's rights vis-à-vis the rights of parents and guardians in can. 1478 which specifies that if the judge considers that the rights of minors are in conflict with the rights of the parents, guardians, or curators, or that these latter cannot sufficiently protect them, then the judge should assign another guardian or curator.

Having placed the obligations and rights of children within the context of the family, we now turn our attention to their obligations and rights within the Church, that is, those which have baptism as their foundation.

¹⁴ See P. BAILLARGEON, *The Canonical Rights and Duties of Parents in the Education of Their Children*, J.C.D. diss., Ottawa, Saint Paul University, 1986, pp. 337-338.

4.2 THE PEOPLE OF GOD

4.2.1 Equal Dignity - Diverse Capacity

There exists among all the Christian faithful a true equality with regard to dignity and activity. Incorporated in Christ and constituted as the people of God by baptism, the faithful share in the three-fold mission (priestly, prophetic, and royal) of Christ.¹⁵ The equality of all the faithful also concerns them as persons in the Church, that is, as subjects of rights and duties.¹⁶ All members of the Church, whether they are infants or adults, clerics or lay persons are equal insofar as they all have the same rights and obligations as *christifideles*.

The *principle of equality* coexists with the *principle of variety* in the Church. The principle of variety refers to the different ways persons are called upon to participate in the mission of the Church according to their condition. The age of minority is one of the several conditions stated in the Code.¹⁷ This condition takes into account the capacity of persons. While minors have a right to equal dignity as *christifideles*, their obligations correspond only to their capacity and are determined by the law.

¹⁵ See cann. 208; 204 §1.

¹⁶ See J. HERVADA, "Christ's Faithful," in *Code of Canon Law Annotated*, p. 191.

¹⁷ Some of the conditions are good standing in the Church (full communion, absence of sanctions as in can. 96); basic juridic conditions as determined by age, domicile, and so forth as delineated in cann. 97-112; the condition of a cleric, lay, and religious (can. 207).

4.2.2 Proper Ordinary, Parish and Pastor

Both through domicile and quasi-domicile persons can acquire their own parish priest and Ordinary.¹⁸ In addition, wherever personal parishes or dioceses are established, persons can acquire membership in them according to the provision of particular law.¹⁹ With the acquisition of a proper parish and pastor, all Christ's faithful have the right to seek assistance from their pastors, especially in matters relating to the word of God and the sacraments.²⁰

The law provides minors who have completed the seventh year of age with the right to acquire a quasi-domicile; moreover by the law itself, all minors have the domicile and quasi-domicile of their parents or guardians (can. 105 §1). This implies that minors could have a choice in the selection of a parish and a pastor for their catechetical instruction, sacramental preparation, and celebrations. Their parents or guardians can assist them in making that choice.

Pastors and parents should encourage and provide opportunities for minors to participate actively in parish liturgies, associations, and other activities. Minors

¹⁸ See can. 107 §1.

¹⁹ Generally membership in a personal parish is obtained by registration. Although, minors would be automatically enrolled in the parish of their parents, taking into account the canonical norms in analogous situations, such as, transfer to another Church *sui iuris*, it is opportune that particular laws provide for minors who have completed their fourteenth year of age to register on their own.

²⁰ See can. 213.

have a tremendous spiritual capacity.²¹ Therefore, all those dealing with them should act as catalysts in promoting their spiritual growth. Minors should be given opportunities and encouragement to participate in the various parochial and diocesan activities. In accord with the particular law of the diocese, minors could be given proportional representation in the diocesan pastoral council (can. 512), the parish pastoral council (can. 536), and in the diocesan synod (can. 463).²² Besides, they can be installed on a stable basis in the ministries of lector and acolyte, provided their age and qualifications meet the requirements of particular law; however, as a rule, episcopal conferences determine the age of majority as the minimum age for installation of ministers on a stable basis.²³ Nonetheless, minors with requisite qualities can fulfil the function of lector during liturgical actions by temporary deputation; likewise they can fulfil the functions of commentator, acolyte, cantor, altar server, or other functions in accord with the norm of law.²⁴

²¹ Marian literature is replete with examples of Mary's apparitions to children and how these children have spread the message.

²² See CASTILLO LARA, "La condizione e lo statuto giuridico del minore," p. 274.

²³ See can. 230 §1.

²⁴ See can. 230 §2. At its meeting of 30 June 1992, the Pontifical Council for the Interpretation of Legislative Texts examined the *dubium*: "Utrum inter munera liturgica quibus laici, sive viri sive mulieres, iuxta C.I.C. Can. 230 §2, fungi possunt, adnumerari etiam possit servitium ad altare." The following response was given: "Affirmative et iuxta instructiones a Sede Apostolica dandas." On 11 July 1992, Pope John Paul II confirmed this decision and ordered its promulgation (see CONGREGATION FOR DIVINE WORSHIP AND SACRAMENTS, Letter to the Presidents of the Episcopal Conferences, 15 March 1994, Prot. no. 2482/93).

4.2.3 Minors and Associations

The Christian faithful have a right to establish and direct associations. They are encouraged to promote through associations the Christian life, worship, teaching, and vocations. These associations should serve pious and charitable purposes.²⁵ The Code encourages the faithful to join associations, especially those which have been established, praised, or recommended by the competent ecclesiastical authority.²⁶ Those who are validly received into an association and not lawfully dismissed from it enjoy the rights and privileges, indulgences, and other favours granted to that association.²⁷ Are minors eligible to be members of such associations?

The admission of members into associations depends on the law and the statutes of each association.²⁸ The statutes determine the age and other requisites of eligibility, with due regard for the nature of the particular association and the types or the grades of membership offered. Generally speaking, minors who have not attained the use of reason are not eligible for membership.²⁹

²⁵ See cann. 215; 299 §1.

²⁶ See can. 298 §2.

²⁷ See can. 306.

²⁸ See can. 307 §1.

²⁹ Can children before the age of reason be ascribed to associations of the faithful? The commentators on the 1917 Code discussed this question at length. According to some authors, the provision of can. 693 §3 of *CIC/17*, which stated that absent members should not be enrolled as members of an association constituted as a juridic person; and those present must be knowing and willing (*scientes et volentes*), - would exclude infants below the age of

What does the revised Code say about the capacity of minors to vote? Canon 167 §1 of the 1917 Code specified the categories of persons who were ineligible to vote. Among the persons legally incapable of casting a vote were those persons who were incapable of human acts and those who were *impuberes*. The former category has been retained in can. 171 §1, 1°, while the latter has been eliminated from the revised Code. There was much deliberation during the revision process to arrive at a decision to remove the reference to *impuberes* or minors.³⁰ In the *relatio* of 1981 a decision was noted, not to deprive minors of their right to vote, if they were members of a council or of an association. In addition to it, the determination of the age of persons as regards their eligibility to vote was left to the particular laws and

reason. Others had a contrary opinion, on the ground that some confraternities, for example, the Holy Childhood Association, enrolled infants (see BOUSCAREN, ELLIS and KORTH, *Canon Law: A Text and Commentary*, pp. 367-368; ABBO-HANNON, *The Sacred Canons*, vol. 1, p. 698).

For more information on various archsodalities, confraternities, and associations which enrol children, see S. DE ANGELIS, *De fidelium associationibus: tractatus ratione et usu digestus*, Neapoli, Pontificius Editor, 1959, vol. 2.

³⁰ During its meeting on 25-28 March 1969, the *coetus* changed the wording of can. 167 §1, 2° from *impuberes* to *minores quattuordecim annorum* (see *Communicationes*, 21[1989], p. 188). During the following session, one consultor suggested raising the age. He recalled that the law concerning religious required twenty one years of age for their perpetual profession. The Secretary suggested the *terminus* of sixteen years on the basis of the age required for temporary religious profession (see *ibid.*, pp. 220, 238). At the meeting of 14-18 February 1972, the age was raised from sixteen to eighteen (see *Communicationes*, 22[1990], p. 87). During the 1980 meeting, the *coetus* adopted the phrase, *aetate minor*, instead of, *minores duodeviginti annorum* (see *Communicationes*, 23[1991], p. 257). The 1980 Schema incorporated this change in can. 168 §1, 2° (see 1980 Schema, p. 35).

statutes of associations or councils.³¹ As a result, the Code does not restrict minors in their ability to cast votes in elections.³²

4.2.4 Communion with the Church

Every Christian faithful has an obligation to maintain communion with the Church.³³ Regardless of this obligation, some persons, in fact, reject the Catholic faith,³⁴ and leave the Church by a formal act.³⁵ Persons can also defect from the Church by way of heresy, apostasy, and schism.³⁶ The failure to maintain ecclesial communion has juridic consequences.³⁷ The question of defection from the Church becomes complex when it touches minors. Are minors capable of leaving the Church by a formal act, and if the answer is yes, at what age? What about minors who, being

³¹ The *1980 Schema* stated that minors were ineligible to vote. Cardinal König suggested the addition of the clause *salvo iure particulari* after *aetate minor*, because many diocesan statutes prescribed a lower age to vote. In response to this proposal, the Secretary suppressed the category of *aetate minor*. He gave the reason: "Revera si sunt membra collegii, non videtur qua de causa iure suffragandi privandi sunt. Norma potest semper in statutis inseri" (*1981 Relatio*, pp. 44-45; *Communicationes*, 14[1982], pp. 152-153).

³² Those who notoriously defect from communion with the Church are legally incapable of casting votes in canonical elections. The phrase "defection from the Church" encompasses apostasy, heresy and schism. The canon does not make a distinction between defection and the latter delicts. Hence, according to the legal maxim, *ubi lex non distinguit, nec nos proinde distinguere debemus*. Canon 171 §1 is an incapacitating law (see can. 10) and not a penal one imposing a penalty (e.g., can. 1364 §1). Therefore, it applies to all persons, including minors.

³³ See can. 210.

³⁴ See can. 1071 §4, 1°.

³⁵ See cann. 1086; 1117.

³⁶ See cann. 751; 1364 §1.

³⁷ See cann. 149 §1; 171 §1, 4°; 194 §1, 2°; 316 §1 & §2; 694 §1, 1°; 701; 729; 746; 1007; 1041, 2°; 1044 §1, 2°; 1071 §1, 4°; 1086 §1; 1184 §1, 1°; 1364 §1.

dependent upon their parents or guardians, are constrained to follow them, when they join a non-Catholic church or religion?

Infants are baptized in the Catholic Church or received into it on the will or decision of their parents or guardians. The fundamental requirement in cases of infant baptism is that there is a well-founded hope that these infants will be raised in the Catholic faith. At baptism, children are automatically ascribed to the Church *sui iuris* of their parents or guardians. Those who have not completed their fourteenth year of age are automatically transferred to the new Church of their parents when the latter transfer to another Church *sui iuris*. However, the norms regarding the transfer cannot be applied to defection from the Church. The former refers to movement within the Church, while the latter concerns movement out of the Church. The theological as well as the juridic implications of transfer within the Church and those of defection from the Church are totally different.

Formal defection from the Church has a specific and personal nature. Unless minors have manifested their intention, the defection of their parents or guardians does not necessarily constitute defection on their part. In other words, minors' rebaptism or registration in other churches or ecclesial communities or other religions may not constitute formal defection on their part, unless there was clear evidence of their intention to *leave* the Church. Minors, who are no longer infants, may even positively intend to join the church or religion of their parents but without intending to leave the Catholic Church. The *intention to join* a new church, ecclesial community, or other religion alone without the *intention to leave* the Church does not

constitute formal defection. However, sometimes, regular attendance at worship, rebaptism, or registration in other churches or communities after one has attained the age of reason can provoke a presumption towards defection. In a recently reported marriage case, a child of seven and a half years of age has been presumed to have defected from the Church when he was "rebaptized" or "dedicated" in a Protestant assembly along with his parents.³⁸

It seems possible to presume that minors who have sufficient use of reason, have formally left the Church, if they knew sufficiently what it meant to defect from the Church at the time and did so with full freedom, and if there is proof of this act in the form of a public document or their rebaptism or registration in a non-Catholic or non-Christian religion.³⁹ The situation of minors, who are under the authority of

³⁸ A response from the Apostolic Pro-Nuncio of the United States to a query from a certain Judicial Vicar concerns the possibility of formal defection by a seven and half year old child who was re-baptized in the Assembly of God. The question was raised in order to determine the validity of a marriage of the person concerned, with a protestant, contracted without dispensation from the canonical form. The response was: "Despite his relatively early age, and the norms of the Assembly of God Church notwithstanding, the presumption of the law accounts Mr. Jones responsible for his actions in 1965 (see Canons 12 and 745 in the 1917 Code, which are repeated in Canons 11 and 852 in the 1983 Code). Thus, unless Mr Jones can substantiate his claims that he never intended to embrace membership in the Assembly of God Church - that his actions belied his intentions - then it seems that it must be presumed that his break with the Catholic Church was formal" (APOSTOLIC PRO-NUNCIO, Private Response, 24 March 1989, in *Roman Replies and Advisory Opinions, 1989*, p. 19).

In this case, the Pro-Nuncio argues for the validity of marriage in accordance with can. 1060 and *presumes* defection. In this respect, the reply lacks a broad application of canonical principles and interpretation regarding the question of defection.

³⁹ According to can. 1364 §1, an apostate from the faith, a heretic or a schismatic incurs *latae sententiae* excommunication. However, minors do not incur this penalty.

For a study on formal defection, see P.J. COGAN, *The Understanding of Defection in the 1983 Code of Canon Law*, J.C.D. diss., Ottawa, Saint Paul University, 1990, xiii-259p.; A. STENSON, "The Concept and Implications of the Formal Act of Defection of Canon 1117," in *SC*, 21(1987), pp. 175-194.

their parents or guardians, and therefore, naturally follow their parents even when the latter formally leave the Church differs from the case of a civilly emancipated minor formally joining another church or religion. In the former case, presumption is in favour of non-defection from the Church, and in the latter, presumption is towards defection.

4.2.5 Choice of State in Life

All Christ's faithful have the right to be free from any kind of coercion in choosing their state in life.⁴⁰ Minors who meet the requirement of law in the choice of a particular state in life, are not bound by the authority of parents in doing so, even though they should seek their guidance. In addition to the freedom of choice they enjoy, we need to look into whether minors are capable of entering the marital,⁴¹ religious, or clerical state.

Religious state: According to can. 643 §1, 1°, whoever has not completed the seventeenth year of age is invalidly admitted to the novitiate. D. J. Andrés states that the rationale for this specific age-requirement has its basis in the logic and internal cohesion of the canonical system. Besides the required age, admission to the novitiate requires a suitable disposition and sufficient maturity to undertake the life proper to the institute (can. 642). It would be preposterous to presuppose these requirements in a person before the age of seventeen years. The completion of the

⁴⁰ See can. 219.

⁴¹ The marriage of minors is treated under "Obligation and Right to Sacraments."

seventeenth year of age for admission into the novitiate is applicable for all religious institutes under the pain of invalidity. This applies even for those institutes which have a two year novitiate. The first twelve month period would be considered as those ones prescribed by the Code and the additional months by the proper law of the institute. The entire period of novitiate should to be taken as one entity. As a consequence, if the first twelve month period is invalid, consequently, the additional period prescribed by the institute can be regarded also as invalid.⁴² Each institute, by proper law, may require a suitable age for admission. This norm should take into account the culture, relative age of maturation, and the demands of the life in the institute. In addition to the requirement of can. 643 §1, an institute's own law can constitute other impediments even for the validity of the admission (can. 643 §2). However, because the minimum age has been determined by the Code, proper law cannot lower the age but only prescribe a higher age for validity or liceity.

The act of religious profession incorporates a person into the religious institute and thereby grants one the status of a religious.⁴³ According to can. 656, 1° of the revised Code, a person cannot validly make religious profession before the

⁴² See D.J. ANDRÉS, *Il diritto dei religiosi*, Roma, Commentarium pro Religiosis, 1984, pp. 208-209.

Chiappetta holds a different opinion and states that wherever the proper law of the institutes prescribes two years of novitiate (can. 648 §3), candidates who have completed their sixteenth year can be admitted, on condition that the canonical novitiate is assigned to the second year: "Nel caso che, per diritto proprio si stabilisca per il noviziato un periodo di due anni (can. 648 §3), il candidato può essere ammesso anche a 16 anni compiuti, a condizione che al noviziato canonico sia destinato il secondo anno, e a quello aggiuntivo il primo" (CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, p. 740).

⁴³ See can. 654.

completion of the eighteenth year of age.⁴⁴ Therefore, it seems obvious that minors cannot acquire the status of religious.⁴⁵

Clerical state: A person cannot enter into the clerical state before he has completed his twenty third year of age.⁴⁶ The choice of this state, therefore, does not pose any problem as far as one's subjection to the authority of parents is concerned, because the law does not envisage the possibility of having clerics who are minors. As for admission to the seminary, the Code does not provide any explicit norm; therefore, it is reasonable to argue that in the choice of entering the seminary minors are not subject to the authority of their parents or guardians.⁴⁷

4.3 THE TEACHING FUNCTION OF THE CHURCH

4.3.1 Parental Obligations and Rights

The procreation and education of children belong to the objective ends of marriage (can. 1055 §1), and therefore, they constitute an obligation freely assumed

⁴⁴ According to can. 721 §1, 1°, one who has not yet attained majority cannot be validly admitted to the initial probation into secular institute. The same is true with regard to admission into a society of apostolic life (see can. 735 §2).

⁴⁵ The only exception would be a person obtaining a dispensation from the Holy See to make religious profession before the age of majority. However, it is difficult to see any justifiable reason for seeking this dispensation (see ANDRÉS, *Il diritto dei religiosi*, p. 290).

Religious profession at the point of death seems to be still permitted to novices. This profession has no juridic effects, only a spiritual one (see SACRA CONGREGATIO DE RELIGIOSIS, Declaration, 30 December 1922, in *AAS*, 15[1923], p. 156-158). In this case, the person does not obtain the juridic status of a religious.

⁴⁶ See can. 1031 §1

⁴⁷ See CASTILLO LARA, "La condizione e lo stato giuridico del minore," p. 273.

by parents. This obligation to promote the good of children is described in can. 1136 as follows: "Parents have the most serious duty and primary right to do all in their power to see to the physical, social, cultural, moral and religious upbringing of their children."⁴⁸ According to can. 975, such an education comprises an integral formation of the child.

Since a true education must strive for the integral formation of the human person, a formation which looks toward the person's final end, and at the same time toward the common good of societies, children and young people are to be so reared that they can develop harmoniously their physical, moral and intellectual talents, that they acquire a more perfect sense of responsibility and a correct use of freedom, and that they be educated for active participation in social life.⁴⁹

The greater number of canons on the role of parents in regard to the education of their children are found in Book III of the revised Code. These canons reiterate the duty of parents to form their children by word and example, in faith and in Christian living.⁵⁰ Christian parents and those who take their place have the duty and right to choose those means and institutions which in their local circumstances

⁴⁸ "Parentes officium gravissimum et ius primum habent proles educationem tum physicam, socialem et culturalem, tum moralem et religiosam pro viribus curandi" (can. 1136).

⁴⁹ "Cum vera educatio integram persequi debeat personae humanae formationem, spectantem ad finem eius ultimum et simul ad bonum commune societatum, pueri et iuvenes ita excolantur ut suas dotes physicas, morales et intellectuales harmonice evolvere valeant, perfectiorem responsabilitatis sensum libertatisque rectum usum acquirant et ad vitam socialem active participandam conformentur" (can. 795).

⁵⁰ See can. 774 §2.

can best provide for a Catholic education of their children.⁵¹ They are to send their children to those schools in which Catholic education is provided.⁵²

The gravity of the obligation of parents and those who take their place regarding the children's baptism and Catholic education is stressed by the prescription of a canonical penalty for their negligence. According to can. 1366: "Parents and those who substitute for parents are to be punished with a censure or another just penalty if they hand their children over to be baptized or educated in a non-Catholic religion."⁵³

4.3.2 Obligation and Right of Minors

All the faithful have the obligation and the right to acquire knowledge of Christian doctrine, according to each one's capacity and condition. This knowledge should enable them to live, proclaim and defend their faith, and assist them in assuming their role in the Christian apostolate.⁵⁴ Moreover, after attaining the use of reason, they should consider it their responsibility to prepare themselves for the reception of the sacraments with proper catechesis. In the case of children, when parents and pastors provide them with proper formation in doctrine and the sacraments, children have a grave obligation to receive such a formation. These

⁵¹ See can. 793 §1.

⁵² See can. 798.

⁵³ "Parentes vel parentum locum tenentes, qui liberos in religione acatholica baptizandos vel educandos tradunt, censura aliave iusta poena puniantur" (can. 1366).

⁵⁴ See can. 229 §1.

obligations and rights are mutual, consequently, parents and children have a coresponsibility towards their fulfilment.

4.4 THE SANCTIFYING FUNCTION OF THE CHURCH

4.4.1 Parents and Sacramental Preparation

The obligation of parents towards their children in relation to the sacraments is clearly expressed in Book IV of the revised Code. Parents are obliged to see to it that infants are baptized within the first weeks after birth.⁵⁵ They are to take care that a name foreign to Christian sentiment is not given to their children.⁵⁶ They have a duty to help their children to receive the sacrament of confirmation at the appropriate time.⁵⁷

Canon 914 states that "it is the responsibility, in the first place, of parents and those who take the place of parents as well as of the pastor" to see to it that children are properly prepared for the reception of first confession and first Communion. The role of the pastor would be to ensure that the children are in fact prepared and do have the appropriate knowledge. Therefore, F. Morrissey suggests:

Since it is the parents who know their children best, they should be the persons in the privileged position to determine whether or not their children are ready for confession and Eucharist. Of course, a child could not be forced to approach these sacraments against its will, even if the parents or the parish priest wanted it to do so, because the

⁵⁵ See can. 867 §1.

⁵⁶ See can. 855.

⁵⁷ See can. 890.

canon is speaking of children who have reached the use of reason, and who thus have some responsibility for their actions.⁵⁸

Recent catechetical authors and child psychologists have stressed the primary role of parents in the sacramental life and experiences of children. This has emphasized parental involvement in the sacramental preparation of their children.⁵⁹ The cooperation of parents with pastors, educators, and other collaborators, besides helping them in fulfilling the parental responsibility, will also promote coresponsibility in the Church, particularly in the sacramental life of minors.

4.4.2 Obligation and Rights of Minors to Sacraments

4.4.2.1 Baptism

Every human being not yet baptized is capable of receiving baptism.⁶⁰ The norms governing baptism are different for infants and adults. As regards the prescriptions on baptisms, the Code defines the term "adult" as those who have attained the use of reason and are no longer infants, that is, they have completed seven years of age.⁶¹ The right to baptism is inseparably linked to the duty of preparation for this sacrament on the part of parents whose infant children are to be

⁵⁸ F.G. MORRISEY, "The Rights of Parents in the Education of Their Children," in *SC*, 23(1989), pp. 442-443.

⁵⁹ See W.J. TOBEN, "The Rights and Obligations of Parents with Reference to the Religious Formation of Their Children," in *Ius populi Dei: miscellanea in honorem Raymundi Bidagor*, Roma, Università Gregoriana Editrice, 1972, vol. 3, pp. 285-286.

⁶⁰ See can. 864.

⁶¹ See can. 852 §1.

baptized and on the part of the adults who desire baptism. As regards infants, it is the duty of Catholic parents to see to their baptism.⁶²

Adults wishing to receive baptism are to be admitted to the catechumenate.⁶³ As catechumens, because of their explicit desire to be incorporated into the Church, they are joined in a special way to the Church, which cherishes them as its own, and accords them various privileges.⁶⁴ Therefore, all catechumens, irrespective of their age, are entitled to enjoy the privileges accorded to them by law.

The situation of adults who are no longer infants, but are still minors is unclear in regard to the exercise of their right to baptism. This is particularly so in light of the *Rite of Christian Initiation of Adults* which states that children who have attained the use of reason and are of catechetical age

seek Christian initiation either at the direction of their parents or guardians or, with parental permission, on their own initiative. [...] they cannot yet be treated as adults because, at this stage of their lives they are dependent on their parents or guardians and are still strongly influenced by their companions and their social surroundings.⁶⁵

The consent of parents in this situation should not to be interpreted as a restriction on the right of children to baptism; rather it must be seen within the larger context of the right of religious freedom enjoyed by the family to organize its religious

⁶² See cann. 851 §2; 867 §1; 868.

⁶³ See can. 851, 1°; 865 §1.

⁶⁴ See can. 206.

⁶⁵ *Rite of Christian Initiation of Adults*, no. 252, in *The Rites of the Catholic Church*, Study Edition, New York, Pueblo Publishing Company, 1990, vol. 1, p. 170.

life under the control of parents.⁶⁶ According to C. J. Errázuriz, this right must be harmonized with the autonomy of minors in spiritual matters as provided in cann. 98 §2 and 1478 §3. Hence, Errázuriz thinks that the canonical norm of the age of fourteen years laid down in analogous situations (e.g., can. 111 §2) can constitute a reasonable rule for the exemption of minors from the requirement of parental consent for the reception of baptism.⁶⁷

The baptism of adults, at least of those who have completed their fourteenth year of age, is to be referred to the diocesan bishop so that it may be conferred by him, if he judges it expedient.⁶⁸ Canon 866 stipulates that, unless there is a grave reason, adults who are baptized must be confirmed immediately after baptism and they should participate in the celebration of the Eucharist and receive Communion.

4.4.2.2 Confirmation

According to can. 891, the sacrament of confirmation is to be conferred on the faithful at about the age of discretion, unless the conference of bishops has decided on a different age, or if there is danger of death or in the judgement of the minister a grave reason suggests otherwise. The canon retains the general practice of the

⁶⁶ See *DH*, no. 5.

⁶⁷ See C.J. ERRÁZURIZ, "Il battesimo degli adulti come diritto e come causa di effetti giuridico-canonici," in *IE*, vol. 2 no. 1(1990), pp. 10-11.

Canon 900 §1 of *CCEO* states that one who has not yet completed his or her fourteenth year should not be received into full communion with the Catholic Church if the parents are opposed to it.

⁶⁸ See can. 863. Including the *1980 Schema*, the canon prescribed the age as sixteen years (see *Communicationes*, 13[1981], p. 221; 15[1983], p. 180). But in the *1982 Schema* it was reduced to fourteen years (see *1982 Schema*, can. 863, p. 159).

Latin Church to administer the sacrament to children at the age of discretion;⁶⁹ however, it admits several exceptions for a lower or a higher age limit. The canon "leaves to the episcopal conferences the liberty to determine, if it so chooses, a common age, to be established as the general practice in the country, while keeping in mind the obligation of the faithful to receive the sacrament of confirmation 'tempestive' (cf. c. 890)."⁷⁰ Therefore, minors certainly can receive this sacrament at the age of discretion, but in order to exercise their right legitimately, they have a duty to make use of the means and opportunities their parents and pastors provide in preparation for its reception.

4.4.2.3 Eucharist and Holy Communion

Every baptized person who is not forbidden by law may be and must be admitted to Holy Communion (can. 912). Canon 913 §1 deals with the communion of children in normal circumstances. It states:

For the administration of the Most Holy Eucharist to children, it is required that they have sufficient knowledge and careful preparation

⁶⁹ For more on this issue, see M.J. BALHOFF, "Age for Confirmation: Canonical Evidence," in *The Jurist*, 45(1985), pp. 549-587; ID., *The Legal Interrelatedness of the Sacraments of Initiation: New Canonical Developments in the Latin Rite from Vatican II to the 1983 Code of Canon Law*, Canon Law Studies, no. 511, Washington, DC, The Catholic University of America, 1984, vi-298p.; L.D. BALQUIEDRA, "The Right Age for the Reception of Confirmation," in *Boletín eclesástico de Filipinas*, 62(1986), pp. 302-309.

⁷⁰ CONGREGATION FOR BISHOPS, Letter, 26 November 1991, Protocol no. 296/84, in *Roman Replies and Advisory Opinions*, 1992, p. 22.

so as to understand the mystery of Christ according to their capacity, and can receive the body of the Lord with faith and devotion.⁷¹

The canon stipulates two conditions for the administration of Communion to children; and they are - sufficient knowledge and adequate preparation. The canon does not establish "specific age for the *use of reason*. The determining factor is the child's mental development. It must be remembered, however, that c. 97, §2, establishes a presumption of the use of reason at the age of seven years; therefore, this age must be considered suitable unless the specific circumstances prove otherwise.⁷² Here, one may recall that many Oriental Churches, both Catholic and non-Catholic, give Communion to infants. There seems to be no doubt that the requirement of the use of reason for the reception of Communion is one of merely ecclesiastical law.⁷³ In view of the right of the baptized to receive the sacrament, should there be a doubt about the attainment of the use of reason or adequacy of preparation, that doubt should be resolved in favour of the child's receiving Communion.⁷⁴

⁷¹ "Ut sanctissima Eucharistia ministrari possit pueris, requiritur ut ipsi sufficienti cognitione et accurata praeparatione gaudeant, ita ut mysterium Christi pro suo captu percipiant et Corpus Domini cum fide et devotione sumere valeant" (can. 913 §1).

⁷² E. TEJERO, "The Sanctifying Office of the Church," in *Code of Canon Law Annotated*, pp. 586-587.

⁷³ See W.H. WOESTMAN, *Sacraments: Initiation, Penance, Anointing of the Sick: Commentary on Canons 840-1007*, Ottawa, Faculty of Canon Law, Saint Paul University, 1992, p. 129.

⁷⁴ See J.M. HUELS, "The Most Holy Eucharist," in *CLSA Commentary*, p. 652.

There are studies documenting the spiritual and religious capacities of children between the ages of three and six. Besides disclosing the capacity of children to experience the spiritual and to pray, these studies demonstrate that their mysterious knowledge in regard to God is marvellous. Children can have an awareness of religious and sacred feelings, and

4.4.2.4 The Sacrament of Penance

Canon 914 obliges the parents and pastors to ensure that children "who have reached the age of reason are correctly prepared and are nourished by the divine food as early as possible, preceded by sacramental confession." There has been a lot of discussion on the obligation of children to make sacramental confession before their first Communion.⁷⁵ The mind of the Holy See seems to be against introduction of any new practices which deviate from the traditional practice of reception of the sacrament of penance before receiving the first Communion.⁷⁶ It appears that the canon addresses the pastoral practice which is considered normative in the Church.⁷⁷ A private response from the Holy See states that "it must be remembered that no one may be compelled to receive a sacrament [...] they are to be encouraged and led to Confession prior to First Communion, as prudent pastoral practice desired by the Holy See."⁷⁸

can feel that the eucharistic elements are different from ordinary food. For one of such studies, see S. CAVALLETTI, *The Religious Potential of the Child*, New York, Paulist Press, 1983, iv-187p.

⁷⁵ See J.H. PROVOST, "The Reception of First Penance," in *The Jurist*, 47(1987), pp. 294-340.

⁷⁶ See CONGREGATION FOR THE CLERGY, Directory, *Ad normam decreti*, in *AAS*, 64(1972), pp. 173-176; CONGREGATION FOR THE SACRAMENTS, Declaration, *Sanctus Pontifex*, 24 May 1973, in *AAS*, 65(1973), p. 410; CONGREGATION FOR THE SACRAMENTS and CONGREGATION FOR THE CLERGY, Letter, 20 March 1977, in *AAS*, 69(1977), p. 427.

⁷⁷ For arguments pro and con, on the practice of reception of the Penance before receiving the first Communion, see PROVOST, "The Reception of First Penance," pp. 331-334.

⁷⁸ CONGREGATION FOR THE SACRAMENTS, Letter, 13 August 1986, in *Roman Replies and CLSA Advisory Opinions*, 1987, p. 19.

Canon 914 does not directly address the children. But, there is no doubt that it directly obliges the parents or guardians and the pastor to provide adequate preparation and an opportunity to children to receive the Sacrament of Penance prior to their first Communion. Once the parents and pastors have adequately prepared the children, they must respect the freedom of the children to go to confession. This freedom is not available to the children if they are not adequately prepared and are not given the opportunity to go to confession. Persons preparing the children for confession can end up restraining children's freedom by conveying a negative attitude towards the reception of the sacrament. This would not only violate the spirit of the canon but also deny the freedom of children to exercise their right.⁷⁹ The General Catechetical Directory states that "one can scarcely have regard for the right that baptized children have to confess their sins if at the start of the age of discretion they are not prepared for and gently led on to the sacrament of penance."⁸⁰

4.4.2.5 Anointing of the Sick

The sacrament of the anointing of the sick can be administered to any members of the faithful who has attained the use of reason and begins to be in danger due to illness or old age.⁸¹ The Church encourages the anointing of sick children "if they have sufficient reason to be strengthened by this sacrament. In case

⁷⁹ See WOESTMAN, *Sacraments: Initiation, Penance, Anointing of the Sick*, pp. 130-131; HUELS, "The Most Holy Eucharist," p. 653.

⁸⁰ CONGREGATION FOR THE CLERGY, *Directory, Ad normam decreti*, in *AAS*, 64(1972), p. 176; English translation in *CLD*, vol. 7, p. 838.

⁸¹ See can. 1004 §1.

of doubt whether a child has reached the use of reason, the sacrament is to be conferred."⁸² This holds true when there is a doubt whether the sick child has "sufficient reasoning power to be (spiritually, physically, and/or psychologically) strengthened by anointing."⁸³ Since in virtue of their baptism, the Christian faithful have a right to sacraments, a broad interpretation of the legal requirements of canons on sacraments would help to "ensure that this right would not be unduly restricted by overly cautious ministers."⁸⁴

4.4.2.6 Marriage

The revised Code which follows the 1917 Code in regard to the age of marriage states in can. 1083 §1: " A man before he has completed his sixteenth year of age, and likewise a woman before she has completed her fourteenth year of age, cannot enter a valid marriage."⁸⁵ During the process of revision of this canon, there was a suggestion to equalize the age for marriage for both sexes and to raise it to the age of majority as done in civil legislations. However, the members of the *coetus "De iure matrimonali"* decided to retain the difference in the marriageable age for men and women, and stated that, since marriage is of natural law, with the attainment of

⁸² *Pastoral Care of the Sick: Rites of Anointing and Viaticum*, no. 12, in *The Rites of the Catholic Church*, vol. 1, p. 781; see can. 1005.

⁸³ F.R. McMANUS, "The Sacrament of the Anointing of the Sick," in *CLSA Commentary*, p. 710.

⁸⁴ J.M. HUELS, "'Use of Reason' and Reception of Sacraments by the Mentally Handicapped," in *The Jurist*, 44(1984), p. 215.

⁸⁵ "Vir ante decimum sextum aetatis annum completum, mulier ante decimum quartum item completum, matrimonium validum inire non possunt" (can. 1083 §1).

the required biological or psychological maturity, it cannot be forbidden merely on account of age.⁸⁶ Given the fact that, on the one hand, there were other canons in the Code which take into account the maturity required for a valid marital contract, and on the other hand, that there are cultural diversities in the world, the consultors were of the opinion that it would not be expedient for the Code to determine a higher age.⁸⁷

Even though the Code acknowledges the right of minors to marry after reaching the canonical age for marriage, it does not encourage the marriage of minors. For example, can. 1071 §1, 6° states that except in case of necessity, no one is to assist at the marriage of a minor without the permission of the local ordinary, when parents are unaware of it or are reasonably opposed to it. Furthermore, if the case warrants, the local ordinary can prohibit a marriage where the party seems too young to marry. But such a prohibition would not have an invalidating effect on the marriage.

Parental knowledge or permission is not necessary for the valid marriage of their children. Since they have freedom in choosing a state of life and are exempt

⁸⁶ "[...] cum matrimonium sit ius naturae, non videtur quomodo iure canonico hoc ius limitari possit, ratione aetatis, quando iam partes ad maturitatem sive biologiam sive psychologiam pervenerint. Iamvero hic canon respicit maturitatem biologiam; de maturitate autem psychologica exstant peculiare canones in capite de consensu" (*Communicationes*, 9[1977], p. 360).

⁸⁷ "Agitur de aetate minima, qua adepti, supponitur haberi maturitas saltem biologica necessaria et ius naturale ad matrimonium non potest, sub hoc respectu, plus aeque coarctari. Non expedit ut Codex aetatem superiorem statuatur, praesertim attentis diversis culturis et adiunctis in orbe regionibus. Adsunt alii canones quibus providetur ne matrimonium sine sufficienti maturitate contrahatur" (*Communicationes*, 15[1983], p. 228).

from the authority of parents, minors who have reached the required age for marriage can marry without parental knowledge or consent, or even when they are opposed to it. In spite of this freedom to choose their state of life, minor children have an obligation to consult their parents and seek guidance from them (cfr. can. 1071 §1, 6°). The obligation of children to love and respect their parents makes it necessary for them to inform their parents, and, if need be, to seek counsel.

In addition to parental consent in the case of those who have not yet reached the civil age for marriage, the person assisting at the marriage needs the permission of the local ordinary (can. 1071 §1, 2°). This norm while seeking to remove the conflict between the civil law and canon law, responds to the conciliar exhortation that

the political community and the Church are autonomous and independent of each other in their own fields. Nevertheless, both are devoted to the personal vocation of man, though under different titles. This service will redound the more effectively to the welfare of all insofar as both institutions practice better cooperation according to the local and prevailing situation.⁸⁸

Canon 1072 exhorts pastors of souls to dissuade young people from entering marriage before the age customarily accepted in the region.⁸⁹ Canon 1083 §2 allows

⁸⁸ *GS*, no. 76; FLANNERY, *Documents of Vatican II*, p. 984.

⁸⁹ It is apparent that the reason for this pastoral caution is the possible lack of sufficient use of discretion in a person who is younger than usual in a given society at the time of contracting marriage. Generally speaking, maturity comes with age. From this, one can presume that the younger the person, the more likely he or she is immature. Thus, when a person is much younger than he or she should be according to the standards of development in a given type of culture, there is a reason for presuming that such a person is incapable of marriage (see J.J. O'ROURKE, "The Presumption of Law Implicit in Canon 1067 §2," in *SC*, 11[1977], pp. 198-199). However, can. 1586 directs the judge not to make presumptions

the conference of bishops to establish a higher age for the licit celebration of marriage. In decreeing such a change, the conference must taken into consideration the customary and cultural circumstances of the place.

The above norms are important from a pastoral perspective. We need to take into account two factors. First, statistics indicate that the highest number of separation and divorces take place among those who are below the age of twenty, that is, among teenagers.⁹⁰ Second, the Code prescribes an age higher than fourteen and sixteen years for positing juridic acts or for assuming offices or functions of lesser importance than matrimony. For example, one must be sixteen years to be a sponsor at baptism (can. 874 §1, 2°), seventeen for admission to the novitiate (can. 643 §1, 1°), eighteen for temporary profession in a religious institute (can. 656, 1°), eighteen for the general capacity to exercise ecclesial rights (can. 98 §1), and in particular for procedural capacity (can. 1478).

Chiappetta thinks that it would have been appropriate to fix the marriageable age at eighteen years complete - an age prescribed by most civil legislations. If this were the case, provision could have been made for dispensation by the local ordinary

which are not stated in the law, other than on the basis of a certain and determined fact directly connected with the matter at hand.

⁹⁰ See CHIAPPETTA, *Il matrimonio*, p. 118; T.P. DOYLE, "Marriage," in *CLSA Commentary*, pp. 756-757.

for one year, and by the Holy See for more than one year. In such a situation, the *ius connubii* is not denied, but its exercise is regulated by appropriate laws.⁹¹

Pastoral care should maintain a delicate balance between the *ius connubii* of the faithful (can. 1058) and the preparation for marriage. The latter is essential to help the young persons in the proper and effective exercise of the former. As Christians, they have a right to spiritual assistance, and since marriage is a sacrament, parents and pastors have a duty to provide adequate pastoral care and solicitude, particularly when the persons are young.⁹² Raising the age of marriage alone would not be of much use without provision for adequate preparation for marriage.

4.4.3 Other Canons Relating to Minors

4.4.3.1 Sponsors

To be admitted to the role of sponsor at baptism and confirmation, a person must have completed the sixteenth year of age, unless a different age has been stipulated by the diocesan bishop, or the pastor or minister considers that there is a just reason for an exception.⁹³ The canon is open to the possibilities of the diocesan bishop fixing a higher or lower age; or the pastor or minister of baptism making an

⁹¹ See CHIAPPETTA, *Il matrimonio*, p. 118. According to the norms for the dispensing power of bishops, issued immediately after Vatican II, the Holy See reserved the dispensation of impediment of nonage for marriage, if the want of age amounted to more than a year (PAUL VI, Motu proprio, *De episcoporum muneribus*, 15 June 1966, in *AAS*, 58[1966], p. 471). The revised Code does not contain this limitation. Nevertheless, such a dispensation must be accorded with utmost caution, only as the rarest exception and having a prudent assessment of the maturity of the person seeking the dispensation.

⁹² See cann. 1063-1072.

⁹³ See cann. 874 §1, 2°; 893 §1.

exception to the age provided by the Code, or particular law prescribing conditions for a just cause.⁹⁴ However, infants and those who do not have the use of reason cannot be admitted to this role. Whereas minors who have completed their sixteenth year can act as sponsors provided the other conditions are fulfilled, those below the age of sixteen years who have sufficient use of reason can be sponsors only by way of an exception for a just cause.

4.4.3.2 Eucharistic fast, annual Communion and Penance

According to can. 919 §1, one who is to receive Holy Communion should abstain from all food and drink for at least one hour before, with the exception only of water and medicine. This is merely an ecclesiastical law. Therefore, in virtue of can. 11, those children who are admitted to Holy Communion but have not completed their seventh year of age are not bound to observe this law. Nevertheless, they should be encouraged and motivated to observe the law at least out of reverence for the Holy Eucharist.

After the first reception of Holy Communion, all the faithful are obliged to receive it at least once a year, preferably during the Easter season.⁹⁵ After reaching the age of discretion, they are also bound by an obligation to confess serious sins at

⁹⁴ In preparation for the 1981 plenary meeting, Cardinal Florit suggested that the episcopal conferences should be authorized to determine the age for godparents for the sake of uniformity in the entire territory. Therefore, he wanted the clause, *nisi alia aetas a Conferentia Episcopali statuta fuerit*, inserted in the text of the canon. The proposal was not accepted because the text was considered to be sufficient (see *1981 Relatio*, p. 203; *Communicationes*, 15[1983], p. 183).

⁹⁵ See can. 920.

least once a year.⁹⁶ The obligation of annual confession refers explicitly to those serious sins which have not been confessed. This leads us to the question whether children who have not completed their seven years of age are bound by these prescriptions. A doubt was proposed to the Commission for the Interpretation of the Code immediately after the promulgation of the 1917 Code:

Whether children who, although they have not yet finished their seventh year, have been admitted to First Holy Communion, having reached the age of discretion or the use of reason, are bound by the two precepts of confessing at least once a year and of receiving Holy Communion once a year, at least at Easter time?

Reply. In the affirmative.⁹⁷

As this response was not published in the *Acta Apostolicae Sedis*, McCloskey concluded that this response was a simple declaration which did not require promulgation.⁹⁸ Moreover, the response of the Commission cannot be considered an authentic interpretation since it was given as a private response addressed directly to the Cardinal of New York. In its response, the Commission provided the reason for its conclusion stating that the merely ecclesiastical laws bind Catholics who have sufficient use of reason, and *unless the law expressly provides otherwise*, have completed the seventh year of age. Thus, the canon referred to the obligation of all the faithful who had reached the *age of discretion and had received the sacraments of*

⁹⁶ See can. 989.

⁹⁷ COMMISSION FOR INTERPRETATION OF THE CODE, 3 January 1918, in *ME*, 30(1918), p. 112; English translation in *CLD*, vol. 1, pp. 53-54.

⁹⁸ See McCLOSKEY, *The Subject of Ecclesiastical Law*, pp. 206-207.

*Communion and Penance.*⁹⁹ In spite of this response, it is obvious that the time-limit specified in the canon is a merely ecclesiastical norm. Therefore, children who have not completed the seventh year of age are not bound by its obligation.

4.4.3.3 Fast and abstinence

All Christ's faithful are obliged by divine law, each in his or her own way, to do penance (can. 1249). Fast and abstinence as forms of penances are imposed by the Church on some of the faithful on certain days of the liturgical year. Thus can. 1252 obliges those who have completed the fourteenth year to abstain, and those who have attained the age of majority to fast up to the beginning of their sixtieth year.¹⁰⁰ In other words, all minors are exempt from the canonical obligation of fast, and all minors below the age of fourteen years from the obligation of abstinence. However, pastors and parents have the pastoral obligation to educate minors, even those who are not bound by the law of fast and abstinence in the true meaning and spiritual value of penance.

⁹⁹ "Et ratio, quoad primum dubium, aperto est. Nam quamvis can. 12 statuat: 'Legibus *mere* ecclesiasticis non tenentur ... qui licet rationis usum assecuti, septimum aetatis annum nondum expleverunt', subdit tamen 'nisi aliud in iure *expresse* caveatur.' Iam vero in can. 859 §1 et 906 *expresse* caveatur: 'Omnis utriusque sexus fidelis postquam ad annos discretionis, idest ad usum rationis, pervenerit,' etc." (*ME*, 30[1918], p. 112).

¹⁰⁰ *CCEO* does not provide a common norm specifying the age for fast and abstinence, rather states that on the "days of penance the Christian faithful are obliged to observe fast and abstinence in the manner established by the particular law of their Church *sui iuris*" (can. 882).

4.4.3.4 Vows and oaths

Unless prohibited by law, all who have a suitable use of reason are capable of making a vow (can. 1191 §2). Therefore, minors who have attained the use of reason are capable of making at least private vows. A vow obliges only the person who makes it, because it strictly entails a personal obligation that can be assumed and fulfilled solely by the one who makes this deliberate and free promise to God (can. 1193). Consequently, if a minor has made a valid vow, there is no juridic obligation on the part of parents or guardians to fulfil it.¹⁰¹

The present Code does not speak of a person's capacity to take an oath. It seems that the canon on vows would apply also to oaths in this matter. Canon 876 states that if it is not prejudicial to anyone, when proof of conferral of baptism is required, the declaration of a single witness who is above suspicion is sufficient, or the oath of the baptized person, if the baptism was received as an adult (i.e., after the completion of seven years of age). Hence, we can deduce from this canon that after completing seven years of age, a person may be asked or required to take an oath in certain circumstances.¹⁰²

¹⁰¹ Can. 1310 §2 of *CIC/17* stated that the obligation arising from a *real vow* passed to the heirs of those who made the vow, and the obligation arising from a *mixed vow* passed to their heirs only in so far as the real part is concerned. The *CIC/83* does not contain this canon. This does not mean that the heirs or parents or guardians do not have a moral obligation to honour bequests. It was not considered expedient to make it also a juridic obligation (see *Communicationes*, 12[1980], p. 376).

¹⁰² Some canons requiring or permitting oaths are cann. 1454; 1455 §3; 1471; 1532; 1562 §2; 1717 §3.

4.4.3.5 Funeral

All the faithful have the right to choose the church for their funeral rites (can. 1177 §2). In the 1917 Code, it was explicitly stated that those who were *impuberes* were prohibited from choosing the church of their funeral rites (can. 1223 §2). The law implied that those who attained puberty (*puberes*) were free to choose the church in this regard. According to Castillo Lara, the norm has not been suppressed, and it seems that no one thought of abolishing it. For reason of simplicity, it has been implicitly included in the formula "any member of the Christian faithful."¹⁰³ The Code allows the local Ordinary to permit ecclesiastical funeral rites to children whose parents had intended to have them baptized but who died before their baptism.¹⁰⁴

4.5 THE TEMPORAL GOODS OF THE CHURCH

4.5.1 Contracts

The Code canonizes the civil law on matters concerning contracts and the corresponding obligation with due regard for divine law and canon law.¹⁰⁵ In matters of contracts, can. 1547 allows proof by witnesses, even if civil legislation does

¹⁰³ See CASTILLO LARA, "La condizione e lo statuto giuridico del minore," p. 272.

¹⁰⁴ See can. 1183 §2; *Order of Christian Funerals*, Ottawa, Canadian Conference of Catholic Bishops, 1990, no. 425, p. 251.

The *Order of Christian Funerals* states: "Part II of the Order of Christian Funerals provides rites that are used in the funerals of infants and young children, including those of early school age" (no. 422, p. 251). As in the case of baptism, those who have completed the seventh year of age may be considered adults as regards funeral rites.

¹⁰⁵ See can. 1290.

not permit it. As regards the contractual capacity of minors, that is, the age and circumstances for entering into valid contracts, the Code defers to the civil law of the place.

4.5.2 Pious Wills

Pious wills and foundations by their nature and finality are in favour of the Church. Therefore, the Church claims exclusive competence over the matter, while canonizing civil law only for contracts in general. According to can. 1299, those who in virtue of natural law and canon law can freely dispose of their goods may leave them to pious causes either by an act *inter vivos* or by an act *mortis causa*.

Canon 1299 speaks of a person's capacity and the requisites to place such an act. The capacity of a person depends solely on natural and canon law. Civil law is deliberately excluded in this matter. Whoever has the capacity by natural or canon law to dispose freely of their goods can donate them to a pious cause, even though such a person is not capable of doing so according to the civil law. According to natural law, then, whoever has the necessary capacity to intend and to will can make a donation. In other words, minors who have sufficient use of reason can be considered capable of donating goods they possess to pious causes.

Persons who have completed the seventh year of age are presumed to have the use of reason. But as minors they are still subject to the authority of parents and guardians in the exercise of their rights. Consequently, in making a will or a bequest, all minors who have sufficient use of reason should do so only with the consent of parents or guardians. The general provisions of the law do not exempt them from

this obligation. However, parental consent does not seem necessary for the validity of the will. As far as the testamentary disposition of property is concerned, minors are entitled to give away what is their own.¹⁰⁶

4.6 SANCTIONS IN THE CHURCH

Christ's faithful have the right not to be punished with canonical penalties except in accordance with the norm of law.¹⁰⁷ The Code has special provisions for minors in penal matters. And they have a right to be treated according to those provisions.

4.6.1 Exemption from Penalty

The Code does not exempt all minors from canonical penalties. Canon 1323 establishes the legal circumstances which exempt a person from any penalty, and age is one of them. In the 1917 Code, the age of minority was one of the factors which diminished imputability in proportion to its closeness to infancy.¹⁰⁸ The prescription of the revised Code is more pragmatic as it establishes a uniform norm which exempts all minors below sixteen years of age from canonical penalties.¹⁰⁹ This

¹⁰⁶ See HANNAN, *The Canon Law of Wills*, pp. 131-133.

¹⁰⁷ See can. 221 §3.

¹⁰⁸ "Minor aetas, nisi aliud constet, minuit delicti imputabilitatem eoque magis quo ad infantiam propius accedit" (can. 2204, *CIC/17*).

¹⁰⁹ Canon 12 §3 of the *1973 Schema* on penal law stated that those below eighteen years of age are exempt from penal sanctions: "Nulli autem poenali sanctioni est obnoxius, qui, cum legem vel praeceptum violavit, duodevicesimum aetatis annum non expleverit, etiamsi rationis usum plenum habuerit et delictum dolo pataverit" (PCCICR, *Schema documenti quo*

norm in can. 1323, 1° states that minors who have not yet completed the sixteenth year of age are not subject to penalties when they have violated a law or precept.¹¹⁰ This norm, however, acknowledges that such minors can commit a delict when they transgress the law or precept. This is deduced from the fact that can. 1322 states that those who habitually lack the use of reason, even though they appeared sane when they violated a law or precept are deemed incapable of committing an offence (*delicti incapaces sunt*), whereas, can. 1323 enlists those not liable to penalty (*nulli poenae est*

disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur, Vaticano, Typis polyglottis Vaticanis, 1973, p. 18). At this stage of revision, a person attained the age of majority with the completion of the twenty first year.

During the discussion of the 1973 Schema by the *coetus studiorum* "De iure poenali", there was a suggestion to specify extenuating, attenuating and aggravating causes for incurring a penalty. One of the consultors proposed to include age as an exempting cause: "Praeterea aliquis Consultor proponit ut in hoc canone statuatur aetas citra nulli quis sit obnoxius. Alii concordant cum Consultore et proponunt ut statuatur aetas 16 annorum, abnuente uno Consultore qui aetatem 18 annorum vellet" (*Communicationes*, 8[1976], pp. 178-179).

¹¹⁰ During the codification of *CCEO*, the *coetus* decided to exempt all minors who had not completed fourteen years of age from penalties (see *Nuntia*, 4[1977], p. 82). Nonetheless, at the meeting of the *coetus* held from 29 November to 4 December 1982 on the *Schema canonum de sanctionibus poenalibus in Ecclesia*, one Consultor proposed to exempt all those who have not completed the eighteenth year of age. The suggestion was not accepted. The Secretary responded that notwithstanding the fact that *CIC/83* has exempted the minors below the age of sixteen, *CCEO* wanted to follow an intermediate way by stipulating a different age, that is, fourteen years complete. Moreover, he considered that it was possible to do so, because the penalties inflicted on minors generally did not include loss of some good (see *Nuntia*, 20[1985], p. 23).

Therefore, *CCEO* states that one who has not completed the fourteenth year of age is not subject to any penalty (can. 1413), and those who have committed an offence between their fourteenth and eighteenth year of age can be punished only with penalties which do not include the loss of some good, unless the eparchial bishop or the judge decides in special cases that their reformation can be better provided for otherwise (can. 1413 §2). It is evident, then, the penalties imposed on minors would be those which require some serious work of religion or piety or charity, such as certain prayers, a pious pilgrimage, a special fast, giving alms, spiritual retreats, etc. (can. 1426 §1).

obnoxius). The latter canon does not exempt the said minors from imputability but only from canonical penalties. Everyone who has attained the age of reason is capable of violating a law or precept, and therefore, capable of committing a delict. Before this age, they do not possess *delictual capacity* as they are considered *non sui compos*, and hence, strictly speaking, they do not come under can. 1323, 1° which only declares the *penal immunity* of minors below the age of sixteen years.¹¹¹ In other words, the canon addresses only those minors who are no longer infants and are under the age of sixteen years, and declares that even if they do commit a delict, they are not subject to penal sanctions.

4.6.2 Diminished Imputability

Canon 1324 lists the extenuating circumstances which diminish penal imputability. These circumstances are "all those excusing causes which lack some requisite for the offence to be canonically complete as well as all those circumstances that diminish the gravity of the offence in its objective and subjective dimension."¹¹² According to can. 1324 §1, 4°, if minors who have completed the sixteenth year of age commit an offense, they are not exempt from the penalty attached to it, but that penalty may be tempered or substituted with a penance.¹¹³ The period of minority from the completion of sixteen years of age until the attainment of the age of

¹¹¹ See CASTILLO LARA, "La condizione e lo statuto giuridico del minore," p. 263.

¹¹² J. ARIAS, "Sanctions in the Church," in *Code of Canon Law Annotated*, p. 827.

¹¹³ According to can. 1340 §1, a penance, which is imposed in the external forum, is the performance of some work of religion or piety or charity.

majority serves as an extenuating circumstance in regard to the imposition of penalty.¹¹⁴ The Code allows considerable discretion to the judge in imposing penalties on minor offenders. The judge can even refrain from inflicting any penalty if he or she considers that the person's reform may be better accomplished in some other way.¹¹⁵

Whether they are below the age of sixteen years or above it, all minors are exempt from *latae sententiae* penalties, whereas *ferendae sententiae* penalties may be imposed on minors who have completed their sixteen years of age.¹¹⁶ In order to incur a *latae sententiae* penalty, the law requires full imputability for the crime. Minors who are below the age of sixteen are considered incapable of full penal imputability, while those above sixteen are held only partially responsible, and therefore, they escape the full rigour of the law. It is obvious that the penal norms of the Church reflect her benign concern for young offenders.

¹¹⁴ Cardinal Freeman and Bishop O'Connell were of the opinion that persons in the Church should not be made subject to sanctions unless they have acquired the full capacity to exercise their rights. Therefore, in preparation for the 1981 plenary meeting they suggested that instead of those who have not completed the sixteenth year of age, all minors, that is, those who have not completed the eighteenth year of age should be considered canonically exempt from penalty. The Secretary did not accept the proposal. He said that there was no reason why persons who have completed their sixteenth year should be exempted from all penalties. Moreover, the canon provided for the mitigation of a penalty (see *1981 Relatio*, p. 294; *Communicationes*, 15[1984], p. 40).

¹¹⁵ Cfr. cann. 1345; 1324 §2.

¹¹⁶ See cann. 1323, 1°; 1324 §3. *Latae sententiae* penalties do not appear in *CCEO*. In the *Plenaria* of the Members of the Commission held on 18-23 March, 1974, they decided with a formal vote that all *latae sententiae* penalties be abolished in *CCEO*, the Code common to all Oriental Churches (see *Nuntia*, 3[1976], p. 9; 20[1985], pp. 4, 8-11).

4.6.3 Protection Against Sexual Delicts

Because minors are the most vulnerable members of society, they not only easily fall prey to sexual exploitation but they are also the least able to defend themselves against those perpetrating the crime. Tremendous physical, emotional, and spiritual harm is caused to every exploited minor trapping him or her in a cycle of victimization, pain, and even life-threatening consequences. The Church is well aware of the sexual exploitation of minors both inside and outside her fold. She believes in "encouraging a denunciation of the situation to help people to be aware of it and to take effective joint action against this scourge, which claims so many victims and physically, psychologically and morally destroys so many children."¹¹⁷

While denouncing sexual crimes against minors, the Church also has incorporated in her legislation a specific norm in can. 1395 §2, imposing canonical penalties on clerics guilty of sexual offenses against a minor under the age of sixteen years, which states:

If a cleric who has otherwise committed an offense against the sixth commandment of the Decalogue with force or threats or publicly or with a minor below the age of sixteen, the cleric is to be punished with just penalties, including dismissal from the clerical state if the case warrants it.¹¹⁸

¹¹⁷ PONTIFICAL COUNCIL FOR THE FAMILY, "Final Declaration of the International Summit on the Sexual Exploitation of Children," in *Catholic International*, 3(1992), pp. 958.

¹¹⁸ "Clericus qui aliter contra sextum Decalogi praeceptum deliquerit, si quidem delictum vi vel minis vel publice vel cum minore infra aetatem sedecim annorum patratum sit, iustis poenis puniatur, non exclusa, si casus ferat, dimissione e statu clericali" (can. 1395 §2).

Since *CCEO* does not contain a canon corresponding to can. 1395 §2 of *CIC/83*, there is no specific reference to the sexual delicts committed against minors.

In recent years, the cases of sexual abuse of minors by clerics has led to further reflection on the relationship between civil and canon law, particularly in regard to the age of minors at which an offense is punishable according to the norm of the above canon.¹¹⁹

Canon 1395 §2 primarily addresses the offender of the crime and the penalty to be imposed.¹²⁰ By itself, the canon does not look into the situation of the offended party, the minor, particularly in reference to his or her right to compensation for damage done. Nevertheless, this issue is treated under can. 128 which stipulates that whoever unlawfully causes harm to another by a juridic act, or *indeed by any other act* that is malicious or culpable, is obliged to repair the damage done.¹²¹ Sexual abuse, as a harmful act committed upon minors, obliges the perpetrators to compensate for the damage done. While a penal trial principally addresses the issue

¹¹⁹ There were proposals before the bishops of the U.S.A. at their meeting on 15-18 November 1993: (i) to raise the age from 16 to 18 years in canon 1395, which says a priest can be laicized for committing a sex crime "with force or threats or publicly or with a minor below the age of sixteen"; (ii) to raise the Church's statutes of limitations for the reporting and prosecution of sex crimes against minors, making it possible to initiate procedures against a priest or deacon up to five years after his minor victim attains the age of majority. The age discrepancy between civil law and canon law has meant, for example, that a priest tried and convicted for a sexual crime against a seventeen year old in civil court cannot be tried in an ecclesiastical court for a sex crime against a minor (see J. FILTEAU, "Bishops to Vote on Changes to Laicize Priests Who Abuse Children," in *CNS - Catholic News Service*, 8 November 1993, p. 22).

¹²⁰ The penalties stated in can. 1395 §2 are indeterminate and discretionary as it is clear from the phrases "*iustis poenis puniatur*" and "*si casus ferat.*" A particular law can establish in its place a determined and a mandatory penalty (see can. 1315 §3).

¹²¹ Canon 128 is new in *CIC/83*. This canon states the obligation deriving from natural law to repair the damage or injustice done to a person. As a result, the harmed party has a right to claim compensation before the judge (URRUTIA, *De normis generalibus*, p. 88).

of the guilt of the offender and the punishment, the question of damage and redress may have to be dealt with in a contentious trial. Accordingly, minors who have suffered harm on account of sexual abuse, have the right to initiate proceedings against the perpetrator in an ecclesiastical tribunal for compensation to repair the damages suffered, with due regard for procedural law.

4.7 PROCESSES

As Christ's faithful, minors have a right to vindicate and defend their rights lawfully. They have the right to be judged according to the provision of the law which is to be applied with equity.¹²² As can be seen from the following discussion, procedural law has norms that take into account the condition of minors and provide mechanisms for adequate defense of their rights.

4.7.1 Procedural Capacity of Minors

Canon 1478 provides important procedural norms governing the capacity of minors to stand in court.¹²³ The first three paragraphs state:

§1. Minors and those who lack the use of reason can stand trial only through their parents or guardians or curators, with due regard for the prescription of §3.

¹²² See can. 221.

¹²³ The revised Code uses Roman law expressions referring to procedural capacity, such as, *stare in iudicio, agere et respondere, legitima persona standi in iudicio* (see cann. 1478; 1480; 1481; 1505, 1620, 5°). See G. RICCIARDI, "La costituzione del curatore processuale," in *Il processo matrimoniale canonico*, Città del Vaticano, Libreria editrice Vaticana, 1988, pp. 154-160; M.F. POMPEDDA, "Cann. 1417-1419," in PINTO, *Commento al Codice di diritto canonico*, p. 860.

§2. If the judge decides that the rights of minors are in conflict with the rights of parents, guardians or curators, or the latter cannot satisfactorily safeguard the rights of the former, then they are to be represented in a trial by a guardian or curator appointed by the judge.

§3. But in spiritual cases and in cases connected with spiritual matters, if minors have attained the use of reason, they can act and respond without the consent of parents or guardian; if they have completed their fourteenth year of age, they can do so on their own; if not through a curator appointed by the judge.¹²⁴

As a general norm, can. 1478 §1 determines that minors and those who lack the use of reason do not have the capacity to stand in court or the ability to plead and respond personally in a process. This norm is in agreement with cann. 96-98, and therefore, it must be interpreted accordingly. Commenting on the canon, C. De Diego-Lora remarks:

Where minors are concerned, the lack of capacity is offset by parents, guardians and curators. It must be noted that this relationship expresses an order of preference, since the guardianship is established only when those who have the *patria potestas* by natural law are absent or morally incapable of deputizing. On the other hand, the curator always fulfills the role of the deputy, as indicated in §2, when the rights of a minor or of a person who lacks the use of reason are in conflict with those of the ordinary legal representatives, or in the cases referred to in §4.¹²⁵

¹²⁴ "§1. Minores et ii, qui rationis usu destituti sunt, stare in iudicio tantummodo possunt per eorum parentes aut tutores vel curatores, salvo paescripto §3.

§2. Si iudex existimet minorum iura esse in conflictu cum iuribus parentum vel tutorum vel curatorum, aut hos non satis tueri posse ipsorum iura, tunc stent in iudicio per tutorem vel curatorem a iudice datum.

§3. Sed in causis spiritualibus et cum spiritualibus conexas, si minores usum rationis assecuti sint, agere et respondere queunt sine parentum vel tutoris consensu, et quidem per se ipsi, si aetatem quattuordecim annorum expleverint; secus per curatorem a iudice constitutum" (can. 1478).

¹²⁵ C. DE DIEGO-LORA, "The Plaintiff and the Respondent," in *Code of Canon Law Annotated*, p. 921.

The principle stated in can. 1478 §1 has an exception which is provided for in §3 of the same canon. This exception to the general principle concerns spiritual cases and cases connected with spiritual matters.¹²⁶ In these cases, minors who have attained sufficient use of reason can act and respond without the consent of their parents or guardian; if they have completed the fourteenth year of age, they can do so on their own without a guardian or curator; if not, through a curator appointed by the judge.¹²⁷ This norm is an example for the explicit exemption of minors from the authority of their parents or guardians.

Duly appointed guardians and curators represent minors who do not have the capacity to stand in court. Minors lacking this capacity cannot place any procedural acts and also are unable to appoint or give a mandate to their procurators or advocates.¹²⁸ Any mandate given by them to the procurator would be invalid. As a result, the sentence itself would be invalid if the person has been represented by a procurator without a valid mandate. Therefore, only guardians or curators can nominate and give a mandate to the procurator on behalf of a minor.

¹²⁶ The Church has proper and exclusive right to judge cases involving matters which are spiritual or linked with the spiritual (see can. 1401, 1°).

¹²⁷ Marriage is a spiritual matter and therefore in marriage cases those persons who have completed the fourteenth year of age have legitimate capacity to stand in court and they do not require a curator.

¹²⁸ According to can. 1648 §3 of *CIC/17*, in spiritual cases or cases connected with spiritual matters, minors who had completed the fourteenth year of age could constitute for themselves a procurator with the authorization of the local Ordinary. The revised Code has suppressed this possibility.

Legitimately constituted tutors or curators continue to pursue their office until the case is brought to a close. They lose their office when the person they represent acquires the capacity to act by himself or herself. If the guardian or the curator ceases to represent the minor, the trial is suspended until a new guardian or curator is appointed (can. 1519 §1), or until the minor acquires the capacity to stand in court. If a person having attained the requisite age during the trial which enables him or her to stand in court on one's own, either fails to challenge the decree of appointment of the curator, or does not object to the representation by the curator after having received personally the acts of the case, then, it would seem that such a person has no justification for claiming injustice on the basis of violation of the right of defence.¹²⁹

When a guardian or curator ceases to represent a minor, at the same time the procurator appointed by him also ceases. Since the role of the procurator does not supply procedural capacity, the acts performed by the procurator during this period would be invalid. The interruption created by the cessation from office of the guardian or curator has the effect that the time period for the abatement established in can. 1520 does not run and the suit is said to be pending (can. 1512, 5°). Meanwhile, no judicial acts may be placed.¹³⁰ The judge has the duty to appoint

¹²⁹ See C. GULLO, "Il diritto di difesa nelle varie fasi del processo matrimoniale," in *Il diritto alla difesa nell'ordinamento canonico*, atti del XIX congresso canonistico, Gallipoli - Settembre, 1987, Città del Vaticano, Libreria editrice Vaticana, 1988, p. 32.

¹³⁰ See L. MADERO, "The Joinder of the Issue," in *Code of Canon Law Annotated*, pp. 946-947.

another guardian or curator as soon as possible. He can also appoint a procurator *ad litem* if the party has neglected to do so within the prescribed time (can. 1519 §2). Just as the law provides for the protection of minors through the institutes of guardian or curator, it also safeguards and promotes the purpose of these institutes by giving the judge authority to appoint or substitute, according to the circumstances, a guardian or curator of his or her own choice.¹³¹

If a person who lacks procedural capacity were to act without proper representation, the sentence pronounced by the judge would be irremediably null in virtue of can. 1620, 5°. The judgement pronounced would be irremediably null due to a violation of the right of defence (can. 1620, 7°) if a minor was allowed to defend oneself. This squares well with the fact that, by definition, a minor is not fully capable of looking after personal affairs.

Through the guardian or curator representing them, minors enjoy all the rights in the process as though they had attained the age of majority.¹³² However, the persons represented are and remain the sole titular of the substantial and procedural rights. Therefore, the constitution of the guardian or the curator, and in particular his or her name must be conveyed to them, and insofar as they are capable of placing

¹³¹ See SESTO, *Guardians of the Mentally Ill*, p. 98.

¹³² The competence of the court is determined on the basis of the domicile of the guardian or of the curator. The question of domicile for competence is of little relevance in the case of a minor since the judge can appoint a curator *ad casum* (see RICCIARDI, "La costituzione del curatore processuale," p. 170; A. DEL CORPO, *De curatore pro mente infirmis in causis matrimonialibus*, Napoli, Editrice Pontificio, 1970, p. 170).

The decree of summons is to be notified to the curator or guardian of the person who has no procedural capacity (see can. 1508 §3).

a human act an opportunity should be given to them either to accept or to reject the guardian or the curator named. This notification and acceptance concerns the *person of the curator* appointed and not the determination of the *necessity of a curator*.¹³³

In a contentious trial which concerns minors or the public good, except for marriage cases, the judge is to appoint *ex officio* a legal representative (*defensor*) for a party who lacks one.¹³⁴ The word *defensor* mentioned in can. 1481 §3 does not refer to the procurator, who has a representational function.¹³⁵ By stipulating the need for a *defensor* for minors, the Code protects their *ius postulandi*, which reinforces the right of adequate defense. To the question, whether the presence of the *defensor* belongs to the right of defense in the strictest sense, the answer seems to be negative. But to say that it is not necessary to have his or her presence does not mean that the party has no right to technical assistance.¹³⁶

¹³³ "Sed ut relatio processualis instaurari queat, constitutio Curatoris notificari debet ipsi parti, quia haec 'est et permanet titularis iuris processualis sicut permanet titularis iuris substantialis' (Ae. DEL CORPO, *De curatore pro mente infirmis in causis matrimonialibus*, Napoli, 1970, p. 21 sq.). Curator est 'tantum repraesentans non autem subiectum relationis processualis: ipsae cum repraesentato una persona consideratur' (*ibid.*, p. 22).

Quare doctrina merito tenet constitutionem curatoris notificandam esse 'parti repraesentatae' (*ibid.*, p. 84). Immo 'etiam repraesentati acceptatio requiritur, si et quatenus ille capax sit actus humani' (*ibid.*, p. 85)" (Decision, *coram* STANKIEWICZ, 20 January 1983, in *DE*, vol. 94, no. 2[1983], pp. 262-263). See also RICCIARDI, "La costituzione del curatore processuale," p. 179.

According to C. Gullo, the notification of information to the minor capable of human act regarding the person of the curator is *ad validitatem* (see GULLO, "Il diritto de difesa nelle varie fasi del processo matrimoniale," p. 32).

¹³⁴ See 1481 §3.

¹³⁵ See DE DIEGO-LORA, "The Plaintiff and the Respondent," pp. 923-924.

¹³⁶ See can. 1481 §1.

In Chiappetta's view the absence of intervention on the part of the *defensor* would not affect the validity of the sentence, unless, in a particular case, one succeeds in proving that the absence of assistance by the *defensor* really deprived the party of the substantial right of defense according to can. 1620, 7°. If a substantial violation of the right of defence is proved, the sentence would be irremediably null.¹³⁷ Since can. 1481 §3 requires a *defensor* on behalf of minors, those who represent them should appoint one. If they do not, then the judge must provide *ex-officio* a *defensor*. This procedural norm is intended to assist minors in protecting their rights. Since the appointment of a *defensor* for minors is mandatory, it seems that his or her absence might create a lack of an adequate *means of defence* thereby seriously violating the *right of defence*, and rendering the sentence irremediably null.

A question that is of interest in this section on the procedural capacity of minors would be whether or not natural parents *ipso facto* become the guardians of minors in the ecclesiastical process? Some canonists who discussed this question affirmed that the parents were the natural and necessary guardians and curators of their children and as such they did not need formal constitution by a competent authority, while some others upheld the necessity of some kind of formal approval at least.¹³⁸ Parents are the natural guardians of their minor children, and they have a duty to protect their rights. Therefore, they are able to represent their children in

¹³⁷ See CHIAPPETTA, *Il matrimonio*, p. 438.

¹³⁸ For the opinion of canonists, such as, Ferraris, Noone, D'Avack, Lega, Roberti and Doheny, see SESTO, *Guardians of the Mentally Ill*, pp. 58-60; DEL CORPO, *De curatore pro mente infirmis*, pp. 46-52.

a trial, provided that there is no conflict of interest (can. 1487 §2). Even though parents are entitled to represent their minor child, it is prudent on the part of the judge to nominate them by a decree as guardians, in order to eliminate any doubt regarding the capacity of the minor to stand in court and adequate provision for the right of defense. This will constitute a legal proof of legitimate representation of the minor by the parent or guardian and recognized as such by the judge. Although there is no canonical norm which demands a decree for the appointment of parents as guardians, in order to provide clear proof of legitimate representation by a particular person on behalf of a minor, prudence calls for a decree.¹³⁹

Rotal jurisprudence recognizes parents as the natural guardians of their children. Nevertheless, it insists on the formal constitution or approval of parents as guardians of their minor children.¹⁴⁰ A. Del Corpo states:

It is certain, however, that prevalent jurisprudence, especially the recent and particularly the more up-to-date jurisprudence, has consistently declared the irremediable nullity of a sentence and of the process in which the father or mother had represented in court their mentally ill child without being appointed and legitimately constituted as curators. Thus, for example, in a recent case from New Orleans (*c. Heard*, 18 January 1958) the intervention of a mother was not considered legitimate even though she was appointed by civil law as the curator, but not approved by the Ordinary.¹⁴¹

¹³⁹ See SESTO, *Guardians of the Mentally Ill*, p. 126.

¹⁴⁰ See RICCIARDI, "La costituzione del curatore processuale," p. 178.

¹⁴¹ "Attamen certum est iurisprudentiam praevalentem, praesertim recentem et potissimum recentiore usque ad hodiernam, constanter pronuntiasset nullitatem insanabilem sententiae et processus in quo, pro mente infirmo, eius pater vel mater stetissent in iudicio absque apposita et legitima constitutione in curatores: ita, v.g. nuper illa Novae Aureliae (*c. Heard*, 18 ianuarii 1958) legitimum non habuit interventum matris, licet curatricis ab

The formal approval or constitution of parents as guardians representing their children is of particular importance in the case of a civilly emancipated minor. It may be reasonable to say that only after being admitted as such by a competent judge, the parents acquire the right to represent their children in the ecclesiastical forum. The right of parents to represent their children in an ecclesiastical court is not absolute as can be understood from can. 1478 §2 which says that if the judge considers that the rights of minors are in conflict with the rights of the parents, guardians, or curators, or if these cannot sufficiently protect the rights of minors, then the judge can *ex-officio* assign a guardian or curator. However, the canon gives the order of priority with regard to persons having the responsibility towards minors - parents, guardians, and curators.

The appointment of guardians for minors and the determination of their powers are governed by the prescriptions of civil law unless canon law provides otherwise (can. 98 §2). The Code grants discretionary power to the judge in ecclesiastical trials to accept or reject the guardian appointed by civil authority. Canon 1479 states that a judge can admit the guardian or curator appointed by civil authority, having consulted the diocesan bishop of the person to whom the guardian or curator has been given, if this can be done. However, the consultation with the

auctoritate civili datae, non autem adprobatae ab Ordinario" (DEL CORPO, *De curatore pro mente infirmis*, pp. 20-21).

diocesan bishop is not required for the validity of the appointment.¹⁴² If there is no such guardian or curator or if it does not seem appropriate to admit the one appointed by the civil authority, the judge is to appoint one for the case.

The Code does not have any reference to civilly emancipated minors in the ecclesiastical processes. As civilly emancipated minors enjoy a certain amount of autonomy, it seems reasonable to let them stand before the court to answer for their own offences or at the order of the judge. In other matters, they must plead and respond through their curators.¹⁴³

4.7.2 *Restitutio in integrum*

The traditional action of *restitutio in integrum* on behalf of minors and others similar to them, whose rights have been seriously injured had better protection and consideration in the 1917 Code. None of the material contained in can. 1684-1689 concerning rescissory actions and the *restitutio in integrum* is retained in the revised Code. These suppressed canons held several distinctions between minors and majors. Hence, it was found necessary to insert a canon dealing with the statute of limitations

¹⁴² According to can. 1651 §1 of *CIC/17*, the judge had to consult for validity the Ordinary of the person to whom the civil guardian or curator was given, in order to allow that person to represent the minor in the process.

A similar norm was in effect for the Oriental Churches (see PIUS XII, *Motu proprio, Sollicitudinem Nostram*, 6 January 1950, can. 166 §1, in *AAS*, 42[1950], p. 41). The initial draft of the *schema* of *CCEO* also maintained the same prescription (see *Nuntia*, 14[1982], p. 37). The *coetus*, which met during 3-13 October 1983, decided to adopt the formulation of can. 1479 of *CIC/83* (see *Nuntia*, 21[1985], p. 48). Therefore, can. 1137 of *CCEO* and can. 1479 of *CIC/83* are similar.

¹⁴³ Canon 1478 §4 prescribes this capacity for the *bonis interdicti* and the infirm of mind.

in matters relating to the challenge against *res iudicata*.¹⁴⁴ As a result, can. 1646 of the revised Code concerns these statutes of limitation to petition for the *restitutio in integrum*. According to can. 1646 §3, time limits stated in the same canon in §1 and §2 do not apply as long as the aggrieved party is a minor. This norm favours minors because the time limits do not run until the day on which the person reaches the age of majority. This canon does retain a distinction between adults and minors with respect to the statute of limitations, but none of the other distinctions found in the 1917 Code.¹⁴⁵ Today the institute of *restitutio in integrum* has been kept in the Code primarily as a remedy for those who could not otherwise have recourse against an unjust *res iudicata* and not just to protect the rights of minors.¹⁴⁶ However, this norm provides a possibility for minors of presenting a challenge of reinstatement by prorogation of the time limit *a quo*. The norm benefits an aggrieved minor, since the computation of the time limit for the presentation of the petition begins only on the day full age is attained.¹⁴⁷

In addition to *restitutio in integrum*, the Code takes into consideration the plight of minors in the event of abatement of their case by the action of their guardians or tutors. According to can. 1521, abatement takes effect in virtue of the

¹⁴⁴ For details on the revision of the canon, see JOHNSON, "Making Restitution in Marriage Cases," p. 166-171.

¹⁴⁵ See *ibid.*, p. 168.

¹⁴⁶ see *Communicationes*, 8(1976), p. 187.

¹⁴⁷ See C. DE DIEGO-LORA, "The Publication of the Acts, the Conclusion of the Case, and the Pleadings," in *Code of Canon Law Annotated*, p. 1018.

law itself against all persons, including the minors, which must be declared *ex officio*. However, minors are entitled to seek compensation from their guardians or curators in the trial provided that the latter can prove that they were not at fault in regard to the alleged damages. The norm presumes culpability on the part of the guardians and curators, freeing minors from the burden of proof.

4.7.3 Capacity of Minors to be Witnesses

The general canonical principle is that all people whom the law does not exclude, either entirely or partially, may be witnesses.¹⁴⁸ Canon 1550 distinguishes between two categories of persons who are or may be eliminated from giving evidence: they are those who cannot be admitted and the incapable. Among people who in principle cannot be admitted to give evidence, but who nevertheless can be permitted to give it by way of an exception by the disposition of can. 1550 §1 and at the discretion of the judge, are minors under the age of fourteen years. Therefore, they are relatively incompetent and since their capacity and the appropriateness of their evidence hinges on the determination of the judge, they may be held to be partially excluded as witnesses by the law. Minors above this age are held equal to

¹⁴⁸ See can. 1549. In designating the the canonical form for marriage, can. 1108 refers to two common witnesses in addition to *the qualified* witness and the contractants. Since the canon does not indicate specific capacity required in the persons to act as common witnesses, it may be taken for granted that everyone who has attained the age of reason and has the capacity to hear, see, and understand what is taking place can be a common witness (see R. NAVARRO VALLS, "The Form of the Celebration of Marriage," in *Code of Canon Law Annotated*, p. 701; CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, p. 236; GHIRLANDA, *Il diritto nella Chiesa*, pp. 360-361).

those in their age of majority in the capacity to give evidence. On the basis of Rotal jurisprudence, L. Del Amo states:

The exclusion of those between eight and fourteen years of age is dependant on nature itself, not on lack of good faith. In fact, they do not have the maturity required to discern, without error, the fact and circumstances leading up to them, as well as subsequent events. Those who are under fourteen years of age are excluded not because they are incapable of observing the facts, but because they might easily be mistaken as a result of their less well developed ability to discern what is happening. Other reasons might include their weaker willpower, their vivid imagination, their greater impressibility, their emotional immaturity and tendency to be distracted by details to the detriment of the whole, as well as their credulity.¹⁴⁹

Canon 1550 §1 determines the condition under which a judge can hear the testimony of minors below the age of fourteen years, that is, they may be heard if the judge declares by a decree that it would be appropriate to do so. It would seem such a decree should provide the reasons for admitting their testimony demonstrating the appropriateness of the decision of the judge. Since cann. 1554 and 1555 grant parties in a trial the right to know the names of the witnesses before the latter are examined and the right to request the exclusion of a witness provided there is a just reason, the decree of the judge stating the reasons for the admission of the aforesaid persons as witnesses has practical relevance.

Minors, who have not attained the use of reason are *non sui compos*, and therefore, are incapable of placing any juridic act (cfr. can. 97 §2). Giving witness is a procedural act and requires a sufficient juridic capacity in the subject. Therefore,

¹⁴⁹ L. DEL AMO, "Proofs," in *Code of Canon Law Annotated*, p. 964.

although minors who have not attained the use of reason are not specified along with those listed in can. 1550 §2 as incapable persons to function as witnesses, the fact that they actually are so, may be understood from the principle of natural law as well as from can. 97 §2. Furthermore, curators and tutors are deemed incapable of acting as witnesses on behalf of these persons whom they represent in a trial.

The revised Code has a better appreciation of the capacity of minors below the age of fourteen years in their capacity to give evidence. In contrast to the 1917 Code, which even though it admitted them as witnesses at the discretion of the judge, as per can. 1758, it did not assign their testimony any value except that of an indication (*indicium*) or a sign (*adminiculum*) that eventually would lead to the establishment of evidence and strengthen the proof of other witnesses,¹⁵⁰ the revised Code considers their evidence as valid testimony.

4.8 MINORITY: STATUS OR CONDITION?

Status and *condition* - these terms overwhelm the legal vocabulary. While their underlying concept itself is unclear, the terms are often used without making proper distinctions. It is very important to examine these terms in relation to minority.

¹⁵⁰ Other renovations in *CIC/83* relating to minors below the age of fourteen years as witnesses in contrast to *CIC/17* are: (i) it does not classify them as unfit (*non idonei*); (ii) it has removed the term *impuberes* that differentiated boys from girls in reference to their age and capacity, and has set an uniform age for both; (iii) it does not state that as a rule these minors are to be heard without placing them under oath (*iniurati audiantur*).

4.8.1 Status

In the revised Code, the term *status* has been used about 54 times. Its use seems to be very flexible in order to accommodate the common condition of the faithful and the various juridical situations of the members of the people of God.¹⁵¹ There is no single commonly accepted definition of *status*, for it is used as a functional word as well as a technical legal term. H. C. Black describes *status* as:

Standing; state or condition; social position. The legal relation of individual to rest of the community. The rights, duties, capacities and incapacities which determine a person to a given class. A legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned.¹⁵²

In the broadest sense, *status* is the place or position a person occupies in a given social or legal system. In this sense, it may even denote the "condition" or the "position" of persons or property in the legal system. However, the word has been given more specialized or technical meanings to differentiate it, in particular, from "capacity" or "incapacity". *Status* also has a restricted and technical meaning. This sees status not in terms of a person's unique or specific characteristic, but of one's relative or differential attributes. In this context, status gives an indication of the role of specific persons (such as minors), in comparison to those who are not minors (such

¹⁵¹ The Code has many usages of the word *status*, such as, *status clericalis*, *status personarum*, *status coelibatus*, *status vitae*, *status canonicus christifidelium*, *status libertatis*, *status matrimonialis*, *status valetudinis physicae*, *status gratiae*, *status gravis peccati*, *status oeconomicus* and *status iudicii* (see D. COMPOSTA, *La Chiesa visibile: la realtà teologica del diritto ecclesiale*, Roma, Tipografia polyglotta Vaticana, 1976, p. 185; see also OCHOA, *Index verborum ac locutionum Codicis iuris canonici*, pp. 463-466).

¹⁵² s.v. "Status," in BLACK, *Black's Law Dictionary*, p. 1264.

as those who have attained the age of majority). In other words, status refers not only to specific rights and duties, capacity and incapacity, but its juridic usage also sees it in terms of persons' relative or differential attributes.¹⁵³

According to D. Composta, the term can have three meanings: (i) ecclesial condition; (ii) canonical status, and (iii) personality with regard to the *ius standi in iudicio*. In the first meaning, the word *status* points out the dignity of the faithful as members of the Church. In the second, it denotes the totality of rights and duties which canonical order attributes to a category of the faithful for their specific mission in the Church; and in the third sense, it indicates a capacity to vindicate one's subjective rights. Thus, the first meaning expresses *societarity* (*societarietà*), the second *constitutionality* (*costituzionalità*), and the third *legality* (*legalità*).¹⁵⁴

Status has a legal connotation, because it has law for its source or foundation. It determines a person's legal condition in the community by reference to some legal class or group. The imposition of status carries with it the attribution of specific capacities and incapacities, rights and duties. The condition of status is legally fixed. Status differs from capacity. *Capacity* is a legally conferred power which affects the

¹⁵³ See S.J. STOLJAR, "The Notion of Status," in *The American Journal of Jurisprudence*, 18(1973), pp. 136-137. "Where most concepts, so to speak, indicate what may be called 'definitional' questions ('What is man?', 'What is law?') status rather puts questions of a comparative nature ('Where does X stand in relation to Y?'). And these questions hint at peculiarities not different but differential, in the sense we now mean to compare or contrast a pair of persons, or groups of persons, not so much to define their individual attributes as, rather, to 'assess' them in their perspective positions to each other" (*ibid.*, p. 137).

¹⁵⁴ See D. COMPOSTA, "Lo stato clericale nei suoi presupposti teologici," in *ME*, 109(1984), pp. 13-14.

rights of a person in relation to other persons towards whom the exercise of capacity is directed, subject to certain general and legally defined limits - limits which vary in relation to each particular form of capacity. Capacity of this kind is one of the incidents of status. It is a dynamic incident of the condition, by which the holder of the status may legally act within the limits of the purposes for which the status was imposed.¹⁵⁵ Status also differs from juridic personality. Juridic personality is a generic fundamental capacity of the person whereas status is more specific.¹⁵⁶

Juridic status can be defined as the sum-total of rights and obligations which a person *de facto* enjoys subject to a determinate juridic order.¹⁵⁷ The status is a matter of concrete capacity and incapacity. The Code speaks of the status of clergy, laity, and religious. It means they have specific obligations and rights consonant with their condition of life.¹⁵⁸ As regards the choice of states in life, there is no possibility for minors to enjoy the clerical or religious status, because the age

¹⁵⁵ See R.H. GRAVESON, *Status in the Common Law*, London, The Athlone Press, 1953, pp. 55-56.

¹⁵⁶ See MICHIELS, *Principia generalia de personis in Ecclesia*, pp. 5-6.

¹⁵⁷ See TOCANEL, *Compendium praelectionum de normis*, p. 255; J.F. CASTAÑO, "Condicio laicalis' e 'status consecratorum' nel nuovo Codice," in *Angelicum*, 65(1988), p. 335.

¹⁵⁸ The treatment of status in reference to clergy, laity and religious (consecrated persons) is beyond the scope of this study. For an elaborate study of the term *status*, see FORNÉS, *La noción de 'status' en derecho canónico*, pp. 25-332; see also G. SARACENI, "Il concetto di 'status' e sua applicazione sul diritto ecclesiastico: sintesi di una parte generale," in *Archivio giuridico*, 132(1945), pp. 107-160; T. BERTONE, "Gli stati giuridici delle persone dopo il Concilio di Trento," in *ME*, 106(1981), pp. 395-410; P. PELLEGRINO, "Gli 'status' ed il principio di ugualianza nell'ordinamento canonico," in *DE*, 84(1974), pp. 165-239.

requirement for reception of Orders and for profession in religious life is higher than eighteen years.

Minors have a status in the law. Why does the law give them a status? The answer is in its function. Status functions in the realm of the legal organization of a given society, giving legal protection to certain social relations, institutions, and individual conditions. By nature minors are weak, and they need protection. Therefore, Graveson states that these members of the society must be

protected by legal safeguards against the naturally stronger, and that the permanent relationships established between the members shall be strengthened by being raised to a legal plane beyond individual control in order to make those relationships a firmer foundation of society. Particularly is this purpose apparent in granting [...] the status of parent and child when issue are born, a similar status in the case of adoption and the status of guardian and ward in the case of guardianship.¹⁵⁹

Minors are the favourites of law and equity. The general capacity of minors is substantially affected throughout their age of minority, although in specific matters they may have full capacity to act as those who have reached the age of majority. Their interests and welfare need to be protected.

S. J. Stoljar states that the status of minors implies that there is something special in the legal position of these persons if seen from the point of view of the persons they are explicitly or implicitly compared with: here the person of full age. In *law*, status peculiarities are normally of only two kinds. They may qualify or diminish comparable rights and duties, in which case we speak of capacity; or they

¹⁵⁹ GRAVESON, *Status in the Common Law*, p. 143.

may enhance certain claims, in which case we refer to particular advantages or entitlements. The status of being a minor, for example may produce an incapacity diminishing one's right to act independently; yet being a minor is also a status conducive to certain entitlements. We arrive then at these two conclusions: that status can be used in a broader and in a more restricted sense; that while its broader meaning does not tell us very much, its relative or differential sense can be helpful in determining a person's comparative position in law; and that in this latter sense status includes both a person's legal entitlements and incapacities.¹⁶⁰

Persons' *concrete capacity* to exercise their rights and duties *follows* from their *condition*. It is important not to confuse juridic status with juridic condition. The former enjoys more stability or permanance than the latter.¹⁶¹

4.8.2 Condition

One of the most frequently mentioned qualifiers in the Code is "condition" (*condicio*). It is also found several times in the Vatican II documents.¹⁶² A. Borrás

¹⁶⁰ See STOLJAR, "The Notion of Status," pp. 137-138.

¹⁶¹ See V. FAGIOLO, "Gli stati giuridici delle persone nella Chiesa," in *ME*, 106(1981), p. 359; A. BORRAS, *L'excommunication dans le nouveau Code de droit canonique*, Paris, Desclée, 1987, p. 193.

Sometimes authors use *status* or *condition* interchangeably. For example, R. Naz referring to the state of persons says: "On appelle *état* d'une personne - *status* ou *conditio* - certaines qualités que le droit prend en considération pour y attacher des effets juridiques. Ainsi la qualité de chrétien, de mineur, de majeur, de clerc, de religieux" (s.v. "Etat des personnes," in NAZ, *Dictionnaire de droit canonique*, vol. 5, col. 465).

¹⁶² "Vatican II used the term ['condition'] at least one hundred and ninety six times. At least sixty percent of the time, it referred to external conditions of time, place, or conditions in the situation. The term was also used with about equal frequency when it related to one's personal abilities or infirmities, a person's social status, the 'human condition,' the condition

is of the opinion that a close analysis of the term indicates that it is used in the Code in five different meanings.¹⁶³

The canons which define the age of majority and minority are placed under the title: *De personarum physicarum condicione canonica* (Book I, title VI, chapter I).¹⁶⁴ Juridic or canonical condition signifies the juridic situation of a person, which

of the Church itself, or preconditions for something else to happen. Less frequently it was used to differentiate the conditions of Christians from non-Christians, and four times it referred to one's condition or state within the church structure (clergy, religious, laity).

The conciliar usage does not canonize any particular meaning of condition, leaving the possibilities open - depending on the context in which the term is used" (PROVOST, "The Christian Faithful," p. 138).

¹⁶³ This can be seen from the context in which the term appears. Sometimes the term can have two meanings or even interpretations where these canons are cited followed by a 'x' mark.

(i) *Conditio* means a *clause* or a *particular disposition* of a juridic act: cann. 30; 39; 41; 42; 68; 126; 172 §2; 174 §3(twice); 175, 2°; 271 §3; 304 §1; 425 §3; 506 §1; 611, 2°; 643 §2; 658; 721 §2; 735 §2; 828; 844 §3; 845 §2; 869 §1; 869 §2; 893 §1; 961 §2; 992; 1080 §1; 1086 §2; 1102 §1; 1102 §2(twice); 1103 §3; 1125; 1165 §2; 1194; 1201 §1; 1202, 3°; 1263; 1267 §2; 1304 §2; 1361 §1; 1743.

(ii) *Conditio* refers to a *juridic situation*: The term is found in Book I, title of chapter I of title VI; also in cann. 96; 155; 204 §1; 208; 210; 216; 281 §1; 384 §2(x); 705; 711.

(iii) *Conditio* is used to signify *external circumstances*, such as, social, economic and political ones: cann. 257 §2; 258; 281 §1; 364, 1°; 512 §2; 659 §2; 714; 1116 §1, 2°; 1148 §3(x); 1271; 1339 §1(x).

(iv) It is also used to express the *rank* or *position* or *personal circumstances* of life which an individual has in society. It refers to the *social condition* of persons or their *condition in life*: cann. 225 §2; 229 §1; 231 §2; 383 §1(twice); 394 §2(x); 568; 687; 745; 769; 771 §1; 777, 4°; 779; 979; 981; 1148 §3(x); 1139 §1(x) 1572, 1°.

(v) Only twice the term has been used to designate the state of patrimonial goods of the physical or juridic persons: cann. 638 §3; 1295 (BORRAS, *L'excommunication dans le nouveau Code de droit canonique*, note 138, p. 192).

¹⁶⁴ The 1977 Schema had named this chapter: "*De personarum physicarum statu canonico*" (PCCICR, *Schema canonum libri II: De populo Dei*, p. 23; *Communicationes*, 9[1977], p. 238). During its deliberations on 17 October 1979, the Secretary of the *coetus studiorum "De populo Dei"* drew the attention of the group to the observation made by one consultative organ regarding this title and the suggestion to name it: "*De personarum physicarum circumstantiis*". The reason was that the word *status* can be applied only to some of the circumstances enumerated in the chapter (see *Communicationes*, 12[1980], p. 63). In the

is different from *status*.¹⁶⁵ According to Borrás, in the context of the revised Code the term *juridic* or *canonical condition* may be defined as the concrete configuration of the subjective rights and correlative duties. This inheritance in question is composed of three necessary components or three levels: firstly, the totality of rights and duties attributed to all baptized persons which form their fundamental status of *christifidelis*; secondly, the totality of rights and duties attached to a particular *status*, those of laity, clergy, and religious; and finally, the sum total of juridic facts and acts which have determining effects on the juridic action of the subject in question. This is because, the concrete inheritance of an individual is not simply determined by the fact of belonging to a *status*. It is equally a function of a totality of the elements, such as, age, use of reason, place of origin and residence, bond of consanguinity and affinity, adoption, and ecclesial rite.¹⁶⁶

Is minority a status or a condition? We can speak of minority, both as a condition and a status. This is due to the fact that there is an intrinsic connection

1980 Schema we find the chapter as: "*De personarum physicarum condicione canonica*". In preparation for the 1981 meeting, Cardinal Palazzini suggested that the title be corrected to read: "*De personarum physicarum constitutione et condicione iuridica*." He wanted to include the canon on the *constitution* of persons in the Church through baptism, which was not included in the 1980 Schema (see 1981 Relatio, p. 30; *Communicationes*, 14[1984], p. 140).

¹⁶⁵ The expression, "juridic or canonical condition" is new in *CIC/83*, because in *CIC/17*, the term *conditio* (spelt "t" and not "c") was not used to designate a juridic or canonical condition (see BORRAS, *L'excommunication dans le nouveau Code de droit canonique*, p. 193-194; CASTAÑO, "Condicio laicalis' e 'status consecratorum' nel nuovo Codice," note 29, p. 336).

¹⁶⁶ See BORRAS, *L'excommunication dans le nouveau Code de droit canonique*, pp. 193-194.

between the two terms. Status is a position that a person enjoys within the juridic order with all the rights, duties and capacities and incapacities which are determined in the law. To acquire this position a person should possess that quality which opens up to him or her that specific status. For example, baptism acts as an incident to the status of the *christifidelis* and Holy Orders to the clerical status. In other words, condition is an incident to the status and constitutes an assumption for the acquisition of status. The law attaches status to a specific condition. Condition refers to the being of a person, whereas, status refers to the concrete or specific capacity of a person. As long as the condition lasts, a person has the status. Minority as defined in can. 97 §1 is a condition, and the general principle determined in can. 98 §2 refers to status. In comparison to can. 98 §1, can. 98 §2 maintains a comparative or a differential status. The specific rights and duties, capacities and incapacities are spread out through the entire Code.

CONCLUSION

The Church places the rights and welfare of children within the context of the family. They find an innate and vital strength in the family through their parents. Parental rights are inseparable from the rights of children. As Christian parents, they have obligations and rights towards the Christian formation of their children, particularly towards their Catholic education, catechesis and sacramental preparation.

Constituted as the people of God by baptism, all persons, irrespective of their condition, enjoy equal dignity and obligations and rights proper to persons in the Church. In this respect, minors have a right to equal dignity as *christifidelis*. However, on account of their condition, the Code regulates their capacity to exercise certain of their rights on their own and provides them with the assistance of parents or guardians or curators.

Minors have an obligation to make use of the means provided to them by parents, pastors, and those who take care of them. They have an obligation to acquire knowledge of the faith and the sacraments, live a holy life, and participate in ecclesial life according to their capacity.

The Code is sensitive towards minors in the realm of spiritual matters. It is generous in regard their right to the sacraments and in other related matters. In procedural matters relating to spiritual issues and in the choice of state in life, it exempts them from the authority of parents and guardians. In penal matters, all minors are exempt from *latae sententiae* penalties, and minors who have not completed their sixteenth year are exempt from all canonical penalties. In those areas, where they incur penalties, the Code exhorts the competent authorities to temper their punishments and to substitute them with suitable penances. In short, the Code not only displays a great concern for the rights of minors, but it also provides adequate means to protect them.

In the Code, there are ample references to the terms *status* and *condition*. Status is a totality of obligations and rights within a juridical order. Condition is a

quality that is recognized in law. Minority as a quality in a person (as an "extended age") is a condition. As a condition it acts as an incident to the status. On account of the condition, the revised Code grants a general status to minors, that is, they are subject to the authority of their parents or guardians in the exercise of their rights with due regard for the exemptions provided for them by divine law and canon law. Although there is no title on the obligations and rights of minors, as we have seen already, there are many canons scattered throughout the Code which specifically mention them. While these canons refer to the capacity of minors to exercise their obligations and rights, some of them also indicate the manner of exercising them.

GENERAL CONCLUSION

Every baptized human being is both a *christifidelis* and a person in the Church. As a *christifidelis* one shares in the threefold mission of Christ, and as a person one has rights and obligations in keeping with one's condition. Irrespective of their age or capacity, everyone enjoys equal dignity and possesses equal rights. However, the condition of every person is not the same, and the Code takes this into consideration in assigning a particular status to persons. Our study focused on the condition of minority, which is a particular period in the life of a person when one needs special protection and assistance. At birth children are totally dependent on their parents for everything. However, since their incapacity is only temporary, their transformation into mature adults capable of exercising full responsibility is inevitable in the course of time.

Law follows life. Therefore, it may be said that every legal norm is a child of history. Moreover, law is neither wholly reason nor wholly experience; rather, it is experience developed by reason, and reason checked and directed by experience. This study reveals the historicity of both the concept of minor and the legal status accorded to minors. The concept of minor as a socio-legal construct, has changed with the flow of time. This is evident in Roman law, which relying on the laws of nature categorized persons into *infantes*, *impuberes*, and *puberes*. Puberty was the dividing line between a minor and a major. However, later in history, due to socio-

cultural situations, the law considered all those who have not completed their twenty fifth year of age as minors and provided them with a special legal status. The Church incorporated the Roman law concept of minority into her legislation and developed relevant legal norms which reflect her specific nature and functions. The Roman law did not contain the concept of emancipation on attaining a certain age. In other words, the juridic effects of attaining the age of majority were foreign to it. The modern civil Codes had a great influence in the formulation of cann. 88 and 89 of the 1917 Code, which for the first time gave a canonical definition of minors, stating that those who had not completed the age of twenty-one years were minors. In response to changes in the secular legislation of various countries, the revised Code has changed the age of minority by declaring those who have not completed their eighteenth year of age as minors. The juridical definition of a minor in the Code is a merely ecclesiastical law, subject to change in the future. However, the mutability of the notion of a minor does not affect their status as *christifideles* and persons in the Church, as well as the equal dignity and rights which they possess in relation to those who are in the age of majority.

Baptism insofar as it constitutes one a person in the Church becomes the foundation of ecclesial rights and obligations. Correlative to the *concept of person* is the *juridic capacity*, that is, the suitability recognized by the law to exercise one's obligations and rights. As persons, all *possess* equal rights, but the juridic capacity to *exercise* them depends on the conditions stipulated in the Code. The period of minority as defined in law is a juridic condition. Although minority is a very broad

concept which includes persons until the completion of their eighteenth year, their human maturity and personal capacity during this period varies considerably. Therefore, the Code recognizes specific periods, such as the ages of seven, fourteen, and sixteen years within the duration of minority, and allows minors to exercise more rights, and enjoins on them more obligations in consonance with their growing capacity.

The revised Code is more pragmatic in its approach to the division of periods within the age of minority. While the 1917 Code divided minors into *infantes*, *impuberes*, and *puberes*, the revised Code has only two broad divisions: *infants* and *those who are not infants*. Infants are those who have not completed their seventh year of age. They are considered *non sui compos*, and by the very disposition of positive law are exempt from merely ecclesiastical laws, even if they should have the use of reason. Since the Code makes use of two distinct concepts: *use of reason* and *infants*, the principles of interpretation require that they be understood according to their proper meaning considered in their text and context. The concept of the *use of reason* gives flexibility to the application of canonical norms affecting minors in favour of their evolving capacity. Consequently, the word *censetur* in can. 97 §2, used in relation to the attainment of the use of reason, should not be construed as a rigid legal determination but rather as a presumption which surrenders to truth. This will eliminate undue restrictions, for example, temporarily denying minors' right to specific sacraments when they are in fact capable of receiving them according to the norms of the Code. Because the concept of the use of reason is a fluid term, the assessment

of whether a minor has it should be determined in relation to the minimum requirements set forth in law for the exercise of the right.

In declaring that minors remain subject to the authority of parents or guardians in the exercise of their rights, with the exception of those matters from which they are exempt in virtue of canon law or divine law, the Code provides minors adequate assistance for their human and Christian growth. It is another way of placing the rights of minors within the context of the family. The norms regarding necessary legal domicile and quasi-domicile of minors and those regarding their *ipso iure* transfer to the Church *sui iuris* of their parents, give practical effect to the principle that the family provides a natural and Christian environment for the emotional and spiritual growth and well being of minors, and facilitates parental responsibilities towards them. Parents and those who take their place have a right and duty towards minor children, and similarly minors have a corresponding duty to respect their parents and seek their consent or counsel as required. As minors advance in years, the Code progressively decreases their dependence on their parents or guardians in the exercise of rights. The obligation of parents or guardians to protect their minor children gives way to the obligation to assist the child's development by helping it to make mature choices. This is because there is more to minority than dependence, as it is also an apprenticeship in maturity which the law facilitates.

Parental obligations and rights as specified in the Code are the core duties of their mission and apostolate. *Parentum potestas* is a mission, a service, and a

coresponsibility in the Church. This authority used for the benefit of the child finds justification insofar as it enables parents to perform their duties effectively towards minors. Moreover, this *potestas* as service enhances the recognition of the equal dignity of minors and of those who are in the age of majority.

The obligations and rights of minors are closely linked to the rights of parents and guardians. This is because the Church treats minors in relation to parents and those who take their place. The exercise of the rights of minors depends upon parents, and therefore the Code, which is solicitous about minors, addresses all those whose actions may affect children and gives a priority to their obligations over rights. The Code provides clear norms governing the constitution of guardians and curators. As a general rule, the Code defers to civil law in regard to the designation of a guardian and his or her authority. However, there are exceptions to this rule when canon law provides otherwise, and when the diocesan bishop decides for a just cause to designate some other guardian. Canon 1479 allows even a judge to appoint a guardian or a curator for minors after having heard the diocesan bishop, if a civil guardian has not been appointed or the one appointed is not admissible in an ecclesiastical trial. This exception upholds the right of the Church to appoint guardians and/or curators for minors, particularly in spiritual matters and in cases connected with spiritual matters.

The institute of guardians is primarily responsible for the protection of minors. Generally, the function of this institute belongs primarily to parents or adoptive parents. In the event of the death or incapacity of the parents or the abandonment

of their children, the juridic order intervenes to take care of minors. In principle, the Code establishes a priority in the order of parents, guardians, or curators.

The revised Code has taken into account the opinions of various canonists in the interpretation of the relevant canons of the 1917 Code and the lack of clarity in some canons. Therefore, the formulation of the canons on minors in the revised Code is more precise and specific compared to that of the previous law. Some of the meaningful changes, for example, consist of: the inclusion of the necessary or legal quasi-domicile for a minor and the proper domicile of a legally emancipated minor (can. 105 §1); the addition of the phrase "canon law" in the areas relating to exemption from parental authority and the constitution of a guardian (can. 98 §2); the freedom of those who have completed their fourteenth year of age to return to their original Church *sui iuris*, if they had been transferred by law itself along with their parents to another Church *sui iuris* (can. 112 §1, 3°); and the suppression of the puberty norm.

The revised Code attempts to strike a balance between the rights of minors, and the good of the Church. Unlike the 1917 Code, the present law does not make it possible for minors to acquire the clerical and religious state of life. While maintaining the same age for marriage as in the previous legislation, it strongly discourages marriage of minors allowing the episcopal conferences to raise the marriageable age for liceity. The discussion during the revision of the Code centring around the *ius connubii* and canonical age for marriage bear evidence to the fact that the Code has tried to uphold the natural right of the individual to marry. However,

it would have been more appropriate to raise the age of marriage to the age of majority as a matter of general principle and by providing the possibility of dispensation from the impediment of age for a just reason. This norm would respect the natural right to marry and at the same safeguard the finality of marriage and the common good of the Church, and bridge the gap between civil and canonical age of marriage.

In penal matters, the present Code specifies the canons which deal with minors. Unlike the previous Code, it does not enter into the question of imputability when they commit an offense. Irrespective of the presence or absence of imputability, when minors transgress a penal law or precept they are exempted from the penalties. No minor incurs *latae sententiae* penalties, and minors below the age of sixteen are not subject to any penalty whatsoever. The penal norms in the revised Code do not seem to deter minors from committing ecclesiastical offenses as we observe an increase in juvenile delinquency and a tendency to disregard the law. The law seems to keep minors outside the purview of penal norms which gives an impression of unjustified laxity towards the offenses of minors. While it is true that the nature of penalty is not the same in the Church as in civil society, the penal norms affecting minors are hardly efficacious and to some extent fail in the educative role not only in compelling them to abide by laws but also in showing that the law embodies a value. It would have been better to stipulate the age of fourteen years for incurring penalties. The *CCEO* follows this age in its penal norms for imposing penances on minors for offenses.

Procedural law aptly demonstrates concern for the rights of minors in spiritual matters and those connected with spiritual cases. The Code gives minors an opportunity not only to stand in court but also the right to technical assistance which the judge is invited to provide for them. The law gives due consideration to the protection of the right of defence of minors. However, there is not adequate development of jurisprudence in matters relating to minors, except in matrimonial cases. This is because, on the one hand, there are no juvenile courts in the Church and on the other, people generally approach civil courts. Nevertheless, jurisprudence has played an important role in matters relating to domicile, legal emancipation, and the procedural and testimonial capacity of minors. The changes incorporated in the Code reveal a better appreciation of the ability of minors and provide them with adequate opportunities to participate, either personally or through their legal representatives, in any judicial and administrative proceedings involving their interests. With due regard for the role of a guardian or curator in the procedural matters in court, taking into account the age and maturity of minors in a trial, they should be helped to know the issues, led through the proceedings, encouraged to participate at all its stages and express their thoughts and opinions.

The concern of the Code with regard to the rights of minors to Christian education and sacraments is quite evident. It emphasizes the obligation of parents and those who take their place, the sponsors, the pastor, and the community towards minors. In some cases, it even penalizes parents for neglecting their duty. Moreover,

the Code also makes some sacraments easily accessible to minors by stipulating minimum requirements for their reception.

Our study also illustrates possible areas of conflict between civil and canon law, particularly in matters of guardianship and sexual abuse of minors. The designation of another guardian by the competent ecclesiastical authority, when the minor has already been given a civil guardian, must be done with utmost caution and prudence. Such a designation should be only for specific cases involving spiritual cases or matters directly related to them. This calls for a clear delineation of the rights and duties of the guardian, the extent of authority and the duration of guardianship, thereby creating the least possible conflict and overlapping between the civil laws and the ecclesiastical guardians. The present conflict between civil laws of some countries and canon law in the matter of age concerning child abuse can be resolved either by raising the age stipulated in can. 1395 §2 - from sixteen to eighteen years complete, or by canonizing the civil law.

The Code has also some anomalies in the designation of ages for certain functions. For example, while a boy and a girl can marry on completing sixteen and fourteen years respectively, persons below the age of sixteen years, as a general rule cannot act as sponsors for baptism and confirmation. The obligations and rights that one assumes in marriage are undoubtedly greater than those required in a sponsor. Another example is the specification of the period of minority above the age of sixteen years as an extenuating circumstance for all penalties. This specification seems to be redundant because the reason for diminishing the penalties must be

based on factors, such as imperfect use of reason, force, fear, lack of full imputability, etc., which reflect better the principles of penal law rather than of mere age.

Minors have a specific juridic status in the Church on account of their natural condition. The juridic status assigned to minors, broadly speaking, is that of juridic dependence on their parents and guardians in the exercise of certain rights. It is a relational status. Their condition reflects an insufficient human maturity to function independently, and this condition acts as an incident to the status. As a sum total of obligations and rights, juridic status regulates and promotes relationships of justice. This helps everyone, young and old alike, to give and receive whatever is due to each one within the particular juridic structure. In the Church, the juridic status of minors offers them the best possibility to participate in the mission and contribute to the good of the Church. The status provided to minors takes into account their human and Christian dignity, at the same time safeguards the good of the institutions, such as marriage, the religious, and clerical state, offices in the Church, etc., by regulating the exercise of the right of minors in specific areas. It takes into account not only the *bonum commune* but also the *salus animarum* which is the supreme goal of all juridic norms of the Church.

While the importance of legislation applicable to minors as a genuine expression of the Church's concern for them and the status accorded them in the juridical order cannot be underestimated, nevertheless, the true recognition of minors' rights calls for implementation of norms in practice. This is a coresponsibility enjoined not only on parents, guardians, ministers, and pastors, but also on the

Christian community at large. Carrying out our responsibilities towards minors would certainly amount to respecting their condition and status in the Church. This can serve as a true testimony to our genuine concern for the total well-being of children about whom Jesus said: "Let the little children come to me."

APPENDIX

PROPOSED DRAFT OF THE CHARTER OF RIGHTS OF MINORS

PREAMBLE

Considering that:

(i) Every human being is created in the image and likeness of God and has human dignity and rights which are universal, inviolable and inalienable. Human nature is the foundation of human rights and the Church has an inherent mission to defend and promote human dignity and fundamental rights of human persons.

(ii) Human life must be respected and protected absolutely from the moment of conception. Every child has an inherent right to life and consequently is entitled to special protection and assistance before and after birth.

(iii) The Holy See as a signatory to the *United Nations Convention on the Rights of the Child* expresses its profound concern not only for the physical welfare of children, but also for their spiritual and moral growth.

(iv) The Church places the rights and welfare of each child in the context of the family and she is committed to the integral well-being of children within the context of the family, the "domestic church." Parents have the most serious obligation and primary right to do all in their power to ensure their children's physical, social, cultural, moral and religious upbringing (can. 1336).

(v) Marriage is a covenant by which a man and a woman establish between themselves a partnership for their whole life, and which is of its very nature ordered to the well being of the spouses and to the procreation and upbringing of children, between the baptized, has been raised by Christ to the dignity of a sacrament (can. 1055 §1). The acceptance and education of children is profoundly linked to the institution of marriage; parenthood represents a responsibility which is not simply physical but spiritual in nature.

(vi) The Church is specifically concerned with the rights of minors mindful of the teaching and example of Jesus Christ who said "Let the little children come to me; do not stop them; for it is to such as these that the kingdom of God belongs" (*Mk.* 10:14).

(vii) The fourth commandment of the Decalogue obliges children to respect and honour their parents; this commandment makes a reciprocal demand on parents to act in such a way that they will merit the honour and respect of their children. In

this way the commandment expresses the intimate bonds of love and responsibility between parents, those who take their place and children.

(viii) By baptism one is incorporated into the Church of Christ and is constituted a person in it with duties and rights which are proper to Christians, in keeping with their condition, to the extent they are in ecclesiastical communion and unless a legitimately issued sanction stands in the way (can. 96).

We propose a draft of the **Charter of Rights of Minors in the Church** based on the Code of Canon Law of 1983.

ARTICLE 1

(a) A minor means every person who has not completed the age of eighteen years (can. 97 §1). For the purposes of this Charter, a minor is also called a child.

(b) A minor, before the completion of the seventh year is called an infant and is considered to be incompetent (*non sui compos*); with the completion of the seventh year one is presumed to have the use of reason (can. 97 §2).

ARTICLE 2

Merely ecclesiastical laws do not bind minors who have no sufficient use of reason and, unless the law expressly provides otherwise, have not completed seven years of age (can. 11).

ARTICLE 3

(a) Minors are Christ's faithful insofar as they are incorporated into Christ through baptism and constituted as the people of God and persons in the Church (cann. 96; 204 §1).

(b) As Christ's faithful they possess equality of dignity and action among all of Christ's faithful. According to their condition and capacity, they are called to participate in the mission of the Church and contribute to the building up of the Body of Christ (cann. 208; 204 §2).

(c) As persons in the Church, minors enjoy all rights and duties according to their condition and as stipulated in the law of the Church (can. 96).

ARTICLE 4

Children who have been adopted in accordance with the civil law are considered the children of that person or those persons who have adopted them (can. 110).

ARTICLE 5

(a) A minor person remains subject to the authority of parents or guardians in the exercise of his or her rights, with the exception of those areas in which a minor by divine law or canon law is exempt from their power (can. 98 §1)

(b) With reference to the designation of guardians for a minor and their authority, the prescription of the civil law are to be followed unless canon law determines otherwise or unless the diocesan bishop in certain cases for a just cause has decided to provide otherwise through the designation of some other guardian (can. 98 §1).

ARTICLE 6

(a) Because they gave life to their children, parents have the most serious and inalienable obligation and right to educate them. They and those who take their place are primarily responsible to ensure their children's Christian education in accordance with the teaching of the Church (cann. 226 §2; 793 §1).

(b) Parents are to form their children by word and example, in faith and in Christian living. The same obligation binds sponsors and those who take the place of parents (can. 774 §2). They have a special obligation to help their children in catechetical formation and sacramental preparation. They need to collaborate actively with the pastors and ministers in availing their help in adequately forming their children.

(c) It is the primary duty of parents and those who take their place, as it is the duty of the pastors to ensure that children who have reached the use of reason are properly prepared to receive the sacraments at the appropriate time (cann. 890; 914).

(d) Parents enjoy true freedom in their choice of school for their children. However, they are to send their children to those schools which will provide for their Catholic education. If they cannot do this, they are bound to ensure the proper Catholic education outside the school (cann. 797; 798)

(e) Parents should guide the minors in the use of the social communication media to reinforce fundamental human and Christian values. They should be vigilant to protect the minors from the negative effects and misuse of the mass media.

ARTICLE 7

In a special way, the pastors are to ensure, in accordance with the diocesan norms, that: (i) an adequate catechesis is given for the celebration of the sacraments and children are properly prepared for first Confession and first Holy Communion, and for the sacrament of Confirmation; (ii) children after their first Communion are given a richer and deeper catechetical formation (can. 777).

ARTICLE 8

(a) Parents are obliged to see their infants are baptized within the first few days. If the infant is in danger of death, it is to be baptized without any delay (can. 867).

(b) Parents, sponsors and pastors are to take care that a name foreign to Christian sentiment is not given to children (can. 855).

ARTICLE 9

Parents have an equal responsibility towards the good of their children even though they may be separated as spouses or their marriage is declared null. When there is a grave danger to the body and soul of the children by one spouse, the other can legitimately seek separation for the good of the child and as long as the reason lasts (can. 1153). Even though their marriage is annulled, parents have the moral and civil obligation to support and bring up their children (can. 1689).

ARTICLE 10

(a) Children conceived or born of a valid or putative marriage are legitimate. Children are presumed to be legitimate if they are born at least 180 days after the celebration of marriage or within 300 days from the date when the conjugal life was terminated (can. 1138 §2).

(b) Illegitimate children are rendered legitimate through the subsequent valid or putative marriage of their parents, or through a rescript of the Holy See. As far as canonical effects are concerned, the legitimized children are equivalent in everything to legitimate children unless the law expressly states otherwise (cann. 1139-1140).

ARTICLE 11

(a) Minors, who having ceased to be infants, have reached the age of reason are considered adults in matters relating to baptism (can. 852 §1). To be admitted to baptism they must have manifested their intention to receive baptism and are to be admitted to the catechumenate and should be introduced through various stages to the sacraments of initiation (cann. 851; 865 §1).

ARTICLE 12

(a) Apart from the danger of death a baptized minor who has the use of reason and is suitably instructed, properly disposed and able to renew the baptismal promises can receive lawfully the sacrament of Confirmation, with due regard for the particular law and judgement of the minister which determine otherwise (can. 891).

(b) Holy Communion may be administered to children in danger of death if they can distinguish the Body of Christ from ordinary food and receive Holy Communion with reverence (can. 913 §2). Similarly the anointing of the sick may be administered to children who have reached the age of reason and are dangerously ill (can. 1005).

ARTICLE 13

(a) A child of parents who belong to the Latin Church is ascribed to it by reception of baptism, or, if one or the other parent does not belong to the Latin Church and both parents agree in choosing that the child be baptized in the Latin Church, the child is ascribed to it by reception of baptism; but if the agreement is lacking, the child is ascribed to the Ritual Church to which the father belongs (can. 111 §1).

(b) Anyone to be baptized who has completed the fourteenth year of age can freely choose to be baptized in the Latin Church or in another Ritual Church *sui iuris*, and in this case the person belongs to that Church which is chosen (can. 111 §2).

(c) After the reception of baptism, children of those persons who legitimately enrol in another Ritual Church *sui iuris* transfer automatically to the Church *sui iuris* of their parents, if the former have not completed their fourteenth year of age; similarly children of a Catholic party in a mixed marriage who legitimately transferred to another Church *sui iuris* (can. 112 §1, 3°).

(d) Minors, who had been transferred automatically by law itself when their parents transferred to another Church *sui iuris*, may return to their original Church when they complete the age of fourteen years (can. 112 §1, 3°).

ARTICLE 14

(a) Minors have a right to make known their needs, especially their spiritual needs and wishes to the Pastors of the Church (can. 212 §2); and they have the right to be assisted by their pastors, especially by the word of God and the sacraments (can. 213).

(b) Taking into account the evolving capacity of minors and their role in the Church, particular laws of the diocese should see that they are given appropriate representation in the diocesan pastoral council (can. 512), the parish pastoral council (can. 536), and in the diocesan synod (can. 463).

(c) Minors with requisite age and qualifications can be installed as ministers either on a stable basis with due regard to the universal and particular law of the Church (can. 230 §1); similarly they can fulfill various liturgical functions according to the norms of law (can. 230 §2).

(d) They have a right to establish and join associations which will facilitate their apostolate in the Church (can. 215).

ARTICLE 15

(a) Minors have a right to follow their own form of spiritual life provided that it is according to the norm of the Church. They have an obligation to observe Sundays and holydays of obligation (cann. 214; 1247).

(b) Minors who have completed their fourteenth year of age are bound by the law of abstinence (can. 1252).

ARTICLE 16

(a) All have the right to immunity from any kind of coercion in choosing a state in life (can. 219).

(b) With due respect for the role of the families in guiding the decisions of their children, any pressure or force which would impede the freedom and choice of vocation is to be avoided.

(c) A man who has completed sixteen years and a woman who has completed fourteen years of age can enter into marriage. However, they should respect the age specified by the particular law of the Church which takes into account the civil law and customary age of marriage (can. 1083).

(d) With due regard for the particular norms of the institute, those who have completed their seventeen years of age can be admitted to the novitiate of a religious institute and a society of apostolic life (cann. 643 §1, 1°; 735 §2).

ARTICLE 17

(a) The place of origin of a child, and even of a neophyte, is that in which parents have a domicile, or lacking that a quasi-domicile when the child was born; if the parents did not have the same domicile or quasi-domicile, it is that of the mother (can. 101 §1).

(b) In the case of the child of *vagi*, the place of origin is the actual place of birth; in the case of a foundling, it is the place where it was found (can. 101 §2).

(c) A minor necessarily keeps the domicile or quasi-domicile of the one to whose power he or she is subject. A minor who is no longer an infant can acquire a personal quasi-domicile (can. 105 §1).

(d) A minor who has been legally emancipated according to the norm of civil law can also acquire a proper domicile (can. 105 §1).

ARTICLE 18

(a) No penalty can be inflicted upon a minor except in accordance with the norms of law (can. 221 §3).

(b) Minors who have not yet completed their sixteenth year of age are not subject to penalties when they have violated a law or precept (can. 1323, 1°).

(c) Minors are exempt from the *latae sententiae* penalties (can. 1324 §3).

(d) Minors who have completed the age of sixteen years are not exempt from penalties for the violation of a law or a precept, but the penalty prescribed in the law or precept must be diminished or a penance substituted in its place (can. 1324 §1, 4°).

ARTICLE 19

(a) Minors can lawfully vindicate and defend the rights they enjoy in the Church before the competent ecclesiastical forum in accordance with the law (can. 221 §1).

(b) Minors can stand trial only through their parents or guardians or curators, with due regard for the exceptions provided in canon law (can. 1478 §1).

(c) If the judge decides that the rights of minors are in conflict with the rights of the parents, guardians or curators, or the latter cannot satisfactorily safeguard the rights of the former, then they are to be represented in the trial by a guardian or curator appointed by the judge (can. 1478 §2).

(d) In spiritual cases and in cases connected with spiritual matters, if minors have attained the use of reason, they can act and respond without the consent of parents or guardian; if they have completed their fourteenth year of age, they can do so on their own; if not, through a curator appointed by the judge (can. 1478 §3).

(e) Whenever a guardian or curator appointed by civil authority is present, this person can be admitted by an ecclesiastical judge after having heard the diocesan bishop of the person to whom the guardian or curator has been given, if this can be done; but if a guardian or curator is not present or does not appear admissible, the judge shall designate a guardian or curator for the case (can. 1479).

(f) In contentious trials which concerns minors, the judge is to appoint *ex officio* a legal representative for a party who lacks one with the exception of matrimonial cases.

(g) If abatement takes place in an ecclesiastical trial, minors have a right to claim compensation against those guardians and curators who have not proved that they were without fault (can. 1521).

(h) Time limits specified in the law to seek *restitutio in integrum* do not apply as long as the aggrieved party is a minor (can. 1646 §2).

(i) Minors who have completed their fourteen years can be witnesses in a trial. Those under the age of fourteen although are not admitted to give evidence, can be heard if the judge declares by a decree that it would be appropriate to do so (can. 1550 §1).

ARTICLE 20

(a) Minors can function as sponsors for baptism and confirmation if they have completed sixteen years of age and fulfill other requirements of law. However, the diocesan bishop can stipulate a higher or a lower age and the pastor or the minister of the sacrament can make an exception for a just reason (can. 874 §1, 2°).

(b) Unless they are prohibited by law, minors who have reached the use of reason are capable of making a vow and taking an oath (can. 1191 §2).

(c) Minors can choose the church of their funeral and cemetery for burial unless prohibited by law (cann. 1117; §2; 1180 §2).

(d) Children whose parents had intended to have them baptized but who died before baptism, may be allowed Church funeral rites by the local Ordinary (can. 1183 §2).

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