

## IUS DIVINUM AS AN ECUMENICAL PROBLEM

AVERY DULLES, S.J.

*Catholic University of America*

NOT ALL differences in church order are so grave as to be church-dividing. Within a single ecclesiastical communion there is room for many variations in the forms of church government, ministry, and worship. Even where the disagreements are serious, they are negotiable when the decision depends on the discretionary power of human authorities. But when the differences are believed to involve what God Himself requires of His Church, compromise becomes difficult. Each party takes the position that the other is simply in error and must be converted before reconciliation is possible.

The divergences among Roman Catholics, Lutherans, and Calvinists at the time of the Reformation rested, in great part, upon incompatible views as to what God had irrevocably entrusted to His Church for safekeeping and transmission. The Protestant Reformers believed that the desacralization or elimination of certain offices and rites cherished by Catholics was permitted or even demanded by fidelity to the Scriptures. Catholics, on the other hand, were convinced that these very changes were in violation of God's law for the Church. Thus the Protestant-Catholic cleavage, and to a lesser extent the cleavages among Protestant groups, were due to discrepancies regarding what was of "divine right," "divine law," "divine institution," or "divine ordination"—terms which, although not synonymous, may be used almost interchangeably for the purposes of this essay.

The Roman Catholic position on what is of "divine institution" has been authoritatively set forth by the last three ecumenical councils. The Council of Trent spoke of the seven sacraments and of the hierarchical ministry with its distinct grades. The First Vatican Council solemnly defined the pope's primacy of jurisdiction. The Second Vatican Council added that "by divine institution bishops have succeeded to the place of the apostles as shepherds of the Church."<sup>1</sup>

The bilateral conversations among Catholics, Protestants, and Anglicans since Vatican II have on numerous occasions adverted to the problem of *ius divinum*. Three examples may be adduced. First, the international Lutheran/Catholic Dialogue, in its Malta Statement (1971), affirmed that "greater emphasis on the historicity of the church in conjunction with a new understanding of its eschatological nature requires that in our day the concepts of *ius divinum* and *ius humanum*

<sup>1</sup> *Lumen gentium*, no. 20

be thought through anew." *"Ius divinum,"* the same Dialogue asserted, "can never be adequately distinguished from *ius humanum.*"<sup>2</sup>

Second, the United States Lutheran/Catholic Dialogue, in its consensus statement concerning papal primacy (1974), observed that while Roman Catholics have affirmed that the papacy exists by divine law (*iure divino*), "Lutherans have held, in opposition to this, that the papacy was established by human law, the will of men, and that its claims to divine right are nothing short of blasphemous."<sup>3</sup> The dialogue partners, however, agreed "that the traditional sharp distinctions between divine and human institution are no longer useful," even though Catholics continue to emphasize that papal primacy is an institution in accordance with God's will, whereas Lutherans hold that the one thing necessary is that papal primacy serve the gospel and that it not subvert Christian freedom.<sup>4</sup> The Lutheran participants, in their reflections, affirmed that the traditional distinction between *de iure humano* and *de iure divino* "fails to provide usable categories for contemporary discussion of the papacy."<sup>5</sup> The Catholic participants, for their part, declared that they could affirm the papacy to be, in a true sense, divinely instituted, but that the term "divine right," burdened with many historical implications, "does not adequately communicate what we believe concerning the divine institution of the papacy."<sup>6</sup>

For a third time, the question of "divine institution" came up for discussion in the Anglican/Roman Catholic International Commission's "Venice Statement" of 1976 on "Authority in the Church." The Commission stated:

The First Vatican Council of 1870 uses the language of "divine right" of the successors of Peter. This language has no clear interpretation in modern Roman Catholic theology. If it is understood as affirming that the universal primacy of the bishop of Rome is part of God's design for the universal *koinonia*, then it need not be a matter of disagreement. But if it were further implied that as long as a church is not in communion with the bishop of Rome, it is regarded by the Roman Catholic Church as less than fully a church, a difficulty would remain.<sup>7</sup>

Each of these statements, by calling attention to the obscurity of the terminology, suggests the need for further theological exploration as a

<sup>2</sup> "The Gospel in the Church," *LW* 19/3, no. 31 (offprint, p. 6).

<sup>3</sup> *Papal Primacy and the Universal Church* (Minneapolis: Augsburg, 1974), no. 7, p. 13.

<sup>4</sup> *Ibid.*, no. 30, p. 22.

<sup>5</sup> *Ibid.*, no. 35, p. 31.

<sup>6</sup> *Ibid.*, p. 34.

<sup>7</sup> *Agreed Statement on Authority in the Church* (Venice Statement) (Washington, D.C.: U.S.C.C., 1977) no. 24 (b), p. 15.

means to clarify both the limits of reformability within a given church and the possibilities of ecumenical accord among churches.

In the pages that follow I shall not attempt to deal with the concept of divine law in its full amplitude. I shall not discuss, for example, the "law of love" which, in the mind of many theologians, constitutes the heart of the New Testament. Instead I shall concentrate on those aspects of divine law which pertain to ecclesiastical structures, for these are at the core of the ecumenical ecclesiological problem. The notion of ecclesiastical structure is not easy to define. It refers to the concrete patterns of organization and institutional relationships in the Church, especially with regard to its sacramental and hierarchical functions. We shall here be particularly concerned with "official" structures—those having dogmatic or canonical status—rather than with what have been called "charismatic structures"<sup>8</sup> and "everyday structures of church life";<sup>9</sup> for it is the official structures which constitute the problematic area in ecumenical theology.

This essay will fall into three main parts. First, I shall give a few general historical indications to set the context for the contemporary discussion. Second, I shall present a summary typology of current positions. Finally, I shall offer some personal theological reflections. My conclusion will be that *ius divinum (positivum)* represents a reality that cannot be reduced either to divine natural law or to human positive law. Yet the term has certain liabilities inasmuch as it connotes several distinct ideas that are not always simultaneously verified. For this reason careful distinctions must be made, and alternative terminology must be considered.

#### HISTORICAL BACKGROUND

For an illustration of the pre-Reformation doctrine of the Western Church, we may fittingly turn to Thomas Aquinas.<sup>10</sup> In the treatise on law in his *Summa theologiae* he holds that divine positive law, in addition to the law of nature, was necessary in order to direct the human race to its final end of eternal beatitude, which excels what can be discovered by human reason.<sup>11</sup> Prior to Christ, it was necessary that the rudiments of salvation be made known, so that people might be

<sup>8</sup> Cf. H. Küng, "The Charismatic Structure of the Church," *Concilium* 4, *The Church and Ecumenism* (Glen Rock: Paulist, 1965) 41-61.

<sup>9</sup> This term is used by Michael A. Fahey on p. 422 of his article "Continuity in the Church Amid Structural Changes," *TS* 35 (1974) 415-40. The first ten pages of this article give a very rich and concise survey of the conceptions of structure found in recent sociological and ecclesiological literature.

<sup>10</sup> For a full discussion of Aquinas's theology of law, see Ulrich Kuhn, *Via caritatis* (Göttingen: Vandenhoeck & Ruprecht, 1965).

<sup>11</sup> *Summa theologiae* 1-2, 91, 4; cf. 2-2, 57, 2.

prepared for the reception of Christ.<sup>12</sup> For this reason God gave the whole body of Mosaic legislation, including a variety of moral, liturgical, and political precepts. But the Old Law, insofar as it went beyond the natural law, was abrogated by the coming of Christ, who was its fulfilment.<sup>13</sup> The New Law given by Christ is primarily invisible and spiritual. In the words of Aquinas, "That which is most important in the law of the New Testament, and in which its whole force consists, is the grace of the Holy Spirit, which is given through Christian faith."<sup>14</sup> This law of the gospel, however, includes in a secondary way certain external prescriptions, by obedience to which the faithful are disposed to receive the grace of the Holy Spirit. Aquinas lays particular stress on the seven sacraments, all instituted by Christ as constitutive elements of the Church.<sup>15</sup> Among the sacraments he reckons that of order, and maintains that the presbyterate and the episcopate, as grades of the priestly ministry, were instituted by Christ himself.<sup>16</sup> He likewise holds that the papacy was instituted by Christ in the sense that Christ willed the headship he conferred upon Peter to be an enduring feature of the Church.<sup>17</sup>

The New Law, according to St. Thomas, will endure to the end of the world; for Christ, having himself entered into the heavenly sanctuary, draws after him all who are on the way to salvation.<sup>18</sup> The New Law, insofar as it is a following of Christ's own way, is the most perfect possible. Variations can, however, occur insofar as different groups of people may be differently situated with respect to the New Law. The grace of the Holy Spirit, he declares, may be more or less perfectly given according to the diversities of place, time, and persons.<sup>19</sup>

Because of the central importance of the Reformation to our theme, we may turn directly from Thomas Aquinas to Martin Luther. In his earlier writings Luther held that divine law is at work in the kingdom of Christ, through the justifying power of God's grace, but not in the kingdom of the world, where the law of wrath obtains. Yet the world is present within the empirical Church, where it appears as the *regnum externum ecclesiasticum*. The external regime of the Church, therefore, is not to be confused with the rule of God. The invisible or spiritual Church of true Christians, however, does exist by the law of Christ.<sup>20</sup>

<sup>12</sup> ST 1-2, 91, 5; cf. 98, 2.

<sup>13</sup> ST 1-2, 103, 3; 104, 4; 107, 2.

<sup>14</sup> ST 1-2, 106, 1.

<sup>15</sup> ST 3, 65, 2.

<sup>16</sup> ST 2-2, 184, 6, ad 1.

<sup>17</sup> *Summa contra gentiles* 4, 76.

<sup>18</sup> ST 1-2, 106, 4c.

<sup>19</sup> *Ibid.*

<sup>20</sup> Erik Wolf, *Ordnung der Kirche* (Frankfurt: Klostermann, 1966) 70-71.

In his later years Luther recognized that there is divine law also in the visible Church.<sup>21</sup> Christ commissioned it to preach and he instituted for the Church the sacraments of baptism and Eucharist. Further he bestowed on the Church the "power of the keys" and the *ministerium publicum verbi* for proclamation and for the administration of the sacraments. In some of his writings Luther equates this "divine institution" with the law of Christ.<sup>22</sup>

Luther, however, does not reaffirm all the traditional Catholic theses regarding divine law. Although he insists that the pastoral office was instituted by Christ, he does not attribute to it any special powers or status conferred by God.<sup>23</sup> Luther further rejects the idea that bishops have jurisdiction by divine law, or that priests are by divine law subject to bishops.<sup>24</sup> He denies that confirmation, marriage, ordination, and extreme unction deserve to be called sacraments.<sup>25</sup>

Melanchthon goes somewhat beyond Luther in his emphasis on divine law. He holds that grace and law are inseparable; "non enim potest praedicari gratia sine lege."<sup>26</sup> By divine law, he holds, the Church has the *notae externae* of word and sacrament. The Bible contains revealed *ius divinum*.<sup>27</sup>

As Arthur Carl Piepkorn has shown, the Lutheran Symbolic Books attach major importance to divine law.<sup>28</sup> Among the divine ordinances pertaining to the order of creation, they list the obligation of authorities to govern and of subjects to obey,<sup>29</sup> and the institution of indissoluble monogamous marriage.<sup>30</sup>

Among the saving ordinances of the Old Law, the Lutherans make mention of the Levitical priesthood.<sup>31</sup> Under the New Law (*iuxta evangelium*) they specify the following ordinances as divinely instituted: the Church itself as the agency of salvation,<sup>32</sup> the sacred ministry of

<sup>21</sup> Ibid. 353-54.

<sup>22</sup> See Johannes Heckel, *Lex charitatis; Eine juristische Untersuchung über das Recht in der Theologie Martin Luthers* (Munich: Abhandlungen der Akademie der Wissenschaften, Philosophisch-historische Klasse, Neue Folge 36, 1953) 119-20.

<sup>23</sup> Wolf, *Ordnung* 346-47.

<sup>24</sup> Ibid.

<sup>25</sup> See, e.g., his *The Pagan Servitude of the Church* (1520).

<sup>26</sup> *Loci communes* (1521), in *Corpus reformatorum*, Melanchthon, Vol. 21, col. 145.

<sup>27</sup> Wolf, *Ordnung* 461.

<sup>28</sup> A. C. Piepkorn, "Ius Divinum and Adiaphoron in Relation to Structural Problems in the Church: The Position of the Lutheran Symbolical Books," *Papal Primacy and the Universal Church* 119-26.

<sup>29</sup> *Augsburg Confession* 28:4 (in T. G. Tappert, ed., *The Book of Concord* [Philadelphia: Fortress, 1959] 81).

<sup>30</sup> *Apology* 23:3, 9 (Tappert 239-41).

<sup>31</sup> *Power and Primacy of the Pope*, no. 38 (Tappert 326-27).

<sup>32</sup> Piepkorn's term, in "Ius divinum" 123; he gives no specific reference.

the word of God and the sacraments;<sup>33</sup> the ordination by pastors of fit candidates;<sup>34</sup> baptism by water;<sup>35</sup> the sacrament of the body and blood of Christ, to be received under both species;<sup>36</sup> the absolution and reconciliation of penitents;<sup>37</sup> and the various obligations of bishops, i.e., to preach the gospel, to forgive sins, to judge doctrine, and to expel manifest sinners from the community.<sup>38</sup> On all of these points except the unconditional necessity of communion under both kinds, Catholics would generally agree.

Negatively, the Lutherans deny that certain institutions regarded by Rome as *iure divino* are in fact such. This is notably the case with regard to the supremacy of the bishop of Rome over all other bishops.<sup>39</sup> Melancthon, in subscribing to the Smalcald articles, said he would be willing to admit the pope's supremacy as a matter of human right, but not as divinely instituted.<sup>40</sup> Further, the Lutherans deny that divine law requires the enumeration of sins in confession<sup>41</sup> and the performance of penances as satisfaction for sins that have been remitted.<sup>42</sup> They also deny that the binding authority of monastic vows is a matter of divine law.<sup>43</sup>

Divine law, as understood by Lutherans, is not dispensable by any human authority. Hence they argue that the fact that the pope could dispense from monastic vows and from clerical celibacy constitutes proof that these were not *iure divino*. Conversely they argued that because the right to marry was given by divine natural law, the pope had no power to forbid priests to marry.<sup>44</sup>

Although the category of "divine law" does not occupy a prominent place in the writings of John Calvin, he goes considerably beyond Luther in holding that Christ in the New Testament conferred upon his Church a permanent constitution. Calvin speaks of the holy ordinances as preaching, community prayer, and a sacramental ministry established by Christ. Christ the Lawgiver, he holds, is the sole norm for baptism, the Lord's Supper, marriage, and the visitation of the sick.<sup>45</sup>

<sup>33</sup> *Augsburg Confession* 5:1, German text (Tappert 31).

<sup>34</sup> *Power and Primacy of the Pope*, no. 65 (Tappert 331).

<sup>35</sup> *Large Catechism*, Part 4, no. 38 (Tappert 441). Also *Smalcald Articles* 3:5, 1 (Tappert 310).

<sup>36</sup> *Smalcald Articles* 3:6, 3-4 (Tappert 311).

<sup>37</sup> *Apology* 12:12 (Tappert 184).

<sup>38</sup> *Augsburg Confession* 28:21 (Tappert 84).

<sup>39</sup> *Smalcald Articles* 2:4, 1 (Tappert 298). Also *Power and Primacy of the Pope*, no. 10 (Tappert 321).

<sup>40</sup> Tappert 316-17.

<sup>41</sup> *Apology* 12:11 (Tappert 184). Also *Apology* 12:23 (Tappert 185).

<sup>42</sup> *Apology* 12:175 (Tappert 210).

<sup>43</sup> *Augsburg Confession* 27:24 (Tappert 74).

<sup>44</sup> *Ibid.* Also *Apology* 7-8:41 (Tappert 176). Also *Apology* 12:175 (Tappert 210).

<sup>45</sup> Wolf, *Ordnung* 462.

The Council of Trent, in response to certain Protestant opinions, insisted that Christ was given to humankind not only as a redeemer to be trusted but as a lawgiver to be obeyed.<sup>46</sup> More specifically, the Council reasserted the medieval doctrine that all seven sacraments were instituted "by Jesus Christ our Lord."<sup>47</sup> This general principle was reaffirmed in particular canons dealing with sacramental confession,<sup>48</sup> extreme unction,<sup>49</sup> holy orders,<sup>50</sup> and matrimony.<sup>51</sup> In the chapters on the sacrifice of the Mass, the Council of Trent taught that Christ had instituted the Eucharist as a sacrifice to be offered by the priesthood of the New Law.<sup>52</sup>

In its treatment of the sacrament of penance, Trent used a remarkably nuanced approach to the question of *ius divinum*. The Council saw the substance of the sacrament as having been instituted by Christ, but conceded that the form of its celebration was a matter of human legislation.<sup>53</sup> The chapter on "Confession" (chapter 5) teaches, moreover, that integral confession of sins was instituted by the Lord "and by divine law is necessary for all who have fallen into sin after baptism."<sup>54</sup> In opposition to the Lutherans, the Council maintained that by Christ's own precept each and every mortal sin that the penitent could recall after a diligent examination of conscience must be confessed. On the other hand, the Council took pains to delimit carefully what was of divine law. Paraphrasing the Tridentine teaching on the subject, one may say: "The method of confessing secretly to a priest is not opposed to Christ's institution, but rather is commended for sound reasons. The regulation that confession is to be made once a year comes not from Christ but from the Church. The practice of making this confession during Lent is meaningful and praiseworthy."<sup>55</sup>

How is it intelligible that the Council of Trent, in its judgment as to what was of divine institution, differed so sharply from the Protestant Reformers, who also differed on certain points among themselves?

<sup>46</sup> Sess. 6, can. 21 (*DS* 1571).

<sup>47</sup> Sess. 7, can. 1 (*DS* 1601).

<sup>48</sup> Sess. 14, *canones de poenitentia*, can. 1 (*DS* 1701); can. 6 (*DS* 1706).

<sup>49</sup> Sess. 14, can. 1 *de ext. unct.* (*DS* 1716).

<sup>50</sup> Sess. 23, can. 1 (*DS* 1771); cf. can. 6 (*DS* 1776) on the distinction of grades in the hierarchy.

<sup>51</sup> Sess. 24, can. 1 (*DS* 1801).

<sup>52</sup> Sess. 22, cap. 1 (*DS* 1739-42).

<sup>53</sup> Carl J. Peter, "Auricular Confession and the Council of Trent," *Proceedings of the Catholic Theological Society of America* 22 (Yonkers: St. Joseph's Seminary, 1967) 185-200; id., "Integral Confession and the Council of Trent," *Communio* 1 (1971) 99-109.

<sup>54</sup> Sess. 14, cap. 5 (*DS* 1679).

<sup>55</sup> Karl-Josef Becker, "Necessity of Integral Confession according to Trent," *Theology Digest* 21/3 (Autumn 1973) 204-9, quotation from p. 209. The original article, "Die Notwendigkeit des vollständigen Bekenntnisses in der Beichte nach dem Konzil von Trient," appeared in *TP* 47 (1972) 161-228.

Quite apart from exegetical disagreements of detail, there seems to have been a significant difference of methodology between Protestants and Catholics. Lutherans and Calvinists, generally speaking, sought to subject all traditions to Scripture as the criterion and touchstone.<sup>56</sup> The Catholics, on the other hand, regarded tradition as being of equal authority with Scripture.<sup>57</sup> To their mind, the consensus of the Church on a matter of faith was itself proof that the doctrine in question arose from divine revelation. "The consensus of the Church in proposing the content of the faith implicitly affirms that this content derives from revelation."<sup>58</sup> For Trent, therefore, it is not essential that the Church be in a position to furnish exegetical or historical proofs that the doctrine in question was taught by Jesus or the apostles. Whatever comes to be seen at any point in history as an irrevocable possession of the universal Church is judged as being of divine institution.

It is often asked whether the fathers at Trent, in asserting the divine institution of certain sacraments and offices, meant to deny that these could have originated after the Ascension or even after the apostolic age. Probably this question cannot be decisively answered by arguments drawn from the Acts of the Council alone. F. Scholz, however, asserts:

On the basis of the records which were kept, there can be no room for doubt that the Council was confining its attention within the framework of the declarations provoked by the Protestants, and that what it sought to define, and in fact did define, when it spoke of the sacraments being instituted by Christ, was intended in the sense of the sacraments being given their force by Christ.<sup>59</sup>

In other words, it would be sufficient for divine institution that Christ by some action should have established the connection between the enacting of the rite and the imparting of the grace, even though the rite did not come into actual use until some later time. While the idea of Jesus making a decree regarding a sacrament that was later to come into existence is scarcely acceptable to contemporary historical consciousness, the fact that such an opinion enjoyed a right of existence in former centuries makes it clear that the Council of Trent does not bind

<sup>56</sup> For the Lutheran position, see the "Summary Formulation, Basis, Rule, and Norm" introducing the *Solid Declaration, Formula of Concord* (Tappert 503-4). For the Reformed position, see, e.g., *The Second Helvetic Confession*, chaps. 1 and 2, in J. H. Leith, ed., *Creeeds of the Churches* (Garden City: Doubleday Anchor Books, 1963) 132-36.

<sup>57</sup> Council of Trent, Sess. 4, *Decretum de libris sacris et de traditionibus recipiendis* (DS 1501).

<sup>58</sup> Becker, "Necessity of Integral Confession" 208.

<sup>59</sup> F. Scholz, *Die Lehre von der Einsetzung der Sakramente nach Alexander von Hales* (Breslau, 1940), cited by K. Rahner, "What Is a Sacrament?" *Theological Investigations* 14 (New York: Seabury, 1976) 146 n. 14.

the Church exclusively to the view that all seven sacraments were established in their full actuality by the explicit words or behavior of Jesus. As additional evidence for this view one may refer to the opinion of the Louvain school, which, invoking the authority of Trent, held for an *institutio immediata sed generalis* by Christ.<sup>60</sup>

The First Vatican Council, in *Pastor aeternus*, tended to promote a somewhat static and objectivistic notion of divine institution. After affirming in chapter 1, with its corresponding canon,<sup>61</sup> that Christ the Lord directly and immediately conferred upon Peter the Apostle the primacy of true and proper jurisdiction over the whole militant Church, the Council went on in chapter 2 (with its corresponding canon) to declare that by the institution of Christ himself, or *iure divino*, Blessed Peter has perpetual successors in his primacy over the universal Church.<sup>62</sup> To all appearances, these statements are intended to refer to the actions of the historical Jesus in his earthly and risen life. The Council refers to Mt 16:16 ff. and to Jn 21:15 ff. to substantiate the doctrine that Christ first promised and then conferred the primacy in question. The biblical texts are seemingly taken as probative, though they are interpreted in the light of traditional testimonies and with the support of theological reasoning.

Omitting any consideration of the references to divine law in the papal encyclicals and the Code of Canon Law, we may now turn directly to Vatican Council II. This council affirmed that the Church has, "by divine mandate, the duty of going out into the world and preaching the gospel to every creature."<sup>63</sup> It reaffirmed the teaching of Vatican I that the pope has by divine institution power over the whole Church.<sup>64</sup> It asserted that the variety of ministries in the Church arises *ex divina institutione*.<sup>65</sup> As previously mentioned, Vatican II taught that bishops are by divine institution successors of the apostles<sup>66</sup> and that, as members of the *collegium*, they are corporately obliged "by Christ's institution" to have solicitude for the whole Church.<sup>67</sup>

Significantly, the Council left somewhat vague whether the distinction between bishop and presbyter is of divine institution. It declared: "Thus the divinely established ecclesiastical ministry is exercised on different levels by those who from antiquity have been called bishops,

<sup>60</sup> Rahner, *ibid.*

<sup>61</sup> DS 3053-55.

<sup>62</sup> DS 3056-58.

<sup>63</sup> *Dignitatis humanae*, no. 13.

<sup>64</sup> *Christus dominus*, no. 2.

<sup>65</sup> *Lumen gentium*, no. 32.

<sup>66</sup> *Lumen gentium*, no. 20.

<sup>67</sup> *Lumen gentium*, no. 23.

priests, and deacons."<sup>68</sup> This statement, while not denying that the threefold hierarchy was divinely instituted, shows more sensitivity than Trent had shown to the complexities of the historical development.

If we suppose that the episcopate, as the college of those who succeed to the apostles, did not come into existence until after apostolic times, how can it still be *iure divino*? Perhaps *ius divinum* may best be understood as something given only inchoatively at the beginning—that is to say, as something that unfolds in the history of the Church. Such a dynamic understanding of divine law, while not explicitly taught by the Council, seems to be suggested by the nuanced approach to the hierarchical ministry in the Constitution on the Church. If accepted, it would harmonize with the dynamic understanding of divine tradition set forth in the Constitution on Divine Revelation.<sup>69</sup> By opening up this more historical and developmental approach, Vatican II made a major contribution to the ferment that has been occurring in Roman Catholic speculation about *ius divinum* since the early 1960's. We turn, accordingly, to an examination of the current state of theological opinion.

#### CONTEMPORARY THEOLOGICAL VIEWS

In twentieth-century Protestant and Catholic theology one finds a striking variety of opinions on the nature of *ius divinum*. Before setting forth a personal position, I shall attempt to summarize several current schools of thought, even though the summaries will necessarily be schematic and incomplete.

In the first place, there is what may be called the neo-Lutheran view. This is, in part, a reaction against the Liberal Protestant view prevalent in the nineteenth century. Rudolph Sohm, for instance, had argued that to recognize the Bible as a source of law would be to denature the spiritual Church of the New Testament and transform it into a church of law.<sup>70</sup> During the *Kirchenkampf* of the 1930's, German Evangelical Christians rediscovered the connection between confession and church order.

Edmund Schlink, a representative of the neo-Lutheran position, holds that the New Covenant includes four essential elements: (a) the mission of the apostles to proclaim God's saving deed in Christ, (b) baptism, (c) the celebration of the Lord's Supper, and (d) the power of binding and loosing.<sup>71</sup> All these elements, according to Schlink, were seen by the New Testament writers as resting on the word of the Lord.

<sup>68</sup> *Lumen gentium*, no. 29.

<sup>69</sup> *Dei verbum*, chap. 2.

<sup>70</sup> See Wolf, *Ordnung* 464.

<sup>71</sup> E. Schlink, "Zur Unterscheidung von *Ius divinum* und *Ius humanum*," in M. Seckler, ed., *Begegnung* (Festschrift H. Fries; Graz: Styria, 1972) 233-50.

As free institutions of God in history, he further maintains, these elements are constitutive of the essence of the Church and therefore are unexpendable. Since these saving actions must be carried out in a decent and orderly way, the Church has authority to regulate the exercise of the ministry. Such further regulations, however, are of human rather than divine institution.

As a good Lutheran, Schlink looks for guidance to the New Testament and especially to Paul. He notes that Paul recognizes a distinction between the binding word of the Lord (e.g., the prohibition of divorce mentioned in 1 Cor 7:10) and what rests on the Apostle's own informed judgment (e.g., the exhortation to virginity given in 1 Cor 7:25-40). The Church, Schlink argues, does not have the power to which even Paul as an apostle did not lay claim, namely, to impose a human interpretation as though it were the word of the Lord himself.

The New Testament, according to Schlink, gives no indication that any set form of ministry is from the Lord. There were different forms of order, as may be seen by comparing what we can learn of Corinth from Paul's letters to that community with the situation at Ephesus and in Crete as indicated in the Pastoral Letters. Yet even between communities as diverse as these, there was mutual recognition and communion. The essential would appear to be only that the order of ministry, whatever it be, be suitable for enabling the Church to perform its fourfold mission. The Church by human right makes decisions that apply the divine law of its own mission to concrete situations. Such ecclesiastical ordinations, while valid in their own way, are never absolute. They leave flexibility to adapt to changing circumstances. Of their very nature, Schlink holds, church orders have a serving function, and therefore ought not to be placed on a par with the gospel itself. For the ecumenical unity of the Church, the decisive thing ought not to be the acceptance of some particular church order, but the acceptance of the gospel.

Some Catholics appear to take positions that closely resemble Schlink's. Hans Küng, as I read him, would readily concede that church office legitimately can develop, and has developed, since apostolic times, according to the decisions of human authorities, and thus *iure humano*. But such human decisions would be bound not to contradict the divine law for the Church as set forth in the mission given in the New Testament. Like Schlink, Küng looks upon church office functionally rather than sacramentally. Judging office in the light of its function, he would presumably regard all specific forms of polity as, in principle, reversible.<sup>72</sup>

<sup>72</sup> In *The Church* (New York: Sheed and Ward, 1968) Küng maintained (418-19) that Trent had erred in looking upon the threefold hierarchical ministry as divinely ordained (*DS* 1776)—a view corrected, in his opinion, by Vatican II. In *Why Priests?*

A second view, rather common among Roman Catholics from the sixteenth century until almost the present day, might be labeled "nonhistorical orthodoxy."<sup>73</sup> Francisco Suarez is perhaps the most eminent spokesman of this school, later represented by important manualists such as J. B. Franzelin (1868), Christian Pesch (1914), and Emmanuel Doronzo (1946). According to this view, everything essential to the Church in any period of its existence must have been actually contained in the apostolic deposit; for the Lord alone could give the Church what it needed for its supernatural mission, and he would surely not have failed to supply it with anything truly requisite. Thus it is held that Jesus himself personally established the Mass as a sacrifice, that he specifically and immediately instituted each of the seven sacraments, and that he conferred upon Peter a primacy of jurisdiction with the intention that it should be a perpetual feature of the Church. Texts from the New Testament are invoked to prove the divine origin of many features of the Church as it has existed in later centuries. Where the biblical texts are deficient in force and clarity (as in the case of the sacraments of confirmation, matrimony, orders, and the anointing of the sick), they are reinforced by an appeal to a fixed oral tradition which is held to be divine and apostolic. Already this form of argument seems to be implied in the maxim used by Pope Stephen in opposition to Cyprian: "Nihil innovetur nisi quod traditum est."<sup>74</sup>

As we have seen in the discussion of the decrees of Trent on the divine institution of the sacraments, this nondevelopmental theory was never universally accepted. Trent itself gave scope to divergent views when it declared that the Church has authority to modify the sacraments *salva illorum substantia*.<sup>75</sup> According to some interpreters, the substance of the sacrament was not its matter and form but rather its significance.<sup>76</sup> If neither the form nor the matter of the sacrament is necessarily unalterable, the possibilities of change are obviously very great.

The gradual erosion of the second view through subtle and minimiz-

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(New York: Doubleday, 1972) he set forth his functional understanding of ministry. In *On Being a Christian* (Garden City: Doubleday, 1976) Küng argues that the apostolic succession in the ministry is functional and that the development of the papal and episcopal offices cannot be traced to a divine right, *ius divinum* (490-91).

<sup>73</sup> I here borrow a felicitous term used in another connection by Michael Novak, *The Open Church* (New York: Macmillan, 1962) *passim*.

<sup>74</sup> In *Ep. 74* (A.D. 256) to Pompeius, in the Cyprian corpus. See *DS* 110.

<sup>75</sup> Sess. 22, on Eucharistic Communion, cap. 2 (*DS* 1728).

<sup>76</sup> Such is the interpretation of Juan de Lugo. See I. A. de Aldama, "Theoria generalis sacramentorum," *Sacrae theologiae summa* (3rd ed.; Madrid: B.A.C., 1956) n. 149, pp. 110-11.

ing interpretations provided the climate for the emergence of a third theory of divine institution. The developmental theory, as I shall call it, is today most impressively represented by Karl Rahner. In several essays he has explained at length the historical improbabilities involved in contending that Jesus specifically instituted the seven sacraments known to the medieval Church, or that Jesus himself established the kind of threefold hierarchical ministry that has become prevalent since patristic times.<sup>77</sup> How, then, can we argue that these structures are, as the councils teach, of divine institution?

According to Rahner, the notion of *ius divinum* in no way demands that the structure in question should have been imposed upon the apostolic Church by Christ himself.<sup>78</sup> The concept of *ius divinum* may be extended, without great difficulty, to free decisions made by the Church in apostolic times, provided that these decisions were consonant with the basic nature of the Church and, having been made, were irreversible. For example, the decision of the apostolic Church to baptize converts from paganism without demanding prior circumcision was, for all that we can see, a free decision, the opposite of which could also have been made. But once the decision was made, it had irreversible effects and thus has necessarily remained a part of the Church's abiding constitution. Even though more than one course of development would have been possible, it does not follow that today we can still pursue even those possibilities which the apostolic Church rejected. With regard to the vexed problem of church office, it may perhaps be true that by the end of New Testament times, at least in some parts of the Church, the threefold division of the hierarchical ministry, together with the monarchical episcopate, had reached the point of irreversibility. If so, we can account for its "divine institution" without appealing to some unknown command of Jesus or of the apostles.

But it may also be supposed that certain features of the Church's constitution—such as, for example, the monarchical episcopate or the sacraments of marriage and confirmation—had not yet achieved historical actuality even by the end of New Testament times. Does this mean that these structures were not, as the Council of Trent taught, divinely instituted? Very tentatively, Rahner suggests that even decisions made freely by the postapostolic Church, when they are in conformity with the Church's essential nature and irreversible in their consequences, might be placed within the category of *ius divinum*. At this point he

<sup>77</sup> K. Rahner, "The Church and Sacraments," *Inquiries* (New York: Herder and Herder, 1964) 191-299, esp. 223-56; id., "What Is a Sacrament?" (n. 59 above).

<sup>78</sup> In the next two paragraphs I am summarizing some points in Rahner's "Reflections on the Concept of *Ius divinum* in Catholic Thought," *Theological Investigations* 5 (Baltimore: Helicon, 1960) 219-43.

appeals, by analogy, to the widely accepted view that the Church can infallibly define doctrines not formally implicit in the apostolic deposit of faith.

Whether or not one accepts his suggestion with regard to the discretionary powers of the postapostolic Church, Rahner has impressive reasons for asserting that for a sacrament or office to be *iure divino* it does not have to rest on an explicit declaration of Jesus or of the apostles. It may draw its *iure divino* character from its being an indispensable way of insuring the necessary continuation of that which Jesus did found. The episcopal office might be *iure divino* because it was found to be uniquely viable and thus capable of displacing other rival structures of ministry.<sup>79</sup>

Rahner is very cautious in asserting that any particular postapostolic structure is divinely instituted. Divine law, he contends, is by its nature general and abstract, for otherwise it could not have universal and enduring validity. For this reason, divine law is open to a multiplicity of concrete actualizations. It can never be put into practice unless it is rendered present in the concrete form of a human law.<sup>80</sup>

Substantially in accord with the views of Rahner are those of the American theologian Carl J. Peter, whose studies on the Tridentine decrees regarding penance we have already cited. For him, as for Rahner, *ius divinum* means something of more than human origin, attributable to God in a way that not all events are, and secondly, something guaranteed to be permanent, though not necessarily in identical form. In his presentation, which on many points parallels that of Rahner, Peter gives particular emphasis to the following three points:<sup>81</sup>

1) Certain institutional developments in the postapostolic Church are in fact permanent and irreversible—a question which Rahner has left open.

2) The divine law of the New Covenant is general; it transcends the particularities of time and place, and thus leaves the concrete details flexible. For this reason, we cannot isolate precisely what in any given institution is of divine law. We know that in any office or sacrament change and adaptation are possible, but we cannot specify in advance exactly what changes would be so drastic as to be incompatible with

<sup>79</sup> Rahner brings out this facet of his theory in "Aspects of the Episcopal Office," *Theological Investigations* 14, 188–89.

<sup>80</sup> K. Rahner, "Basic Observations on the Subject of Changeable and Unchangeable Factors in the Church," *Theological Investigations* 14, 20; "On the Theology of a 'Pastoral Synod,'" *ibid.* 126–27.

<sup>81</sup> C. J. Peter, "Dimensions of *Jus divinum* in Roman Catholic Theology," *TS* 24 (1973) 227–50.

the abiding nature. Thus *ius divinum* claims are always, according to Peter, "shrouded in the realm of mystery."<sup>82</sup>

3) There is no historical demonstration from Scripture as to what is or is not *de iure divino*. Looking at the text of the Bible, one might think that foot washing or the wearing of veils by women were *de iure divino*, but subsequent evolution shows that they were not. Conversely one might think that the Petrine primacy was not a permanent institution in the Church, but subsequent evolution in the life and consciousness of the Church shows, to the satisfaction of Roman Catholics, that it is.<sup>83</sup> In faith we can affirm the positive relationship of certain historical structures of the Church to the will of God for His Church, but the grounds for that affirmation are not fully cogent outside of the commitment of faith itself. Hence the logic of *ius divinum* is not unlike that by which the creeds have developed. The Nicene doctrine of the *homoousion* has a sufficient basis in the New Testament, but it is a further development, as the necessity of recourse to the metaphysical term indicates. The logic by which the *homoousion* developed from the biblical Christological statements is not merely syllogistic. So, too, we may expect that institutions such as the seven sacraments, episcopacy, and papal primacy would develop by some process other than logical deduction from statements found in the Bible.

Like the "organic" theories of doctrinal development to which they correspond, the developmental theories of *ius divinum*, as represented by Rahner and Peter, may properly be called "irreversibilist."<sup>84</sup> These authors hold that what develops in the Church, even freely and since apostolic times, may be irreversible and attributable in a special way to God. Yet these authors are reluctant to specify exactly what in the later development was in fact irreversible. If the episcopate is such a development, does this mean that the monarchical episcopate is forever necessary—or could you, for example, have a college of presbyters collectively filling the office of bishop? If papal primacy is an essential and irreversible feature of the Church after a certain date, what exactly does that mean? Must the primacy always be that of the bishop of Rome? Could it be exercised by a group of bishops rather than by a single individual? Could the papacy rotate from see to see according to a cycle of a certain number of years? Could the pope be required always to consult the synod of bishops when he exercises his primacy of jurisdiction or infallible teaching functions? These questions are not easily answered.

<sup>82</sup> Ibid. 245.

<sup>83</sup> These examples are my own attempts to illustrate the theory.

<sup>84</sup> I borrow this term from G. A. Lindbeck, "Papacy and *Ius divinum*: A Lutheran View," in *Papal Primacy and the Universal Church* 203.

Once one admits that *ius divinum* may depend upon a development in time, it is difficult to insist upon absolute irreversibility. What is appropriate or even necessary for a later age is admitted to have been inappropriate or even impossible for an earlier time. If this is so, how can we say that at some future time or in some other culture the previous development might not again become inappropriate or impossible? If development is acknowledged, the institution which develops becomes tied to certain historical and cultural conditions whose permanence might itself be questionable. Thus the theory of development seems to call for something like de-development, at least as an abstract possibility.

Not surprisingly, therefore, still a fourth theory seems to be emerging in recent Catholic thought. This has been labeled the "functionalist" view.<sup>85</sup> Johannes Neumann, a proponent of this outlook, rejects Rahner's contention that the development of the threefold hierarchical ministry in the postapostolic period could be irreversible,<sup>86</sup> but, unlike Schlink and Küng, he seems willing to admit that such a development could in some sense be called *de iure divino*. It is quite thinkable, he argues, that a definite norm which has won for itself in a given period the status of *ius divinum* might subsequently be modified or reduced; for such a concrete norm could in a new situation become not only superfluous but even positively harmful.<sup>87</sup>

Edward Schillebeeckx, like Neumann, rejects Rahner's suggestion that the development of the monarchical episcopate since New Testament times could be irreversible.<sup>88</sup> He denies that there is any direct link between the contemporary offices of the Church (episcopate, presbyterate, diaconate) and an act of institution on the part of the earthly Jesus. Postapostolic developments, in his opinion, although governed by sociological laws, are not for that reason merely human; for the Holy Spirit is continually operative in the Church, enabling it to restructure itself according to the demands of its current mission. It is not entirely clear to me whether Schillebeeckx looks upon Spirit-inspired but reversible restructurings as being *iure divino*. He does, however, say that they "are based on a *ius divinum*" and that divine law can "be so understood that it includes and at the same time makes possible a historical growth of various forms"—forms which can again be altered by future restructurings.<sup>89</sup>

<sup>85</sup> This term is also from Lindbeck, *ibid.*

<sup>86</sup> "Erwägungen zur Revision des kirchlichen Gesetzbuches," *TQ* 146 (1966) 296.

<sup>87</sup> *Ibid.* 297-98.

<sup>88</sup> E. Schillebeeckx, "The Catholic Understanding of Office in the Church," *TS* 30 (1969) 567-87.

<sup>89</sup> *Ibid.* 569.

Schillebeeckx, nevertheless, cannot be classified as a pure "reversibilist." He speaks of structures of the Church which are essential and "dogmatically inviolate." Among these he places the collegial unity of all the pastoral leaders among themselves and with the one of their number who performs the function of Peter. Although the structures of the Church are to be continually adapted, as the changing exigencies of mission demand, adaptations are to be made according to certain constant principles, such as the following:<sup>90</sup> that office in the Church be "serving leadership" according to the model of the apostolic leadership in the New Testament; that ecclesiastical office represent Christ to the community and the community to the world; that the universal Church be made present in each place by a local church; that the local church, as a realization of the total Church, have the right to order itself according to its own needs; that every local church maintain communion with the other local churches and with the church in which he who bears the function of Peter resides.

Schillebeeckx, in the writings familiar to me, does not specify the criteria for distinguishing between structures which are "dogmatically inviolate" and those which are not. Why, for instance, does he maintain that the Petrine office is forever essential to the Church? Would he say that it was established as a permanent office in apostolic times? Unanswered questions such as these seem to call for the judgment that the Schillebeeckx theory, as it stands, is incomplete.

The American Lutheran theologian George A. Lindbeck, in his incisive essay on *ius divinum*,<sup>91</sup> makes a sharp distinction between the "irreversibilist" position of Rahner and Peter and the "functionalist" position he attributes to Neumann and Schillebeeckx. The Rahner-Peter position, insofar as it says anything determinate, seems to him to run directly counter to Lutheran tenets and hence to be ecumenically unpromising. He adds, however, that in admitting that *ius divinum* claims are "shrouded in mystery," the proponents of this position provide scope for ecumenical give-and-take. But the more one insists on the element of mystery, Lindbeck suggests, the less fitting does it seem to apply the term "divine law"; for if divine law itself is seen as fluid, "sixteenth century *ius divinum* becomes twentieth century *adiaphoron* and vice versa."<sup>92</sup>

The Neumann-Schillebeeckx position, as Lindbeck interprets it, is not clearly unacceptable to Lutherans. Lutherans can admit, for example, that the papacy may have been fully in accordance with God's will

<sup>90</sup> These principles are culled from the article just cited, but the formulations and ordering are my own.

<sup>91</sup> G. A. Lindbeck, "Papacy and *Ius divinum*" 193-208.

<sup>92</sup> *Ibid.* 204.

for his Church at certain periods in the past and may become so again in the future. This admission would not be contrary, except verbally, to what the early Lutherans meant when they denied that the papacy exists *iure divino*. But still Lindbeck would ask: Does not such a radical departure from the traditional usage, which has seen *ius divinum* as irreversible, render the old terminology inappropriate and confusing?

Lindbeck's own position, therefore, is that the *ius divinum* terminology is today unserviceable. Thanks to modern biblical criticism and the development of historical consciousness, we can no longer think of divine ordinances as distinct from human initiatives. We need new categories.

Lindbeck's suggestion is surely worthy of serious consideration, but perhaps he would not insist upon doing away with the old terminology until we have an acceptable set of substitute terms. After all, it is important to find ways of expressing that the Church is not its own Lord. Whether we speak of the word of God, the gospel, the law of Christ, or divine institution is probably not a matter of great moment. But there has to be some terminology that allows us to distinguish what the officers of the Church decide as a matter of free discretion and what they hold because fidelity to God's revelation so requires. The traditional *ius divinum* terminology, for both Protestants and Catholics, provided ways of making this distinction. Today we shall doubtless wish to substitute terminology that is less juridical and less anthropomorphic, but no new set of terms will by itself solve the theological problem. Whatever the terminology, we shall have to grapple with the question how to ascertain the limits of the Church's power to restructure itself or, in other words, the demands placed upon it by obedience to its divine Lord. In an effort to clarify this question, we may now engage in some theological reflections.

#### SPECULATIVE CONSIDERATIONS

With reference to the problem of permanence and mutability, the Church appears to be confronted with a dilemma. To the extent that it becomes tied to the specific circumstances of its own origins, its adaptability and consequently its mission are likely to suffer. There is always the danger that in new situations the inherited structures may become dysfunctional. But if, on the other hand, there are no limits to change, the Church runs the risk of sacrificing its identity. It could cease to be the same institution as that which existed in apostolic times and lose its formal continuity with the original community.

Protection against erratic change could be afforded by conformity to

what may be called transcendental social precepts, such as the promotion of freedom, co-operation, friendship, human dignity, responsibility, unrestricted love, and the like. These precepts could result in certain structural developments such as accountable leadership, constitutional government, subsidiarity, and due process. These features, which should figure prominently in the Church as in any good society, are not, however, specific to the Church. For this reason they do not assure the Church's proper identity, but tend rather to assimilate it to the general culture. Thus the question remains: Are there any structuring principles that are both abidingly valid and at the same time distinctive to the Church?

The answer, I believe, is to be sought by reflection on the fundamental nature of the Church. By very definition the Church is, under Christ, the universal sacrament of salvation or, in other words, the sacrament of Christ in the world. In order to be a sacrament, the Church must be an efficacious sign—one in which the reality signified is manifestly present and operative. The Church, in other words, must be a lasting incarnation in the world of God's redemptive love for all humankind as originally signified and concretized in Jesus Christ. From this notion of the Church it is possible to derive the traditional "four notes" of the Church:

*one*: because without unity there would be neither the reality nor the sign of reconciling grace;

*holy*: because in the Church the divine Lord is mysteriously present and operative in human hearts through the Holy Spirit;

*catholic*: because the redemptive love of Christ reaches out to all, and must be manifest as such;

*apostolic*: because the Church of all times must be in real and visible continuity with the apostolic community of the first century. To be a sign of Christ, it must be historically in continuity with the community of the first disciples whom Jesus gathered about himself.

What is unchangeable about the Church, therefore, would seem to be best described in relational rather than essential terms. The Church is constituted on the one hand by its relationship to Jesus Christ, and on the other hand by its relationship to those to whom it mediates the presence of Christ. These two relationships cannot be in conflict with each other, for unless the Church were itself related to Christ it could not mediate his presence to others; nor could it mediate his presence without really being related to the people of each time and place.

In Jesus Christ, "the same yesterday and today and forever" (Heb 13:8), the Church has a stable reference point. In particular, it recalls and mystically relives by sacramental re-enactment the paschal event

from which it takes its rise. Only by recapturing in its contemporary life the mysteries of Jesus' death and resurrection does the Church bring its own members into a saving relationship with God.

This relatedness to Christ does not prevent the Church from adapting its forms of life and speech to the people of various ages and cultures. The Church in a given time and place consists of a specific group of people who have to actuate for themselves the Christ-relatedness of which we have been speaking. The abiding structures of the Church, therefore, must undergo ceaseless modification, not in order to weaken or dissolve its bonds with Christ, but precisely in order to keep them intact. An analogy may clarify this point. A growing child has to relate itself to its parents in constantly new ways, not in order to destroy the relationship it formerly had, but rather in order to keep that relationship alive. So, too, the Church has to adapt itself as may be necessary to maintain a living relationship to its Lord.

In the light of these general principles, we may consider ecclesial structures under four general headings, each of which is related in different ways to the concept of *ius divinum* as presented in the theological literature we have reviewed. The four classes may be conceived as concentric circles or spheres.

1) Neo-Lutheran theology has turned the spotlight on the innermost circle—that of the fundamental mission of the Church as attested by the dominical sayings preserved for us in the New Testament. Whether or not these sayings are authentic words of Jesus, Schlink's conclusions, in what they positively affirm, may be accepted; for the later Church would not be an efficacious sign of God's redemptive act in Christ unless it had the four elements on which Schlink insists.

First, an apostolic ministry appears to be required in order that Christian proclamation and pastoral care may be extended to peoples of various times and places. Thanks to this apostolic ministry, the Church is assured of always possessing an authority which in some sort represents Christ its Lord. According to the representative theory I have outlined, it is important that the pastoral leaders be seen as endowed with the authority of him who said "He who hears you hears me" (Lk 10:16). Yet this identity must not be too materialistically understood, as though Christ were somehow reincarnated in his ministers, or as though their relationship to him were independent of their solidarity with the ongoing community of Christian faith.

Second, one may affirm as divinely instituted and essential the rite of baptism by which individuals are initiated into the community of those whose lives are placed in subjection to Christ the Lord. It seems to be demanded in the nature of the case that such an entry into the community of believers be sealed with a visible sign, in order that

through the sign itself deeper relationships may be fostered among all who belong to the community.

Third, the community of believers must have at the center of its worship the meal which the New Testament sees as invested with sacramental significance both as an anamnesis of what Jesus did at the Last Supper and as a sign and anticipation of the eschatological banquet. Without the Eucharist the community would be deprived of its most powerful liturgical link to the paschal event on which its existence is founded and to the heavenly consummation toward which it tends.

Finally, the Church must continually reappropriate its fundamental nature as a community in which God's forgiveness is shown forth and mediated. The sacramental enactment of that "binding and loosing" which Jesus entrusted to the apostolic ministry would seem to be a necessary feature of any community that claims to mediate God's merciful pardon.

These four basic structural elements, representing Christ's irrevocable gift to his Church, correspond to the sacraments of ordination, baptism, Eucharist, and penance. Whether the term "sacrament" is used in each of these four cases is not of crucial import, for the category of "sacrament" is not itself a foundational element but is a product of ecclesiological reflection. Yet the category does seem meaningful and valid. Not only Catholics, Orthodox, and Anglicans but many Lutherans have been willing to recognize these four rites as deserving to be called "sacraments," for they are viewed in the New Testament as divinely instituted and may be thought to involve a promise of grace.

2) No sharp line can be drawn between the inmost circle of sacramental structures which the New Testament ascribes to the founding action of Jesus himself and the second circle to which we now turn. There are certain institutional features which first clearly appeared as distinct entities some time subsequent to the apostolic age but which, once they did appear, were able to be traced to a biblical basis and, moreover, were found to be expressive of the very nature of the Church. Structures of this category seem to be best explained not by the static theory of tradition characteristic of Neo-Scholasticism but by the developmental theory I have ascribed to Rahner and Peter. These developments, inasmuch as they may not be reversed by the free, discretionary action of church authorities, may be called *iure divino* in a somewhat more extended sense than structures that pertain to our first category.

The strongest objection would be that the Church, for all that we can discover, existed for some years without these structures. How then can they be essential? This objection, however, does not seem to be

fatal; for if we regard the Church as a historically developing reality, there is no need that its essence should be realized in manifest clarity from the beginning. Biological analogies come to mind. Acquaintance with chickens perfects our knowledge of what an egg is. A human person is frequently—and I believe correctly—understood as being rational by nature; yet the note of rationality is not manifest in the newborn baby. Indeed the “age of reason” is commonly placed about the seventh year. So too in the case of the Church, we may suppose that only as it achieved a certain temporal and geographical distance from the time and place of its origins did it evidently show forth its inherent properties of apostolicity and catholicity, so that it could acquire the institutional features corresponding to these properties.

The majority of Christian traditions accept the creeds of the early Church and the canon of Scripture drawn up in the early centuries, even though these norms are themselves postapostolic; for the Church in later ages finds that these doctrinal norms enable it to express and maintain the apostolic faith. So likewise we may suppose that certain sacramental and ministerial structures which cannot themselves be surely traced back to the apostolic generation may nonetheless be essential to the Church in later ages. Among these structures we may plausibly reckon the three sacraments not listed in our first category: confirmation, marriage, and the anointing of the sick. These rites are not without a biblical basis, and when they did become universally practiced they were seen as expressing aspects of the Church’s abiding nature. Confirmation effectively symbolizes the special assistance of the Holy Spirit promised to, and conferred upon, those who enter the community of faith. Christian marriage transforms nuptial relationships in the light of the union between Christ and his Church, thus making the Christian family what Vatican II does not hesitate to call a “domestic church.”<sup>93</sup> The anointing of the sick perpetuates in a visible and sacramental way the healing that belongs so prominently to the ministry of Jesus and the apostles.

It is along these lines that some recent scholarship has attempted a justification of the papacy as divinely instituted.<sup>94</sup> It may plausibly be argued that the papal office, as an embodiment of the Petrine ministry, even though it cannot be historically traced to the first few generations, has won for itself an enduring place in the Church. True, there are doubts and differences of opinion as to the exact shape that the papacy may be called to assume for the Church of the future, but this uncertainty does not negate the judgment that an office concerned with

<sup>93</sup> *Lumen gentium*, no. 11.

<sup>94</sup> See, e.g., the U.S. Lutheran/Catholic consensus statement, *Papal Primacy and the Universal Church*, esp. no. 9, p. 13.

the ministry of world-wide unity will and should remain. The same, I believe, may be held regarding episcopacy as a ministry of supervision over more particular ministries to congregations. But to discuss in detail exactly what features of any given sacrament or ministry are essential and enduring would be to exceed the scope of the present essay, which is concerned only to clarify the notion of *ius divinum*. In agreement with Karl Rahner and Carl Peter, I believe that the notion is applicable to this second circle.

3) Can there be temporary, reversible developments truly willed by Christ and inspired by the Holy Spirit? This possibility, envisaged by Johannes Neumann and Edward Schillebeeckx, cannot, in my judgment, be ignored. As I have already argued, the maintenance of a living relationship to Christ may actually demand adaptations to a given period of history or to a given geographical or cultural situation. Such adaptations are not arbitrary. In admitting them, the Church is not acting on its own initiative but is exercising obedience to its Lord.

The idea that there could be something divinely instituted and yet not apostolic in origin was discussed, more than is generally known, in the Middle Ages. To give but one example, one may refer to Jean Gerson, whose position is described as follows:

Betraying, perhaps, some Ockhamistic influence, Gerson does concede that the hierarchical constitution of the church can be changed but never through human instrumentality. Divine intervention is absolutely necessary if there is to be any modification in the church's essential nature. The Holy Spirit alone is capable of creating new channels of authority and order within the church, thereby restructuring its essential framework. This possibility is implied by his use of the principle: "*lege stante et non facta nova institutione*." The present hierarchical structure has been constituted by divine decree and can only be changed by subsequent divine intervention and the establishment of a new dispensation.<sup>95</sup>

I would not wish to argue that God has dramatically intervened in history to institute new structures in the Church in the manner that Gerson apparently had in mind. But it is commonly taught today that God is at work in history and that He speaks to the Church through the "signs of the times."<sup>96</sup> If we accept this point of view, we can easily see how the introduction of certain new forms, and the abrogation of certain old forms, might be divine imperatives for the Church.

On the positive side, we may think that in our time God's will for His Church—and hence, also, the appropriate realization of the Church's essence in history—demands a less juridical and more consen-

<sup>95</sup> L. B. Pascoe, *Jean Gerson: Principles of Church Reform* (Leiden: Brill, 1973) 28.

<sup>96</sup> *Gaudium et spes*, nos. 4 and 11.

sual form of leadership than has prevailed in recent centuries. Just as in the civil arena the participation of every individual in the life of the state is increasingly recognized as a right founded in natural law,<sup>97</sup> so in the ecclesiastical arena the current demand for greater participation and dialogue seems to be a uniquely fitting institutionalization for our time of what the Church is by nature and by God's intention,<sup>98</sup> namely, an interpersonal communion established by means of the grace of the Holy Spirit. The Vatican II principles of collegiality and conciliarity may be taken as responses to this demand. In addition, the vital insertion of Christian faith into the cultures of various peoples, combined with the avoidance of cultural imperialism, seems to call for a greater degree of cultural and regional pluralism than has prevailed since the centralization of the Counter Reformation. In this context we may theologially situate the discussion of regional and local autonomy which surfaced at the 1974 World Synod of Bishops.

On the negative side, it may be necessary to ask whether certain historical forms previously regarded as irreversible ought not to be subjected to critical scrutiny. Because of the inevitable restrictions imposed upon us by our own cultural ambience, we can all too easily confuse divinely willed but reversible developments with those that are irreversible. In the past, theologians have often tended to overextend the sphere of the essential. Gerson, for instance, has been summarized as holding: "The church is so integrally and perfectly constituted in its essential hierarchy, that is, papacy, cardinalate, patriarchate, archiepiscopacy, episcopacy and priesthood, that if it lost one of these hierarchical orders it would cease to be the church that Christ established."<sup>99</sup> To our contemporaries it seems clear that cardinalate, patriarchate, and archiepiscopacy are not divinely mandated grades of the hierarchical ministry, even for a given historical era, and yet many theologians are convinced that papacy, episcopacy, and presbyterate are permanently essential. In view of the past confusions concerning divinely instituted ministries, we have to ask ourselves continually whether we have drawn the line at the right point. Ecumenical dialogue with other Christian communities raises this question in a particularly poignant way; for non-Roman Catholic communities are asking the Catholic Church to recognize that their historic structures could continue to exist in a reunited Church. And the Catholic Church

<sup>97</sup> See J. Maritain, *The Rights of Man and the Natural Law* (New York: Scribner's, 1949) 85.

<sup>98</sup> Paul VI in *Octogesima adveniens*, no. 22, called attention to the aspirations to equality and to participation as two characteristic trends of the present age.

<sup>99</sup> Pascoe, *Jean Gerson* 28. As indicated above (n. 95), Gerson admits that God can by His absolute power modify what belongs to the Church's essential nature.

is asking other churches to accept its own essential structures, both sacramental and hierarchical.

Do we have any criteria for distinguishing between the second and third spheres just described? In the last analysis the decision must rest on an act of discernment that cannot be justified by demonstrative proofs. But there are indications. When, for instance, a given ecclesiastical structure seems to be an impediment to the Church's mission as embodied in the divine mandates of our first sphere, or when it conflicts with the transcendental precepts that hold for any good society, we may have reason to think that this particular structure can and should be radically changed or suppressed. For it is difficult to see how God could will for his Church something that is a countersign or is counter-productive.

Applying these criteria, one might ask, for example, whether the papacy must be regarded as a permanent feature of the Church. With most Catholics, I would answer in the affirmative, on the ground that it remains important in every age for the Church to possess an efficacious sign of its world-wide unity and to perpetuate what has been called the "Petrine" ministry.<sup>100</sup> A more difficult question, still under debate, is that of the ordination of women. As with the papacy, so here, it would not be enough to argue simply from apostolic precedent or from unbroken continuity in the past. If the exclusion of women from ordination is to be sustained, a justification must be given in terms of the biblical and liturgical symbolism and the needs of the Church as a sign of Christ in the world today. The Congregation for the Doctrine of the Faith, in its Declaration of October 15, 1976, held that the reservation of priestly ordination to men corresponds to "God's plan for his Church," but the rationale for this decision continues to be debated. It is important for the universal Church not to let itself become bound, even unconsciously, to the sociocultural conditions of a dying age.

4) Beyond these three spheres of divinely required structures lies an outer realm of discretionary matters, corresponding approximately to what Scholasticism calls *ius mere ecclesiasticum* and what Lutheranism has traditionally regarded as "adiaphora" (matters of indifference). In more modern terminology, Michael A. Fahey refers to "operational" and "ad hoc" structures.<sup>101</sup> The Church has the obligation to make

<sup>100</sup> Thus the Catholic participants in the U.S. Lutheran/Catholic Dialogue felt entitled to assert (par. 60, p. 37): "While we look forward to changes in the style of papal leadership corresponding to the needs and opportunities of our times, we cannot foresee any set of circumstances that would make it desirable, even if it were possible, to abolish the papal office."

<sup>101</sup> Fahey, "Continuity" 427.

certain provisional dispositions that are neither contrary to God's will nor expressly required by it. In many cases one cannot say that either of two alternative regulations is more consonant with the Church's nature and mission, but a decision has to be made—somewhat as civil authorities have to regulate, more or less arbitrarily, whether cars are to drive on the right or the left side of the street. In these cases it is unhelpful to speak of divine law except possibly in a merely permissive sense.

On the basis of these four classes of structure we may now proceed to draw some conclusions about divine positive law. With regard to the continued usage of the term itself, we must acknowledge, with Lindbeck, certain real disadvantages. *Ius divinum* terminology tends to make too sharp a separation between divine and human activity, to absolutize what is historically conditioned, and thus to lend support to ideological distortions,<sup>102</sup> as did the political theory of the "divine right of kings." And yet the term does have the value of calling attention to the fact that the Church stands under its divine Master, that there is a point at which the Church itself must say "I can do no other, so help me God. Here I stand."<sup>103</sup>

The traditional category of divine law, in my judgment, is applicable with varying degrees of appropriateness to each of the first three of the four types of structure discussed above. The first type offers the least difficulty, for here we find verified not only God's will but also divine institution (by Jesus Christ as attested by the Scriptures), apostolic origin, and permanence.

For our second class, *ius divinum* terminology is less appropriate but still meaningful. The term expresses the divinely willed and irreversible character of certain structures, even though they came into being since apostolic times. Yet the terminology is questionable, since we have no assurance of immediate and specific institution by Christ or even by the apostles. Without this element the traditional category of *ius divinum* is weakened.

For our third class, which includes structures willed by God for His Church in a certain passing phase of its existence and in a certain historical situation, *ius divinum* terminology still has the merit of

<sup>102</sup> In his *Kirche als Institution* (Frankfurt: Knecht, 1976) Medard Kehl has a brief section (106–9) on ecclesiology and ideology. He concludes (108): "To escape a justified suspicion of ideology, ecclesiology must not attempt to attribute to all the institutional forms that have developed in history the theological predicate of 'divine,' i.e., of absolutely immutable and exclusively valid law. . . . Such a theological overloading of historical forms makes theology suspect of ideology." In this connection see also K. Rahner, "Ideology and Christianity," *Theological Investigations* 6 (Baltimore: Helicon, 1969) 44.

<sup>103</sup> These words are memorable even though Luther apparently never uttered them.

bringing out that in establishing or maintaining these structures the Church has a sense of not acting arbitrarily but under a divine imperative. It would not be proper to speak in such instances of merely ecclesiastical law or even of adiaphora. But the *ius divinum* terminology is only marginally applicable, because both apostolic origin and irreversibility are lacking.

For many of our contemporaries, it may seem presumptuous to categorize ecclesiastical structures by reference to God's will and misleading to depict God in the likeness of a human lawgiver. Such persons may find it more helpful to define the structures in question by their relationship to the Church itself. The innermost circle would then be seen to include what is necessary *ad esse ecclesiae*, "for the very being of the Church" – to borrow a term from the discussions concerning episcopacy within the Anglican communion.<sup>104</sup> The second circle corresponds to what may, in the same terminology, be called *ad plene esse ecclesiae*; for without these features the Church would lack something that pertains to its integral and developed existence. The Church would indeed exist, but only in rudimentary or mutilated form. Our third circle would correspond to what is, for a certain time or situation, *ad bene esse ecclesiae*.<sup>105</sup> If these structures were lacking, the Church would be present and integral, but not in a healthy condition. The fourth circle includes structures that do not belong to the Church's *esse*.

This alternate set of terms, while laboring under certain disadvantages such as the danger of contributing to an exorbitant ecclesiocentrism, has the merit of bringing out into the open some of the distinctions we have found it necessary to build into the notion of *ius divinum*. Doubtless, still other vocabularies can be proposed. Whatever terminology is employed, it will be necessary to differentiate, as we have done, between the biblical and the nonbiblical, the apostolic and the nonapostolic, the reversible and the irreversible.

Rigid and exaggerated claims for *ius divinum* have surely exacerbated the divisions among the churches. A more modest and nuanced view of *ius divinum*, conversely, may provide a much richer basis for mutual listening, recognition, and sharing. As each church, in dialogue with others, labors to bring its own institutions into line with God's present will for the Church, convergences may be expected to occur. The growing recognition of the historically conditioned aspects of all ecclesiastical structures, not excluding those traceable to God's perma-

<sup>104</sup> This threefold distinction appears for the first time, I believe, in Kenneth M. Carey, ed., *The Historic Episcopate in the Fullness of the Church* (London: Dacre, 1954).

<sup>105</sup> In the Venice Statement (cf. n. 7 above) the Anglicans seem willing to admit that the papacy may belong to the *bene esse* of the Church, but unwilling to recognize it as belonging to the *plene esse*.

ment design for the Church, opens up rich possibilities of change and mutual rapprochement.

As noted by one author, the classical notions of church reform have left no place for transformation or revolutionary change.<sup>106</sup> Almost since the beginning, Christian thought has been too much concentrated on preservation, restoration, and homogeneous development. The schematization suggested in this essay, however, provides for creative innovation as a form of authentic obedience. It has the advantage of fitting such materially discontinuous change into the framework of a Church which has received its essential structures and its mission from Christ and the Holy Spirit.

The concepts of continuity and mutability are commonly seen as incompatible. According to the vision here proposed, the opposite should be said. The Church's abiding essence actually requires adaptive change; and such change, if it is healthy, serves to actuate and express more vividly the true and permanent nature of the Church itself. Creative fidelity, I would suggest, must be the very soul of any fruitful ecumenism.

<sup>106</sup> J. W. O'Malley, "Reform, Historical Consciousness, and Vatican II's *Aggiornamento*," *TS* 32 (1971) 573-601, esp. 595, 598-601.