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Reception in ecclesiastical law

Juridical science that set its goal to describe and study the objective reality has no right to exclude phenomena connected with existence and activity such a numerous "public union" (as a modern jurist would call it) as a Church, from object of its research. We would remind you that the issue is not only a union that influenced greatly on our state's modern political and social life. The multifaceted European culture taking the road of secular society only relatively lately, owes its formation to Christianity. The Church has its religious doctrine, history, traditions, law after all. And handling of church law, study of its peculiarities has objective legal-theoretical and legal-historical interest. All the more so because the last researches in that area for obvious reasons were ceased nearly hundred years ago except for certain rare ones that appeared in recent years.

However, there is a practical aspect in full here. The government, implementing the civic right of conscience and religious freedom, in the name of supreme political power has to know what real consequences one or another legislative act, infringing Church's interests and sphere of activity, will have. The legislator that tries to regulate such a delicate sphere of person's spiritual life, should, of course, proceed from principles, categories and values those church mentality operates. This is possible only in the case where they are known: you need to live up to Church's reason and not to "analytics" of the secular man to comprehend an ecclesiastical law.

The researcher, taking the liberty of handling such a difficult subject, can not disregard the most striking feature of ecclesiastical law that practically does not show up in so called secular law of states. The issue is a *reception* as a peculiar perceptual process by church sense of justice of one or other rules of church life, the base of church lawmaking and law enforcement.[1] The author of this text has no illusions about disclosure of all nuances of the chosen topic within the scope of one article. Nevertheless, he hopes that this work, with its entire shortcomings that readers and specialists can judge, will make it possible to estimate certain peculiarities of the same canonical (church) law, those absent in secular law of the state, and to detect the reason of distinction between one law and another.

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[1] It should be mentioned, that the author uses the term "sense of justice" with necessary reservation. As is known, there is no common opinion about content of this notion in legal theory. The author inclines to the thought-out and well-grounded point of view, expressed by one of modern authors, that sense of justice is an act of conscience, verifying compliance of man's free will (his deeds and thoughts) with laws and morality from God. He writes: Sense of justice has an aim to establish legal regime in society in compliance with its convictions… Sense of justice is a part of conscience", and conscience is a natural law, knowledge about good and evil, impressed to man's soul by God. *Ivanov V.I.*Faith as a base of sense of justice // Orthodox statehood: 12 letters about the Empire. Ed. A.M. Velichko and M.B. Smolina. St. Petersburg, 2003. P.96, 102, 103.

I. Reception and church lawmaking

Apparently, the term "reception" comes from Latin words *receptare* – "to accept" and *recepta sentential* – "legal decree, generally established view". Reception in juridical literature is usually understood as historical process of adoption of foreign law by certain nation or nations[2]. But this term contradicts the content and meaning of reception, those it has got in church (canonical) law. Before further exposition, we can not of course forget that reception becomes apparent not only in ecclesiastical law, but also significant for Christian religious doctrine and theology in whole. As is known, no Christian dogmas, formulated by Ecumenical Councils were accepted by the Church without its reception (preliminary or subsequent) by church society. Moreover, any Church's activity, becoming apparent in outside world in one visible form or others, connected inseparably with the reception.

Though researches – canonists are concordant with the fact that Scripture commandments form divine right (*jus divinum*), nevertheless canon law body is not restricted only to *jus divinum*[3]. As a well-known Russian canonist A.S. Pavlov (1832-1898) indicated, regulations of divine right do not form affirmative ecclesiastical law code, fixed external Church order in all its particulars once for all. They are fundamental principles, the Divine Principles of affirmative ecclesiastical law that is formed by the Universal Church and by certain local churches[4]. Thereupon the Church, as the only interpreter of rules of divine law from the earliest time and very often faces the challenge of separation of wrong rules, even if they are accepted by authoritative bodies and persons of the church, from regulations that meet *jus divinum* in full measure and are able to regulate relations between its members as it follows from spirit and content of Jesus' teachings[5]. Moreover, even the fact of direct adoption one or another rule from the Holy Scriptures texts does not evidently indicate that this regulation has the universal nature. There is many examples in the history of the Church, when a definite resolution, commanded even by Apostles, becomes the part of "dead laws" and is substituted for new ecclesiastical law.

The supposition that the Apostles were mistaken is wrong: according to the teaching of the Church, they, as the people endowed with divine grace, could not (consciously or unconsciously) command coreligionists wrong laws[6]. The matter is that Spiritual texts contain different regulations. Some of them are suitable only for

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[2] *Gambarov Y.S.* Course of civil law. Vol.1. St. Petersburg, 1911. P. 110

[3] *Zypin Vladislav the, archpriest.* The course of ecclesiastical law. Klin, 2002. P. 38, 39 *Pavlov A.S.* The course of ecclesiastical law. St. Petersburg, 2002. P. 32

[4] *Pavlov A.S.* The course of ecclesiastical law P.34

[5] One can remember the authoritative names of Tertullian and Origen, whose activities had a strong impact in the field of wide disseminate of Christian ideas. But not all their ideas have been accepted by the Church. Moreover, as is known, some theses of Origen have been anathematized later at the General Council of Constantinople in 553. *Kartashev A.V.* Ecumenical Councils. Moscow 1994 P.333, 356

[6] Apostle (from Greek "messenger") is a person, called by God to tell people His will and Law and for administration of the Church in ancient times. The dictionary of Christianity. In 3 vol. Vol.1. Moscow,1993. P.109.

certain period of time, as, for example, many regulations of the Old Testament. Quite often the Bible expounds concrete regulations, assuming the possibility of their direct and immediate use. After all, the Holy Scriptures contain many certain rules (sometimes they are not connected outwardly), those gradually, as the church sense of justice develops, form "mosaicly" into universal regulations. Mentality, originally brought up in pagan traditions simply can not always to notice and understand such a regulation apart from observing it. The mentality is somewhat blind, and the rule, meant for certain cultural level, is empty for it yet. Therefore the Apostles expounded often the definitions, more understandable for pagan non-Christian mentality. They, on the one hand, did not contradict the generalities of close texts and, on the other hand, involved the moderate rule that later revel itself in absolute completeness. In this respect the words of Apostle Paul from the First Epistle to Corinthians become clear: "Now, brothers, I was not enabled to speak to you as spiritual men but as worldly ones, as babies in Christ. Milk I fed you, not meat, for you were not yet able.[7]"

Christian sense of justice developed, and a halfway policy of the law applied earlier was no longer sufficient, it became aware of law's halfness and tries to learn it in in its entirety. Thenceforth an "opening" of a new canon occurs, its inclusion in ecclesiastical law body and experimental use. *All that total process of Truth's comprehension, the check of compliance of typical rules of conduct (legal regulations), formed in the process of church life, with it, their perception, spreading and use are called reception.*

As long as church sense of justice handles the Absolute Truth, and ability of human mind to adopt it is limited, the process of formation of church canon is rather difficult and involves many intermediate stages. For example, when different bodies of church authorities at different times establish the same or very similar rules of conduct. At the same time church-legal practice quite often arises with analogous or very close content, besides the acts, appeared as a result of official church lawmaking. In other words, the Church ascertains through a great deal of experience that just that very rule with such content conforms completely to regulations of Christian piety. Consequently, the final drawing up of a law with certain legal content and its official implementation in church life comes[8].

What did serve as a criterion for the Church to conclude from the Holy Scriptures text precise and clear principle, taken as a basis for rule of law currently in force? According to reasonable words of A.S. Pavlov, the criterion is only pronounced Universal Church's awareness that "known rule or ascertainment comes from

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[7] 1 Cor. 3, 1-3.

[8] One of many examples – canon about necessity to convene a council of bishops in all regions every year to resolve questions connected with church life was based on many various decrees: 5 law of the first Ecumenical Council, 2 law of the second General Council of Constantinople, 40 laws of the Council of Laodicea, 18 laws of the Local Carthaginian Council and others, till it was finally formulated in 19 law of the Ecumenical Council at Chalcedon.

divine will and applies to very essence of the Church"[9]. The reception enables to determine compliance of one or another rule, canon, dogma with divine will.
That process of Christian learning of the Truth or the reception was well and clear described by an outstanding Orthodox theologian. "The Church, that slowly checks and proves everything in all bearing, and, first of all, *the influence of the teaching on life*, judges every new book that has claims on inclusion in the teaching of the Church or expression of it. This criterion, i.e. the influence of the teaching on life, is very important because of the closest link between dogmatic thinking and life, and Church rejects everything that contradict or disagrees the spirit of Christ's love, with which Church lives… The Church knows deep down the truth of Christ's love by the Holy Ghost… the Church does not deceive itself"[10].
One of telling examples is a regulation about bishops' monogamy, commanded by Apostle Paul in the Holy Scriptures. Nevertheless, with the lapse of time church awareness came to another purview of law, which is still universal: total celibacy of episcopate and calling to Episcopal rank only from monks. However, with outward dissimilarity, there is no contradiction between these two rules. Indeed, the Apostle wrote his epistle when it was difficult to find celibates for Episcopal consecration, and monasticism was not formed yet. For these reasons the Apostle places *certain* limitation (a bishop can be married only once), but even it was discordant in ancient pagan times against dissolute moral of the contemporary society[11]. During long period of time when, besides married, unmarried were consecrated bishops, church awareness, basing on its own appraisal of first and second practice's implications for church's life, formulated gradually the principle, indicated above, with necessary accuracy for legal regulation in its entirety, also based on the the Holy Scriptures[12]. So under the influence of reception a certain regulation of church (canon) law formed. In the given example the written confirmation of the regulation by bodies of church authority was a natural legalization of generally established church's opinion – 12 rule of VI Ecumenical Council.

II. Reception and the sources of ecclesiastical law.
The universal effect of reception is easily seen with regard to others sources of ecclesiastical law: *church-legal customs, Holy Tradition and decrees of church authorities' bodies* (that involve not only the acts of the Councils, but also imperial acts of Byzantium and Russian Empire, as well as patriarchs).

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[9] Pavlov A.S. The course of ecclesiastical law. P.33.
[10] *Sophronius (Saharov), the archimandrite.* Reverend Silvanus from Athos. The Holy Trinity-St. Sergius Lavra
[11] Another example was given by Christ. When the Pharisees asked Him if a husband may give his wife a divorce, He answered: "Moses allowed you to divorce your wives through his hard-heartedness, at first it was not allowed" (Matthew 19, 3-6). A little earlier the Savior said: "I tell you: who divorces his wife, besides guilt of adultery, gives her cause to commit adultery" (Matthew 5, 31, 32).
[12] *Nicodemus (Milash) Dalmatian-Istrian bishop.* The Laws of Orthodox Church. In 2 vol. Vol.1 Moscow, 2001. P.460-473.

As is known, a custom, including the church-legal, is understood as a practice "that approved not by a direction of legislative authority, but by a common belief of a given social circle, that in certain cases it is necessary to act in one way , not in other, in other words – to observe a certain rule, although it is unwritten"[13]. The highest appraisal of church-legal custom was made in the Rule of St. Basil (IV). In 91st rule from canonical books St. Basil maintains that the one, who says that unwritten customs do not have great powers, detracts from Gospel's significance in the main subjects. This is because the Church gets good customs from "the unwritten Scripture" of devout fathers. He questioned: "What Scriptures has taught you to turn to the East in devotional hours?"

In addition to that, constant use of one custom or another, and its legalization as written regulation of church law, is based on its reception by church sense of justice, on its recognition as appropriate to Christian Teaching. In case of failing tests, the custom is rejected. It is no accident that quite a number of canonical definitions say about customs that do not correspond to spirit and content of Christian beliefs. For example, some rules of VI Ecumenical Council are devoted to this question: the 13th rule, disapproving the custom of priest celibacy, existing in the Church of Rome; the 28th rule about the exclusion of custom to sacrifice fruits on the altar; the 32nd rule, disapproving the custom of the Armenian Church to bring unmingled wine to Communion; the 33rd rule, recognizing the custom of the Armenian Church to make readers choristers without monastic vows, probation and so forth as non-Orthodox.

In other words, the custom is also tested by the reception, as any Church's rule. Therefore the situation is available, when church custom not only completes the effective church law, but also used as a regulation, more powerful in comparison with written law. For example, on the basis of literal interpretation of the 45th rule of Carthaginian Local Council and the 53rd canon of VI Ecumenical Council, it follows that at the sacrament of baptism baptizee should have one godparent (godfather or godmother)[14]. But later a custom emerged, according to which a baptizee should have two godparents (godfather and godmother). The custom prevailed. Of course, there is no contradiction between custom and law in this case: the differences are optional. Nevertheless, this example indicates the power of the custom, based on its reception by church sense of justice.

The Holy tradition is the body of effective regulations of church life (we are interested in legal regulations) that the Church has got not from the Holy Scriptures, but from God-inspired authorities (Apostles, Holy Fathers, Doctors of the Church and so forth). Since the Holy Scriptures is substantially based on oral legends, it sometimes called as "oral word of God". Simply speaking, the Holy Tradition and the Holy Scripture have the same Truth[15]. One Orthodox theologian enounced very well the essence and significance of the Holy Tradition for the

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[13] *Pavlov A.S.* The course of ecclesiastical law. P. 36.

[14] Ibid.

[15] *Barsov N.I.* The Holy Tradition // The dictionary of Christianity. In 3 vol. Vol.2 Moscow, 1995. P.383, 384.

Church. He wrote that the Holy Tradition, as the life in the Church, is the constant activity of the Holy Ghost, one form of which is the Holy Scripture. "If the Church has lost its Tradition, it would have no longer be what it is, because the service of the New Testament is the service of spirit, written not in ink, but by the Spirit of God, not on tables of stone, but on tables of heart (II Cor. 3, 3-6). Suppose that the Church for some reason or other lose all its books, i.e. the Old and the New Testament, works of Holy Fathers and prayer books, then the Tradition will restore the Holy Scriptures, not literally and in different terms thought, but this new Scriptures would be in essence the expression of the same "faith, once betrayed by saint" (Jud. 1,3)[16].

Unlike the custom, the Holy Tradition involved not only rules of conduct, but, essentially, doctrinal propositions, and it is quite natural that many regulations of canonical law originate from the Holy Tradition. For example, it is significant, how discussants and members of the Councils often resorted to works of the Holy Fathers and Doctors of the Church during Ecumenical Councils to understand disputable or indistinct propositions. As stated above, St. Basil the Great referred to the Holy Tradition, talking about derivation of the church custom, and the Councils referred to it too, formulating content of one or another church-regulatory legal act.

But nevertheless the recognition one or another Tradition as devout is the result of reception. It is necessary to ascertain that the Church for a long time observed this Tradition as "necessary law of its life"[17]. In addition, - an important fact – by ancient church tradition, canonization (or apotheosis) of a certain person, the Christian experience of which, set in the Holy Tradition, is taken as a principle of church lawmaking, has an integral, organic phase of *reverence* of him by church people[18]. Thus the Holy Tradition is formed on the basis of preliminary recognition of persons' ecclesiastical authority and, consequently, tested by reception many times[19]. At first – by person's canonization, then – by acceptance of the rules, proposed by him.

A well-known Russian jurist and canonist N.S. Suvorov gave a good example of reception's application for decisions of lawmaking bodies of the Church (in this case Ecumenical Councils). He wrote: "In the ancient history the Council did not determine infallible teaching: only the posterior church acceptance imparted the seal of infallibility to conciliar decisions"[20]. Then: "The law that runs counter to

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[16] *Sophronius (Saharov), the archimandrite.* Reverend Silvanus from Athos. P.93, 94.

[17] *Pavlov A.S.* The course of ecclesiastical law. P.33.

[18] The dictionary of Christianity. In 3 vol. Vol.1 Moscow, 1993. P. 673, 674.

[19] It is noteworthy, that fathers at the second Ecumenical Council at Nicaea did not appreciate the evidence of St. Eusebius of Ceasarea (AD IV) over the veneration of relics, mentioned at "iconoclastic" Council 754 and decisions, taken as its principle, because, in their fair opinion it could be valid, if it had been said by honorable father of the Church. Meanwhile, Eusebius had sullied his name by inclination to Arianism (a heresy), so his words can not be veritable and useful for the Church. John, the bishop of Aksay. The history of Ecumenical Councils. Kiev, 2004. P. 447.

[20] *Suvorov N.S.* The textbook of ecclesiastical law. Moscow, 2004. P.235

church awareness can not become an active law in the Church, not that ecclesiastical hierarchy has no right to abrogate or canonize a law, but for the reason that church conscience would not allow to put a law, conflicted with the spirit of the Church, in force, even if ecclesiastical hierarchy approves it"[21]. Simply speaking, the regulations that were not quite Orthodox, had been in force till church reason perceived its imperfection and non-compliance with canons.

So the formal promulgation of a legal act, even by a body of church authority, does not stop the process of reception. In particular, for ascertainment of the fact that church canon is formulated and accepted by a church, it is necessary that the body of church authority, approved the rule, is recognized as plenipotentiary authority of the Church by all ecclesiastical world. In fact, not all legal-church decisions, promulgating by the Councils, emperors and patriarchs, has always passed the test of Truth. On the one hand, the Church proceeded from formal matters, then, for example, it refused to recognize the bishops' councils without patriarchs or their legal representatives as ecumenical. But at the same time, the Church, as the society of believers, examined thoroughly the content of rule of law. For example, the second Ecumenical Council was not formally irreproachable (there were no western bishops and the Patriarch of Rome at it, and it was no accident – the emperor that had convened the Council, did not invite them), as the Council in the year 754 that claims to be ecumenical, which was not attended by patriarchs[22]. But in the first case the reception has been accomplished and the Council has been recognized as ecumenical, and in the second case the participant of the Council have been anathematized by the Church and its decisions have been declared void.

The Russian historian A.V. Kartashev (1875-1960) gave another example. "By appearance, the Council of Ephesus in 431 (the Third Ecumenical Council), in comparison with others Ecumenical Councils, is the most unattractive, vague, unsuccessful and simply officially unaccomplished. The next Council of Ephesus in 449 that had been also convened as ecumenical was even more irregular, than the preceding one, and has been stigmatized as "the Robber Council of Ephesus". Meanwhile, the deeds of the Council of Ephesus in 449 had been approved by the very emperor, Theodosius II, and the deeds of the third General Council at Ephesus had not been approved, and the Council had been dissolved for disorder and lawlessness. But the Church judged otherwise. The Church had the contrary perception"[23].

The Acts of Local Churches in the light of reception.

The rule of law, recognized by canons that must be observed under threat of being anathematized, was still tested of Truth, though in a different way, even after reception of Councils' decisions and others bodies of the Church. The social life is always develops, and it is naturally has an effect on church life. The new

[21] Ibid. P.238.
[22] *Kartashev A.V.* The Ecumenical Councils. P.131.
[23] Ibid. P.232.

circumstances and problems appear that should be solved within the scope of church law.

Enforcement Church practice on the basis of the ecumenical laws begins to form new regulations, with some features of content in comparison with older canons, passed the reception. They are usually local ecclesiastical laws, adopted by certain local churches and active not everywhere in the Universal Church. As is known, the absolute authority of ancient canons those are universal does not prevent Local Churches from lawmaking on conditions that their acts comply with principles, content and spirit of older laws[24].

It might seem that this process is usual for secular legislation, when common legal principles develop in various regulations at first, and then the principles are *defined more precisely* on basis of emerging enforcement practice. But there is no similarity with this order in ecclesiastical law. Local church novels are also tested by reception and their fortune is clear: either they retain the status of the Local Church act, or, as has been many times in the period of Ecumenical Councils, some of them are recognized as universal and involved in canonical law body that has binding force in the all Universal Church. That was the fortune of the acts of the Prime-Second Local Council of Constantinople 861 A.D., Local Council in Saint Sophia 879 A.D., laws of St. Tharasius and some others. Though catholic legal awareness accepted these laws without their official recognition by Ecumenical Councils, as the Ecumenical Councils have not convened after VIII century. There is no reconsideration or "adjustment" of earlier canons in the first and second cases, the church-legal principles were still absolute and universal (In the second example only the arithmetic number of canons increases, but the earlier canons are not abrogated).

The Church is catholic by nature, so the universal church reception can exist only in a united church society. Set of canonical rules, which is closed now, has been created when the Universal Church has not lost its western part in consequence of schism 1054 A.D. yet and was monolithic. Ancient canons have the supreme force in comparison with acts of Legal Churches, because they have passed the reception of Universal Church, and the acts of Local Churches are territorial, i.e. they have not passed the catholic reception. However, the local church lawmaking was not totally free from universal reception. So long as the Church is single, defective regulations, from a perspective of ancient canons, in any of Local Churches' set of legal rules are not recognized by the Universal church. And in this case the Local Church is under threat of severance of Eucharistic communication with other Local Churches. In other words, when the universal legal awareness discovers non-orthodox segments in its activities, this may be the reason to have a canonical influence on it. Relations between Eastern Church and the Church of Rome developed in that way in IX-XI centuries after the latter implemented canonical law and canons (e.g. Filioque), what eventually led to the Schism.

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[24] *Nicodemus (Milash) Dalmatian-Istrian bishop.* The Laws of Orthodox Church. Vol.1. P.438, 439.

It is noteworthy, that in former times, when the whole areas and countries (e.g. Russia, Bulgaria), adopted Christianity, joined religious communities, appeared earlier, neophytes (newly converted) with the Holy Scriptures received the whole body of canonical law, which had been formulated by the Church and had passed the reception earlier, as absolute truth. And the Orthodoxy of one or another newly organized religious community was determined by their fidelity to the main canonical principles and laws of Universal Church. By the way, this fact – the ability to be used by culturally and historically different nations – once more indicates the universality of the ecclesiastical (canonical) law.

Act that had passed the reception and was recognized as canonical by church conscience can not be excluded only by reason of change of external conditions, impeding its actual application. A canon, passed the reception, continues to implement its great sacred mission of educating people "in piety and purity", either by its application or by the fact of its existence. One would think, why are the laws, regulating the institution of deaconess (e.g. the 15th rule of IV Ecumenical Council about women, ordained deaconess), left in the code of canonical regulations, whereas this institution disappeared long ago. But the church law keeps this "dead" regulation, adhering to the traditions of the Church, its history and Holy Tradition that maintain the unity of religion and external unity of Local Churches within the single Catholic Church. For excluding them officially from the code of canonical law a universal body of church authority that can revise dormant laws is needed and the unity of Catholic Church is necessary to approve its decisions. In addition, the fact that these regulations are dormant does not indicate they won't be applied when the external conditions of existence of the Church change. This is hypothetically (or theoretically) possible for many canons, which are not used today. For example, the canon about reverence of a king: "Whosoever shall insult the King, or a ruler, contrary to what is right, let him suffer punishment. If he be a clergyman, let him be deposed; if a layman, excommunicated." (Apostolic canon LXXXIV), about king's court and so forth.

Force of canon, accepted by catholic sense of justice, is especially apparent when conditions of existence of the Church take a turn for the worse as a result of political persecution. At such times some canons often "stand still" for a while, because church life does not need them. The church life itself may be said to become restricted, less full-blooded. So long as temporal power, trying to regulate the church life, almost always exerts pressure on ecclesiastical law at times like these, the church sense of justice faces the challenge of maintenance of religious purity and piety. This is also important because at these times the bodies of church authority often make compromises with temporal power to the detriment of the Church for some reason or other. Obvious cases: the heresy of "renovationism" in the 20s and the early 30s of the twentieth century, supported by Bolshevist government, and entry of the Russian Orthodox Church into the World Council of Church in 1960s. In such cases church-legal novations (no matter who caused it, the Church or government) may have a bad effect on the Church, and only compliance with ancient canons makes it possible for the Church to appraise new pseudo ecclesiastical rules of law, proposed to it, and continue to undertake

activities properly. As canonists note, that is why almost all decisions of Ecumenical Councils show that it is necessary to maintain ancient customs, traditions, rules and laws. Anyone who enacts something against them may be excommunicated[25].
Thus the church reception appraises new law and passes sentence on the regulations that are bad for the Church, overcomes the force of temporal power and its own authorities that renounced groundlessly.

IV. The reception and bodies of the ecclesiastical authority.
Unlike the situation, frequent for secular legislation, the authority of bodies of ecclesiastical regiment and quality of acts, issued by it is not connected with their quantity. A certain regulation is formalized only when it is necessary and church life itself raises the questions that must be settled immediately. According to felicitous expression of one of historian of the Church, to a certain extent the reception is latent and becomes apparent as the need for the Church to clarify its attitude to one or another view and facts arises. "As soon as decisions and activity of (an religious) community draw public response, catholic nature of these decisions turns from latent state into active state and the church reception comes into operation. It is difficult to define range of questions in catholic state, because it changes from age to age"[26].
So it is erroneously to link the reception solely to activity of bodies of church authorities and suppose that it is enough to be issued by authorized person for recognition of one or another law as canonical. And force of an act, its capacity to be accepted by church sense of justice, completely depends on status of authority that accepted it. Of course, an assertion that an act of a local religious community may claim to ecumenical importance without participation of church body of authority is absurd. But the significance of a law, especially of an ecclesiastical one, consists in its capability to give the most veritable, true law of regulation of conduct, corresponding to human nature, the Church, society, authority and so forth[27]. For that matter an Ecumenical Council, a body of a Local Church or an individual have the capability to express the Truth, regardless of time, place and social status. As stated above, quite a number of canons are the works of Local Councils, Apostles, Holy Fathers and Doctors of the Church. The Ecumenical Councils often just resumed the process of church reception and made them the highest laws of the Church[28]. It is noteworthy that the decision of the sixth General

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[25] *Nicodemus (Milash) Dalmatian-Istrian bishop.* The Laws of Orthodox Church. Vol.1. P.436, 437.
[26] *Nikolay Afanasyev, the protopresbyter.* The Church Councils and their origin. Moscow, 2003. P.35.
[27] That is why Ilyin (1883-1954) said that a law is by nature a thought about right and true juristically. Ilyin I.A. About monarchy and republic // Ilyin I.A. Works. In 10 vol. Vol.4. Moscow 1994. P.419, 420.
[28] Of course, the Ecumenical Councils passed their own acts, and they did not only officially confirmed the Orthodoxy of one or another law, applied by the Church. In addition, they adopted disciplinary decisions in relation to certain persons.

Council of Constantinople, approved the universality of some Local Church's acts, enumerates them all and Holy Fathers, whose laws are recognized as canonical. As if Fathers of the Council confirm that they are not lawmakers, but the witnesses of the Truth. As the second rule of the sixth General Council of Constantinople says, thy just "accepted and validated by the holy and blissful Fathers preceding us, be henceforth retained and left firm and secure for the care of souls and the cure of diseases." And allege, that we are "ordered in these Canons to accept the Injunctions of the same holy Apostles". The distinction between lawmaking and observance of ancient decree is almost indiscernible here.

As A.S. Pavlov rightly noted, a generally recognized power needed to establish and preserve order in any human society: the Church also has such a power. "But the Church was based for humanity and for all time, and circumstances of its external life may be various. So it, when accomplishing a task, needs and has a right to change forms of its external order, because this order is not connected with its essence and does not have real grounds in Divine right"[29]. Of course, the bodies of church power know its hierarchy and have a scope of traditional authority. For example, bishops are supreme body of church power in eparchies they guidance, they implement the teaching and exercise church justice, pass administrative-disciplinary acts, confers orders and so forth. But Episcopal rank does not guarantee infallibility. Catholicism adheres to opposite point of view and ascribes the dogmatic infallibility in presentation of doctrinal formularies to the Patriarch of Rome. For example, acts of The Second Vatican Council say: "Roman Pontiff has the papal infallibility…, when he, supreme pastor and the teacher of all faithful… proclaims the teaching of faith and morality… his decisions are justly called indisputable without consent of the Church and do not need any other approval"[30].

In essence, with such statement of a question church people are separated from reception. That is why Roman church alleges, that "bishops are unerring too, when they with successor of St. Peter, implement the supreme teaching"[31]. Moreover, such approach does not imply the necessity of canons' reception. A deceptive idea arises, that they do not need it on the strength of its status due to extremely authoritative position of their legislator.

No wonder, that such "dogma" and its "canons" were never recognized by the Universal Church. In fact, as the Church history shows, the decisions of Ecumenical Councils have also passed the reception – think, for instance of decisions of the Ecumenical Council at Chalcedon, which generated the most serious unrest in the Universal Church. And the reception distinguishes real Councils from false ones, which the Church has rejected, at least on its face, and everything was the other way or, at least, formally there were no distinction. Significance of one or another canon was determined not only by the fact that they were passed by authoritative and universally recognized body of church power (i.e. emperor, Council, patriarch), but also because they had been earlier recognized by

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[29] *Pavlov A.S.* The course of ecclesiastical law. P.34

[30] Vatican II. Constitutions, decrees, declarations. Brussels, 1992. P.30.

[31] Ibid. P.30, 31.

the Church, although they were included in canon law body later. For example, a bishop Nikodim (Milash) (1845-1915), estimating aforementioned 2 law of the sixth General Council of Constantinople, by which the Church had recognized 625 laws, given by Apostles, Holy Fathers and earlier Local Councils, as the most important, " and the most important for study of canon law", noted that "these laws in themselves had already have *universal significance*"[32].

Protopresbyter Nikolay Afanasyev (1893-1966) has stated a different, but not more correct point of view. He fairly admitted that the church reception is part of the Church as record of the Church about Truth, i.e. record of the Church about Itself.[33] He further excludes expressly or by implication some organizing-authoritative segment, including Councils, episcopacy and emperors. From his point of view bishops did not have legal power in ancient Church. They were only top leaders of religious communities and preceptors of church life. "Ecclesiastical nature of acts and decisions within any community was defined by act of church meeting that said that it had revealed the Will of God"[34]. Or another thesis about the decisions of the Council of Jerusalem (AD 49 or 50): "It is not difficult to ascertain that the universality of that decision was based on the fact that it was the decision of universal church meeting, which is obligatory for all and generally valid. The presence of the Apostles, who had an exceptional charisma, emphasized the catholic nature of decisions of the Council of Jerusalem and indicated its truth"[35].

Father Nikolay, speaking about conciliar form of church life, maintained that, in consequence of establishment of authority bodies in the Church, church people had lost any serious influence on canonical lawmaking. In essence, the church reception was also abolished, because the church meeting had lost its ancient right to adopt bishop's decision or reject it[36]. For communities, whose bishops participate in councils, the moment of reception is removed and "it is for the first time replaced by moment of law… The reception is totally removed by these communities of council's decisions"[37]. Council's decision is not more to be discussed[38]. Though the author supposes further that the Council itself did not remove the reception, but the communities, whose bishops participate in Council are supposed to give the reception beforehand. It is clear, that with this approach it is difficult to say about church authority and canonical law. By the way, father Nikolay was one of the rare persons, who maintained skepticism to the idea of "ecclesiastical law"[39].

Indeed lawmaking in the Church is impossible without participation of bodies of church authority. They enact laws and church decisions and abrogate them, when

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[32] *Nicodemus (Milash) Dalmatian-Istrian bishop.* The Laws of Orthodox Church. Vol.1. P.436.
[33] *Nikolay Afanasyev, the protopresbyter.* The Church Councils and their origin. P. 34
[34] Ibid. P.30, 31.
[35] Ibid. P.37.
[36] Ibid. P106.
[37] Ibid. P.130.
[38] Ibid. P.156.
[39] *Zypin Vladislav the, archpriest.* The course of ecclesiastical law. P.13, 14.

noncompliance with universal church principles and the content of Christian beliefs. N.S. Suvorov spoke about this: "A law that encounters an opposition on the part of the Church is still the law, till it is abrogated by legislator. It is not impossible that with clarification of views the same law will be recognized as appropriate to the spirit of the Church. If any law had been only expression of people's sense of justice or people's legal views, as historical school taught, legislators would have not needed to be reformers of juridical order or withstand struggle against inertia or obvious resistance for triumph of better bases over worse ones"[40].

Accordingly, bodies of church authority either approve a settled practice of traditional law, accepted by all church fullness, or initiate laws on the basis of needs of church life, which further are accepted by the Church. One is impossible without another, as contrary to the nature of the Church and canonical law. That is why church lawmaking and reception can not be detached from church people or leading bodies of the Church.

V. Reception and secular legislation

Apparently, such a crucial role of reception in church lawmaking is *nonsense* for secular legislation. Usually jurists inclined to argue about competence of one or another body of state authority in sphere of adoption of appropriate normative act, correlation between various types of legal acts, for example: what is superior – law or "decree". But if an act is adopted by appropriate body and within its jurisdiction, if the act is not abrogated in accordance with established order, the statement of a question, whether it is legal and should be used, is nonsensical. Furthermore, it is impossible to imagine that, as a result of adopting of "erroneous" law, law-making body can be declared unauthoritative. Even in the cases, which jurisprudence often knows, when a rule of law is dormant in reality such an example does not certainly evidences that the law is not legal, if it corresponds to the criteria formally. In particular all sorts of circumstances could arise that could prevent it from application[41]. On the other hand, history and modern world know a lot of cases, when anti-humanistic rules of law were and are active regardless of what the majority of country's population thinks about them. An easy example – serfdom, slavery laws, many legal acts of fascist Germany, privatization laws in 90s and many others. Are not they considered to be legal acts? Is not their validity obligatory?

On the contrary, these situations are uncharacteristic for church reception in particular and the whole ecclesiastical law. Refusal to recognize one or another law

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[40] *Suvorov N.S.* The textbook of ecclesiastical law. P.238.

[41] In particular, I.A. Ilyin wrote about this. He wrote: Legal regulations have legal significance, irrespective of stream of phenomena or facts; And stream of phenomena and facts interflows and rushes, forming a living life, irrespective of legal laws… it appears that (often – A.V.) legally established thing can not be politically realizable… Some laws implemented in this country do not find political application. Like, for example unrealized Cromwell's constitution 1647; and well-known French revolutionary constitution 1791, studied in all textbooks and treatises, but never applied . (Ilyin I.A. About monarchy and republic. P.420, 421).

as Orthodox entails its loss of some legal effect; simply speaking, such act is not recognized as church-legal one. It is noteworthy, that a long period of time often passes between adoption of a law and its rejection by orthodox sense of justice. It is also significant that this consequence has no exceptions for bodies of church authority: everyone sooner or later will face trial of the Church conscience.

Rejection of a law, issued by a body of church authority often entailed "deprivation of rights" of the church legislator. If a Council issued such an act, it would be recognized as "robber" and "heretical". If a non-Orthodox act was issued by patriarchs, they were banished from cathedra (if they were alive and hold their positions) and anathematized[42]. None of effective acts of ecclesiastical law was ever applicable without its recognition by church people (by this "guardian of piety", as Holy Fathers call them) and its legalization in the form of written law by the bodies of church authority. This indispensable condition has an effect upon custom, which the Church uses upon unanimous consent of church plentitude and bodies of church authority.

Differences between ecclesiastical and secular law become especially apparent in comparison of church reception to process of spreading of Roman law in Europe, which also has got (unfair though) the name "reception". This comparison is also appropriate, because the Roman law was and is called "universal", "general", having universal and historic importance, overcoming principles of nationality[43].

In particular, in the opinion of well-known civilians, accepted Roman law was nowhere recognized as perfectly-general law involving all civil law-formations. At best it was recognized as a subsidiary-general law, applied so far as it did not contradict local sources of law[44]. Every legal system, affected by Roman law, has got only what conforms with its own spirit and peculiarities, i.e. reception everywhere had *selective character*. The reception of Roman law in France led to formation of institutional system of law, in Germany – of pandectists. England borrowed Roman precedent-related institutions of lawmaking[45]. This reception sometimes came into contradiction with people's sense of justice. According to researches, Roman law took acknowledgment in Europe by the end of XV century, when opinion of lawyers becomes deciding in governmental bodies[46]. A German peasant programme shows, how the nation was ready to follow ancient examples: "No doctor of Roman law can be admitted to a court; the old native natural law school be returned to nation"[47].

As a well-known Russian sociologist N.M. Korkunov (1853-1904) noted, Roman law in Germany has become an established law in XIII-XIV centuries, but at the

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[42] The only exception were Byzantine and Russian emperors. No one of them was ever anathematized by the Church, that, however, did not validated their erroneous legal acts. *Asmus Valentin, the archpriest.* Ecclesiastical authorities of Bizantine emperors // Orthodox statehood: 12 letters about the Empire. P.33. *Kartashev A.V.* Ecumenical Councils. P.442.

[43] *Yering Rudolf fon*. Spirit of Roman law. In 3 vol. St. Petersburg, 1875. Vol.1. P.1.

[44] *Gambarov Y.S.* The course of civil law. Vol.1. St. Petersburg, 1911. P.112.

[45] Ibid. P.176-180. *Shershenevich G.F.* The course of civil law. Tula, 2001. P.35-44.

[46] *Gambarov Y.S.* The course of civil law. Vol.1. P.118.

[47] Ibid. P.126.

same time a common German law was in force, which has a source in Roman law[48]. Another sociologist explained manifold advances of Roman law in Germany by the fact that the country has been an independent confederation of numerous countries and principalities, having their own legislation, but united officially under the Holy Roman Empire from XIII century. In this connection Roman law and its clear developed, universal institutions and terms were the serious obstacles to centripetal tendencies and legal chaos[49]. In whole, the reception of Roman law was a long, centuries-old (Till the end of XIX century) process. "Center of gravity of European jurisprudence was, in spite of its practical tendencies, not in life observation and formulation of a law on basis of the observation, but in simple adoption of Roman regulations, without studying its motives and intentions, without historical criticism, with full faith in their absolute perfection and suitability for all times and nations"[50].

To a considerable degree the reception of Roman law draw special attention of "pioneers of statehood" that took a great interest in ideas of superiority of government over personality, of law and order[51]. Of course, it was a collision and overcoming of inferior culture by qualitatively superior legal culture, but the world, in spite of all significance of Roman legal heritage for modern jurisprudence, lived and lives with "its own" law. Roman law did not replace national legislation. Reception, as it understood by church law, literally has not been established.

So why, let's ask ourselves, two types of law – ecclesiastical and secular are so different by method of formation and application? There are many reasons, let's single out the two most important. Firstly, ecclesiastical law is based on absolute Truth of Christianity. Church sense of justice does not look for ideal, "natural law" *out* of the Holy Scriptures and Holy Tradition, but follows them for regulating of inner church life. Church-legal regulations are so "conservative", because Truth does not need to change, and it is self-sufficient by nature. Secondly, the Church is a perpetual union and society of believers. In this connection a phase of spiritual, experimental and vital test of one or another decision of church power becomes possible, no matter how high its authority is. Let's notice, that any church decision is always morally purposeful, that is it focuses not on any another result, but exclusively on achievement of the only important goal for Christian – people's salvation for eternity.

On the contrary, it is either not typical of secular law, in particular, of classical positivism, to look for ideal elements, or the ideal elements admitted to be historically conditioned, therefore practically empty. And the society is understood not as organic unity, but as mechanical aggregate of many various individuals. The less secular law depends on content of religious dogmas, the less its need in the Christian experience and moral verification of regulatory acts enclosed in it. With a

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[48] *Korkunov N.M.* Lectures on general legal theory. St. Petersburg, 1898. P. 280, 281.
[49] *Vinogradov P.G.* Roman law in mediaeval Europe. Moscow, 1910. P.78-83.
[50] *Gambarov Y.S.* The course of civil law. Vol.1. P.127.
[51] *Vinogradov P.G.* Roman law in mediaeval Europe.

broad spectrum of various beliefs, and without common moral convictions, the reception in church-legal conception is impossible: anarchy of individual views nips it nip in the bud. Like a law, separated from the morality and recognized itself independent from it (this conclusion is unavoidable, when morality in secular state loses feature of absolutes and this term is understood as mechanical complex of personal views of every individual), secular legislation does not need moral basis more.

Of course, secular legislator has its own set of absolute "truth", for example: "social justice', "human rights", "humanism", "democracy", "free market", "right on worthy life", "political freedoms", "environmental safety", "peace of the world" and so forth. Needless to say, that they have a great applied importance in person's social life, but they can not make him better. Are they universal? It is obvious that no. Otherwise we would not have to argue, if the USA right or not, imposing on humanity its ideology and doctrine of "unipolar world". A modern Russian scientist I.R. Shafarevich makes another example. He writes: What right is more indefeasible than right to life, not our one, because we all doomed to death, but the right to our progenies' life. But these are the facts which often cited in western ecological literature: the population of the USA is 5,6% of the world population, they use 40% of all natural resources, they through out 70% of all waste products, poisoned the environment. Simply speaking, the USA lives at others expense - at our and ours progenies, threaten their existence. But I have never heard that such a situation is connected with category of "human rights"[52]. Without unity in moral views, without support of Supreme Authority, substantive implementation of these "truths" inevitably causes the most contradictory results.

To sum up, let's mention the main distinction of ecclesiastical law, unfeasible for secular legislation. From point of view of Christian Science, secular law, even the ideal one, "warns against sin", "exposes a sinner and condemns him". But it does not give strength to "dissolve this yoke of servitude", "does not administer means to expiate unlawful action that have been done"[53]. As Apostle Paul said, that is the "feebleness" of secular law[54]. So there is no wonder that universality and many others features, which are natural for ecclesiastical (canonical) law, are unfeasible for secular law.

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[52] *Shafarevich I.R.* Two roads to a precipice // Shafarevich I.R. Works. In 3 vol. Moscow, 1994. Vol.1. P.344.

[53] Prelate Filaret (Drozdov). Speech on a birthday of devotional emperor Nikolay Pavlovich // Works of Filaret, metropolite of Moscow and Kolomna. Moscow, 1994. P.279.

[54] Rome. 8,3.