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THE RIGHT OF CONFIDENTIALITY
AND DIOCESAN CLERGY PERSONNEL RECORDS

by

Kevin E. McKenna

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



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ABBREVIATIONS

Documents of the Second Vatican Council

<u>DF</u>	<u>Dignitatis humanae</u>
<u>GS</u>	<u>Gaudium et spes</u>
<u>LG</u>	<u>Lumen gentium</u>
<u>PO</u>	<u>Presbyterorum ordinis</u>

Other References

<u>A.A.S.</u>	<u>Acta Apostolicae Sedis</u>
<u>A.S.S.</u>	<u>Acta Sanctae Sedis</u>
<u>CIC</u>	<u>Codex iuris canonici (1917)</u>
<u>CU</u>	<u>Convenientes ex universo</u>
<u>MM</u>	<u>Mater et magistra</u>
<u>PP</u>	<u>Populorum progressio</u>
<u>PT</u>	<u>Pacem in terris</u>
<u>QA</u>	<u>Quadragesimo anno</u>
<u>RC</u>	<u>Renovationis causam</u>
<u>RH</u>	<u>Redemptor hominis</u>
<u>RN</u>	<u>Rerum novarum</u>
<u>SR</u>	<u>Sollicitudo rei socialis</u>
<u>SS</u>	<u>Sedes sapientiae</u>



INTRODUCTION

The last few years have seen increasing emphasis placed upon the nature and use of rights, particularly human rights. While the secular world has contributed much to this topic, the Church itself has found the question of rights to be an urgent one, demanding its own input. Towards this effort, recent pontiffs, with increasing determination, have proclaimed the necessity of peoples and governments to observe proper respect for human rights within the world community. At the same time, pressure has built within the Church itself towards a consistency in its own actions and teachings concerning human rights.

This dissertation will attempt to analyze one such human right, the right of confidentiality, as it may be applied to clerics of the Roman Catholic Church. This right will be studied under two aspects: the right to privacy, or the limitations which an individual may place on what information of a personal nature can be shared, and the right to a good reputation. This right of confidentiality is now included in the 1983 Code of Canon Law, legislated as c. 220, one of the "Rights of the Christian faithful" (cc. 208-223).

Some situations of a practical nature in contemporary times suggest the usefulness of such a study:

1. One of the phenomena of the post-Vatican II Church has been the multiplicity of consultative organisms assisting diocesan bishops in the governance of the particular Church and religious superiors in their governance of institutes. Within the diocesan structure, many bishops have created "personnel boards", usually a representative body of priests who assist the bishop in the appointment of priests to their ministerial assignments. Although the method of selection to this board is as diverse as the number of dioceses, almost all boards have as their function to propose to the diocesan bishop assignments for the members of the local presbyterate. Frequently, a priest of the diocese is appointed by the bishop to coordinate personnel matters. Such a priest is often appointed a "Vicar for Priests" or "Director of Personnel" or an equivalent title. His responsibility normally, but not always, includes chairing the personnel board meetings, where the tentative assignments are discussed. At times, much information of a confidential nature has been shared by the director of personnel with the members of the board. Within the context of c. 220 and its assertions concerning damage of reputation and the

right to protect one's privacy, is there any limit in canon law as to what may be shared by the bishop with the director of personnel, and consequently with the members of the personnel board concerning the priests of the diocese?

2. Many diocesan bishops in recent times have found themselves faced with litigation brought to secular courts by victims of alleged improprieties by members of the clergy. Civil courts have pressed, often times successfully, for the right of access to clergy personnel records. In attempting to respond in a correct legal manner to civil law demands, what canonical responsibilities must be observed by bishops to protect proper confidentiality of the records of accused clerics?

3. In a related issue, it has become increasingly more common for clerics to utilize the services of psychological resource personnel as they struggle with the increasing complexities and demands of serving the Church in the post-Vatican II milieu. Such resources are often sought not only by a concerned bishop, but courageously, by the cleric himself. Who, besides the bishop, may properly have access to the written records which frequently emerge from such situations, and what safeguards to protect the confidentiality of these records ought to be maintained?

This dissertation will attempt to propose some recommendations to the above questions. It will do so by use of the following methodology:

1. The issue of "confidentiality" will be contextualized within the Roman Catholic human rights tradition. Human rights will be here understood as a particular type of warrant for and protection accorded to certain types of actions on the basis of common humanity. Beginning with recent papal encyclicals in the modern period, chapter one will trace the development of human rights within the last hundred years as the focus of papal teaching.

2. The second chapter will trace the "canonization", or incorporation of human rights into legislative form in the Catholic tradition. Of particular interest will be the inclusion of several human rights, including confidentiality, into the 1983 Code of Canon Law (c. 220). In this chapter will also be discussed a few of the approaches to rights presently being considered by contemporary canonists.

3. Chapter three will demonstrate canonical institutions, drawn primarily from religious law, which have been erected for the protection of privacy and good reputation and which may, by proper analogy, be appropriated for use by diocesan bishops in these same areas.

4. Lastly, the fourth chapter will examine the canonical institution known as the "secret archives", a long-standing effort by the Church to provide a receptacle with limited access to procure confidentiality for certain documents with restricted purview.

In 1965, J. Calhoun authored the dissertation The Restraint of the Exercise of One's Rights (The Catholic University of America).¹ This thesis presented the historical development of the concept of canonical ownership and the theological and philosophical foundation of freedom and its restraint. The dissertation also demonstrated the presence of restraint in the exercise of rights found in the 1917 Code of Canon Law, and is useful in illustrating the concept of the common good as it relates to the wider issue of rights.

J. Kinney's dissertation, The Juridic Condition of the People of God (Pontifical Lateran University, 1972)², attempted to define the basis for fundamental rights and duties in the Church in terms of c. 87 of the 1917 Code of

1. J. Calhoun, The Restraint of the Exercise of One's Rights, Canon Law Studies, no. 432, Washington, DC, Catholic University of America Press, 1965, xiii-146p.

2. J.F. Kinney, The Juridic Condition of the People of God: Their Fundamental Rights and Obligations in the Church, Rome, Officium Libri Catholici, 1972, viii-99p.

Canon Law and apply insights gleaned from the study of fundamental rights of the baptized to the position of the laity within the Church. This work has been useful in the exploration of rights which pertain to the juridic condition which result from baptism and has clarified some distinctions which must be made concerning these rights and "human rights" which originate from human nature.

Both these works have been valuable in contextualizing the issues of rights within the Church and providing a needed background for a still emerging appreciation and understanding of rights in the postconciliar Catholic Church.

The pontificates of recent popes have been characterized by repeated efforts to proclaim and instruct concerning human rights, and the Church's responsibility to defend and protect basic human rights within every society. The primacy of this task has been reinforced by documents of the most recent ecumenical council, and now augmented by legislative form, the 1983 Code of Canon Law, which includes specific references to the promotion and protection of rights.

The period of time following promulgation of the Code has already witnessed tension among the ideals of human freedom, basic human rights, and the defense of the common good. Various ecclesiastical authorities have been

challenged to a careful observance of canonical formalities in the area of personnel management. At the same time, as this thesis will endeavor to show, these authorities are called to a careful observance of the basic human rights which now find expression in the Code of Canon Law, and serve to protect the dignity of all the Christian faithful, including those who minister in the name of the Lord.

1. THE CATHOLIC APPROACH TO HUMAN RIGHTS:
THE DIGNITY OF THE HUMAN PERSON

Introduction

The Roman Catholic Church has attempted by means of its particular theological perspective of man to provide a distinctive shape and context to the idea of human rights. Its unique anthropological foundations serve to differentiate a Christian and specifically Catholic approach to human rights from those which have their source in other religious and intellectual traditions.¹

The basis for the Church's teaching concerning human rights, as will be seen from an analysis of recent papal teaching, is the dignity of the human person. This teaching is grounded in the biblical account of man's creation in the image of God (Gn 1:28). "Human rights to life, freedom, community and self determination mirror God's claim upon persons, because in all their relationships in life they

1. For an overview of some contemporary secular approaches to human rights see R. Dworkin, Taking Rights Seriously, Cambridge, MA, Harvard University Press, 1977; R. Flathman, The Practice of Rights, Cambridge, MA, Cambridge University Press, 1976; T.M. Benditt, Rights, Totowa, NJ, Rowman and Littlefield, 1982; R. Tuck, Natural Rights Theories: Their Origin and Development, Cambridge, MA, Cambridge University Press, 1979.

are destined to reflect the image of God."² The nature of this image has been interpreted in various ways in the Church's tradition.³ What appear fundamental are two central doctrines of Christianity: the Incarnation and Redemption, by which the Christian tradition expresses the reality that God so loved the world that he accepted our human condition and became one like us. A specifically Christian warrant seeks to ground human rights, therefore, on the dignity of the person, made in God's image and likeness.

It is the continuing attempt by the Church to express and clearly specify the claims of human dignity in each age that has given rise to the development of a Roman Catholic human rights tradition. The last one hundred years in particular have seen the promulgation of many papal encyclicals which have attempted to articulate the centrality of respect for human dignity and its proper

2. B. Johnstone, "Privacy and Intrusions: A Discussion from a Christian Perspective", in Australasian Catholic Record, 59 (1982), p. 328.

3. See L. Cahill ("Toward a Christian Theory of Human Rights", in Journal of Religious Ethics, 8 (1980), pp. 277-301), which discusses the image of God in man as "intrinsic relationship" as well as the concept of image as conferred or attributed to the person by virtue of God's valuation; both concepts have been employed in the past as the Christian basis for the dignity of man and human rights.

protection. The remainder of this chapter will trace the development of the Catholic human rights tradition as proclaimed in various papal encyclicals, a tradition which includes, as we shall see, the human rights of privacy and confidentiality. It is important to note, however, that these teachings concerning human rights are specific responses at a specific time to a specific concern, a context which shaped the content and the tone of the particular teaching(s). Therefore, it shall be important at least to summarize the context for the particular teachings as well as to identify their theological contribution(s) to the development of the Church's teaching in the area of human rights. As will also be seen, the teaching of human rights by the various pontiffs has had an inevitable impact upon canon law, since the Church's legal apparatus must recognize, guarantee, and foster the fundamental rights of the faithful in the same manner in which the social teachings of the Church have recognized the fundamental rights of man. "For the Church in her own juridic order to ignore rights which she fostered in other orders would be tantamount to hypocrisy."⁴

4. Kinney, The Juridic Condition of the People of God, p. 34.

1.1 - Leo XIII: The Affirmation of Man's Dignity As Laborer

On February 20, 1878, Gioacchino Vincenzo Pecci was elected to the papacy to succeed Pope Pius IX and chose to be called Leo XIII. During the course of his pontificate, he became aware of the long term problems generated by an increasingly industrialized society.⁵ Leo had seen in the production of wealth generated by the Industrial Revolution the supreme evil which forced him to raise his voice against the "long hours of labor, against the drudgery and slavery of woman and children in the factory, against the break-up of the home and its attendant vice and corruption."⁶

In the later part of the nineteenth century, small intellectual groups appeared in almost every industrialized country, particularly in Central Europe and France, to challenge the perceived threat of capitalist industrialism. The desire of Leo to provide a firm intellectual foundation for his social teachings and program led him to form his

5. In addition to the problems generated by the Industrial Revolution, Leo XIII faced difficulties created by liberal and anti-clerical political parties which, while asserting the need to recognize "modern liberties" of freedom of speech, press, and religion, also attempted to diminish the privileges and temporal power of the Church (see R. Corrigan, The Church and the Nineteenth Century, Milwaukee, WI, Bruce Pub. Co., 1948).

6. Ibid., p. 242.

own study group, organized in the early 1880s, known as the "Roman Committee of Social Studies."⁷ The research of this group and others led Leo to see that a radical failure to respect the claims of human dignity was present in the economic organization of the Europe of his time.⁸

The encyclical Rerum novarum of May 15, 1891,⁹ was the attempt by Leo XIII to confront the false political, social and economic philosophies of his times which he believed injurious to the dignity of the laborer:

It is not surprising that the spirit of revolutionary change which has long been predominant in the nations of the world should have passed beyond politics and made its influence felt in the cognate field of practical economy.¹⁰

7. G. Guitton, "The Background of Rerum novarum", in America, 45 (1931), p. 56.

8. D. Hollenbach, Claims and Conflicts: Retrieving and Renewing the Catholic Human Rights Tradition, New York, Paulist Press, 1979, p. 48 (hereafter cited as Claims and Conflicts, followed by page number).

9. In Acta Sanctae Sedis, 23 (1890-91), pp. 641-670 (hereafter cited as RN, followed by page number; English translation in Encyclical Letter of Pope Leo XIII on the Condition of Labor, New York, Paulist Press, 1939 [hereafter cited as Condition of Labor, followed by page number]).

10. "Rerum novarum semel excitata cupidine, quae diu quidem commovet civitates, illud erat consecuturum ut commutationum studia a rationibus politicis in oeconomiarum cognatum genus aliquando defluerunt" (RN, p. 41; English translation in Condition of Labor, p. 3).

1.1.1 - Man: His Inherent Rights and Dignity

According to Leo man was by nature an individual, possessing inherent rights and dignity. The result of his attempt to combine the fundamental moral norms of human dignity and the particular conditions of the times resulted in the formulation of a number of specific rights and duties within the economic sphere, particularly the relative rights and mutual duties of the rich and poor, of capital and labor.¹¹ These rights would be the result of the necessary relationship between human dignity and its limits and conditions.

Leo recognized that modern society was not necessarily destructive of Catholic ideals and doctrine but had many features which could be beneficial to society and the church. A society which observes the Christian life and provides all Christian institutions the freedom and the protection necessary for a healthy development, "will guarantee to the working classes their rights, and secure for the weak and necessitous whatever should be granted by public authority and private charity."¹²

The basis of Leo's solution to the economic and political

11. Claims and Conflicts, p. 47.

12. F.P. Kenkel, "The Sum of Social Doctrines", in America, 45 (1931), p. 104.

problems he addresses was the primacy of human dignity: "But all agree, and there can be no question, whatever, that some remedy must be found, and quickly found for the misery and wretchedness which press so heavily at this very moment on the large majority of the very poor."¹³ Persons, according to Leo, have a transcendental value which entitles them to be treated more than as a means to the economic well-being of the more fortunate: "Now as concerns the protection of corporeal and physical goods, the oppressed workers, above all, ought to be liberated from the savagery of greedy men, who inordinately use human beings as things for gain."¹⁴ Social organizations must be responsive to the moral claims of human dignity. Otherwise they become oppressive. Human beings therefore precede the state in virtue of the moral claim of each person to respect for his or her own worth. It is the primacy of the person over the state which is the standard by which political institutions and organizations are to be judged

13. "Utrumque sit, plane videmus, quod consentiunt universi, infirmæ sortis hominibus celeriter esse atque opportune consulendum, cum pars maxima in misera calamitosaque fortuna indigne versentur" (RN, p. 641; English translation in Condition of Labor, p. 4).

14. "Quod ad tutelam bonorum corporis et externorum, primum omnium eripere miseros opifices e saevitia oportet hominum cupidorum, personis pro rebus ad quaestum intemperanter abutentium" (RN, p. 660; English translation in Condition of Labor, p. 36).

and evaluated.

Leo's views of the concrete implications of human dignity were filtered through his understanding of the social order. His hierarchical perception of societal ordering provided the only framework within which human dignity could possibly be defended: "Rights must be religiously respected wherever they are found; and it is the duty of the public authority to prevent and punish injury, and to protect each one in the possession of his own."¹⁵

1.1.2 - Human Dignity as the Basis For Human Rights

Rerum novarum laid the foundation for the modern Catholic theory of human rights, with respect for human dignity as the basis for this theory. The defense of human dignity, especially on behalf of the worker, was the source of Leo's objections to the more liberal theories of the state: "In both the political and the economic spheres, the demands of human dignity were interpreted with the help of an analysis of the impact of social, economic and political

15. "Iura quidem, in quocumque sint, sancte servanda sunt: atque ut suum singuli teneant, debet potestas publica providere, propulsandis atque ulciscendis iniuriis" (RN, p. 658; English translation in Condition of Labor, p. 23).

institutions on human persons."¹⁶ Later social encyclicals were to build upon the teachings of Leo:

a. Man is necessarily a social being. He is never sufficient unto himself but needs society to help him realize fully his powers and aspirations.

b. Because the human being is a creature of God, possessed of a spiritual nature and destined for eternal life, every person has an innate dignity that raises him above all creation. Thus in fact it is man who must be the measure of all economic activity.

c. Since the human being is sacred, he radically possesses God-granted rights which are not conferred by society nor are they dependent on the will of the state, but are rather inherent and inalienable. They do not exist apart from duties but are correlative with duties; each right implies a corresponding duty to recognize a right in others.

Leo XIII, in establishing the primacy of the individual in his social teachings, set a new direction for papal instruction concerning human rights. Although Leo's teachings emerged specifically from an analysis of the economic plight of the masses, his perspective regarding human rights and human dignity would remain constant,

16. Claims in Conflict, p. 49.

though adaptable to the various contexts and situations addressed by succeeding pontiffs.

1.2 - Pius XI: Human Dignity and Social Justice

Pope Pius XI, born May 31, 1857, was elected to the papacy in 1922 and took as his motto "Christ's peace in Christ's kingdom", declaring that the Church and Christianity should be active in and not insulated from society.¹⁷ As an administrator and statesman, he was very much aware of the various currents of thoughts and problems characterizing his age.

The years during which Pius XI was pope (1922-1939) were dominated by three significant social developments: the Great Depression, the consolidation of the Russian Revolution into a communist regime and the emergence of fascist dictatorships in Italy and Germany. The Roman Catholic understanding of human rights was to develop rapidly under the pressure of these events.

17. J.N.D. Kelly, The Oxford Dictionary of Popes, Oxford, Oxford University Press, 1986, p. 316.

1.2.1 - The Dignity of the Person and Social Justice

Pius XI's encyclical Quadragesimo anno of May 15, 1931,¹⁸ focused on various economic patterns which lay at the foundation of the Great Depression which seriously threatened the economic well-being and human dignity of the person. The violations of human dignity were the result, Pius XI believed, of the patterns of domination of one group of persons over another:

It is patent that in our days not alone is wealth accumulated, but immense power and despotic economic dominations are concentrated in the hands of a few, and these few are frequently not the owners but only the trustees and directors of invested funds, which they administer at their good pleasure.¹⁹

The patterns of immoral social structure which so adversely affected human dignity centered on what Pius XI

18. In Acta Apostolicae Sedis, 23 (1931), pp. 177-228 (hereafter respectively cited as A.A.S. and QA followed by page number; English translation in On the Reconstruction of the Social Order, New York, American Press, 1938 [hereafter cited as Social Order, followed by page number]).

19. "Atque in primis omnium oculos percellit, nostris temporibus non modo coacervari opes, sed immanem accumulati potentiam et despoticum potentatum oeconomicum penes paucos, qui plerumque non domini, sed depositae rei custodes tantum et administratores sunt eamque nutu suo arbitrioque regunt"(QA, p. 211; English translation in Social Order, p. 50).

saw as the absolute devaluing of the human person. All of Pius XI's claims about respect for persons' claims to material, bodily and even psychological necessities are ultimately founded on a characteristic of the person which transcends any and all of these needs. Human beings have a spiritual, transcendental nature which must never be totally subordinated to the functional needs of other persons or institutions.²⁰

Pius XI placed man at the center of social and economic life. For him, man was far from being a passive element in social life. On the contrary, he is the subject of it, its ground and its end.²¹ The starting point, then, of the social doctrine of Pius XI was the dignity of the person, a being created in the likeness of God himself. Because man is self-conscious and free, he cannot be assimilated into the rest of the universe. His activity sets upon nature the mark of a being who cannot be reduced to the level of nature. "Because, through the acts of his daily life, man is called to fulfill so high a destiny, the Church defends him against all that would seek to enslave him or destroy

20. Ibid., p. 51.

21. J. Calvez and J. Perrin, The Church and Social Justice: The Social Teachings of the Popes from Leo XIII to Pius XII, translated by J. Kirwin, London, Burns and Oates, 1961, p. 103.

his personality."²² Pius proposes the true determination of social progress which he sees as the human personality: "The masterpiece of creation is not paganized collectivity; it is man."²³

Pius XI in his opposition to various forms of totalitarianism was affirming the stress of his predecessor Leo XIII on the primacy of human dignity. At the same time, his use of the concept of social justice marks a significant advance in the tradition's understanding of the manner in which social institutions mediate the claims of human dignity and shape the content of human rights.

1.3 - John XXIII: The Specification of Individual Rights

Angelo Giuseppe Roncalli assumed the papacy on October 28, 1958. "Warm-hearted and unaffectedly simple in spite of his erudition and command of many languages, attached to his humble origins and always retaining a peasant's shrewdness and jovial humor, John brought a wind of change to his office."²⁴ His brief pontificate (1958 to 1963) was however to have enormous impact upon the growth of the

22. Ibid., p. 106.

23. J.F. MacDonnell, "Human Liberty and the Social Revolution" in Catholic Mind, 35 (1937), p. 248.

24. Kelly, The Oxford Dictionary of the Popes, p. 321.

human rights tradition within the Roman Catholic Church. It was to be John XXIII who would, for the first time within the Roman Catholic human rights tradition, in fact specify certain rights which should be observed by all people of good will. More detail will be given to his encyclicals which treated human rights on a larger scale and brought their consequences to the attention of all of Christendom.

1.3.1 - Mater et Magistra

1.3.1.1 - Human Dignity Within the World Community

On December 30, 1960, Pope John announced during a public audience that he would issue an encyclical letter on social issues.²⁵ This encyclical, Mater et magistra, of May 15, 1961,²⁶ would attempt to review social changes since previous major papal writings. A rapidly changing world community needed moral reform:

25. D. O'Brien and T. Shannon, eds., Renewing the Earth: Catholic Documents on Peace, Justice and Liberation, Garden City, New York, Image Books, 1977, p. 44.

26. In A.A.S. 53 (1961), pp. 401-464 (hereafter cited as MM, followed by page number; English translation in Encyclical Letter of Pope John XXIII, Mater et magistra, Christianity and Social Progress, by W. Gibbons, New York, Paulist Press, 1961 [hereafter cited as Social Progress, followed by page number]).

Innovations such as atomic energy and automation were transforming the technological basis of the moral life of society. A whole series of new forms of legislation was involving government in areas of life previously considered private. Levels of education and political participation were rising. Colonized and newly independent nations were increasing both the range and seriousness of their claims to self-determination, while at the same time there was a growing awareness of the need for international cooperation and organization.²⁷

This encyclical built on a foundation of four themes: first, a short résumé of the social teachings of the Church beginning with Leo XIII; second, an enumeration of the many and profound changes that have taken place on the economic and social plane since 1941; third, discussion of the changes that have taken place on a national and international level; and fourth, his own contributions to the discussion, making relevant the social teachings of the Church in his own age.²⁸

The development of Catholic social teaching for John XXIII, like his recent predecessors, resulted from his intention to apply traditional principles of justice and truth to present historical circumstances:

27. Claims and Conflicts, p. 62.

28. P. Riga, John XXIII and the City of Man, Westminster, MD, Newman Press, 1966, p. x.

In this encyclical, however, John attempted to develop the application of standards of social justice to the post-war world, where the social question had changed, it seemed from one primarily related to the struggle of labor against capital to one which featured a complex effort to achieve balanced economic growth [...].²⁹

In addition, the collapse of the imperialist systems of the nineteenth century and the awakening aspirations of new nations posed a new problem. There was now a need for a balanced international order in a way that dramatically challenged the standards of social justice and even more dramatically threatened the precarious balance of the international political system.³⁰

1.3.1.2 - Human Rights and Inter-Dependence

Mater et magistra seeks to situate respect for human dignity as the basis for all human interrelations, even complex international ones: "The lofty dignity of this life, she [the Church] has always held in the highest

29. O'Brien and Shannon, Renewing the Earth, p. 45.

30. Ibid.

respect and guarded with watchful care."³¹ The absence of such dignity, observed John, has had impact upon every type of association of individuals including the laboring class:

Our heart is filled with profound sadness when we observe, as it were, with our own eyes a wretched spectacle indeed - great masses of workers who, in not a few nations, and even in whole continents, receive too small a return from their labor. Hence, they and their families must live in conditions completely out of accord with human dignity.³²

John XXIII reaffirmed the principle once again that the human person is the "foundation, cause and end"³³ of all social institutions. "The distinctive note in John's affirmation of this traditional principle was his continual emphasis on the fact that human dignity can only exist within a consciously developed context of human

31. "[...] cuius excellentem dignitatem ipsa summo semper in honore habuit, vigilanterque tuita est" (MM, p. 401; English translation in Social Progress, p. 9).

32. "Vehementi sane aegrimonia animus afficitur Noster, cum veluti ante oculos Nostros obversantur - pro miserrimum spectaculum - ingentes opificum multitudines, qui in nationibus non paucis atque in latis etiam terrarum continentibus tam parvam laboris mercedem accipiunt, ut ipsis eorumque familiis vitae condicionibus utendum sit, ab hominis dignitate omni ex parte alienis" (MM, p. 418; English translation in Social Progress, p. 28).

33. Claims and Conflicts, p. 63.

interdependence."³⁴

The individual is a person endowed with an immortal soul, with freedom and intelligence. This confers on man a unique dignity and makes him the subject of both rights and duties:

In the economic field the most important rights are the right to live, to a job, to a wage suitable for family living, and to fair and humane treatment at work. His most important duties in the economic area involve respect for the rights of others and concern for the common welfare of the community.³⁵

Such principles, insisted John, are readily available to all:

Beginning with this very basic principle whereby the dignity of the human person is affirmed and defended, Holy Church - especially during the last century and with the assistance of learned priests and laymen, specialists in the field - has arrived at clear social teachings whereby the mutual relationships of men are ordered. Taking general norms into account, these principles are in accord with the nature of things and the changed conditions of man's social life, or with the special genius of our day. Moreover,

34. Ibid.

35. J.F. Cronin, Christianity and Social Progress: A Commentary on Mater et magistra, Baltimore, MD, Helicon Press, 1965, p. 34.

these norms can be approved by all.³⁶

1.3.1.3 - Individual Rights and the Common Good

In what would be a an important philosophical and moral element in the question of confidentiality and privacy, Pope John XXIII's contribution to human rights included the dimension of the common good. This he defined as the "sum total of those conditions of social living, whereby men are enabled more fully and more readily to achieve their own perfection."³⁷ The common good is not seen as the summation of the goods of the individuals, but as a set of social conditions which facilitate the realization of personal good by the individual person. "Thus in a

36. "E gravissimo huiusmodi principio, quo sacra humanae personae dignitas affirmatur et defenditur, praesertim superioribus hisce centum annis, Ecclesia sancta, sacerdotibus et laicis hominibus doctissimis operam ferentibus, luculente conclusit de re sociali praecepta, ad quae mutuae hominum necessitudines componantur: spectatis nimirum generalibus normis, congruentibus sive cum natura rerum et variis humani convictus condicionibus, sive cum praecipua huius temporis indole; quae propterea normae omnibus probari possunt" (MM, p. 453; English translation in Social Progress, p. 69).

37. "[...] quae summam complectitur earum vitae socialis condicionum, quibus homines suam ipsorum perfectionem possint plenius atque expeditius consequi" (MM, p. 417; English translation in Social Progress, p. 27).

significantly new emphasis within the tradition John XXIII moved toward a definition of human dignity in social and structural terms."³⁸

The personalism of the encyclical, so basic for the theory of human dignity and human rights, rests on a conception of society existing for the individual and not the individual for the society. Two equally demanding parts of man's nature are thus balanced:

[O]ne can never be sacrificed for the other under any condition. The two extremes are carefully avoided by the Pope: The first, an exaggerated individualism which would over-emphasize individual traits and abilities and thereby gravely endanger man's necessary social relationship with his fellow man; and the second, an extreme collectivistic socialism in which the individual is absorbed into and is used for the total mission of the State.³⁹

An important principle was thereby enunciated by John XXIII in this encyclical with implications for the proclamation of human rights by the church: a proper respect for the individual person's dignity must be considered fully and balanced with the needs of the larger society. Such a consideration will be of importance in questions dealing with the right of confidentiality.

38. Claims and Conflicts, p. 64.

39. Riga, John XXIII and the City of Man, pp. 200-201.

1.3.2 - Pacem in terris

1.3.2.1 - The Specification of Human Rights

Many would claim that the central and classical document for the doctrine of human rights within the Roman Catholic tradition is Pacem in terris⁴⁰ the encyclical letter issued by Pope John XXIII on April 11, 1963. There is present in this document a nuance not noticeable in previous encyclicals which had addressed the social questions: a strong dependence on the principles of human nature as a basis for defining and evaluating human rights.⁴¹

1.3.2.2 - Human Rights and the Natural Law

Pacem in terris defends the dignity of the human person reiterating the fundamental, traditional thought of previous encyclicals on social justice. But much of the argumentation of the document relies on reason and natural law, an argument which attempts to convince all readers,

40. In A.A.S., 55 (1963), pp. 257-304 (hereafter cited as PT followed by page number; English translation in Encyclical letter of His Holiness Pope John XXIII, Peace on Earth, Pacem in Terris, Boston, St. Paul Editions, 1963 [hereafter cited as Peace on Earth, followed by page number]).

41. Instituto Social León XIII, Comentarios a la Pacem in terris, Madrid, La Editorial católica, 1963, p.77.

since this encyclical is addressed to all persons of good will. This natural law framework as used in this encyclical represents thus a new approach to papal teaching in the area of social justice:

Even though references to natural law were reinforced with reference to Catholic teaching, nonetheless the encyclical attempted to argue on the basis of reason that it was possible to discover a natural order and use it as the foundation for a new sense of international harmony and order. In doing this, the Pope placed the human person at the center of the encyclical.⁴²

1.3.2.3 - Rights and Duties

This encyclical affirms a wide variety of rights, including the right to life, the rights to clothing, food and shelter, rest and medical care, the rights to culture and education, the rights to freedom of expression, association and the free exercise of religion, the right to work, organize and form labor unions, the right to private property and the right to juridical protection of one's human rights.⁴³ Pacem in terris also develops a listing of various duties that are proper to the human person:

While the references to duties were part

42. Claims and Conflicts, p. 65.

43. Claims and Conflicts, p. 41.

of a standard Catholic orientation toward natural law and the hierarchical order in which human persons existed, nonetheless Pope John attempted to surpass this tradition by his development of the rights of the individual vis-à-vis the larger society.⁴⁴

He implicitly acknowledges the tradition which states that individuals by reason of their place in society have certain duties to society; on the other hand he validates the modern claim that individuals by virtue of their personhood have legitimate moral claims over and against a society.⁴⁵ There is an inherent problem however; while many would argue that the introduction of the philosophy of rights is a major improvement in papal social teaching, nonetheless, as suggested by O'Brien and Shannon, it is not clear how one can systematically reconcile the philosophy of both rights and duties.⁴⁶ A partial answer is provided by natural law: "This [natural law] framework begins with an understanding of the person and his or her role within society. Then the person is placed in relationship to the state and the rights and duties of each are elaborated."⁴⁷

44. O'Brien and Shannon, Renewing the Earth, p. 119.

45. Ibid.

46. For a fuller discussion of this issue, see O'Brien and Shannon, Renewing the Earth, p. 119.

47. Ibid., p. 120.

It was the belief of Pope John XXIII that the "weight and validity of his on-going natural-law argument will guarantee the explication of the duties that he sees as inherent in the variety of relationships at different levels within the organization of the world community."⁴⁸

The rights that the pope presents in this encyclical, that belong rightfully to all people, are not unique in themselves or constitutive of a major departure from traditional Catholic thought. However, an effort has been made to gather these rights and to list them in an explicit manner. This listing also provides the basis for an evaluation of all societies in terms of respect for human rights.

The mutual acknowledgment of rights and duties in society, as viewed by John, is a kind of preparatio evangelica, since it can bring the wider world to an awareness of fundamental values such as truth, justice, charity, and freedom and thus closer to a knowledge of the true God, personal and transcendent. Pacem in terris demonstrates the concern of the Catholic human rights tradition to set specific rights within a moral context. To every human right, there corresponds a duty that this right be respected by the subject of the right himself, by other

48. Ibid.

individuals and by the greater society as well. As Pacem in terris explains:

Since men are social by nature they are meant to live with others and work for one another's welfare. A well-ordered society requires that men recognize and observe their mutual rights and duties.⁴⁹

Pacem in terris maintains that the protection and coordination of human rights is a responsibility which requires organized action by the entire society:

Though governmental actions cannot be the sole guarantee of human rights because the complexity of the forms of human interdependence is greater than the flexibility of law, it remains indispensable for the protection of all rights. The action of the state, however must be constantly checked and reevaluated against the human rights and dignity it is to protect.⁵⁰

Pacem in terris gives the most exhaustive and systematic listing of human rights within the Catholic tradition. This encyclical also seeks to demonstrate that there is a tradition and a development which has linked these human rights together. As Hollenbach explains:

49. "Cum homines sint natura congregabiles, ii oportet alii cum aliis vivant, atque alii aliorum quaerant bonum. Hanc ob causam recte compositus hominum convictus postulat, ut iidem pariter iura pariter officia mutuo fateantur et faciant" (PT, p. 265; English translation in Peace on Earth, p. 13).

50. Claims and Conflicts, p. 66.

The thread which ties all these rights together is the fundamental norm of human dignity. Human dignity is not an abstract or ethereal reality but is realized in concrete conditions of personal, social, economic and political life. The history of the papal teaching has been a process of discovering and identifying these conditions of human dignity. These conditions are called human rights.⁵¹

To understand the personalistic conception of man's rights the exact nature of these rights must be examined closely. It is evident that the subject of these rights is the person himself because he has intelligence and free will, and is thus capable of and responsible for the realization of his moral destiny.⁵² In man's personal being lies the very source of his rights and duties and he himself is the bearer of these rights. These rights can be said to be universal because they pertain to every person on the face of the earth.

They are inviolable and inalienable because each person has a destiny which no one else can take or fulfill for him; and if each man must fulfill his destiny, he must have the means, secured by his fundamental rights, to do so. Therefore it is only the individual person who is the

51. Ibid.

52. P. Riga, "Peace on Earth": A Commentary on Pope John's Encyclical, New York, Herder and Herder, 1964, p. 39.

subject of rights.⁵³

Pope John was to intensify this relationship between dignity and rights:

Any human society, if it is to be well-ordered, and productive, must lay down as a foundation this principle, namely that every human being is a person, that is his nature is endowed with intelligence and free will. Indeed, precisely because he is a person he has rights and obligations flowing directly and simultaneously from his very nature. And as these rights and obligations are universal and inviolable so they cannot in any way be surrendered.⁵⁴

The Christian faith has revealed the truth of this dignity: "If we look upon the dignity of the human person in the light of divinely revealed truth, we cannot help but esteem it far more highly; for men are redeemed by the blood of Jesus Christ; they are by grace the children and

53. Ibid.

54. "Porro in quovis humano convictu, quem bene compositum et commodum esse velimus, illud principium pro fundamento ponendum est, omnem hominem personae induere proprietatem; hoc est, naturam esse, intelligentia et voluntatis libertate praeditam; atque adeo, ipsum per se iura et officia habere, a sua ipsius natura directo et una simul profluentia. Quae propterea, ut generalia et inviolabilia sunt, ita mancipari nullo modo possunt" (PT, p. 259; English translation in Peace on Earth, p. 9).

friends of God and heirs of eternal glory."⁵⁵

Each human being must therefore be considered the subject of rights by the fact that he or she is a person. Man's equality insures also his dignity, and his diversity ensures a development that is individual:

Once this is admitted, it also follows that in human society, to one man's right there corresponds likewise a duty in all other persons: the duty, namely of acknowledging and respecting the right in question. For every fundamental human right draws its indestructible moral force from the natural law, which in granting it imposes a corresponding obligation. Those, therefore, who claim their own rights, yet altogether forget or neglect to carry out their respective duties, are people who build with one hand and destroy with the other.⁵⁶

55. "Quodsi humanae personae dignitatem ex veritatibus divinitus traditis intuemur, tunc fieri non potest quin eam longe maiorem aestimemus; quippe homines sanguine Christi Iesu redempti sunt, superna gratia filii et amici Dei sunt facti, aeternae gloriae instituti heredes sunt" (PT, p. 264; English translation in Peace on Earth, p. 9).

56. "Quibus probatis, consequens est etiam, ut in hominum consortione unius hominis naturali cuidam iuri officium aliorum hominum respondeat: officium videlicet ius illud agnoscendi et colendi. Nam quodvis praecipuum hominis ius vim auctoritatemque suam a naturali lege repetit, quae illud tribuit, et conveniens iniungit officium. Qui igitur, dum iura sua vindicant, officia sua vel omnino obliviscuntur, vel aequo minus praestant, iidem sunt cum iis veluti comparandi, qui altera manu aedem exstruunt, altera evertunt" (PT, p. 264; English translation in Peace on Earth, p. 13).

John XXIII's positioning of human rights within a natural law framework provided linkage with a central Catholic theological tradition. It also provided a parallel to those who had argued in the Western tradition towards human rights from positive law, appealing instead to a "higher law" which affirmed natural and "God-given" rights. The freedom, dignity, rights and responsibilities of each human person are sacred. The dignity of man derives from his universal inviolable and inalienable rights; he has these rights because he has been endowed by God, his Creator with intelligence and free will: "Therefore, the supreme test of any society or government, national or international, will be the degree to which it protects and promotes these rights, thus enabling the person to achieve his destiny in the liberty and the dignity of a true son of God."⁵⁷ Since these are rights of the human person, no one may shirk their responsibility to participate in protecting and promoting them by pretending that this duty belongs to the state or to some nebulous authority outside himself.

57. Ibid., p. 192.

What is also of significance in John's theory is his understanding of the common good in relationship to human rights. Part of the common good is the totality of the rights which the Pope outlined in the first part of the encyclical. As noted by O'Brien and Shannon:

These [totality of rights] are to be shared by all members of the political community, and it is the responsibility of the civil authority to ensure that these rights are promoted. What is also important is Pope John's argument that each political community also has a common good which transcends the individual person's good, but which cannot be divorced from the common good of the entire human community.⁵⁸

John's theory of human rights contributed a natural law foundation to the discussion within the Roman Catholic tradition which gave the Church the opportunity to dialogue with other cultures and states in an area of mutual concern. For the first time within the Roman Catholic tradition, an enumeration of human rights was made in a papal encyclical. And finally, an understanding of the common good was articulated which held for an equal emphasis upon the dignity of the individual and the importance of the state.

58. O'Brien and Shannon, Renewing the Earth, p. 122.

1.4 - Paul VI: Human Development and Human Rights

Giovanni Battista Montini, who became the successor of Pope John XXIII in 1963 as Paul VI, wrote the encyclical Populorum progressio, issued on March 26, 1967⁵⁹ and which placed the "social question" in a world-wide context:

Freedom from misery, the greater assurance of finding subsistence, health and fixed employment; an increased share of responsibility without oppression of any kind and in security from situations that do violence to their dignity as men; better education - in brief to seek to do more and have more in order to do more; that is what men aspire to now when a greater number of them are condemned to live in conditions that make this lawful desire illusory.⁶⁰

To the thinking of Paul VI, the attainment of full development on the part of all people, especially the poor,

59. In A.A.S., 59 (1967), pp. 257-299 (hereafter cited as PP and followed by page number; English translation in On the Development of Peoples, Boston, MA, St. Paul Editions, 1967 [hereafter cited as Development of Peoples, followed by page number]).

60. "Nostris hisce diebus dum homines id appetere videmus, ut exploratius inveniant quo alantur, quo aegroti curentur, quo firmiter occupati teneantur; ut ab omni vexatione tuti, ab omnique liberi deformitate, hominis dignitatem labefactante, maiora in dies de se praestare possint; ut se doctrina magis expoliant: hoc est, ut magis operentur, discant, possideant, ut ideo pluris valeant; interea magnam eorum partem videmus in eiusmodi vitae condicionibus versari, quae iustas eorum appetitiones frustrentur" (PP, p. 260; English translation in Development of Peoples p. 6).

was the true method for obtaining human rights:

Development cannot be limited to mere economic growth. In order to be authentic, it must be complete: integral, that is, it has to promote the good of every man and the whole man. [...] 'We do not believe in separating the economic from the human, nor development from the civilization in which it exists. What we hold important is man, each man and each group of men, and we even include the whole of humanity.'⁶¹

The principles of human rights, so vital in the encyclicals of Pope John XXIII, were continued with even greater vehemence. As one commentator observes regarding this social gospel pronouncement:

On the surface, at least, Populorum Progressio seems the most radical of the pronouncements on social issues. [...] There is a note of urgency missing from earlier statements, a sense that in the absence of clear and decisive action the arms race and the disparity between the rich and the poor nations will accelerate and the world will be faced with disaster.⁶²

61. "Progressio, de qua loquimur, non unice ad rei oeconomicae incrementum contendit. Nam, ut vera dici possit, eadem integra sit oportet: scilicet cuiuslibet hominis ac totius hominis profectui consulere debet. [...] nobis id minus probatur, rationem oeconomicam a ratione humana disiungi, aut a civili cultu, ad quem pertinet, seorsim considerari. Nostra sententia, magni aestimandus est homo, quivis homo, quaevis hominum congregatio, atque etiam universa hominum societas'" (PP, p. 264; English translation in Development of Peoples, p. 11).

62. O'Brien and Shannon, Renewing the Earth, p. 308.

Paul outlines in this encyclical what he considers to be the observable qualities which indicate a less human condition, and therefore the absence of human dignity and human rights:

[T]he lack of material necessities for those who are without the minimum essential for life, the moral deficiencies of those who are mutilated by selfishness. Less human conditions: oppressive social structures, whether due to the abuses of power, to the exploitation of workers or to unjust transactions.⁶³

He then outlined the qualities needed for more human conditions:

Increased esteem for the dignity of others, the turning toward the spirit of poverty, cooperation for the common good, the will and desire for peace [...].⁶⁴

For Paul VI, development was not to be limited to merely economic growth. As described by O'Brien and Shannon, true and integral human development consists in the following

63. "[P]rimum qui aut tali inopia rerum premuntur, ut vel minimo subsidio careant ad vitam necessario, aut morali egestate fere comminuuntur, quam ob nimium sui amorem, sibimetipsis attulerint; qui deinde civitatis structuris vexantur, quas vel pravus proprietatis imperiive usus, vel quaestus ex operariorum labore dolose perceptus, vel iniustae negotiationes creaverint" (PP, p. 267; English translation in Development of Peoples, pp. 13-14).

64. "[D]einde aucta alienae dignitatis aestimatio, propensio ad paupertatis studium, conspiratio ad bonum commune, pacis voluntas [...]" (PP, p. 267; English translation in Development of Peoples, p. 14).

qualities: "the acquisition of knowledge, culture and the necessities of life: the desire for cooperation and peace, with a corresponding recognition of human dignity."⁶⁵ A crucial step towards the acceptance of human dignity by all is the common recognition of a common humanity:

There can be no progress towards the complete development of man without the simultaneous development of all humanity in the spirit of solidarity. [...] Man must meet man, nation meet nation, as brothers and sisters, as children of God. In this mutual understanding and friendship, in this sacred communion, we must also begin to work together to build the common future of the human race. ⁶⁶

The protection of human dignity therefore requires respect for all the social, economic and personal elements, both individual and of the whole man. This can occur only in society through collaboration of all internal structures, each respecting man and his human dignity.

Populorum progressio defines the manner in which the human rights tradition must affirm the importance of

65. O'Brien and Shannon, eds., Renewing the Earth, p. 309.

66. "Omnimoda singuli hominis progressio coniungi debet cum progressionem generis humani, mutuo peregranda conatu. [...] Oportet homo homini occurat, nationes inter se, ut fratres et sorores, ut filii Dei, occurrant. Hac mutua cum benevolentia et amicitia, hac sacra cum animorum concordia nos pariter aggredi debemus opus, communem prosperitatem futuram humani generis apparandi" (PP, pp. 278-279; English translation in Development of Peoples, p. 27).

material well-being for the realization of human dignity. "Possession of economic well-being, when properly coordinated with the other aspects of development, is thus perceived by the encyclical as a positive value, directly related to human dignity."⁶⁷

Human rights, as envisioned by this document, are expressions of the fundamental moral experience of common humanity. "Whether these rights be negative immunities or positive entitlements they presuppose that persons recognize that they are bound together in a moral community of mutual inter-dependence."⁶⁸

With Paul VI's encyclical Populorum progressio, a wider understanding is presented for human rights. Expanding from Leo XIII's focus of labor and management, Paul sees the necessity of exploring the wider dynamic of relations among peoples and nations and the respect needed for basic human dignity which he calls the development of persons. It must include both progress on the material level and a greater appreciation of the higher values of human existence. "Human dignity can only be respected and realized within a society when the essentially moral call to mutual

67. Claims and Conflicts, p. 79.

68. Ibid., p. 81.

interdependence is heeded."⁶⁹

1.5 - John Paul II: The Sanctity of The Individual

Karol Wojtyla was elected to the papacy in October of 1978. His first encyclical, Redemptor hominis of March 4, 1979,⁷⁰ was an eloquent statement of Christian humanism, continuing the tradition of encyclicals addressing the question of social and human rights.

The dignity of the human person was to be the bedrock for John Paul II's teachings on human rights. This dignity is based on the doctrines of creation and redemption. In John Paul's approach, it is understood that the human person cannot be seen as self-sufficient; rather each person is called to a poverty of spirit, willing to depend on God: "The Pope argues that hearts open to God are more open to other human beings and much less susceptible to seduction by totalitarian ideologies or consumerism."⁷¹ At the same

69. Ibid., p. 82.

70. In A.A.S. 71 (1979), pp. 257-324 (hereafter cited as RH, followed by page number; English translation in Encyclical Letter Redemptor hominis of the Supreme Pontiff, Ottawa, Canadian Conference of Catholic Bishops, 1979 [hereafter cited as Redeemer of Man, followed by page number]).

71. J.B. Benestad, "The Political Vision of Pope John Paul II: Justice Through Faith and Culture", in Communio, 8 (1981), p. 10.

time, relations among men must be a legitimate concern for the Church, since all activities that are a part of human nature concern the Church.⁷² For this reason, the Church must contribute to the discussion of human rights:

In this domain, the Catholic Church - and perhaps other spiritual families - has an irreplaceable contribution to make, for she proclaims that it is within the transcendent dimension of the person that the source of the person's dignity and inviolable rights is to be found, and nowhere else. [...] One can see that human rights are not just juridical norms but first and foremost values. These values must be maintained and fostered in society, otherwise they also risk disappearing from the texts of the law. And so the dignity of the person must be protected in society before being protected by law.⁷³

72. J. Zumaquero, "Los derechos humanos en la enseñanza de Juan Pablo II", in Les droits fondamentaux du chrétien dans l'Église et dans la société: Actes du IVe Congrès international de droit canonique, Fribourg (Suisse), 6-11.X.1980, [= IVe Congrès international], publié par E. Corecco, N. Herzog, A. Scola, Fribourg, Editions Universitaires; Freiburg i. Br., Herder; Milano, A. Giuffrè, 1981, p. 928.

73. John Paul II, "Address to the Diplomatic Corps accredited to the Holy See", in L'Osservatore romano, weekly ed. in English, February 13, 1989, p. 3.

1.5.1 - Human Dignity and Conversion

The present pope continually addresses the theme of the dignity of the human person. He contends that modern man is deficient in his appreciation of social justice:

He [John Paul II] believes that the effective communication of genuine spiritual values by Christian and non-Christian religious traditions, and the proper kind of culture - which includes development of the mind, heart and will - do teach the meaning of human existence, form character and contribute to the establishment of a more just political order.⁷⁴

Human beings, created in God's image and redeemed by Jesus Christ, have freedom and the capacity to know, to love and to achieve perfection by living according to their nature, as given by God. John Paul stresses individual conversion as the principal method and means for achieving social justice:

In reality, the name for the deep amazement at man's worth and dignity is the Gospel, that is to say: the Good News. It is also called Christianity. This amazement determines the Church's mission in the world and perhaps even more so, in the

74. Benestad, "The Political Vision of Pope John Paul II", p. 3.

modern world.⁷⁵

Continuing Paul VI's theme of authentic development, John Paul criticizes those who ignore the principles of human dignity in the social order:

When individuals and communities do not set a rigorous respect for the moral, cultural and spiritual requirements based on the dignity of the person, and on the proper identity of each community, beginning with the family and religious societies, then all the rest - availability of goods, abundance of technical resources applied to daily life, a certain level of material well-being - will prove unsatisfying, and in the end, contemptible.⁷⁶

True development, in keeping with the specific needs of the human being, implies, especially for those who actively share in this process, an awareness of the value of the

75. "Re quidem vera miratio maxima illa de pretio ac dignitate hominis nuncupatur Evangelium, id est Bonus Nuntius. Vocatur item Christianismus. Ex eadem ipsa admiratione profiscitur Ecclesiae munus in hoc mundo, immo ac fortasse etiam magis 'in mundo huius temporis'" (RH, p. 275; English translation in Redeemer of Man, p. 28).

76. "Cum in societate personae et communitas, quae solet populus vocari, rigide servari non vident morum postulata, culturae et spiritus, quae dignitate nituntur personae humanae et propria cuiusque communitatis natura, imprimis" (John Paul II, encyclical letter, Sollicitudo rei socialis, December 30, 1987, in A.A.S. 80 (1988), p. 557; English translation in Encyclical Letter Sollicitudo rei socialis of the Supreme Pontiff John Paul II for the Twentieth Anniversary of Populorum progressio, Ottawa, Canadian Conference of Catholic Bishops, 1987, p. 61).

rights of each person:

If human rights are violated in time of peace, this is particularly painful and from the point of view of progress it represents an incomprehensible manifestation of activity directed against man, which can in no way be reconciled with any programme that describes itself as "humanistic". [...] We are firmly convinced that there is no programme in today's world in which man is not invariably brought to the fore, even when the platforms of the programmes are made up of conflicting ideologies concerning the way of conceiving the world.⁷⁷

1.5.2 - Human Dignity:
The Relationship of the Person to Christ

The ultimate source of human rights, as outlined by John Paul II in Redemptor hominis is in the relationship of the human person to Christ. John Paul develops an anthropology of personal dignity and social rights as explained by T.P. Doyle: "Such an approach is based on the conviction that the gradual process whereby persons are dehumanized starts with an inadequate view of the human person which fails to

77. "Iura autem hominis in pace violari acerbissimum est et, quantum ad progressum pertinet, quaedam est incredibilis hominis pugna contra hominem, adversans omni agendi consilio, quod se ipsum humanisticum profiteatur. Quod vero initum consilium sociale, oeconomicum, politicum et ad humanum cultum pertinens patitur sic non definiri? Persuasissimum Nobis est nullum hodie esse in mundo consilium eiusmodi, in quo, etsi contrariae sint ideologiae circa rationes de rebus humanis statuendi, homo non semper primum locum obtineat" (RH, p. 296; English translation in Redeemer of Man, p. 60).

relate the person to the divine."⁷⁸ John Paul's stress on the dignity of the human person points to a continuation and reinforcement of the social doctrine of his predecessors:

Following the Pope's line of thought, the real challenge of the Church, and in fact to any society that seeks to secure the proper welfare of all its citizens, is the development of a system or systems that are premised in the fundamental dignity of the human person and his or her mastery over creation.⁷⁹

The concept of human dignity as developed by John Paul is understood not merely in metaphysical terms but rather in concrete historical terms. As J. Donahue explains, this concrete framework leads to strongly practicable applications:

To be valid, human rights theory must have concrete expression in the culture, political system, and institutions of a society. Ideological systems cannot appeal to human dignity for their justification unless they can specify how they dignify the worth of the person with particular human freedoms, powers and relationships. Without this, the notion of human dignity

78. T.P. Doyle, "The Dignity of the Human Person in the Thought of John Paul II" in Social Thought, 13, no. 2/3 (Spring/Summer 1987), p. 8.

79. Ibid., pp. 17-18.

becomes empty.⁸⁰

John Paul II demands that concern for human rights be the primary concern for all human institutions and, towards this end, requires that all institutions constantly reassess their structures and procedures to assure that human rights and dignity are being served.

Conclusion

Concern for human rights within the Church has received particular impetus and prominence in the papal encyclicals written during the last one hundred years. Several popes have made application of the principle of human dignity as the basis of human rights to confront institutional problems within labor relations, between nations, and most recently to discuss relations between developing nations and the more advanced societies. Although the issues addressed by the popes have changed, reflecting the particular circumstances and problems of the age in which the encyclical was written, some common themes have emerged which can be truly said to constitute a "social doctrine." Most basic has been the theme of human dignity and its

80. J. Donahue, "The Social Theology of John Paul II and the Understanding of Social Institutions" in Social Thought, 13, no. 2/3 (Spring/Summer 1967), p. 25.

respect as the basis for human rights.

It has become necessary for the Church to become more introspective and to analyze the question of human rights within its own institution and to see how the principles that have developed from recent papal teaching may profitably be applied in terms of relationships among its own members. The remaining three chapters will investigate the human rights to good reputation and privacy as they are implemented in the 1983 Code of Canon Law.

2 - THE CANONICAL IMPLEMENTATION OF THE HUMAN RIGHTS OF PRIVACY AND REPUTATION

Introduction

The first chapter outlined some of the major contributions of papal encyclicals to a Catholic understanding and basis for human rights. The cornerstone of this development was seen to be the innate dignity of the human person.

The second chapter will review the incorporation of human rights into the 1983 Code of Canon Law, and in particular the right of confidentiality under its dual aspects: the right of privacy and the right to a good reputation.

The documents of the Second Vatican Council enumerated several basic human rights which were later included in canonical legislation as "Rights of the Christian faithful", including the right of confidentiality. It will therefore be necessary to examine the influence of the Second Vatican Council on the introduction of human rights into the Code of Canon Law. After a review of this conciliar teaching, a brief study will be made of the 1971 Synod of Bishops' document, Convenientes ex universo, which attempted to implement a consistency in Church

teachings concerning human rights and the Church's internal structure. The chapter will then examine the development of human rights into legislative form, including the ten principles for revision which emphasized the enunciation and protection of rights in the Church's legal system, followed by a study of the schema for a Lex Ecclesiae fundamentalis which included an attempt to legislate rights and duties for the members of the Church. Finally, the chapter will review the development of c. 220 of the 1983 Code which legislated the human right of confidentiality.

2.1 - The Influence of the Second Vatican Council on Human Rights Legislation in the 1983 Code

The Second Vatican Council in its teachings underscored the Church's concern for human rights as the theory had emerged from recent encyclicals. This interest developed as a logical extension of the Church's pastoral solicitude, as it had developed in recent papal teaching. J. Langan explains in discussing the origin of the Church's concern in this area:

What we have in Vatican II is not a demand for restructuring the Church according to human rights norms but rather an expression of confidence that harmony between human rights norms and the

structure of the Church can be achieved.¹

D. Hollenbach describes the formal support of human rights within the Church as a "phenomenon" and as a "remarkable historical development".² As he also notes: "The Catholic Church was a vigorous opponent of both the democratic and socialist revolutions which were the chief proponents of the civil and social rights enshrined in twentieth century human rights declarations."³ However, as observed in chapter one, a significant change in perspective had emerged from the impetus of papal teachings: "[T]he central institutional organ of the Catholic Church, the Holy See, has adopted the cause of human rights as the prime focus of its ethical teaching and pastoral strategy in the domain of international justice and peace."⁴

1. J. Langan, "Can There Be a Human Rights Problem in the Church?" in The Jurist, 46 (1986), p. 34.

2. D. Hollenbach, "Global Human Rights: An Interpretation of the Contemporary Catholic Understanding", in A. Hennessey and J. Langan, eds., Human Rights in the Americas: The Struggle for Consensus, Washington, DC, Georgetown University Press, 1982, p. 9.

3. Ibid.

4. Ibid.

2.1.1 - Gaudium et spes and Human Rights

The recent approach of the Church towards human rights was most forcefully articulated in the Pastoral Constitution Gaudium et spes (The Church in the Modern World),⁵ the conciliar document which contained, as described by Hollenbach, "innovative discussions of the religious basis of Christian ethical concern."⁶

2.1.2 - A New Anthropology and Human Dignity

In Gaudium et spes a new anthropological perspective can be observed which stimulated an increased sensitivity to human rights. The uniqueness of the person is accentuated and a new anthropology of man is developed: "[R]eality is to be interpreted in terms of the person, i.e., created reality finds its meaning and fulfillment in terms of the person."⁷

5. Vatican Council II, Pastoral Constitution on the Church in the Modern World, Gaudium et spes, December 7, 1965, in A.A.S., 58 (1966), pp. 1025-1115 (hereafter cited as GS followed by paragraph and page number; English translation in A. Flannery, ed., Documents of Vatican II, Grand Rapids, Mich., W.B. Eerdmans Pub. Co., 1975, pp. 799-812).

6. Claims and Conflicts, p. 69.

7. Ibid.

Gaudium et spes begins with an understanding of the transcendental value of the human person:

The dichotomy affecting the modern world is, in fact, a symptom of the deeper dichotomy that is in man himself. He is the meeting point of many conflicting forces. In his condition as a created being he is subject to a thousand shortcomings, but feels untrammelled in his inclinations and destined for a higher form of life.⁸

Chapters one and two of Gaudium et spes outline an anthropology that recognized the fact that the pivotal point of the entire document would be man himself, "man considered whole and entire, with body and soul, heart and conscience, mind and will."⁹ Such an approach leads inevitably to a true Christian humanism focused on protecting individual rights and freedoms.

8. "Revera inaequilibria quibus laborat mundus hodiernus cum inaequilibrio illo fundamentaliori connectuntur, quod in hominis corde radicatur. In ipso enim homine plura elementa sibi invicem oppugnant. Dum enim una ex parte, utpote creatura, multipliciter sese limitatum experitur, ex altera vero in desideriis suis illimitatum et ad superiorem vitam vocatum se sentit" (GS, no. 10, p. 1032; English translation in Flannery, Documents of Vatican II, p. 910).

9. "Homo igitur, et quidem unus ac totus, cum corpore et anima, corde et conscientia, mente et voluntate, totius nostrae explanationis cardo erit" (GS, no. 3, p. 1026; English translation in Flannery, Documents of Vatican II, p. 904).

2.1.3 - Pluralism and Human Rights

While identifying the centrality of the person, Gaudium et spes also recognized the social nature of each person. "Individuals are not seen as solitary beings, for by their inmost nature persons are social beings, and unless they are related to others, they can neither live nor attain their full potential."¹⁰

The innovative discussions alluded to by Hollenbach included an increasing awareness of pluralism which compelled the Church to expand upon its previous reluctance in the area of human rights:

At the Council, the modern Catholic Church for the first time was compelled to come to grips in an official way with the realities of the religious, cultural, social, economic, political and ideological pluralism of the contemporary world.¹¹

2.1.4 - The Global Approach to Human Dignity and Human Rights

Such dramatic shifts in thinking contributed to new approaches to human rights within the Church itself. This new thinking is perhaps most clearly presented in Gaudium et spes. This constitution defined a new global approach to

10. O'Brien and Shannon, Renewing the Earth, p. 174.

11. Hollenbach, "Global Human Rights", p. 11.

human dignity:

Undoubtedly not all men are alike as regards physical capacity and intellectual and moral powers. But forms of social or cultural discrimination in basic personal rights on the grounds of sex, race, color, social conditions, language or religion, must be curbed and eradicated as incompatible with God's design.¹²

A full array of rights as norms to which every society is accountable is presented, as Hollenbach explains, to an extent not normally identified with the Church: "These rights include both the civil and political rights generally associated with Western democracies and the social and economic rights emphasized in socialist societies."¹³ There was no specific model of government or philosophy endorsed by Gaudium et spes in its approach to human rights, other than "a normative framework for a pluralistic world."¹⁴

All social organizations and political structures which

12. "Sane varia capacitate physica viriumque intellectualium et moralium diversitate non omnes homines aequiparantur. Omnis tamen discriminandi modus in iuribus personae fundamentalibus, sive socialis sive culturalis, ob sexum, stirpem, colorem, socialem condicionem, linguam aut religionem, superandus et removendus est, utpote Dei proposito contrarius" (GS, n. 29, p. 1048; English translation in Flannery, Documents of Vatican II, p. 929).

13. Hollenbach, "Global Human Rights", p. 12.

14. Ibid.

touch man will be judged by the Church according to how well they serve and protect man's personal dignity. The changed social conditions in which this pastoral constitution was written present a conclusion that the fundamental obligation to respect human dignity is no longer defined in permanently fixed institutional patterns:

Rather than focus on a traditional theory of duties articulated within the context of a hierarchically ordered universe, the Council centers on a doctrine of individual rights which focuses on the person and which validates the claims of the person over and against society.¹⁵

2.1.5 - The 1971 Synod of Bishops

The impact of the Second Vatican Council on the Roman Catholic rights tradition was not limited to the changes which it stimulated in future papal legislation alone. One of the more significant postconciliar developments was the establishment of the Synod of Bishops. This body, which had begun the process of translating into action the Council's commitment to a less centralized form of Church organization, also reflected on the Church's responsibility and commitment to human rights.

15. O'Brien and Shannon, Renewing the Earth, p. 172.

2.1.5.1 - Justice and the Gospel

The document Convenientes ex universo¹⁶ issued by the second Synod (1971) examined the issues of justice and human rights, incorporating the strength of the tradition's theory of human dignity and rights with an understanding of social relationships characteristic of Paul VI's writings.¹⁷

The interest of the Synod in defending human rights was underscored in a key statement of the document:

Action on behalf of justice and participation in the transformation of the world appear to us as a constitutive dimension of the preaching of the Gospel, or in other words, of the Church's mission for the redemption of the human race and its liberation from every oppressive situation.¹⁸

16. Synod of Bishops, 1971, Convenientes ex universo, November 24, 1971, in A.A.S. 63 (1971), pp. 923-942 (hereafter cited as CU, followed by page number; English translation in The Ministerial Priesthood, Justice in the World, Washington DC, National Conference of Catholic Bishops, 1971, [hereafter cited as Justice in the World, followed by page number]).

17. Claims and Conflicts, p. 85.

18. "Actio pro iustitia et participatio transformationis mundi plene nobis apparent tamquam ratio constitutiva praedicationis Evangelii, missionis nempe Ecclesiae circa generis humani redemptionem et liberationem ab omni statu oppressionis" (CU, p. 924; English translation in Justice in the World, p. 34).

"Work for justice is essential to the Church, pertaining to its innermost nature and mission."¹⁹ Thus reinforced is the notion that concern for human rights must be a dimension of all aspects of Christian life and that personal and collective action on behalf of justice is critical:

The bishops recognize of course that it is not proper for the Church to offer specific solutions or programs to solve a variety of problems in the world; the mission of the Church involves defending and promoting the dignity and rights of the human person. Christians then are to act as a leaven in the world and to accept their responsibilities in the world. Thus while recognizing that the political mission of the Church is an indirect one, the Synod nonetheless affirms the responsibility of the Church and its members to speak out strongly when necessary, against the injustice that is present.²⁰

This Synod document thus recognized that human dignity contains a constellation of rights which must be understood, not singly, but in relation to each other. The concrete content of the demands of human dignity must be worked out in terms of modern developments which press in on and threaten man and his human rights. As the Synod very forcefully declared:

19. As quoted in J. Coriden, "Human Rights in the Church: A Matter of Credibility and Authenticity", in Concilium, no. 124 (4/1979), p. 68.

20. O'Brien and Shannon, Renewing the Earth, p. 385.

The strong drive toward global unity, the unequal distribution which places decisions concerning three-quarters of income, investment and trade in the hands of one-third of the human race, namely the more highly developed part, the insufficiency of merely economic progress, and the new recognition of the material limits of the biosphere - all this makes us aware that in today's world new modes of understanding human dignity are arising.²¹

The specificity of rights contained in Pacem in terris is not found in the Synodal document Convenientes ex universo. However, there is still prominent a concern for the establishment of firm criteria for judging the presence of proper respect in society for personal dignity. D. Hollenbach defines the over-arching criterion:

The right to development is the norm which has led to the Synod's affirmation of a number of more particular rights: the

21. "Validus impulsus ad unitatem mundialem et inaequalis distributio, quae efficit ut decisiones circa tres ex quattuor partibus reddituum, collocationis pecuniae et commercii penes unam tantum ex tribus partibus generis humani sint, illius nempe, quae maiore progressionem gaudet - atque simul inanitas progressus mere oeconomici una cum nova perceptione limitum materialium biosphaerae - nos ducunt ad conscientiam habendam huius facti, quod scilicet in hodierno mundo oriuntur novae dignitatem humanam concipiendi rationes" (CU, p. 426; English translation in Justice in the World, p. 36; italics in original).

right of self-determination, the right to participate in the formation of economic, social and political structures, the right to the preservation of one's cultural identity, the rights to religious freedom, due process and a fair trial, the rights to life and bodily integrity, the right to freedom from manipulation by images presented to the media, and the right to education.²²

2.1.5.2 - Consistency in Teaching and Internal Procedure

The Synod was also to remind the Church of its need to be internally consistent in its human rights and justice proclamations: "While the Church is bound to give witness to justice, she recognizes that anyone who ventures to speak to people about justice must first be just in their eyes."²³ As J. Coriden comments:

[W]itness to human rights is credible and effective only when it is not contradicted by internal counter-witness by which the Church denies those same rights to its members or those who come in contact with it.²⁴

This Synodal document continues the human rights

22. Claims and Conflicts, p. 88.

23. "Si Ecclesia testimonium iustitiae reddere debet, ipsa agnoscit eum iustum in primis esse debere ante aliorum oculos, quicumque loqui audeat de iustitia coram hominibus" (CU, p. 933; English translation in Justice in the World, p. 44).

24. Coriden, "Human Rights in the Church", p. 68.

tradition characteristic of contemporary magisterial teaching and integrally links Church teachings regarding human dignity and freedom in the world to the internal structures and procedures of the Church. The impetus of such conciliar documents as Gaudium et spes and the Synodal document Convenientes ex universo with their emphasis upon human dignity and its proper respect within the internal procedures of the Church saw a quite natural development in the drafting of legal texts such as the Code of Canon Law.

2.2 - The Canonical Implementation of Rights

The revised Code of Canon Law goes much further than previous universal Church legislation in declaring basic rights for its members. Canon 87 of the 1917 Code of Canon Law stated simply the general principle that baptism constitutes a human being a person in the Church, with all the rights and duties of Christians.²⁵

A significant contribution to the Code of Canon Law promulgated by Pope John Paul II in 1983 was the canonical

25. "Baptismate homo constituitur in Ecclesia Christi persona cum omnibus christianorum iuribus et officiis, nisi, ad iura quod attinet, obstet obex, ecclesiasticae communionis vinculum impediens, vel lata ab Ecclesia censura."

recognition of several rights, including human rights, for all the Christian faithful. Pope John Paul II, in the Apostolic Constitution promulgating the revised Code of Canon Law, stressed the importance of the inclusion of rights within the Code:

As a matter of fact, the Code of Canon Law is extremely necessary for the Church. Since the Church is organized as a social and visible structure, it must also have norms: in order that its hierarchical and organic structure be visible; in order that the exercise of the functions divinely entrusted to it, especially that of sacred power and the administration of the sacraments, may be adequately organized; in order that the mutual relations of the faithful may be regulated according to justice based upon charity, with the rights of individuals guaranteed and well defined.²⁶

The full meaning of these rights is still developing, and as noted by S. Holland, the interaction of these norms with new ecclesial structures will help in their clarification: "[W]hile some of the their content is not new, much of it

26. "Ac revera Codex Iuris Canonici Ecclesiae omnino necessarius est. Cum ad modum etiam compaginis sit constituta, ipsa normis indiget, ut eius hierarchica et organica structura adspectabilis fiat, ut exercitium munerum ipsi divinitus creditorum, sacrae praesertim potestatis et administrationis sacramentorum rite ordinetur, ut secundum iustitiam in caritate innixam mutuae christifidelium necessitudines componantur, singulorum iuribus in tuto positis atque definitis (John Paul II, Apostolic Constitution, Sacrae disciplinae leges, in A.A.S. 75, pars 2 (1983), pp. xii-xiii; English translation in Code of Canon Law, Latin-English edition, Washington, DC, Canon Law Society of America, 1983, p. xv).

is, and the new ecclesial environment being gradually formed as a result of the council gives it added meaning."²⁷

This section will attempt to review the implementation of rights into the 1983 Code by reviewing the development of two significant contributions to the section of the new Code called "The Obligations and Rights of all the Christian faithful": The Principles for Revision of the Code and the Lex Ecclesiae fundamentalis. This section will conclude with a summary of some contemporary understandings of rights as included in the new Code, under three aspects: human rights canonically recognized, rights as "subjective" (or from obligation); and rights as "constitutional".

2.2.1 - Principles for Revision of the Code

One of the major influences towards the incorporation of rights and their protection in the revised Code was the development of the Principles for Revision approved by the 1967 Synod of Bishops as a reference for the Code revision work.

In April 1967, a central committee of consultors for the revision of the Code of Canon Law, under the direction of

27. S. Holland, "Equality, Dignity, and Rights of the Laity", in The Jurist, 47 (1987), p. 127.

Cardinal Pericle Felici, the second president of the Commission (1966-1982), set out to develop several fundamental principles to aid in the task of revision.

The consultors, in fact, in working on the canons to be revised for their first preparatory schemata very often felt the need for certain principles to guide them so that their work of revision could proceed faster and with greater confidence and sureness. We may therefore conclude that the principles now presented as a result of the work of the Commission be considered a good set of principles, agreed upon by the Commission.²⁸

These principles, as outlined by the Commission, were presented to the first Synod of Bishops which approved them with a few reservations after a five day discussion (September 30, 1967- October 4, 1967). One of the primary purposes of the ten principles which ultimately emerged was to guarantee harmony between the Church's revised law and the documents of the Second Vatican Council. As J.

28. "Consultores enim in usu redigendorum canonum ad prima eorum schemata praeparanda, frequentissime necessitatem experti sunt quorundam principiorum ut labores sui celerius atque securius ad finem ducerentur. Recte igitur concludi potest principia nunc enuntiata, in Commissionis labore hucusque peracto bonitatis confirmationem quodammodo obtinuisse" (Communicationes 1 (1969), p. 77; English translation in R. Schoenbechler, "Principles Which Govern the Revision of the Code of Canon Law", in J. Hite et al., eds., Readings, Cases, Materials in Canon Law, Collegeville, MN, Liturgical Press, 1986, pp. 70-71).

Alesandro has noted: "Throughout the revision process, the principles regulated the task of translating the pastoral decisions of the Council into the juridic content of the canons."²⁹

It becomes clear in examining the ten principles for revision adopted by the Synod, that the bishops desired the new Code to emphasize the fundamental equality of all the faithful and appropriate judicial and administrative measures be created to protect the rights of persons from arbitrary uses of authority. The first principle identified the juridic character of Church law and indicated that the essential object of canon law is the determination and safeguarding of the rights and obligations of each person.³⁰ The sixth principle establishes that the revised Code is to acknowledge, define and articulate rights which persons possess by natural law, divine positive law, and by

29. J. Alesandro, "A General Introduction" in J. Coriden, T. Green and D. Heintschel, eds., The Code of Canon Law: A Text and Commentary, New York, Mahwah, NJ, Paulist Press, 1985, p. 5.

30. "Canonici quoque iuris obiectum praecipuum et essenziale est iura et obligationes uniuscuiusque hominis erga alios et erga societatem definire atque tueri, etsi eatenus fieri possit in Ecclesia quatenus ad Dei cultum et animarum salutem pertineant" (Communicationes 1 (1969), p. 79; English translation in Schoenbeckler, "Principles", p. 72).

their proper juridical condition in the Church.³¹

The seventh principle stated the need for implementing structures which would safeguard subjective rights:

Nor is it enough to say that the safeguarding of human rights is adequately provided for in our legislation. We must also acknowledge the truly personal subjective rights, without which a juridically organized society cannot be imagined.³²

This sensitivity for rights is particularly appropriate in relationships between religious subjects and their superiors:

In Canon Law, we must, therefore proclaim that the principle of the juridical protection of rights applies with equal measure to superiors and subjects alike, so that any suspicion whatsoever of arbitrariness in church administration may completely disappear.³³

31. "Unicuique christifidelium iura agnoscenda ac tuenda sunt, et quae in lege naturali vel divina positiva continentur, et quae ex illis congruentur derivantur ob insitam sociale conditionem quam in Ecclesia acquirunt et possident" (Communicationes 1 (1969), pp. 82-83).

32. "Neque id sufficit ut tutela iurium in iure nostro convenientur vigeat. Agnoscenda enim sunt iura subiectiva vera et propria sine quibus ordinatio iuridica societatis vix concipitur" (Communicationes 1 (1969), p. 83; English translation in Schoenbechler, "Principles", p. 76).

33. "Proclamari idcirco oportet in iure canonico principium tutelae iuridicae aequo modo applicari superioribus et subditis, ita ut quaelibet arbitrariness suspicio in administratione ecclesiastica penitus evanescat" (Communicationes 1 (1969) p. 83; English translation in Schoenbechler, "Principles", p. 76).

To remove the dangers of arbitrariness in the exercise of authority and to protect more effectively proper rights, a revised system of recourse would be necessary:

Although it is generally thought that recourses and judicial appeals are sufficiently provided for in the Code of Canon Law according to the demands of justice, it is nevertheless the common opinion of canonists that administrative recourses are still lacking considerably in church practice and in the administration of justice. Hence the need is everywhere strongly felt to set up in the Church administrative tribunals of various degrees and kinds, so that defense of one's rights can be taken up in these tribunals according to proper canonical procedures before authorized officials of different ranks.³⁴

In the pursuit of justice, it would also be important that procedures be as open as possible, that the individual's rights be clearly identified and protected: "It is, however necessary that in any procedure, whether judicial or administrative, the one who has lodged a

34. "Dum in Codice Iuris Canonici recursus et appellationes iudiciales sufficienter regulatae secundum iustitiae exigentias reputantur, e contra communis opinio canonistarum censet recursus administrativos non parum deficere in ecclesiastica praxi et administratione iustitiae. Exinde necessitas ubique persentitur ordinandi in Ecclesia tribunalia administrativa secundum gradus et species, ita ut defensio iurium in eisdem habeat propriam et canonicam proceduram quae apud auctoritates diversi gradus apte evolvatur" (Communicationes (1) 1969, p. 83; English translation in Schoenbechler, "Principles" p. 76).

recourse or been accused must be informed of all the charges made against him."³⁵

The Pontifical Commission for the Revision of the Code, as reaffirmed by the Synod of Bishops, had effectively established the protection of rights as one of the bases for the revised universal Church legislation. These principles were to insist that power not be used arbitrarily, that rights of each and every member of the Church be acknowledged and safeguarded - both the rights which they have by natural law and the rights contained in divine positive law, as also the rights which are derived from these laws because of the social conditions which the faithful acquire and possess in the Church.

The Commission believed that sufficient protection of rights by law could be obtained only by the recognition of real and proper subjective rights.

35. "Requiritur autem ut, in processu sive iudiciali sive administrativo, recurrenti vel reo manifestentur omnes rationes quae contra ipsum invocantur" (Communicationes 1 (1969), p. 83; English translation in Schoenbechler, "Principles", p. 77).

2.2.2 - The Lex Ecclesiae fundamentalis
and the Legislation of Rights

2.2.2.1 - Purpose of the Lex Ecclesiae fundamentalis

The Commission for Revision's effort to formulate a Lex Ecclesiae fundamentalis³⁶ has been described as an attempt to present the fundamental structures of the Church as a juridical community.³⁷ In the textus prior published in 1969, Msgr. W. Onclin, the official relator, noted that it was on November 2, 1965, that Pope Paul VI himself had suggested to the members and the consultors of the Pontifical Code Commission the possibility of formulating one basic schema of norms which could be considered as a constitution for the entire Church, Eastern and Western.³⁸ Such a constitution should, in the estimate of the pope, reveal the essential theological and juridical character of the Church. It could also serve as a base upon which the rest of the new law could be structured.³⁹

36. Hereafter cited as LEF.

37. A. Gauthier, "The Progress of the 'Lex Ecclesiae fundamentalis'", in Studia canonica, 12 (1978), p. 378.

38. W. LaDuc, "A Written Constitution for the Church?" in The Jurist, 32 (1972), p. 1.

39. Ibid.

2.2.2.2 - Development of the Schema

According to the description of events in the textus prior, the Commission accepted the papal charge, and several people were selected as a distinct and separate coetus, to draft an initial schema. The first draft of the Commission, the Prima quaedam adumbrata propositio Codicis Ecclesiae fundamentalis was distributed to the central committee of the Code Revision Commission for study, and these consultors gathered together in June of 1966 to discuss the document. The central committee recommended that certain major changes be made in the draft:

a. That the LEF articulate a truer picture of the reality of the Church, and be animated by an easily discernible ecumenical spirit.

b. That the notion of the Church as people of God receive the central emphasis in accord with the teaching of Vatican II, and that the rights and prerogatives of the community of believers be delineated within this context.

c. That the LEF should explicate, at least in a general way, the relationship between the Church and mankind in terms of the Church's rights and responsibilities vis-à-vis the world.⁴⁰

40. Ibid., pp. 1-2.

One of the features of the LEF since the first draft was the attempt to include a list of rights and duties pertaining to all the Christian faithful:

Later, from the time of the second draft (Lex Ecclesiae fundamentalis: altera quaedam adumbratio propositionis), some canons on the rights and obligations were included. The 1971 Schema, modified according to the observations of the Cardinal Fathers, for the first time bore the title Christifidelium officia et iura fundamentalis.⁴¹

The part of the schema on rights and obligations contained a text of 16 canons. The LEF coetus listed many of the same statements of rights as did the other coetus which had been charged with the same responsibility, since these groups had begun with the same raw material from the Second Vatican Council. It was, however, organized differently, betraying what Provost described as a "more institutional bias than the other coetus".⁴²

As early as 1975, the Commission considered the schema for the LEF near definitive completion. Consequently, it was necessary for the coetus De laicis to review its own

41. R.J. Castillo Lara, "Some General Reflections on the Rights and Duties of the Christian Faithful", in Studia canonica, 20 (1986), p. 12.

42. J. Provost, "Ecclesial Rights", in CLSA Proceedings (44th Annual Convention, Hartford, Connecticut, 18-21 October, 1982), Washington, DC, Canon Law Society of America, 1982, p. 53.

text which included rights of the Christian faithful, in order to avoid any repetitions or divergences. This was done in its session of April 7-11, 1975. The revision included aspects of details, especially terminology. In the arrangement of Book II, De populo Dei a list of 23 canons was placed under the heading De omnium christifidelium obligationibus et iuribus and was distributed for consultation in 1977.⁴³

The study group which had overseen the revision of the schema, De populo Dei, based its work in the observations gathered from the consultation. It noted on the one hand the inevitable repetitions, which at times were almost verbatim, between these canons and the corresponding canons of the LEF draft. The coetus received suggestions for modifying the LEF version of some of the canons to benefit from elements only the De populo Dei listing had included. The coetus for De populo Dei had in mind the apparently certain and imminent promulgation of the LEF. As Castillo Lara recounts, the coetus took the rather drastic step of suppressing all of the canons that could have been duplicated in the LEF.⁴⁴ In this way, 17 canons were dropped from the text. Since so few canons remained, it was

43. Castillo Lara, "Some General Reflections", p. 13.

44. Ibid.

not considered necessary to reserve a special chapter for them. For this reason, De omnium christifidelium obligationibus et iuribus did not appear in the 1980 schema of the Code.⁴⁵

Pope John Paul II decided not to promulgate a separate LEF for the Church. Castillo Lara suggests that he was motivated by ecumenical considerations as well as the fact that on some points sufficient favorable doctrinal consensus was lacking.⁴⁶ This decision not to legislate the LEF raised once again the question of the means for inserting the rights and duties of the Christian faithful into the Code. The corresponding canons of the last edition of the LEF were employed in this task. They form, with some small modifications, the text of the present Title I of Book II of the 1983 Code of Canon Law, "De omnium christifidelium obligationibus et iuribus."

2.2.3 - Rights as Understood in the Code

In the "De omnium christifidelium obligationibus et iuribus" which now appear in the Code of Canon Law, at least three traditions regarding the concept of rights

45. Ibid.

46. Ibid.

have merged.

In the first tradition, rights are seen as the simple sphere of free choice in which one is at liberty to act or not, as with the United States Bill of Rights, or the French Declaration of the Rights of Man.

There is also an approach that views rights as an entitlement. The individual is not an isolated individual but a member of society; to exercise true liberty it may be required that society supply for deficiencies in the resources of the individual. As Provost explains, such thinking underlies the United Nations Universal Declaration of Human Rights and may be found in the canonical right to receive assistance from the sacred pastors out of the spiritual goods of the Church, especially the word and sacraments (c. 213).⁴⁷

A third approach to rights has also developed, which attempts to blend the best features of the previous two positions. Rights are not merely claims one can make for isolated freedom; neither are they only entitlements that one can demand from society. They entail an interaction between individual and society, located in the concept of the common good, understood as "the sum of those conditions of social life by which individuals, families and groups

47. Provost, "Book II", p. 136.

can achieve their own fulfillment in a relatively thorough and ready way."⁴⁸ Authors such as Provost believe that this third approach is found in the 1983 Code of Canon Law.

It will be important to analyze the significance of these rights as canonically sanctioned, since their canonical import will influence the manner and method in which they are observed and protected.

Canonists such as J. Provost have attempted to analyze the term "rights" as employed in the 1983 Code of Canon Law. Provost has helpfully classified rights into four distinguishable categories:

- a. human rights which arise from the dignity of human nature;
- b. ecclesial rights which pertain to the baptized;
- c. ecclesiastical rights which arise from the present ordering of Church life;
- d. communal rights which pertain to members of communities endowed with those rights. ⁴⁹

The right of confidentiality, as we have identified it, can be recognized as a human right and will therefore be treated under that category of right which Provost

48. Ibid., p. 137.

49. Provost, "Ecclesial Rights", p. 42.

identifies as arising from human nature.

2.2.3.1 - Human Rights Canonically Recognized

It is clear, as canonists such as Provost indicate, that in the Code, human rights have been identified as the proper subject for the ecclesial sphere: "We do not lose our humanity when we are baptized; if grace builds on nature then the rights which arise from human nature remain ours as Christians."⁵⁰ Included in the listing of rights of the Christian faithful are what may then be described as human rights: freedom from coercion in choosing a state in life (c.219) and the right to a good name and privacy (c. 220). The Second Vatican Council, as has been seen, brought to the life of the Church a new understanding and consciousness of human rights. The direction taken by the Code of Canon Law in implementing human rights within its legal framework continues the same thrust.

The Code is an attempt to open the Church up, applying principles such as subsidiarity and shared responsibility [...]. [T]he revised Code proposes a new way of thinking in Church law, a way of thinking faithful to the teachings of the Second Vatican Council, and hopefully, adaptable to the changed situation of the modern age. Key to this new way of thinking

50. Ibid.

is the approach to rights within the Church and the suggestion of various systems of vindicating those rights.⁵¹

2.2.3.2 - Rights from Obligations and Rights as Subjective

There are two strongly defended but quite dissimilar positions on how the various strata of Church life work together in terms of rights. One position sees rights as resulting directly from duties. Objectively, a right would relate to what is perceived as just, especially to what is considered just within a given social system.⁵² As Provost explains, with this view of rights everyone in society has a proper state in life. Corresponding to that state are the obligations of one's state. A person necessarily has the rights proper to carrying out their obligations. This particular perspective quite often views rights primarily in terms of one's particular state in life. Rights perceived thusly are always viewed as an obligation, and are pertinent to a static view of society. There are clear criteria for who is entitled to rights. This view, explains Provost, is also compatible with an understanding of the Church which sees its mission as basically dependent upon

51. Ibid., p. 50.

52. Ibid., p. 54.

the hierarchy and the hierarchical ordering of Church life: Each person has the obligation (and the obligatory right) to participate in the teaching, sanctifying and ruling functions of the Church in keeping with their appropriate state in life. None are to usurp what is rightly an obligation of others in keeping with their status in the Church.⁵³

Another approach to rights sees them primarily as "subjective", rights viewed as constitutive to the person themselves. Provost explains such subjective rights in terms of a more basic level of the person:

That is, at a more fundamental level than my state in life, is God's action in my being - creating me, and re-creating me in grace through baptism. There are rights which correspond to this level of my existence as well."⁵⁴

As Provost also indicates, there is no easy way to determine precisely and explicitly what these rights are: "This level of Church existence leaves greater openness to the work of the Spirit. The 'condition' of a person here could refer to one's abilities, talents, gifts - in short, the charisms [...] of which Vatican II spoke."⁵⁵ Rights according to this way of thinking are also not an absolute

53. Ibid.

54. Ibid.

55. Ibid., p. 50.

claim: They are relevant to the common good rather than relative to one's state in life. The common good would then be understood as the conditions needed for each person to achieve his or her own fulfillment in a relatively thorough manner.⁵⁶ Such rights are not mandatory in the sense that they must always be exercised:

They do cause people to face a personal, moral choice, however. One is free not to exercise a right, but this is morally acceptable only if my failure to act does not make it impossible for others to fulfill their obligations or, in some other manner harm the common good.⁵⁷

The obligations and rights proper to this condition differentiate the Christian from the non-baptized. They do not differentiate one Christian from another. "We have differing gifts and talents ("conditions"), and exercise various functions in carrying out the work which is based on that equality; but these do not limit the rights themselves which come from baptism."⁵⁸

T. Green, in analyzing the "Rights of the Christian faithful" that have been incorporated into the present Code of Canon Law, believes that the first position concerning

56. Ibid., p. 51.

57. Ibid.

58. Ibid., p. 52.

rights, i.e., as based on obligations, was utilized by the Code Commission:

For the [Code] commission, rights are rooted in the duties flowing from one's state in life; rights are not so much absolute claims but rather relative claims connected with the fulfillment of one's social duties. One must always exercise such rights if society is going to be properly ordered.⁵⁹

2.2.3.3 - Canonical Rights as "Constitutional"

The efforts made to introduce the LEF into the legislative apparatus of the Church during the process of Code revision stimulated many canonists to reflect on the need for implementing more fully the civil law concept of "constitutional" or "fundamental" law into the canonical system. In a general sense, constitutional law would indicate a system of legal principles, according to which a society, a community, or an association is governed.⁶⁰ Such a classification as "constitutional" would therefore give a certain juridic priority to particular sections of law.

59. T. Green, "Persons and Structures in the Church: Reflections on Selected Issues in Book II", in The Jurist, 45 (1985), p. 65.

60. L. Örsy, "The Problem of Constitutional Law in the Church", in The Jurist, 29 (1969), p. 31.

As Castillo Lara reflects, there was a desire on the part of the consultors for the coetus De laicis and the one on LEF to underscore the importance of their respective listing of rights as "fundamental" (or "constitutional"):

Just as in the schema for the lex fundamentalis, the canons [of the coetus de laicis] were grouped under the title Christifidelium officia et iura fundamentalia. So the intention of the editors of the Schema was undoubtedly that of referring to the fundamental rights of the Christian faithful.⁶¹

Castillo Lara proposes that these rights be viewed as "subjective" rights, which would lend a certain prominence to them, but not as "fundamental" or "constitutional". The ultimate basis for these rights, insists Castillo Lara, is in the Christian condition itself. "[I]ncorporation in Christ through baptism [...] constitutes a 'person' in the Church with rights and duties which are proper to Christians. It is this which constitutes the person as a subiectum iuris."⁶² The majority of these rights, insists Castillo Lara, are not granted by the legislator. They are inherent rights which are intrinsic to being a Christian. These rights are explications of being a Christian, rights which generally express participation in the three-fold

61. Castillo Lara, "Some General Reflections", p. 15.

62. Ibid.

munera of Christ, teaching, governing and sanctifying. There are also rights which may be more properly described as human rights: they belong to any person. Within this category would be the right to a good reputation and to privacy to the legitimate protection of personal rights of being punished only in accordance with the established norms of law and the responsibility for the promotion of social justice. It could be asked why these rights have been incorporated into the Code alongside what would be considered more specifically Christian rights, or rights which are intrinsic to the reception of baptism. According to Castillo Lara, their presence in legislation was demanded by virtue of completeness and Christian association:

Some were placed there because they are needed for the completeness of the canonical structure. For example, the protection of rights. Others are there because they acquire a specifically Christian connotation and are also required by being Christian (esse), for example, the right of association.⁶³

The Code followed a pragmatic approach in setting forth its rights, much conditioned by the time and circumstances in which they were composed. It is suggested then that the

63. Ibid., p. 20.

legislator included these "human rights" motivated by historical circumstances, "drawing attention to these matters which, at this particular moment seemed necessary to be reaffirmed, underlined or expressed in legislation."⁶⁴

Such a pragmatic criterion should not be interpreted as a minimalizing of the significance of the canons on rights and responsibilities of the Christian faithful. They have an objective foundation and by virtue of "canonization" are not dependent on the changing will of the legislator. This pragmatic criterion, even if not absolute, indicates that the relevance given to specific rights and duties in any legislation corresponds to a given cultural situation. In this perspective one cannot deny that in giving particular prominence to some rights and duties in the Code, it is due to some cultural exigencies present at the time of composition.⁶⁵

Provost is of the opinion that rights as they are presented in the Code are to be considered so "fundamental" that they pertain to the "Church's own constitution even though they are not stated in the form of a written

64. Ibid., p. 21.

65. Ibid.

constitution or fundamental law as such."⁶⁶ J. Coriden has also argued forcefully for the designation of "constitutional" for the rights and responsibilities of the Christian faithful as now organized in the Code of Canon Law. He argues from six points:

a. the rights had their origin in the constitutional statement, Lex Ecclesiae fundamentalis;

b. they were uniquely mandated by the Principia quae Codicis iuris canonici recognitionem dirigant;

c. the apostolic constitution Sacrae disciplinae leges which promulgated the Code of Canon Law asserts that rights are a chief purpose of the code;

d. they have been placed at the beginning of the book, De populo Dei, and thereby are given a prominence where membership within the community and its characteristics are delineated.

e. their content is of basic importance, that is, they are intrinsically fundamental claims;

f. John Paul II singled out the charter of rights for special attention just after the promulgation of the Code.⁶⁷

66. J. Provost, "Promoting and Protecting the Rights of Christians: Some implications for Church Structure", in The Jurist, 46 (1986), pp. 294-295.

67. J. Coriden, "A Challenge: Making the Rights Real", in The Jurist, 42 (1982), p. 4.

According to Coriden, such a constitutional status would accord these rights a juridic priority:

The rights of church members must be accorded a certain antecedence. They deserve and command juridical anteriority in relationship to other canonical dispositions. More concretely, when reflecting on a canonical action, before considering pastoral prerogatives or episcopal responsibilities or official duties, the first concern must be for the rights of the Christian faithful affected by the action. They have the primacy of constitutional claim.⁶⁸

As has been seen, there exists some diversity of opinion among canonists concerning the exact nature of the rights which are now included in the Code under the title of "Rights of the Christian faithful". Many canonists, including those cited affirm that certain human rights have been canonically recognized and that there has been a prominence accorded to rights by virtue of their inclusion in the Code although there is substantial disagreement regarding the applicability of the designation "constitutional" to these rights.

2.3 - Canon 220: The Human Right of Confidentiality

The previous section identified the effort of the Code to

68. Ibid., p. 10.

give prominence to rights, including certain human rights by virtue of legislative form. The concluding section will examine specifically one of the human rights now legislated, the right of confidentiality.

The Code of Canon Law promulgated in 1983 provides protection to all members of the Christian faithful by affirming the basic human right of every human being to good reputation and privacy: "No one is permitted to damage unlawfully the good reputation which another person enjoys nor to violate the right of another person to protect his or her own privacy."⁶⁹

St. Thomas Aquinas placed reputation among the most valuable goods enjoyed by the individual. It is a ius nativum: by the natural law every human being has the right to respect for his person, to his good reputation.⁷⁰ A good reputation has always been a protected right and protected by canonical structures: "The right to one's own privacy was expressly noted because of the danger - not illusory, either of violations that could happen, for example, in seminaries, religious institutes or in some other similar

"Nemini licet bonam famam, qua quis gaudet, illegitime laedere, nec ius cuiusque personae ad propriam intimitatem tuendam violare (c. 220)."

70. "Auferre alicui famam valde grave est: quia inter res temporales videtur fama esse pretiosior" (Summa theologica, IIa-IIae, q. 73. a. 2c).

associations."⁷¹ A. del Portillo underscores the importance of the right of privacy and good reputation:

Since this right is something which belongs to the human person as such, it follows that, within the Church it should be acknowledged as among those enjoyed by all the faithful, independently of their particular function [...][I]t should form an essential part of the basic legal constitution for all the baptized.⁷²

2.3.1 - Gaudium et spes, no. 26

It is significant that the development of papal encyclicals in the area of human rights was to greatly influence the approach of the Second Vatican Council on this topic.

2.3.1.1 - The Right of Privacy and Reputation in Relation to the Common Good

Canon 220 is based on no. 26 of the Second Vatican Council Pastoral Constitution, Gaudium et spes, which addressed the problem of human rights and human dignity within the world community. This article was subtitled, "Promoting the Common Good", a theme prominent in

71. Castillo Lara, "Some General Reflections", p. 20.

72. A. del Portillo, Faithful and Laity in the Church: The Bases of Their Legal Status, tr. by L. Hickey, Shannon, Ireland, Ecclesia Press, 1972, p. 78.

association with the right of privacy and good reputation.

As one commentator to this article observed:

[E]xperience shows that human beings who know how to look after themselves mostly do so at the expense of the common good, while conversely, those who promote the common good all too easily favour the dubious principle that the common interest takes precedence over the interests of the individual. The former confuse promotion of the person with individualistic self-interest, the latter want the individual to merge anonymously with the collectivity.⁷³

This article was a strong endorsement by the Council of the dignity of the human person and its natural result: several rights including the right to a good name and to the safeguarding of privacy all set within the context of the common good:

At the same time, however, there is growing awareness of the sublime dignity of the human person, who stands above all things and whose rights and duties are universal and inviolable. He ought, therefore, to have ready access to all that is necessary for living a genuinely human life; for example, food, clothing, housing, the right freely to choose his state of life and set up a family, the right of education, work, to his good name, to respect, to proper knowledge, the right to act according to the dictates of conscience and to safeguard his privacy, and rightful

73. O. Semmelroth, "The Community of Mankind", in H. Vorgrimler, ed., Commentary on the Documents of Vatican Council II, v. 6, New York, Herder and Herder, 1967, p. 164.

freedom even in matters of religion. 74

Since society can support the needs of the individual only if the individual members are cognizant of the demands and needs of the greater society, there will always be reciprocal activities and duties. As one commentator has observed concerning this dynamic:

It is no accident that the dignity of the human person is evoked in connection with this reference to service of the great society. It is not only in relation to the world of things that the human person has an exalted dignity. Society, too, must be ready to serve; it must not absorb the human person in itself but realize that society only lives by personal development. Society is not a compulsory collectivity with human beings like things that form part of the whole. It is the freely accepted common life of persons who in conjunction promote the physical and mental well-being of its members.⁷⁵

74. "Simul vero conscientia crescit eximiae dignitatis quae personae humanae competit, cum ipsa rebus omnibus praestet, et eius iura officiaque universalis sint atque inviolabilia. Oportet ergo ut ea omnia homini pervia reddantur, quibus ad vitam vere humanam gerendam indiget, ut sunt victus, vestitus, habitatio, ius ad statum vitae libere eligendum et ad familiam condendam, ad educationem, ad laborem, ad bonam famam, ad reverentiam, ad congruam informationem, ad agendum iuxta rectam suae conscientiae normam, ad vitae privatae protectionem atque ad iustam libertatem etiam in re religiosa" (GS, no. 26, pp. 1046-1047; English translation in A. Flannery, Documents of Vatican II, p. 927; emphasis added). Canon 220 has incorporated both the right to a good reputation and the right of privacy: "Nemini licet bonam famam, qua quis gaudet, illegitime laedere, nec ius cuiusque personae ad propriam intimitatem tuendam violare."

75. Semmelroth, "The Community of Mankind", p. 171.

It was therefore within the context of the respect of society towards the individual that the right of reputation and privacy was presented.

2.3.1.2 - The Protection of Personal Rights
and the Common Good

It is clear that the individual and the society are not equal. The individual must devote himself to the community so that through common efforts, all the members of the society will have what is necessary to sustain a fulfilled human life.⁷⁶ But, as a commentator explains, "[F]or its part, however, society must not endanger the independence, privacy and just freedom of the individual."⁷⁷

The common good insists that the larger society never becomes an end in itself, and always places as central the well-being of the human person. "Even though the individual cannot justly refuse to serve the community, the right perspective is, nevertheless, that the social order

76. The 1983 Code has included the concept of the common good in relation to the exercise of rights in c. 223 §1: "In iuribus suis exercendis christifideles tum singuli tum in consociationibus adunati rationem habere debent boni communis Ecclesiae necnon iurium aliorum atque suorum erga alios officiorum."

77. Ibid.

exists for the sake of persons, and not vice versa."⁷⁸ The service which is therefore performed for the society by the individual can in fact promote the well-being of the individual, since such service, if done unselfishly and with true regard for the rights of all people in the society, promotes the individual and helps increase his human dignity.

The popes have given in their writings affirmation to the traditional principle of the common good over individual goods or advantages. This article, however, gives emphasis to a sometimes neglected aspect of the issue which must be considered if human dignity is to be respected and rights protected:

But while the common good is more concrete, it is also less absolute than the fundamental and imprescriptible rights of the person. In other words, it can and should be itself judged by reference to the imprescriptible rights to which it is meant to give concrete expression, against a background of diverse inter-relationships of persons in all sorts of societies.⁷⁹

In a comment particularly appropriate to the issue of right of privacy and to the protection of reputation, Calvez and Perrin state:

78. Ibid.

79. Calvez and Perrin, The Church and Social Justice, p. 121.

The common good is sovereign, but it is in danger of degradation in practice due to the fact of its being exterior to the person. It has to be confronted with the fundamental rights of the person[...]. The popes never speak of apparent personal rights, but they do speak of an apparent common good. Personal rights, which belong to an 'absolute order of values', are the very essence of the common good; it is never permissible to sacrifice them to whatever may appear to be the common good.⁸⁰

Number 26 of Gaudium et spes reflects a careful perspective that should be employed when examining the right of confidentiality. In the past, it has often been appropriate to use the argument of the protection of the common good as the basis for a violation of the individual right of privacy. This article was to state also the corresponding duties of society towards the individual, whose personal rights must also be respected and maintained.

Canon 220 establishes a juridical protection for two distinct but similar rights: the right to a good reputation and the right to privacy. It emerged as legislation in the 1983 Code of Canon Law as the result of the work of two separate coetus: De laicis deque associationibus fidelium⁸¹

80. Ibid.

81. Hereafter cited as De laicis.

and the LEF.

2.3.2 - The Right to a Good Reputation

The coetus, De laicis, in drafting a list of rights of the Christian faithful for the proposed section of the code De populo Dei, utilized a sophisticated organization. It distinguished rights in the Church and rights the Church proclaims for Christians in the world. Rights of the members of the Church themselves were distributed according to a theological system: rights of communion came first; then rights relating to the teaching, sanctifying and ruling functions of the Church; these were followed by personal rights and the protection of rights. Rights of Christians in the world included an express recognition of human rights and concern for justice and peace.⁸² Included in the list of personal rights assembled at the first session of the coetus (November 28 - December 3, 1966) was the right of confidentiality as regards written communications.⁸³ By the sixth session, c. 18 had been formulated which protected the right to a good reputation,

82. Provost, "Ecclesial Rights", p. 53.

83. "Ius ut agnoscatur et servetur secretum correspondentiae" (Communicationes, 17 (1985), p. 190).

which could not be violated illegitimately.⁸⁴ It became the understanding of this coetus that this canon, which duplicated in many respects a similar canon in the LEF, would be eliminated if the LEF were promulgated; otherwise it would be retained as proposed.⁸⁵ In fact, this canon was present in the 1977 schema as c. 32, as formulated at the sixth session.⁸⁶

At a meeting of the coetus in October 1979 to review observations of the 1977 Schema submitted by various consultative groups, it was proposed that c. 32 be suppressed⁸⁷ since the norm was already present in c. 20 of the LEF draft.⁸⁸ Consequently this proposed canon as well as the section which would have included the "Rights of the Christian faithful" were eliminated from the 1980

84. "Fidelibus ius est ut bona fama qua gaudent ab omnibus in honore habeatur; quapropter nemini licet illegitime eandem laedere" (Communicationes, 18(1986), p. 373).

85. Communicationes, 18(1986), p. 373.

86. Pontificia Commissio Codici Iuris Canonici Recognoscendo, Schema canonum libri II de Populo Dei, Typis polyglottis Vaticanis, 1977, p. 30 (hereafter cited as 1977 schema).

87. "Mons. Segretario ne propone la soppressione perché la norma è già nel can. 20 della LEF" (Communicationes 12 (1980), p. 86).

88. "Nemini licet bonam famam qua quis gaudet illegitimi laedere" (Schema Lex Ecclesiae fundamentalis, Romae, Pontificia Commissio Codici iuris canonici recognoscendo, 1976).

draft of the Code of Canon Law.

In 1981, when it was determined that a separate LEF would not be promulgated, the canons on rights and duties were returned to Book II.⁸⁹ However, the formulation of the canon regarding good reputation maintained the wording of the LEF, c. 20, and appeared as c. 220 in the 1982 Schema.⁹⁰

2.3.3 - The Right to Privacy

The right to privacy is also included in c. 220 of the 1983 Code of Canon Law.⁹¹ A preliminary formulation of the concept of privacy emerged in the 1977 schema, in c. 33 as submitted by the coetus De laicis: "The Christian faithful have the duty and the right to privacy in correspondence or anything else of a personal nature."⁹² However, at the

89. Provost, "Book II, 'The People of God'", p. 136.

90. "Nemini licet bonam famam qua quis gaudet illegitime laedere" (Pontificia Commissio Codici iuris canonici recognoscendo, Codex iuris canonici: schema novissimum, Typis polyglottis Vaticanis, 1982).

91. "[N]ec ius cuiusque personae ad propriam intimitatem tuendam violare."

92. "Christifideles officium et ius habent servandi secretum commercii epistolaris aliusve personalis indolis" (Schema canonum libri II, 1977; English translation in CLSA, "Draft of the Canons of Book II: The People of God", Rome, Vatican polyglot Press, 1977).

meeting of the Commission which reviewed observations to the 1977 Schema, it was suggested that c. 33 be eliminated, since the norm was already contained in the Code and, in fact, had more relevance to religious and need not be included in this section (Rights of the Christian faithful).⁹³ The concept of privacy however reappeared as a canonical norm in the promulgated Code of 1983 within c. 220, but in a more generalized context than the prior form as a specific reference to correspondence.⁹⁴

Conclusion

Canon 220 establishes the right of privacy and the right to a good reputation. The first part of c. 220 addresses the right to a good reputation. This right was appropriated from the list of human rights enumerated by Pope John XXIII in his encyclical Pacem in terris, and later included in the Pastoral Constitution, Gaudium et spes. It was included in the Code revision schema, De populo Dei, c. 32. It was also listed in the LEF c. 20. The second right, that of privacy, is taken from c. 33 of De populo Dei, which was not found in the LEF.

93. Communicationes, 12 (1980), p. 86.

94. Provost, "Book II, 'The People of God'", p. 153.

The next chapter will seek to analyze the applicability of c. 220 to diocesan clerics, particularly by examining issues of confidentiality as they have developed and been applied traditionally to religious.

3 - CONFIDENTIALITY AND CLERGY PERSONNEL RECORDS

Introduction

In the preceding chapter, the development of the human rights of privacy and to a good reputation were presented within the context of the human rights tradition of the Roman Catholic Church. It was also seen that these rights are now present within the universal legislation of the Church by their inclusion in c. 220 of the 1983 Code of Canon Law. Since c. 220 is included in the section of the code entitled "The Obligations and Rights of all the Christian faithful", it may be properly concluded that this designation includes clerics and the laity.

This chapter will seek to demonstrate the applicability of c. 220 to members of the diocesan clergy by analyzing the principles regarding confidentiality which have emerged primarily from religious law and norms regarding seminary procedures. The first section of this chapter will examine secular and ecclesial concepts of privacy and confidentiality; the next section will explore principles regarding confidentiality and privacy which have developed primarily from religious law. Included in this section will be a study of psychological testing as it has been introduced into religious life, and some principles

regarding testing which have been issued by the Holy See. Lastly, c. 642, which explicitly makes reference to the right of privacy and confidentiality in regard to novitiate screening, will be analyzed. As will be stated frequently in this chapter, the principles which have been enunciated in regards to religious have practicability in regards to diocesan clergy and their personnel records.

3.1 - An Understanding of Privacy

The concept of privacy is often difficult to define. As

A. R. Miller explains:

[I]t [privacy] is exasperatingly vague and evanescent, often meaning strikingly different things to different people. In part, this is because privacy is a notion that is emotional in its appeal and embraces a multitude of different 'rights' some of which are intertwined, others often seemingly unrelated or inconsistent.¹

E. Van Den Haag discusses privacy in terms of the "individual's right to be free from unwarranted intrusions and publicity. It is, in essence, the right of the

1. A.R. Miller, The Assault on Privacy: Computers, Data Banks and Dossiers, Ann Arbor, MI, University of Michigan Press, 1971, p. 25.

individual to be let alone."² Perhaps the best known legal exposition of the modern right to privacy was given by S. Warren and L. Brandeis, who in reviewing earlier decisions granting relief for violation of privacy on the basis of defamation, invasion of a property right and breach of contract or of implied trust, determined that an underlying theory did in fact underlie such decisions. This theory was the "right of privacy".³

The right of privacy is currently protected in a vast majority of jurisdictions in the United States, as statute, constitutional law, natural law, or evolution from common law.⁴ The term "privacy" was defined by U.S. Supreme Court Justice W. O. Douglas to encompass two distinct elements: "[T]he individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing."⁵ This definition reserved to the client to enter

2. E. Van Den Haag, "On Privacy", in J. R. Pennock and J. W. Chapman, eds., Privacy, New York, Atherton Press, 1971, p. 149.

3. S. Warren and L. Brandeis, "The Right to Privacy" in Harvard Law Review, 4 (1890), pp. 193-220.

4. "The Right of Privacy" in The Catholic Lawyer, 11 (1965), p. 336.

5. As quoted in J. Hennessy, "The Client's Right to Privacy", in W. C. Bier, ed., Privacy: A Vanishing Value? New York, Fordham University Press, 1980, p. 112.

a therapeutic relationship with the assurance of confidentiality, but also the freedom to decide how much would be shared with the therapist. Black's Law Dictionary defines privacy as "the legally protected right of an individual to be free from unwarranted publicity and to be protected from any wrongful intrusion into his private life which would outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities."⁶ Early in the common law of the United States, it was recognized that physical intrusion violated the right of privacy. This concept of unauthorized intrusion was logically extended eventually to such issues as the tapping of telephone wires which was deemed by some civil courts as an unwarranted intrusion, therefore, an invasion of the right of privacy.⁷ A civil law jurisprudence developed that acknowledged that an act would constitute a violation of privacy at common law if "it constitutes a prying or intrusion into a private matter which would be offensive to a reasonable man."⁸

6. H.C. Black, Black's Law Dictionary, 5th ed., St. Paul, MN, West Pub. Co., 1979, p. 1075.

7. "The Right of Privacy", p. 336.

8. Ibid.

3.1.1 - Privacy in an Ecclesial Perspective

Many Christian authorities, while citing the same sensitivity found within the secular realm, would look for a particular Christian perspective to anchor their concerns about the right of privacy. As Johnstone points out, there is no real scriptural warranty as such for a doctrine of the Church about privacy: "The scriptures do not address our modern question of the right to privacy and it would be artificial to look for proof texts."⁹ But as Johnstone also observes, even though there is no theory of rights in the scriptures, there is a fundamental vision of life found in the scriptures which gives meaning to work for justice and human rights.¹⁰

Recent Christian social teaching, explains Johnstone, would see the interest (and right) of privacy not merely as a negative matter of liberty, erecting frontiers around the inviolable person, but positively, as a special contribution of society to the person, facilitating his or her development in genuine autonomous, moral

9. Johnstone, "Privacy and Intrusion", p. 328.

10. Ibid., p. 329.

responsibility.¹¹

R. McBrien observes that the concept of privacy has received little attention directly within the theological realm:

[T]he category of privacy appears in no theological dictionary or encyclopedia. [...] The right of privacy is understood as the right to the protection of one's secrets, of one's confidences, of one's psychic self. Thus my privacy is violated, if someone reads my mail without permission, or photographs my medical records surreptitiously, or tape records my conversations without my knowledge, or tells other persons something communicated in the strictest confidence, or wiretaps my telephone without legal warrant or probes into my credit records without my consent.¹²

McBrien then goes on to expand this traditional understanding of privacy in a more positive light:

The right to privacy can also mean the right to self-determination. [...] The believer's right to be a believer at all is itself a matter of privacy. The believer's right to follow a spiritual program best suited to himself or herself for the sake of Christian growth and ultimately for the sake of personal salvation is a right of privacy. The believer's right to decide how much physical and psychic energy he or she can realistically expend on behalf of the gospel is covered by the right of privacy. The believer's right to decide how to

11. Ibid.

12. R. McBrien, "The Believer's Right to Privacy", in Bier, Privacy, A Vanishing Value?, p. 124.

regulate his or her leisure activities, friendships, modes of recreation, and so forth, is similarly a matter of privacy.¹³

J. Coriden speaks of privacy in an "informational sense". "It [privacy] is the limitation of access to one's personal history, life, health and feelings. Privacy is based on the autonomy, selfhood, self-determination, and sacred specialness of the human person, but it is not identified with it."¹⁴ As Coriden further observes, the right to privacy is not an unlimited one:

It goes without saying that the right to privacy is not absolute even though it is closely related to the identity, autonomy, and sacredness of the person. The need of the society or the community to obtain a certain amount of information about its members, certain critical or qualifying facts, balances and puts in perspective the individual's need for and right to privacy. The Roman Catholic Church is the community in question here; the parishes, seminaries, religious communities, and dioceses are the social settings which constitute the other pole of the tension with personal reserve or privacy.¹⁵

13. Ibid., p. 127, 130.

14. J. Coriden, "Toward a New Policy for the Church", in Bier, Privacy: A Vanishing Value? p. 388.

15. Ibid.

3.1.2 - Confidentiality and Respect for Reputation

Respect for another's reputation involves, according to F. G. Morrisey, the refraining from the communication to others of specific information that could be harmful.¹⁶ This aspect, included in c. 220, could be properly referred to as "confidentiality" and deals more properly with the protection given to individuals from improper sharing of certain information and the violation of one's good name. The term "confidentiality" can be understood as some defined information which will be kept secret from some people, but not others, at least for a certain period of time.¹⁷ Hennessy describes this concept as "the right of the client to have communications or exchanges of information given in a professional-client relationship kept secret."¹⁸

It is important that both aspects of c. 220 - privacy and good reputation - be kept in mind, since as Morrisey

16. F. G. Morrisey, "Practical Points for Formation Directors in the New Code", in In-Formation, no. 92 (March/April 1986), p. 1.

17. J. Serritella, "Confidentiality, the Church and the Clergy", in CLSA Proceedings (48th Annual Convention, Denver, Colorado, 13-16 October, 1986), Washington DC, Canon Law Society of America, 1986, p. 85.

18. Hennessy, "The Client's Right to Privacy", p. 112.

comments, these two aspects can readily overlap and both are a part of the nature of confidentiality.¹⁹

3.2. - Privacy and Good Reputation:
Principles from Religious Law

Various canonical institutions within religious law have attempted to offer protection from improper violations of privacy to the members of religious communities.

3.2.1 - Manifestation of Conscience

In religious law, traditionally when one has been obliged to reveal private matter, the revelation is protected by two safeguards: the seal of confession or manifestation of conscience:

Thus in sacramental confession, for example, he [the religious subject] is obliged to reveal the matter necessary to receive absolution, but his revelations are protected by the seal of confession. In manifestation of conscience to a spiritual father (or to a superior) outside of confession, he may be obliged to reveal himself in order to receive spiritual direction, but his revelations are protected by the strictest secrecy short of the seal.²⁰

19. Morrisey, "Practical Points", p. 1.

20. Ibid., p. 34.

The protection granted in the case of manifestation of conscience indicates that the material manifested cannot be used in any external way without the express consent of the subject, e.g., material which could render the subject unsuitable for vows or orders.

The 1917 Code, in c. 530, § 1²¹ and the 1983 Code of Canon Law, in c. 630, § 5²² protects religious in their right to privacy by forbidding their superiors to induce them to a manifestation of conscience. The canonical principles, although again primarily oriented towards religious life, contain a certain applicability to diocesan clerics as well, since "the natural law protects all, it seems, in a right to privacy."²³

As Bondero and McCarthy observe, there is perhaps no greater indication of the need for dialogue between psychology and theology, than the uncertainties surrounding

21. "Omnes religiosi Superiores districte vetantur personas sibi subditas quoquo modo inducere ad conscientiae manifestationem sibi peragenda."

22. "Sodales cum fiducia Superiores adeant, quibus animum suum libere ac sponte aperire possunt. Vetantur autem Superiores eos quoquo inducere ad conscientiae manifestationem sibi peragenda."

23. F. F. Reh, "Use of the Psychologist's Report in a Diocesan Seminary", in Selected Papers from the American Catholic Psychological Association, 1960, 1961, New York, Fordham University Press, 1962, p. 74.

psychological assessment and matters of conscience.²⁴ This concern has been noted in such instances as the demand of a superior to his subject to receive diagnostic evaluation. Is he forcing an involuntary manifestation of conscience? "Every psychologist knows that projective tests utilize stimuli that are purposively structured - even if they are ambiguous[...] such tests are in truth clearly administered to uncover concealed attitudes."²⁵ According to J. C. Ford, it is clear that psychotherapeutic interviews and personality tests often contain substantial revelations of matters which pertain strictly to the domain of manifestation of conscience.²⁶ It would be an abuse, claims Ford, for a superior to induce a subject to undergo testing that would result in a report containing material within the forum of conscience:

But the superior who would demand that such material be communicated to him, or would induce a subject in any way to communicate it to him, would be violating canon law, even if the communication is to be made in a psychiatric report, personality test, or psychological

24. E. A. Dondero and T. N. McCarthy, "Professional and Theological Problems in Psychological Assessment", in Selected Papers from the American Catholic Psychological Association, 1960, 1961, New York, Fordham University, 1962, p. 68.

25. Ibid.

26. J. C. Ford, Religious Superiors, Subjects and Psychiatrists, Westminster, MD, Newman Press, 1963, p. 52.

evaluation. The fact that the psychiatrist looks at his material from a different point of view, or is not interested from a moral point of view, and uses it only to make a psychological evaluation, does not change the fact that it does constitute manifestation matter and that the superior is ordering or inducing the subject to have it revealed to himself.²⁷

And, importantly, it is a problem that is not resolved by the subject giving consent: "The superior is forbidden not only to command the subject to reveal his conscience, but must not ask him, persuade him, or induce him to do so."²⁸ Even if a psychiatrist were to submit a general report, omitting details which pertain to the conscience, the potential for possible violation of conscience is present: "It does not do to say that such a report or evaluation or diagnosis is distinct from the information on which it is based."²⁹ Ford contends that the superior is strongly bound not to make use of the psychiatrist, psychologist or any counselor to extract in any way information reserved to the forum of the conscience:

When the superior makes use of a psychiatrist instead of the spiritual father, he seems to be countenancing [...] inadmissible confusing of the two fora. He is not, perhaps, explicitly inducing the

27. Ibid.

28. Ibid.

29. Ibid., p. 54.

subject to manifest conscience material outside of the seal of confession and outside the specifically safeguarded secret of manifestation to the psychiatrist, who is expected thereupon to report back, so that the superior can make decisions in the external forum. One must not forget that, when a subject manifests his conscience in religious life, the recipient of this confidential material is forbidden not only to reveal the secret material itself, but is also forbidden to make use of the material whatever against the will of the subject. Furthermore, the subject may have the right, according to rule, to manifest his conscience only under the seal of confession.³⁰

At times it may also be prudent for a candidate to religious life to answer certain relevant questions that directly relate to his inner psychism. As Ford indicates, this should always be done with the candidate's consent:

The constitutions and rules may require of subjects that they be open with their superiors or spiritual guides or both. By entering the particular congregation they agree to these rules and consent to this limitation on their psychic privacy. But they consent to it within the framework of the laws of the Church and of the institute, which surround these communications with special safeguards, one of the main purposes of which is to keep the internal forum separate from the external forum. There would be very little openness except for some such protection.³¹

30. Ibid., pp. 55-56.

31. Ibid., p. 35.

Thus as Ford illustrates, in religious life, the dependence of the religious on the superior does not include a general accessibility to the secrets of the subject's psychism.

To summarize concerning the matter of manifestation of conscience and the right to privacy, the following principles may be extracted:

a. A superior's right to command or induce a member of a community to psychiatric testing, evaluation or treatment is limited by the content of the material and the forum to which that material properly belongs.

b. A psychiatrist is not permitted to submit an even general report to a religious superior of a member's revelation of matters of conscience.

c. The superior's right to act in the external forum is seriously limited if the information that gives basis for the action is revealed in the forum of the conscience.

The separation in religious life of the forum of conscience from the forum of government, as foreseen in the canonical protection of improper manifestation of conscience, in fact explicates the natural law and the right of privacy, again equally applicable to the relationship of diocesan cleric to bishop. The diocesan bishop, it would seem, could not extract conscience material from a cleric to be used as the basis of any

external governing action.

3.2.2 Psychological Testing

It is not uncommon that in the course of a cleric's ministry, he may need to avail himself of psychological testing or counseling, or he may be instructed by his bishop to seek psychological help. This may be assessed as a healthy development. As Ford observed analogously for religious:

Religious orders and congregations today are coming to recognize (as they should and this is a healthy development) the existence and great importance of mental and emotional illness in the modern psychiatric sense. Recognizing such illness as 'legitimate' in religious life, and not by any means disqualifying from it, they are forced to recognize also the need for appropriate, professional psychiatric treatment.³²

With the widespread use of psychological testing as a screening device in programs for religious formation and seminary training, as well as the increasing dependence of diocesan bishops and religious superiors on such tools for assistance in personnel matters, growing concern over the last few years has surfaced. Some have suggested that the kinds of assessments rendered by such testing could

32. Ford, Religious Superiors, p. 29.

constitute the invasion of privacy of the individual. It becomes important that the parameters of privacy and confidentiality be explored; who may properly have access to any records that are generated as a result of these procedures? What rights exist for the cleric in regards to the dissemination of resulting reports?

3.2.2.1 - Categories of Psychological Testing

Psychological tests have been defined as an "objective and standardized measure of a sample of behavior."³³ A. Anastasi observes that psychological tests are like any other tests in any other science, insofar as observations are made on a small but carefully chosen sample of an individual's behavior.³⁴ When psychological testing is applied to candidates for the religious life, the aim is the suitability of the candidate, "whether the candidate has the necessary qualifications to lead the life of a

33. W.C. Bier, "Psychological Tests and Psychic Privacy", in Catholic Theological Society of America Proceedings, (17th Annual Convention, Pittsburgh, PA, 25-28 June, 1962), Yonkers, NY, Catholic Theological Society of America, 1963, p. 161.

34. A. Anastasi, Psychological Testing, New York, Macmillan, 1976, p. 23.

religious in some particular institute."³⁵

Clinicians typically draw upon many sources of data in arriving at test scores. Commonly, information that is derived from interviewing and from the particular case history is combined with test scores to build up an integrated picture of the individual.³⁶ These tests are sometimes referred to as "personality tests". Although the term "personality" is sometimes employed in a broader sense, in the terminology of psychological studies, personality tests are instruments for the "measurement of emotional, motivational, interpersonal and attitudinal characteristics."³⁷ The diagnostic or predictive value of psychological tests depends on the degree to which it serves as an indicator of a significant area of behavior.³⁸

A frequent division of psychological tests is into four basic categories:

a. intelligence tests, also called general ability tests, designed to estimate the overall level of intellectual functioning;

35. R. Vaughan, "Moral Issues in Psychological Screening", in Review for Religious 16 (1957), p. 65.

36. Anastasi, Psychological Testing, p. 464.

37. Ibid., p. 493.

38. Ibid., p. 24.

b. aptitude tests, used to predict success in some occupation or training course;

c. achievement tests, designed to assess the effect of training in a given field;

d. personality tests, which include measurement of emotional adjustment, social traits, character traits, and measures of motivation, interests, and attitudes.³⁹ Personality tests are frequently the type utilized for religious vocational screening and personnel development.

Personality tests are often divided into two overall groups: self-report and projective.

a. Self-report Inventories - The first type of personality test to be developed was the "self-report" inventory. This test was developed during World War I, in an effort to detect soldiers likely to break down in combat. Since individual interviews were not feasible with such large numbers of recruits, a "Personal Data Sheet" was developed as an answer to this problem.⁴⁰ This format attempted to standardize the psychiatric interview, adapting it for mass screening purposes. The Personal Data Sheet was followed by a number of adjustment measurement inventories, which consist of "lists of problems, symptoms,

39. Bier, "Psychological Tests", pp. 163-164.

40. Ibid., p. 164.

or grievances to be checked or answered."⁴¹ The purpose of these tests was to differentiate persons who are essentially normal psychologically from those who were considered to have notable psychological problems or some neurotic tendencies. It has become quite evident that self-report inventories constitute a process of self-revelation. As Bier points out, while there is no right or wrong answers on personality tests, there are psychologically favorable or unfavorable responses.⁴²

b. Projective Technique - The second technique utilized in psychological testing is referred to as "projective". Its distinguishing feature is in the use of a relatively unstructured task - one that permits an almost unlimited variety of possible responses. The underlying hypothesis is that the way in which the individual perceives and interprets the test material or "structures the situation" will reflect fundamental aspects of his psychological functioning."⁴³ The expectation is that the test matter will serve as a sort of screen upon which the subject "projects" his characteristic ideas, strivings, conflicts,

41. Ibid., p. 165.

42. Ibid., p. 167.

43. Ibid., p. 169.

fears, attitudes, and aggressions.⁴⁴ As Anastasi observes: "Like the performance and situational tests, projective techniques are more or less disguised in their purpose, thereby reducing the chances that the subject can deliberately create a desired impression."⁴⁵ These types of tests normally consist of free associations, sentence completion tests, drawing, arranging toys to create a scene, extemporaneous dramatic plays, and interpreting pictures or inkblots.⁴⁶

Such projective testing is usually employed by psychologists as a supplement to information that is obtained by "self-report inventories", since the claim is made frequently that projective techniques give indications of the unconscious forces at work in the personality. Anastasi observes:

To the extent to which the latter claim is true, such techniques would obviously supplement the information provided by the self-report inventory, which would be limited to the conscious image an individual had of himself.⁴⁷

In the projective technique there is an obvious self-

44. Ibid.

45. Anastasi, Psychological Testing, p. 19.

46. Ibid.

47. Bier, "Psychological Tests and Psychic Privacy", p. 171.

revelation; however, as Bier indicates, there is usually less a feeling by the respondent of self-disclosure because he does not know anything about the inferences, which are normally quite subtle, of his responses:

It can truly be said, therefore, that an individual in taking a projective test gives information about himself to the examiner that he is unaware of giving. It is possible also that he may give evidence from his test responses, for instance on the Rorschach, of tendencies of which he himself is unconscious, e.g., of latent homosexuality, or aggression, or hostility. This therefore, can be a profound revelation of the self.⁴⁸

3.2.2.2 - Individual and Institutional Testing

Individual testing has been defined as testing undertaken for the benefit of the individual at his request and for his personal information and guidance alone.⁴⁹ Institutional testing is undertaken for the benefit of an institution, organization, or religious community to which an individual belongs or desires to belong. As Bier indicates, important ramifications result in regards to privacy depending on the type of testing employed:

In the first case [individual testing]

48. Ibid., p. 172.

49. Ibid.

the psychologist acts in the name of the individual and per se owes duties only to him. In the second case the psychologist acts primarily in the name of the organization or religious order. He is their agent, and owes duties primarily to them.⁵⁰

It is normally expected that if the procedure is primarily for the benefit of the individual as in the first case (individual testing), the results will not be used to the jeopardy of the person tested. In the second case (institutional testing) it is implied that the procedures are carried out primarily for the benefit of the institution (organization or religious community which has employed the psychologist) and issues of conflict of interest may arise which will require careful attentiveness to procedures of consent.

3.2.3 - Psychological Testing and the Directives of the Holy See

The directives of the Church concerning psychological testing have been developed, for the most part, within the context of screening of candidates for the priesthood and religious life. It will be important to review the various directives that have been included in certain documents issued by the Holy See in regard to psychic evaluation that

50. Ibid.

some guidance may be elicited in regards to confidentiality.

3.2.3.1 - Sedes sapientiae

The need for some psychological assessment has been expressed by the Holy See for screening candidates for religious life. The "General Statutes" annexed to the Apostolic Constitution, Sedes sapientiae⁵¹, in discussing the admission of candidates to the novitiate stated a need for both a physical and psychological assessment:

Both the moral and the intellectual qualities of the candidates must be accurately and thoroughly examined. Moreover, their physical and psychological fitness must also be investigated, relying in this on the medical history and diagnostic judgment of an experienced doctor, even in relation to possible hereditary disease, especially mental ones; the judgment of the doctor must be recorded

51. Sacra Congregatio de Religiosis, "Constitutio apostolica 'Sedes sapientiae' eique adnexa 'Statuta generalia' de religiosa, clericali, apostolica institutione in statibus acquirendae perfectionis clericis impertienda", May 31, 1956 (hereafter cited as General Statutes, followed by page number and article; English translation in Sedes Sapientiae and the General Statutes, 2nd ed., Washington, DC, Catholic University of America Press, 1957).

in the report of each candidate.⁵²

The aim of such psychological testing and evaluation of potential candidates is to insure that the institute has in the applicants persons of sufficient psychological maturity and stability to enable them to adjust psychologically to the demands of the religious life.⁵³ It is the function of the psychological evaluation to furnish more precise information on the personality characteristics of the individual so that judgment on the stability of the candidate may be made more carefully.

3.2.3.2 - Pius XII: Address on Applied Psychology

Pius XII, in an address to a Congress of the International Association of Applied Psychology on April

52. "[C]andidatorum dotes accurate omnique ex parte examinentur, sive morales sive intellectuales; physica insuper et physica eorum aptitudo exquiratur, adhibito quoque probati medici anamnestico atque diagnostico diligenter iudicio, etiam quoad tabes forte hereditarias, praesertim mentales; medici iudicium in singulorum scheda adnotetur" (General Statutes, p. 54, a. 33; English translation in Sedes Sapientiae and the General Statutes, p. 46, a. 33).

53. B. Frison, Selection and Incorporation of Candidates for the Religious Life, Milwaukee, WI, Bruce Pub. Co., 1962, p. 88.

10, 1958,⁵⁴ explained the inviolable right of the person to keep secret the content of his own psychism: "In itself, the content of the psychism belongs exclusively to the person (here, to the subject of the experiments and treatment) and remains known to him alone."⁵⁵ The psychologist however acts with freedom in those areas which have not been designated by the examinee with any particular private significance. Caution is called for, claims Pope Pius, in certain circumstances: "But there is a large portion of his inner world which the person discloses to a few confidential friends and shields against the intrusion of others. Certain matters are kept secret at any price and in regard to anyone."⁵⁶ There exists an area of the inner psychism, which Pope Pius warns, deserves most careful consideration by therapeutic counselors:

54. In A.A.S., 50 (1958), pp. 268-286 (hereafter cited as Applied Psychology, followed by page number; English translation in The Pope Speaks 5 (1958), pp. 7-26).

55. "En soi, le contenu du psychisme appartient exclusivement à la personne (ici, au sujet des expériences et du traitement) et reste connu d'elle seule" (Applied Psychology, p. 276; English translation in The Pope Speaks, p. 15).

56. "Mais il est une large part de son monde intérieur, que la personne ne découvre qu'à peu de confidents et défend contre l'intrusion d'autrui. Certaines choses seront même gardées secrètes à tout prix et à l'égard de n'importe qui (Applied Psychology, p. 276; English translation in The Pope Speaks, p. 15).

Moreover, psychology shows that there exists an area of the intimate psychism - in particular, tendencies and dispositions - which is so hidden that the individual will never know its existence, much less suspect it. And just as it is illicit to appropriate another's goods or to make an attempt on his bodily integrity without his consent, so it is not permissible to enter into his inner domain against his will, whatever is the technique or method used.⁵⁷

In such cases, the importance of consent is of particular importance:

If the consent is unjustly extorted, any action of the psychologist will be illicit; if the consent is vitiated by a lack of freedom (due to ignorance, error or deceit), every attempt to penetrate into the depths of the soul will be immoral. On the contrary, if the consent is given freely, the psychologist can in the majority of cases, but not always, act according to the principles of his science without contravening moral norms.⁵⁸

57. "La psychologie montre en outre qu'il existe une région du psychisme intime - en particulier des tendances et des dispositions - si cachée que l'individu n'arrivera jamais à la connaître ni même à la soupçonner. Et de même qu'il est illicite de s'approprier les biens d'autrui ou d'attenter à son intégrité corporelle sans son consentement, il n'est pas permis d'entrer, contre sa volonté, dans son domaine intérieur, quelles que soient les techniques et les méthodes employées" (Applied Psychology, p. 276; English translation in The Pope Speaks, p. 15).

58. "Si ce consentement est extorqué injustement, toute action du psychologue sera illicite; s'il est vicié par un manque de liberté (dû à l'ignorance, à l'erreur ou à la tromperie), toute tentative de pénétrer dans les profondeurs de l'âme sera immorale" (Applied Psychology, p. 277; English translation in The Pope Speaks, p. 15).

3.2.3.3 - July 15, 1961 Monitum of the Holy See

A monitum issued by the Supreme Sacred Congregation of the Holy Office on July 15, 1961, contained directives addressed directly to the question of psychological methods in religious life discernment:

The opinion of those who maintain that previous psychoanalytical training is altogether necessary for the reception of orders, or that candidates for the priesthood and religious profession must undergo examinations and tests of a strictly psychoanalytic character, must be rejected. This holds also if there is a question of determining the aptitude required for the priesthood or religious profession.⁵⁹

Although seminary officials and religious superiors were not prevented from making use of psychological tests for assessment of perspective candidates, those procedures which could be described as strictly psychoanalytical (such as the investigation of mental processes by means of free

59. "Improbanda est opinio eorum qui autumant praevidiam institutionem psychoanalyticam omnino necessariam esse ad recipiendos Ordines Sacros, vel proprie dicta psychoanalytica examina et investigationes subeunda esse candidatis sacerdotii et professionis religiosae" (A.A.S. 53 (1961), p. 571; English translation in Canon Law Digest, 5 (1958-1962), p. 196). The doubt engendered by these directives concerns the precise meaning of 'psychoanalysis'. For a fuller discussion of the use of the term in this monitum, see J. J. Lynch, "Notes on Moral Theology" in Theological Studies, 23 (1962), p. 235.

association, dream interpretation, interpretation of resistance, transference manifestation, etc.) were prohibited.⁶⁰

3.2.3.4 - Renovationis causam

The Instruction of the Sacred Congregation for Religious, Renovationis causam, issued January 6, 1969,⁶¹ while expressing its support for psychological assessments in vocational screening, cautioned its use be restricted to exceptional cases in the selection of novitiate candidates:

If the superior judges, in certain more difficult cases, that a fully-consenting candidate should resort to the services of a prudent and qualified psychologist known for his moral principles, it is also desirable that this examination, in order to be fully effective, should take place after an extended period of probation, so as to enable the specialist to formulate a diagnosis based on experience.⁶²

60. Lynch, "Notes on Moral Theology", p. 237.

61. Sacra Congregatio pro religiosis et institutis saecularibus, Renovations causam, January 6, 1969, in A.A.S., 61 (1969), pp. 103-120 (hereafter cited as RC, followed by article no. and page). English translation in The Pope Speaks 14 (1969), pp. 61-77.

62. "Quodsi in quibusdam casibus difficilioribus Superior censuerit, consentiente eo, cuius interest, medicum psychologum, in arte sua vere peritum, prudentem et principiis moralibus commendatum, consulere, optandum est, ut, ad maiorem efficacitatem assequendam, hoc examen non nisi post satis diuturnum tempus probationis transactum fiat, ea mente, ut medicus speciali disciplina insignia

Recourse to a specialist is therefore seen in this directive not as a general rule but in more difficult cases. Also importantly noted was the fact that nothing was to be done in regards to this referral without the candidate's knowledge and consent.

3.2.4 - Principles in Psychological Evaluation

Pius XII emphasized the respect for the personal psychism of the individual as well as the necessary obtaining of consent before probing this area. Psychologists have frequently indicated that when dealing with psychological testing and evaluating, it is necessary that, to a large extent, the testing devices remain obscure and ambiguous so that the integrity of the exam and the validity of the results are assured. In order to maintain the effectiveness of psychological screening but also to protect the privacy of the individual, two concepts have been gradually developed by psychologists, with inherent adaptability to the Church when dealing with this issue: relevance and informed consent.

post experimenta proferre possit iudicium" (RC. p. 113; English translation in The Pope Speaks, p. 71).

3.2.4.1 - Principle of Relevance

"Relevance" has been defined as a practicable effort to ascertain the validity of tests or other procedures for the particular diagnostic or predictive purposes for which they are being utilized.⁶³ The information which the person examined is asked to reveal must be relevant to whatever has been stated as the purpose of the examination. Two psychologists have noted:

Problems arise when we are asked to do a diagnosis on a candidate for the priesthood or religious life. We are then commissioned to render a judgment on the suitability of the candidate from our particular frame of reference. Can such a commission be construed as carte blanche permission to investigate all areas of psychological functioning? Is there an obligation to indicate to the candidate the intended scope of our investigation? True, in practice most psychologists do sketch in the broad outlines of the areas to be investigated when they first meet the candidate. However, the question of an obligation to indicate the scope of the investigation invites a clarification from the theologian.⁶⁴

Bier recommends that boundaries be set before the

63. A. Anastasi, "Psychological Testing and Privacy", in Bier, Privacy: A Vanishing Value? p. 351.

64. Dondero and McCarthy, "Professional and Theological Problems", p. 68.

psychologist begins an examination and that restraint be exercised:

By restraint I would mean that the psychologist should refrain from probing any more deeply into the personality of the subject than is really necessary to achieve the purpose of testing. [...] [A] psychological examination should not require the subject to bare his soul any more than necessary.⁶⁵

Bier would attempt to reserve intense self-revelation in testing procedures:

It would be my contention that the self-report inventories should stay as clear as possible of the inner self-concept and the reasonable elaboration and explanation of the latter. [...] Whatever incursion is unavoidably made into the inner psyche by the self-report inventories should be made with reserve and restraint.⁶⁶

It could be concluded from Bier's observations, that projective tests used in psychological screening programs should be used sparingly and only if the self-inventory component is ineffective. Usually the self-report inventories are used as initial testing devices and when further testing is shown to be necessary, the more penetrating projective techniques are used: "The psychologist does not usually start with projective

65. Bier, "Psychological Tests", p. 68.

66. Ibid.

techniques, but resorts to them in the individual cases in which there is a need for them."⁶⁷ This would underscore Bier's hesitation and restraint in projective technique utilization. Ford correctly observes, even with safeguards as to the relevance of the testing procedure: "Any test may be seen as an invasion of privacy for the subject who does not wish to reveal himself to the psychologist."⁶⁸

3.2.4.2 - Principle of "Informed Consent"

The second factor to be considered in the area of psychological testing is informed consent. This concept has been described by Anastasi in terms of three components: "The examinee should certainly be informed about the [1] purpose of testing, the [2] kinds of data sought, and the [3] use that will be made of his scores."⁶⁹ Anastasi and other psychologists have been challenged by the development of psychological assessment programs to protect the individual's right to safeguards in regards to privacy while still producing significant data. When testing is

67. Ibid., pp. 178-179.

68. Ford, Religious Superiors, p. 38.

69. Anastasi, "Psychological Testing and Privacy", p. 51; emphasis added.

provided for institutional purposes, the examinee should be "fully informed as to the use that will be made of his tests scores."⁷⁰ The results of tests that have been administered in a clinical situation should not be made available for institutional purposes unless consent has been given by the examinee. Ford states that if the candidates for admission to religious life have taken psychological exams for entrance, they should always be notified if the results of these tests are to be used for or by anyone else:

If in addition it is intended to make use of the test results for other purposes [than admission requirements], the candidates' consent should be asked. For instance, if the master of novices or others will use the psychologist's report for the guidance of the novice, to help superiors decide about admission to first vows, or later in religious life for other purposes; or if it is contemplated to give access to the reports at a later time to those who are studying the validity of the psychological evaluations and predictions - for all these purposes the consent of the subject is required, and in case of doubt about his mind in the matter, consent cannot be presumed.⁷¹

Ford goes on to observe further that the right of religious in regards to the use of any psychological examinations administered after their admission to religious life should be scrupulously observed:

70. Ibid.

71. Ford, Religious Superiors, p. 44; emphasis added.

Likewise religious, after entrance into religion (this includes novices, of course), cannot give valid consent to tests, evaluation or treatment, unless they know what use will be made of the reports. For instance, will these be used by superiors for their external government to help decide promotion to orders or vows? or to make assignments? or by deans for their academic guidance and disposition? or by spiritual fathers for their spiritual direction in the internal forum?⁷²

Religious should also be informed in general what persons or classes of persons will have access to these reports: "[U]nless they have adequate, concrete knowledge of the uses to which the results of testing, evaluation, and treatment are to be put, they do not give a valid consent to the proceedings."⁷³ As Ford further observes, it is important that the subject understand what kind of information will be revealed as a result of the testing:

Obviously he cannot know the specific information. The test is given precisely to discover these specifics. But he should have a general but concrete appreciation of the kinds of material which these tests and interviews elicit and the kinds of reports which psychologists and psychiatrists make. He cannot validly consent unless he has some real appreciation that he may reveal unfavorable material about himself, embarrassing if not defamatory traits of character or personality; that the

72. Ibid. p. 45.

73. Ibid.

information to be revealed may include unconscious material of which he is not aware and what this means in the concrete; that consultation with a psychiatrist may result in a diagnosis of emotional illness, more or less severe.⁷⁴

Ford as a practical matter suggests that in order to facilitate a valid consent on the part of the subject preliminary to psychological testing, evaluating and treatment, the person be permitted to see samples of psychologists' and psychiatrists' reports. With this more concrete kind of information and the knowledge of what will be done with the results of the tests, a better chance is given for the validity of the consent given by the subject.⁷⁵

It has been seen that policies which govern the administration of either self-reporting inventories or projective techniques need to be clearly spelled out by the institutions that use them, and these policies need to be made fully known in advance to those who will be subject to the evaluations. As has also been seen, several principles have emerged as religious life has attempted to deal with the question of confidentiality and psychological screening:

74. Ibid.

75. Ibid. p. 48.

a. Psychological testing has been a valuable tool in the screening of applicants for religious life and seminary programs. Safeguards, however, have developed from the sciences of psychology and psychiatry, as well as the Church, for the protection of confidentiality.

b. Self-reporting inventories and projective techniques have been utilized as adaptable methods for vocational screening. Both methods involve self-revelation and therefore require safeguards in admission for proper protection of confidentiality.

c. When such testing is required by an institution, including the Church, the concepts of "relevance" and "informed consent" should be utilized so that ethical boundaries are established.

d. "Informed consent", in order to be effectively utilized as a mechanism for confidentiality, should include the revelation by the examiner to the examinee of at least the following: the purpose of the testing, the kind of data that is sought, and the use that will be made of the results.

Although the above mentioned principles have been developed within the Church primarily due to the influence of religious life, it can be readily seen that these principles are more universal in nature when applied to

confidentiality and psychological testing and/or evaluating. They can be equally applicable to the relationship of bishop to diocesan cleric with the appropriate adaptations.

3.2.5 - Confidentiality and Third Parties

One of the principal difficulties that has arisen in regard to confidentiality and religious life is that of harmonizing the right of the individual religious to the privacy of his interior life with the responsibilities of the religious superior to the well-being of the individual and the entire community. No solution to this difficulty, suggests Ford, will be satisfactory which does not "protect simultaneously the mental health of religious, the principles of religious government, the right of the religious to psychic privacy, and the filial confidence of religious subjects in their superiors."⁷⁶

Discussion of the confidentiality of test records usually deals with accessibility of test records to third parties. "The fundamental question is: who shall have

76. Ibid., p. 101.

access to test results?"⁷⁷ The underlying principle in the scientific community itself is that such records should not be released without the knowledge and consent of the individual.⁷⁸ In addition to the problems that develop when records are not kept confidential in an institutional setting, Anastasi indicates a potential problem in the retention of records: "[T]he availability of old records opens the way for such misuses as incorrect inferences from obsolete data and unauthorized access for other than the original testing purposes."⁷⁹

As has been previously indicated, obtaining consent is required before psychologists engage in therapeutic activities. Such consent acknowledges a confidentiality which has both a moral and practical basis: from a practical point of view, the confidentiality requirement is necessary for the good of the profession. "People must be able to trust psychological services and be willing to participate in psychological research."⁸⁰ Within the discipline itself, there is a call to responsibility about

77. Anastasi, Psychological Testing, p. 52.

78. Ibid., p. 54.

79. Ibid.

80. M. A. Carroll, H. G. Schneider, and G. R. Wesley, Ethics in the Practice of Psychology, Englewood Cliffs, NJ, Prentice-Hall, 1985, p. 27.

the relationship to the client and confidentiality: "The moral basis for the duty to maintain confidentiality is a person's right to privacy, which thereby imposes on others in general and psychologists in particular the duty to respect that right."⁸¹

Psychologists involved in screening candidates for religious life must be involved in a number of serious moral issues in regards to confidentiality and the psychological functioning of candidates as well as the information which may be provided to others concerning candidates. Since some of these issues have helped in the formation of principles of confidentiality and third parties, it will be helpful to review this development.

It is quite clear that during the last few decades the Holy See has been concerned about the selection of candidates for the priesthood and religious life. These various encyclicals and instructions have demanded the careful scrutiny of candidates for religious vocations within the Church. Although neither Church law nor the various instructions from the Holy See require psychological testing as an absolute condition for admission, the prudent employment of such assessments along with the mandatory recommendations became quite

81. Ibid., p. 33.

standardized in seminaries in the United States.⁸² With the advent of screening devices such as psychological testing, it became possible to use more rigorous methods for assessing candidates for religious life and to complement the judgment of superiors.⁸³ This need has become even more necessary in contemporary times:

It is almost universally recognized that the life-style of priest, and religious women and men in the modern world imposes a great deal of stress on the person who chooses to follow a ministerial vocation in the Church. [...] In an effort to insure that these men and women will be able to deal with the stresses of the life to which they aspire, bishops and the superiors of religious communities generally require some form of psychological testing for those who apply for admission to their seminaries and programs of formation.⁸⁴

The problem, indicates Vaughan centers upon the personality tests:

In some instances, this information is the equivalent of conscience matter. Typical examples of such data can be found in certain items on the MMPI, such as those dealing with sexual activity and over-indulgence. The superior has a right to inquire into these areas if he thinks that

82. Reh, "Use of the Psychologist's Report", p. 74.

83. M.B. Arnold et. al., Screening Candidates for the Priesthood and Religious Life, Chicago, IL, Loyola University Press, 1962, p. 1.

84. A. J. Placa, "Confidentiality of Psychological Testing Data", in Bulletin of the National Guild of Catholic Psychiatrists, 27 (1981), p. 66.

such information is necessary for him to make a correct decision as to the fitness of the candidate. Other information derived from personality testing, while not constituting conscience matter, greatly affects the reputation of the candidate. Since the candidate has a right to his good reputation, even though it be putative, the superior is not free to deprive the candidate of this right by indiscriminately disclosing the information obtained from screening.⁸⁵

As therefore can be seen, the testing and evaluation process for candidates to the priesthood or religious life creates potential conflict between confidentiality and the duty to the institution requiring testing. As A. Placa has posited, it is essential that every possible protection be given to the applicant's confidence and dignity as a human being:

It is [...] the duty of all concerned to conduct the testing and to handle the results of testing with the highest possible degree of professional integrity: with a deep respect for the applicant, for the religious entity the applicant wishes to serve, and for the general public who must be the ultimate beneficiaries of the process.⁸⁶

As we have seen, the general area of vocational screening for religious has raised canonical and ethical questions of

85. Vaughan, "Moral Issues", p. 29.

86. Placa, "Confidentiality of Psychological Testing Data", p. 83.

relevance to clergy personnel issues of confidentiality. One further question that needs to be explored is the role of the psychologists or other professionals who have received, by virtue of their profession and testing/screening, information of a confidential nature. The psychologist administering tests must be extremely sensitive to the information that will be revealed to him or her. As we have previously seen, when the psychiatrist uses personality tests, whether projective or non-projective, these frequently involve a great deal of self-revelation. The patient opens up the secrets of his interior psychic life, revealing not only much of its conscious but also of its unconscious content. "Through the projective techniques the psychologist has contrived methods of quick access to elements of the personality which otherwise might come to light only through prolonged psychotherapy or analysis."⁸⁷

With such access, it is incumbent upon the professional to use great discretion about what may be revealed to third parties. Guidance was provided by Ford to psychiatrists who were working with religious:

Psychiatrists who deal with religious, therefore, should be informed by superiors that matters of confession and matters of

87. Ford, Religious Superiors, p. 17.

conscience, especially those which can embarrass the subject, whether culpable or not, should never be included in a report without explicit consent. [...] When a report is made which will be used administratively in making decisions about orders, vows, assignments, etc., the subject should consent to this ahead of time.⁸⁸

Lacking such consent, insists Ford, grave restrictions are enforced upon the practitioner:

Without such consent it would be improper to give even a general report, if it were based to any substantial degree on defamatory self-revelation or on matters of conscience; nor may the subject be forced against his will to reveal such matters when they will form the basis of a report to be used for his government in the external forum.⁸⁹

Ford also addresses the difficult case in which either the community physician or psychiatrist may feel uncertain as to whether his primary loyalty is to the superior or to the member of the community:

Cases of drug addiction, alcoholism, communicable disease, suicidal tendencies, scandalous compulsive behavior, etc., can raise special problems of confidentiality. The troublesome cases are not those which are already known to the superior and for which he is seeking help from the psychiatrist, but those which so far the patient has succeeded in keeping secret,

88. Ibid., p. 80.

89. Ibid., p. 86.

revealing them to the psychiatrist or community physician precisely in order to get professional help.⁹⁰

Ford outlines a practical and effective approach:

In the case of ordinary illnesses, which do not involve special embarrassment, culpability, or danger to reputation, the patient cannot reasonably ask the physician to keep secret from his superior the nature of his illness - especially when the illness requires that special provision be made.⁹¹

There is however, some clarification made by Ford in regards to certain illnesses:

On the other hand, when there is a question of a very embarrassing illness or affliction, especially if it involves culpability, and when the subject reveals it with the implicit understanding that it is not to be revealed to the superior, the physician is bound per se not to reveal the secret so entrusted. Only some imminent emergency, threatening grave harm here and now, especially to the common good, would justify the revelation, and then only if revelation to the superior would de facto avert the harm.⁹²

Ford here also alludes to some traditional moral imperatives that should be considered, depending on the particular circumstances. For example, the physician

90. Ibid., p. 86.

91. Ibid., p. 87.

92. Ibid.

should not report to a superior

except in those rare cases where moralists allow the entrusted secret to be revealed, for example, because of a serious imminent threat to the common good of such a kind that it can be averted only by revelation to the superior. Even in this case the physician should give the patient chance to reveal the secret himself.⁹³

In the case of a communicable disease and the ramifications to the wider community, Ford again urges caution in the violation of confidentiality:

Again the physician's first duty, as healer and counselor, is to advise the patient of his obligation to inform the superior of the situation in foro paterno [...] when a physician reveals such cases to the superior, the latter is bound per se by the secret of the paternal forum and cannot use the information to punish or dismiss the subject.⁹⁴

Ford is quite adamant in his concern about the responsibility of the psychiatrist to preserve confidentiality: "I am of the opinion [...] that secrets of conscience, entrusted to professional advisers as above, enjoy an inviolability just short of that of the secret of

93. Ford, Religious Superiors, p. 90. For a thorough explanation and discussion of the "entrusted secret" in moral theology, see R. E. Regan, Professional Secrecy in the Light of Moral Principles, Washington, DC, Augustinian Press, 1943, xv-221p.

94. *Ibid.*, p. 91.

confession."⁹⁵ Such a trust that develops between those who seek professional guidance and their counselor assists as well the therapeutic aspect: "Nobody in trouble is going to confide in them [counselors] if they allow the slightest suspicion to grow that they have expansive ideas as to the requirements of the common good."⁹⁶ Thus the trusting relationship between counselor and counselee is of utmost importance:

This trust can exist only when there is some reason to believe that one is safe when revealing personal information and feelings. Thus rapport, willingness in self-disclosure, and openness to the therapeutic process are affected by the client's belief that what is said will be held in confidence and that there are valid therapeutic reasons for divulging highly personal information.⁹⁷

Progress is often measured, in therapeutic relationships, by the willingness of the client to disclose highly personal material. As Placa observes, the promise of absolute confidentiality is often the premise which facilitates such disclosures, that "creates or contributes to the atmosphere of honest self-revelation upon which various professions rely for their existence and

95. Ibid., p. 93.

96. Ibid.

97. Hennessy, "The Client's Right to Privacy", p. 112.

efficacy."⁹⁸ People whose professions place them in a position of having access to confidential information assume a serious obligation to obtain careful information about the nature and limits of confidentiality:

They must consider their ethical and legal right and duty to protect the confidentiality of information given to them in the course of their professional activities, and they must also consider the ethical and legal liabilities they may acquire by maintaining confidence under certain circumstances.⁹⁹

Within the context of professional screening for ministry, Placa suggests that such sensitivity is appropriate:

No psychologist or psychiatrist who undertakes to test applicants for seminaries or religious communities can begin that task without a frank discussion with the applicant, touching on the question of the purpose of the testing procedure.[...] The practitioner's own professional integrity requires referring openly to the complexity of the three-way relationship and making an honest statement of his or her own convictions about the needs of the religious institutions (and of the community it serves) and the needs and rights of the applicant.¹⁰⁰

Such an understanding, believes Placa, will establish the

98. Placa, "Confidentiality of Psychological Testing Data", p. 64.

99. Ibid.

100. Ibid., p. 69.

environment appropriate for therapeutic services which properly respect the dignity of the person.

Hennessey offers three guidelines for psychological assessment programs:

- a. Informed consent prior to the examination;
- b. Reporting only what is necessary to render and support the requested evaluation;
- c. Proportionate justification.

When these guidelines are followed, Hennessey believes, protection is afforded to candidates who are asked to submit to psychological assessment while at the same time the practitioner is given sufficient latitude to discharge his own responsibility to the institute.¹⁰¹ These norms would be practicable to clergy assessments and release of information obtained by any psychological testing programs to a third party.

101. Hennessey, "The Client's Right to Privacy", p. 68.

3.3 - Canon 642

Canon 642¹⁰² provides an immediate application of c. 220 and the right to a good reputation and privacy. Provision is made for consultation with experts (periti) regarding the health and maturity of candidates for religious institutes.

3.3.1 - Consent of the Candidate

The canon affirms the right of an institute to utilize psychological tests for perspective candidates for admission to the particular community. However, the use of such testing does not imply that the results of this screening procedure are communicated without the consent of the candidate. As Morrissey states, in commenting on the purpose of this testing: "In fact, the psychological assessment should be seen as being more directly oriented toward the candidate's benefit."¹⁰³ It is desirable that

102. "Superiores vigilanti cura eos tantum admittant qui, praeter aetatem requisitam, habeant valetudinem, aptam indolem et sufficientes maturitatis qualitates ad vitam instituti propriam amplectendam; quae valetudo, indoles et maturitas comprobentur adhibitibus etiam, si opus fuerit, peritis, firmo praescripto can. 220."

103. Morrissey, "Practical Points for Formation Directors", p. 2.

the candidate sign a release, granting the practitioner of the examination permission to release the results of the tests to a limited number of individuals, more specifically those who are directly involved in the evaluation process. R. Hill believes that the persons who participate in the admission process should be reasonably assured that the candidate has "sufficient physical health, possesses the desired natural qualities and talents and is emotionally mature enough to make a successful novitiate. If this can be done without the opinions of periti, there is no need to require their input into the process."¹⁰⁴

3.3.2 - The Right to Privacy

The reference to c. 220 in c. 642 attests to the right of every baptized person to a good reputation and privacy. In reference to religious, it is appropriate to ask about how much must be known about a person's past health problems or events in a person's past life or psychic well-being: "The candidate should not be required to surrender all privacy in order to follow a vocation to religious life. There is no question in my mind that at least sometimes the scope of the pre-admission evaluation,

104. R. Hill, "Screening Candidates: The Need to Know", in Review for Religious, 45 (1986), p. 459.

violates the right to privacy."¹⁰⁵

3.3.3 - The Right of Confidentiality

It is important to establish, when dealing with psychological testing, the extent to which information obtained will be disseminated, "determining how many persons share the need to know the psychological assessment drawn up by the professional."¹⁰⁶ There is, as Hill explains, a tension experienced between the needs of the community and the needs of the individual:

There has been a generally laudable development in religious communities which draws more and more members into the decision-making processes. Governance has become more participative, and the information which is necessary for such participation has to be given to more people. When the information, however, is very personal, and is disclosed only because an individual wishes to be accepted as a member of this religious congregation, the problem of the right to privacy again arises. When the procedure for the admission of candidates involves many layers and consultation and scrutiny, a point is certainly reached beyond which the right of privacy is being violated.¹⁰⁷

105. Ibid., p. 460.

106. Ibid.

107. Ibid., pp. 460-461.

Hill correctly summarizes the critical element in the question he raises: "[T]he dignity of the person can easily be transgressed upon, and his or her right to privacy unduly and therefore unjustly curtailed. The question that has to be asked and truthfully answered is: what is the irreducible number of persons who have to review a psychological evaluation?"¹⁰⁸ Even the procedures that might be erected to insure strict confidentiality cannot fully guarantee the protection of the individual. "The certainty that the information will be scrupulously kept confidential is not relevant, and the wish to involve more people in decision-making is not justification for further abridgment of someone's right."¹⁰⁹

As a practical consideration it would seem appropriate that full disclosure of the parameters of the evaluation should be discussed before the examination is administered. "Both (candidate and evaluator) clearly have the right to know who will receive the written evaluation, how it will be used, and why this is the case."¹¹⁰

108. Ibid.

109. Ibid., p. 461.

110. Ibid., p. 462.

3.3.4 - Life Span of Records

The further question of the reliability of dated records is raised by Hill:

It is universally recognized that the actual test results rather quickly become unreliable, and it is generally accepted that the assessment derived from these tests becomes less and less reliable. The issue, then, which has to be considered is whether it is legitimate to retain such evaluations in personnel files for possible future use. There may be some merit in retaining such material in inactive storage, but it should be clearly understood that, while they have a legitimate use in recalling the past, they are not sufficiently valid to be employed in future evaluations, e.g., for first profession, or for final or perpetual profession.¹¹¹

3.3.5 - Guidelines for Investigation

E. McDonough offers guidelines that will be useful in any investigations done by a religious community, whether for admission to novitiate or for profession:

- a. Specific free consent of the member concerned for whatever psychological testing or treatment is suggested;
- b. Non-revelation, without previous consent, to any

111. Ibid.

third party by the expert involved concerning any private matter revealed by the member;

c. Mutual confidentiality following standard moral principles by both the expert and members regarding any revealed natural, professional, or committed secrets.¹¹² McDonough realizes also the difficulty of applying these guidelines in a way that will equally benefit and protect the community receiving the perspective candidate as well as guarding against any abuse of rights involving the candidate's right to privacy:

Needless to say the right of the individual to psychic privacy and the right of an institute to appropriate information must be carefully balanced so that access to information is limited to, but not restricted from those who have proper consent for such access and those whose interest in the information outweighs the usual norms for confidentiality in particular circumstances.¹¹³

J. Hite, in commenting about the sufficient qualities of maturity and more particularly mental health which in the past has been investigated by means of psychological testing, cautions against placing too much confidence in the results of screening procedures: "It seems clear that in most cases serious psychological illnesses or organic

112. E. McDonough, "The Protection of Rights in Religious Institutes", in The Jurist, 46 (1986), p. 191.

113. Ibid.

disease can be detected, but such testing is not predictive of future perseverance in religious life." ¹¹⁴ Like Hill and McDonough, Hite cautions about proper releases that should be signed before institutes receive medical and psychological data; the release should explain the purpose of the examination, who will eventually review the material, and what will be the final use of the information that has been obtained.¹¹⁵ In addition, Hite suggests that the psychologist who might be preparing a report, provide information to the institute on the correct manner of interpreting the results - including "the nature, uses and limitations"¹¹⁶ of the report that is submitted.

Hite notes that at times such reports are shared with formation directors so that they may better understand the candidate and contribute to their development within the community. But continuing the emphasis placed by c. 642 on the right of privacy, the sharing of this report should be explained to the candidate and permission should be

114. J. Hite, "Admission of Candidates and Formation of members, Canons 641-661", in J. Hite, S. Holland, and D. Ward, eds., A Handbook on Canons 573-746, Collegeville, MN, The Liturgical Press, 1985, p. 119.

115. Ibid.

116. Ibid.

secured.¹¹⁷

So seriously must the privacy of the individual be protected, that Hite suggests if

there is information that an institute cannot have access to except by violating or seeming to violate an individual's right of privacy, it should forego seeking the information, but it should not place itself at a disadvantage by granting admission on inconclusive evidence of suitability.¹¹⁸

Even investigations that are conducted orally preliminary to novitiate would be considered confidential material in terms of c. 642:

Thus, while canon 642 does not mandate specifically confidentiality regarding these oral communications concerning a candidate's health, character and maturity, the scope and sensitivity of information entailed in such an investigation, as well as the law's twofold concern for not damaging unlawfully the good reputation a person enjoys, nor violating the right of persons to protect their privacy, connotes an attitude of respect for confidentiality of oral communications between prospective candidates and superiors of religious institutes.¹¹⁹

R. McDermott has observed that the help that can be

117. Ibid.

118. Ibid.

119. M. Brietenbeck, "The Canonical Tradition of Confidentiality Pertaining to Oral Communications" in D. K. Ioppolo et al., Confidentiality in the United States: A Legal and Canonical Study, Washington, DC, Canon Law Society of America, 1988, p. 114.

provided by an approved specialist can be employed only with the knowledge and consent of the individual.¹²⁰

Conclusion

This chapter has looked at the right to psychic privacy, an element of confidentiality that has developed primarily in religious law as a result of the Church's solicitude for dignity of the person. As has been seen, canonical protections in religious life such as limitations to the manifestation of conscience by a member of an institute to a superior, as well as the protections that have been afforded to potential members of communities who undergo psychological screening procedures have developed in recent years. Such protections to the individual's dignity in religious life are based on respect for the person and the natural right to privacy. These principles derive ultimately from the natural law and are applicable to all the Christian faithful, including diocesan clergy. This chapter has demonstrated that since the psychological testing and evaluating procedures which evolved from religious communities and seminary formation programs are

120. R. McDermott, "Admission of Candidates and Formation of Members", in Coriden, Green, and Heintschel, The Code of Canon Law: A Text and Commentary, p. 490.

now being adapted for the general health concerns of diocesan clergy, the canonical precautions such as c. 642, as well as the psychological testing principles such as "relevance" and "informed consent" are adaptable to the diocesan bishop and his clerics. Such protection is also present in the 1983 Code of Canon Law by the maintenance of the institution known as the "secret archives" which designates a restricted area for the maintenance of confidential information (see chapter 4).

4 - THE RIGHT TO CONFIDENTIALITY AND THE DIOCESAN SECRET ARCHIVES

Chapter three attempted to delineate some concepts drawn principally from religious law and screening procedures for admission to religious and seminary life as a support for the right to confidentiality which could be adapted to diocesan clergy. As has been demonstrated, the sensitivity to the personal dignity of the members of a religious institute has resulted in an insistence on proper observance of confidentiality in regard to any psychological tests or evaluations administered on behalf of these institutions to their members.

Of primacy has been proper regard for "psychic" privacy, the inner psychological make-up and dispositions of the person, and care that there be some regulation of access to that domain as well as records that may result from such access. Since these concerns have a basis in c. 220, and the right articulated there for privacy and good reputation for all the Christian faithful, it can be deduced that the principles that have emerged in regards to religious can be applied, with proper exceptions, to diocesan clerics. Since they may need to avail themselves of various medical and psychological techniques and programs for their personal care, it is important that they

be aware of the safeguards that are available for the protection of their own privacy. As chapter three attempted to illustrate and analyze the various rights to privacy as they emerge within the context of examinee, practitioner and third parties, it is also important to review the mode and manner of preserving the records which result from such procedures. Included in this topic is the question of access to personal records that may result from intensive psychological and/or medical procedures. Who may see these records, as well as where these records are maintained, are important considerations in the area of privacy and confidentiality. One canonical institution that is available to assist in this regard is the secret archives of the diocese.

In this chapter, an examination will be made of the diocesan secret archives which is mandated in the 1983 Code of Canon Law in a manner similar to the previous Code. As will be seen, the very nature of these archives makes them appropriate receptacles for confidential matter and various records of a personal nature. The attempt by the legislator of the Code to restrict access to these archives and the elaboration of procedures for admittance to these archives gives added protection to the confidentiality that should be preserved in this area.

After describing the development of diocesan archives in general and then specifically the diocesan secret archives, principally by reference to relevant papal legislation, a study will be presented of the secret diocesan archives as it is legislated in the 1917 and 1983 Codes of Canon Law. This will be followed by an examination of the pertinent aspects of the legislation in regards to diocesan archives which affect the cleric's right to confidentiality. Finally, some observations concerning civil law accessibility to the diocesan archives will be made.

4.1 - Papal Legislation and Diocesan Archives

The preservation of important records has been recognized for every civilization as an essential factor for good administration. This necessity was also recognized by the Roman Catholic Church. In the sixteenth century, papal legislation appeared, in the form of the bull Muneris nostri by Pope Pius V,¹ addressed to the bishops of Sicily as a correction to deplorable conditions which had resulted in the loss of testimonies and acta of criminal

1. Pius V, "Muneris Nostri", March 1, 1571 in Bullarium Diplomaticum et Privilegiorum Romanorum Pontificum, Taurinensis Editio, v. 7, Augustae Taurinorum, S. Franco et H. Dalmazzo, 1863, p. 593.

cases.² An authentic inventory was demanded as a protection against future losses to the archives.³ Also legislated was that the bishop, in approaching death, was by a testament to commit the custody of the archives to his confessor or to a monastery until his successor was appointed.⁴ Any cleric who in any way destroyed material from the archives was to be deprived of his office, dignity, or benefice and thereafter to be held as incapacitated for any future

2. "Audivimus exoriri quod, cathedralibus ecclesiis praesuli viduatis, vicarii a capitulis constituti, gratia, timore, odio vel sordibus, quas volunt inquisitiones et testimonia rerum et causorum criminalium violant, subripiunt et lacerant, ne delictorum cognitio vel vindicta uspiam consequatur" (Muneris nostri, p. 893).

3. "[P]raecipimus omnibus archiepiscopis et episcopis dicti regni, praesentibus et futuris, ut deinceps inventarium authenticum omnium et quarumcumque suae curiae quarelarum, accusationem, inquisitionum, denuntionum testificationum, instrumentorum, processum, ceterorumque actorum, causarum, et negociorum criminalium, etiam mixtorum, quae apud curiae suae notiarum fuerint, quotannis in perpetuum conficiant" (ibid.).

4. "Et si eos de vita decedere interim contigerit, illud universum sigillo suo obsignatum, fidei sacerdotis cui peccata confitentur, morte impendente, committant, qui, ea secuta, protinus ipsum praelato ac domui seu conventui digniori regularium illius civitatis debeant resignare, ut ab eis tute et fideliter asservetur, donec futurus advenerit praesul, cui illud itidem clausum, et integrum tribuatur; quod ipsimet per se faciant, si quando necesse habuerint peregre proficisci, ita ut illud ipsum, statim cum praesente redierint, recipiant ab eisdem" (ibid.).

office, dignity or benefice.⁵

Within a few years, Pope Sixtus V was by his constitution Provida to demand the erection of archives in each diocese, order, or pious place in Italy.⁶ The Apostolic Constitution, Maxima vigilantia,⁷ of June 14, 1727 was the most complete treatment on diocesan archives until the publication of the 1917 Code of Canon Law, and has served since its appearance as the model for most of the local legislation and stands as the principal source cited in the 1917 Code for the canons on archives.⁸ On November 17, 1743, Benedict XIV issued the encyclical Satis vobis in an attempt to regulate marriages of

5. "Quicumque autem testimonia, processus, scripturas et instrumenta huiusmodi quocumque modo violaverit, corruerit, subtraxerit, combusserit, suppresserit ac iusserit id fieri, seu auxilium, consilium vel favorem praestiterit, omni sit dignitate, officio et beneficio, praesentium relevandi sive redimendi omnia bona seu census aut livellos praedictos, omnemque actionem olim dicto extincto Ordini et illius praepositis competentia, pro usu et commodo dictae fabbricae, uti postea statuemus et declarabimus, nobis et dictae Sedi retinemus" (ibid.).

6. "Tutti gli Atti, Scritture, appartenenti a materie del S. officio, che devono conservarsi in Armario a parte, chiuso a chiave" (Appendix XI, sect. III, n. 9, Concilium Romanum, 1725, Bruxelles, F. Toppens, 1726, p. 2321).

7. In P. Gasparri, ed., Codicis iuris canonici fontes, v. 1, Rome, Typis polyglottis Vaticanis, 1923, no. 293, pp. 636-640.

8. C. A. Kekumano, The Secret Archives of the Diocesan Curia, Canon Law Studies, no. 350, Washington DC, Catholic University of America Press, 1954, p. 12.

conscience.⁹ It is in this constitution that one can trace the first vestiges of the institute of the secret archives. "The very nature of these marriages postulated secrecy as a protection, and accordingly one finds for the first time a specific element in the universal legislation on secret archives."¹⁰ On January 1, 1912 Pope Pius X issued the Apostolic Constitution Etsi nos, new regulations for the vicariate of Rome; establishing four departments in the curia, he decreed that two archives must be erected for each department, with secret archives and general archives.¹¹

The 1917 Code of Canon Law, in legislating universal norms for diocesan archives, cited as the principal sources for the new legislation Satis vobis of Benedict XIV and Etsi nos of Pius X.

9. In Gasparri, Codicis iuris canonici fontes, v. 1, no. 319, pp. 701-705.

10. Kekumano, The Secret Archives, p. 12.

11. In Gasparri, Codicis iuris canonici fontes, v. 3, no. 697, pp. 810-824.

4.2 - The Secret Archives in the 1917 Code

CIC 379, § 1, expressly demanded the erection of secret archives, beyond the common or general archives of the diocese:

Besides the ordinary archives, bishops must also have secret archives or at least they must provide a special safe within the ordinary archives, to be locked and immovable, in which all secret papers shall be preserved with extreme diligence.¹²

This obligation rested on all residential bishops and called for a separate room established purposively for the preservation of documents of a highly secret character. The law also made provision for a smaller chest or safe if the needs are less than what an entire separate room would provide for. Even if the secret archives could be maintained in a safe, it was still imperative that sufficient cautionary measures be taken to protect the records contained therein; the safe must be kept closed and locked and also immovable.

It was clear that some of the administrative details of

12. "Habeant praeterea Episcopi aliud archivum secretum vel saltem in communi archivo armarium seu scrinium omnino clausum et obseratum, quod de loco amoveri nequeat. In eo scripturae secreto servandae cautissime custodiantur" (English translation from J. A. Abbo and J. D. Hannan, The Sacred Canons: A Concise Presentation of the Current Disciplinary Norms of the Church, v. 1, St. Louis, MO, Herder, 1952, p. 393).

the diocese in which the bishop was involved concerned affairs of a confidential nature, either by virtue of their nature or by determination of law.

In attending to these duties the ordinary obtains documents which must be isolated from the other writings of the office and kept from the eyes of almost everyone, even of those who may have access to the common archives.¹³

4.2.1 - Contents

Although CIC 379 legislates that all documents which must be preserved secretly must be maintained in the secret archives, only one type of document is expressly mentioned, namely documents which pertain to criminal processes which deal with matters of morality: "Every year there must be burnt those documents which, relating to the prosecution of crimes of immorality, involve deceased defendants or cases ended more than ten years previously with a condemnatory sentence."¹⁴

However, there was provision made elsewhere in the 1917

13. W. F. Louis, Diocesan Archives: A Historical Synopsis and Commentary, Canon Law Studies, no. 137, Washington DC, Catholic University of America Press, 1941, p. 70.

14. "[S]ed singulis annis quamprimum comburantur documenta causarum criminalium in materia morum, quarum rei vita cesserint vel quae a decennio sententia condemnatoria absolutae sunt" (English translation from Abbo and Hannan, The Sacred Canons, p. 394).

Code for the explicit mention of custodial responsibility and the secret archives, beyond the expressed location of matters of moral concern in CIC 379, which included records of dispensations granted in the internal non-sacramental forum from occult impediments in marriage, the book that contained notations of marriages of conscience and of the baptisms of children born of such marriages; documents of a completed process, the nature of which demands secrecy, the acta of an inquisition which precedes a criminal trial, and the documents which prove a formal rebuke or admonition has been given to a party. Of implicit mention is the preserving of a book containing the records of dispensations conceded in the internal non-sacramental forum from irregularities or impediments of holy orders.

CIC 1645 permitted the judge in a criminal case to decree that a document could be retained by the tribunal if this was demanded by the common good. These documents were to be placed in either the public or private archives of the curia, as the nature of the case indicated.¹⁵ As regards extrajudicial procedures, it was the recommendation

15. "Judicio expleto, documenta partibus restitui debent, nisi in criminalibus, bono publico ita exigente, iudex aliquod retinendum censuerit (CIC 1645, §1); Documenta omnia, quae apud tribunal manent, in archivo Curiae deponantur sive publico sive secreto, prout eorum natura exigit" (§ 2).

of some canonists that these as well be maintained in the secret archives: "The documents of [...] extrajudicial procedures should be preserved in the same way as was determined for formal trials. Since there is no express statute on the matter, by virtue of canon 20¹⁶ the ordinary can follow the norm of canon 1645, § 2."¹⁷ In accordance with CIC 1645, § 2, a document of this nature should therefore be preserved in the public, or possibly the secret archives, depending upon the nature of the case. When the extrajudicial procedure suspension ex informata conscientia was utilized, by virtue of CIC 2142¹⁸ a signed record of the acts was to be kept in the secret archives. Some canonists maintained that two copies of the decree of suspension were to be made; one copy to be preserved in the secret archives, the other copy to be given to the cleric who had incurred the suspension.¹⁹

Louis, in commenting on material not expressly

16. "Si certa de re desit expressum praescriptum legis sive generalis sive particularis, norma sumenda est, nisi agatur de poenis applicandis, a legibus latis in similibus; a generalibus iuris principiis cum aequitate canonica servatis; a stylo et praxi Curiae Romanae; a communi constantique sententia doctorum."

17. Kekumano, The Secret Archives, p. 54.

18. "In processibus de quibus infra, adhibeatur semper notarius, qui scripto consignet acta quae ab omnibus subscribi debent et in archivo servari."

19. Kekumano, The Secret Archives, p. 54.

designated for the secret archives but considered as appropriate, includes minutes of meetings held by the canons of the cathedral chapter or the diocesan consultors, as well as confidential writings pertaining to the secret of the Holy Office, the morals and life of clerics, to suspension and/or removal from office.²⁰ In addition to this listing, it would seem that the determination of further material for the archives would be the responsibility of the bishop.²¹

4.2.1.1 - Material Pertaining to Criminal Matters

The only specific type of document mentioned in CIC 379, § 1, as properly belonging to the contents of the secret archives of the diocese, is that which pertains to criminal processes which deal with matters "relating to the prosecution of crimes of immorality" ("documenta causarum criminalium in materia morum"). It would appear that the intention of the legislator in prescribing secret archives is the concern for the rights of defendants as well as for the prevention of any miscarriage of justice.²² This demand

20. Louis, Diocesan Archives, p. 72.

21. Ibid.

22. Kekumano, The Secret Archives, p. 49.

of the law that the acts of criminal cases be preserved in the secret archives demonstrated the solicitude of the Church to guard the rights of every individual and yet maintain efficiency in administration of justice.

If the supposed culprit has not been proved guilty, he has a strict right to his good name. Therefore, the provisions requiring these unproved allegations to be placed in the secret archives serves the purpose of keeping the inquisitorial proceedings outside the arena of public use.²³

4.2.1.2 - Penal Remedies

The secret archives of the diocese have also been the receptacle for penal procedures known as "penal remedies" which are intended as preventive measures to avert the lapse into more serious or grave offenses. Penal remedies in the 1917 Code of Canon Law consisted of admonitions, corrections, precepts and surveillance. Before administering an admonition, the ordinary was to conduct an investigation.²⁴ In accordance with CIC 2309, § 5, admonitions or corrections, even if administered secretly,

23. Ibid., p. 51.

24. "Eum qui versatur in proxima occasione delictum committendi vel in quem, ex inquisitione peracta, gravis suspicio cadit delicti commissi, Ordinarius per se vel per interpositam personam moneat" (CIC 2307).

must be available to proof through a document that is preserved in the secret archives of the diocesan curia.²⁵ The express requirements of the law in this regard favor the retention of necessary documents for possible future proof - both for remedial measures, as well as the possible infliction of penalties of a more severe nature. But also this designation of the secret archives as the proper repository provides that access be limited to such documentation. It would appear then, that whenever the nature of the case demanded more than ordinary secrecy, it was the secret archives that were to serve as the proper safeguard for the documentation.

4.2.1.3 - Destruction of Documents in the Secret Archives

The law demanded that each year, the contents of the secret archives be reviewed and as soon as possible after the death of a guilty party or not later than ten years have lapsed since the pronouncement of the condemnatory sentence, the documents of these processes must be

25. "De monitione et correptione, etsi secreto factae fuerint, constare debet ex aliquo documento in secreto archivo Curiae asservando."

burned.²⁶ The insistence that documents which contain defamatory material be destroyed performed in the law two important functions. Firstly, even the delinquent parties to criminal activities would seem to enjoy some protection of reputation. As Louis comments about this aspect of the legislation:

[T]he Legislator reveals his desire that all such documents disappear in order so to protect the reputation of delinquents, that after many years, when memory of their crime is already erased from the minds of the people, no one will be able to obtain knowledge of the details of the case, not even the bishop to whom the secret archives are entrusted.²⁷

There was also the concern that the reputation of the Church be protected as well:

However, more important than this charitable consideration of the good name of individuals is the fact that timely destruction of the documents may prevent scandal and avoid unjust, unnecessary and embarrassing attacks upon the Church, by making it impossible for such documents to fall into the hands of her enemies.²⁸

26. "[S]ed singulis annis quamprimum comburantur [...] quarum rei vita cesserint vel quae a decennio sententia condemnatoria absolutae sunt, retento facti brevi summario cum textu sententiae definitivae" (CIC 379, § 1).

27. Louis, Diocesan Archives, p. 72.

28. Ibid.

CIC 379, § 1, demanded the destruction of documents take place by burning ("comburantur documenta"). The ten years after the condemnatory sentence were to be computed in accordance with CIC 34, § 3 nos. 1 and 3,²⁹ and although the documents were to be destroyed, a summary of the criminal process was to be maintained. The reason for retaining some record of the criminal process, suggests Louis, was to guard against the possibility of some possible future action against the Church, brought by one of the guilty persons, or perhaps by his relatives.³⁰

4.2.1.4 - Access to the Materials of the Secret Archives

The nature of secret archives necessarily required that their use be extremely limited. The 1917 Code of Canon Law clearly identified the personnel who could be admitted to the secret archives of the diocese:

They must be kept under locks fitted with two different keys, one of which is kept by

29. Si tempus constet uno vel pluribus mensibus aut annis, una vel pluribus hebdomadibus aut tandem pluribus diebus, et terminus a quo explicite vel implicite assignetur: 1. Menses et anni sumantur prout sunt in calendario; [...] 3. Si terminus a quo coincidat cum initio diei, ex. gr., decimus quartus aetatis annus, annus novitiatus, octiduum a vacatione sedis episcopalis, decendium ad appellandum, etc., primus dies ne computetur et tempus finiatur expleto ultimo die eiusdem numeri."

30. Louis, The Diocesan Archives, p. 73.

the bishop or the apostolic administrator, the other by the vicar general or, in his absence, by the chancellor of the curia.³¹

The need for two different keys as presented in the Code attempted to guarantee limited access.

The custody of each of these keys is specifically determined no matter who may legitimately be responsible for the administration of the diocese. The entrance of the secret archives, therefore must be provided with a lock requiring two different keys to open.³²

The keys were to be kept by the bishop or by the apostolic administrator, or in his absence, by the chancellor of the curia. Only the bishop or the apostolic administrator was entitled by law to open and inspect the secret archives alone.³³ Though the law explicitly empowered only the bishop or the apostolic administrator to inspect, without witnesses, the documents maintained in the secret archives, it was presumed by some canonists that the

31. Hoc archivum vel armarium duabus clavibus inter se diversis aperiatur, quarum altera apud Episcopum vel Administratorem Apostolicum, altera apud Vicarium Generalem vel, eo deficiente, Curiae cancellarium asservetur" (CIC 379, § 3; English translation in Abbo and Hannan, The Sacred Canons, p. 394).

32. Kekumano, The Secret Archives, p. 65.

33. "Episcopus vel Administrator Apostolicus, repetita altera clave, ipse solus, nemine adstante, archivum vel armarium secretum, ubi opus fuerit, aperire et inspicere potest, quod deinde utraque clavi iterum claudatur" (CIC 379, § 4).

bishop could allow the vicar general or the chancellor to do the same whenever in his judgment there existed a sufficiently justifying reason to do so.³⁴

Immediately after the bishop had taken possession of his diocese, he was to appoint, in accordance with CIC 380, a priest who, in the event that the diocese becomes vacant or the bishop is impeded from communicating or governing the diocese, will take over the custody of the key of the secret archives that is normally retained by the bishop.³⁵ When the bishop was prevented from governing the diocese and an apostolic administrator had not yet been appointed, the priest designated by CIC 380 was to hand over the key to the archives to the cleric who may have been delegated the government of the diocese; if the government is in the hands of the vicar general, the designated priest retains the key.³⁶ Not even the chancellor was officially delegated to open the secret

34. See Abbo and Hannan, The Sacred Canons, p. 394.

35. "Statim a capta possessione, Episcopus sacerdotum designet qui, sede vacante aut impedita, clavem secreti tabularii seu armarii quae apud Episcopum erat, assumat."

36. "Nisi Administrator Apostolicus diocesi datus fuerit: 1) Sede impedita ad normam can. 429, par. 1, sacerdos ab Episcopo designatus, si quidem regimen diocesis sit penes virum ecclesiasticum ab Episcopo delegatum, clavem eidem remittat; si penes Vicarium Generalem, eam ipse retineat" (CIC 381, § 1, no. 1).

archives, although the archives of the diocese are under his supervision.³⁷ The only duty that was given to the chancellor in regards to the secret archives was custody of the key that belongs to the vicar general when that office is vacant or when he is not present. The chancellor himself is never permitted access to this secret part of the archives.³⁸

When the see itself was vacant, the duty of safeguarding one of the keys to the archives no longer belonged to the chancellor, but rather if he had the key of the vicar general, he must give it to the senior of the diocesan consultors:

When, in these circumstances, a cleric has not been delegated, or if delegated, is unable to function, and in accordance with canon 429, § 3, or because the see is vacant, the cathedral chapter (diocesan consultors) has elected a vicar capitular (diocesan administrator), the priest entrusted with the bishops's key to the secret archives shall hand it over to the vicar capitular (diocesan administrator) as soon as he is elected; at the same time the vicar general or the chancellor shall give up the other key to the first dignitary of the cathedral chapter or to the senior in

37. For a comprehensive treatment of the role of the chancellor in the 1917 Code of Canon Law, see J. E. Prince, The Diocesan Chancellor: An Historical Synopsis and Commentary, Canon Law Studies, no. 167, Washington DC, Catholic University of America Press, 1942.

38. Prince, The Diocesan Chancellor, p. 76.

office of the diocesan consultors.³⁹

4.2.1.5 - The Sealing of the Secret Archives

The importance of protecting the contents of the secret archives was accentuated in the 1917 Code, by an elaborate procedure for the "sealing" of these archives when the see was impeded. Before the keys to the archives were handed to the proper persons, designated in CIC 381, the vicar general or the chancellor and the priest entrusted with the bishop's key were to seal the secret archives with the seal of the diocesan curia.⁴⁰ The seal was not to be removed and the secret archives were not to be opened except in the case of urgent necessity, and then by the vicar capitular in the presence of two canons or diocesan consultors, who were to see that no papers were carried away. Only the vicar capitular was permitted to examine the documents in the presence of the designated canons or diocesan consultors, and the vicar capitular was not

39. "Sede vero vacante aut impedita ad normam cit. can. 429, par. 3, idem sacerdos clavem remittat Vicario Capitulari statim post eius designationem; Vicarius vero Generalis vel cancellarius aliam clavem a se retentam remittere eodem tempore debet primae Capituli dignitati vel consultori dioecetano munere antiquiori" (CIC 381, § 1).

40. "Antequam claves iis, quibus tradi debent ad normam § 1, remissae fuerint, Vicarius Generalis vel cancellarius et sacerdos, ut supra, ab Episcopo designatus, tabularium vel armarium sigillis Curiae obsignent."

permitted to remove any documents.⁴¹ If the seal was removed and the archives opened, the vicar capitular was required to give the newly appointed bishop, as soon as he had arrived in the diocese, an account of the urgent reason that warranted his action.⁴² Although there was an express prohibition against the removal of documents from the secret archives by the vicar capitular, anyone entrusted with any key to the archives, and all others, some canonists believed that this prohibition did not pertain to the bishop or to the apostolic administrator who could withdraw documents, but they, per se, only.⁴³

41. "Tabularium vel armarium nunquam aperiatur nec segilla ab eo removeantur, nisi urgente necessitate et ab ipso Vicario Capitulari coram duobus canonicis vel dioecesanis consultoribus, qui evigilent ne qua scriptura e tabulario auferatur; solus autem Vicarius Capitularis documenta in tabulario asservata potest, iisdem canonicis vel consultoribus adstantibus, inspicere, nunquam tamen auferre, Archivum autem, post inspectionem, iterum sigillis obsignetur" (CIC 382, § 1).

42. "Advenienti novo Episcopo, si sigilla remota fuerint et tabularium aut armarium apertum, Vicarius Capitularis rationem reddat urgentis necessitatis, qua ad hoc motus fuerit" (CIC 382, § 2).

43. See, for example, M. Conte a Coronata, Institutiones iuris canonici, v. I, Taurini, Romae, Marietti, 1939, no. 429, p. 507, note 2.

The 1917 Code of Canon Law attempted to legislate a receptacle for the proper storage of papers and documents of a confidential nature. It did this by creating several safeguards which included: two distinct keys to the archives in the custody of two separate persons; a separate room or a safe which would guarantee complete protection to the contents contained therein; designating the bishop as responsible for the maintenance of the archives, and legislating specific procedures regarding access to the archives when the bishop is not able to govern the diocese, including the sealing of the secret archives. These specific requirements legislated by the universal law of the church, as well as the specifications of the contents of the archives in regards to the records of criminal matters of immorality and later destruction of these records, indicate a strong concern to protect and guard reputation and guarantee privacy in the matter of records and record keeping. It will be useful to briefly analyze the efforts of the 1983 Code of Canon Law to legislate secret archives which will likewise give insight into the Church's regard for confidentiality in records maintenance and the right of privacy.

4.3 - Secret Archives in the 1983 Code

The detailed legislation of the 1917 Code of Canon Law concerning the secret diocesan archives has been mitigated in detail, though the concept of a receptacle restricted in access for certain materials of a confidential nature remains intact. The current legislation for secret archives within the diocesan curia is located in Book II, cc. 489 - 490, of the 1983 Code of Canon Law.

As also legislated in the 1917 Code, each diocese must have a secret archive, or at least a safe or file within the ordinary archive which is completely locked and cannot be removed from the place, where documents may be kept secret and secure.⁴⁴

4.3.1 - Contents

As in the 1917 Code, there are no explicit references to the content of the secret archives; however, c. 489, § 2, repeats the general category of "documents of criminal cases" in "matters of morals" which are to be destroyed

44. "Sit in curia dioecesana archivum quoque secretum, aut saltem in communi archivo armarium seu scrinium, omnino clausum et obseratum, quod de loco amoveri nequeat, in quo scilicet documenta secreto servanda cautissime custodiantur" (c. 489, § 1).

when the criminal has died, or ten years have passed since the condemnatory sentence.⁴⁵ This canon basically repeats the same category from the 1917 Code with the same concern: until the records are destroyed, they must be maintained in the secret archives. Before they are destroyed, a summary of the case accompanied with the definitive sentence is to be prepared.

As in the 1917 Code, various references may be found in the 1983 Code to confidential documents which must be stored in the secret archives: matrimonial dispensations in the non-sacramental internal forum⁴⁶ and the register for secret marriages.⁴⁷ There are various places in the Code where it may be presumed that use should be made of the secret archives: dispensations from irregularities to orders and impediments (cc. 1047 and 1048); the decree of dismissal from a religious institute (c. 700) and documents

45. "Singulis annis destruantur documenta causarum criminalium in materia morum, quarum rei vita cesserunt aut quae a decennio sententia condemnatoria absolutae sunt, retento facti brevi summario cum textu sententiae definitivae" (c. 489, § 2).

46. "Nisi aliud ferat Paenitentiariae rescriptum, dispensatio in foro interno non sacramentali concessa super impedimento occulto, adnotetur in libro, qui in secreto curiae archivo asservandus est, nec alia dispensatio pro foro externo est necessaria, si postea occultum impedimentum publicum evaserit" (c. 1082).

47. "Matrimonium secreto celebratum in peculiari tantummodo regesto, servando in secreto curiae archivo, adnotetur" (c. 1133).

that relate to the loss of the clerical state by invalidity, penalty, or dispensation (cc. 290-293).

4.3.2 - Accessibility

As regards the securing of the secret archives, it can be noted that the very detailed norms concerning the use of two separate keys have been omitted from the new legislation. However, there is the stipulation that only the bishop is to have the key to the secret archives.⁴⁸ If the see is vacant, the key would be given to the diocesan administrator.⁴⁹ J. Alesandro suggests that the bishop consign a duplicate key to the vicar general or to the chancellor with authority to admit to the secret archives for legitimate reasons.⁵⁰

There have been numerous modern inventions and technologies that have developed since the legislation concerning the secret archives in the 1917 Code.

48. "Archivi secreti clavem habeat tantummodo Episcopus" (c. 490, § 1).

49. "Sede vacante, archivum vel armarium secretum ne aperiat, nisi in casu verae necessitatis, ab ipso Administratore dioecesano" (c. 490, § 2).

50. J. Alesandro, Book II, "The Internal Ordering of Particular Churches", in Coriden, Green and Heintschel, eds., The Code of Canon Law: A Text and Commentary, p. 397.

Developments such as photostatic copying machines have raised questions about reproducing materials found in these archives. Alesandro cautions against permitting the photocopying of materials from the secret archives since this would be equivalent to removal, and the intent of the legislation concerning secret archives is not simply to preserve the original but to avoid dissemination of the information contained in the document.⁵¹ There may, however, be circumstances when this access is necessary:

Nonetheless, if necessity warrants it, the diocesan bishop may permit certified copies to be made for legitimate confidential use. In such cases, however, the copies should be returned to the chancellor for filing or destruction.⁵²

The legislation in the 1983 Code, though mitigating

51. Alesandro, "The Internal Ordering of Particular Churches", p. 397.

52. Ibid. Alesandro raises the practical issue of concretizing the general legislation concerning secret archives with particular law. Perhaps his most interesting observation concerns using certain designations for various levels of confidentiality: "The canons address only two levels of confidentiality (normal records and secret records). In fact, however, there are many grades of confidentiality attached to the various documents preserved in curial archives. While the canons provide flexibility through the use of authoritative permissions, a curia with an organized system will need to draft written policy and procedures for the many levels of access and information-sharing which administration requires, possibly adopting in some cases even the governmental model of variously classified documents" (ibid.).

somewhat the procedures, security and access to the secret archives that was a part of the 1917 Code, has still preserved these archives and should provide clerics, as well as all members of the Christian faithful, some security regarding the confidentiality and privacy of any personal records or reports that are maintained in these archives. It may be useful to comment on the aspect of access to the secret archives by the public, particularly civil law, which at times may deem it necessary to enter these archives for investigative purposes.

4.3.3 - The Secret Archives and Public Access

The very fact that there is a secret archives in a diocesan curia indicates that a special area has been designated for records and documents that are not generally accessible. Therefore, it may limit the ability of a diocese to prevent public accessibility to records and documents that are not maintained in the secret archives. As D. Ioppolo comments, "The diocesan bishop should make it clear if there are confidential documents in these archives and why they are not kept in the secret archives."⁵³

53. D. Ioppolo, "Civil Law and Confidentiality: Implications for the Church", in D. Ioppolo et al., Confidentiality in the United States: A Legal and Canonical Study, Washington, DC, Canon Law Society of America, 1988,

She similarly cautions against the over-use of the secret archives, with material that would more properly be maintained in other archives or receptacles:

The value of the secret archives in safeguarding truly confidential material may be diminished if all Church documents are designated as part of the secret archives. This is particularly true if files or groups of files are assigned to the secret archives upon indication that the civil court may attempt to subpoena particular documents. In such a case, the court may exercise its exception to the rule of deferral to church law for instances of fraud, collusion, and arbitrariness and waive the application of canonical mandates.⁵⁴

Ioppolo makes recommendations concerning files and file maintenance which seem particularly appropriate for the secret archives such as diocesan policies which include provisions for the explication of those who have proper access to particular files, what is properly kept in the files, and how long the file is normally kept, whether there is any appeal for denial of access and with whom the final determination rests.⁵⁵

Although not ordinarily a part of the secret archives, clergy personnel files which may contain letters of

p. 23.

54. Ibid., p. 24.

55. Ibid., p. 39.

complaint or accusation(s) against a cleric should be carefully considered when policies are formulated concerning confidential documents and their maintenance:

These letters [complaints or accusations] should be kept in the priest's file attaching to them a memorandum of what action was taken to deal with the accusation. Such action might include, though is not limited to memoranda of discussions of the charge with the priest, reports that the charge was determined to be unfounded, or referrals of the priest to professional counseling.⁵⁶

The care taken to document that procedures' have been determined for dealing with personnel issues and have been properly executed in particular circumstances, will be of assistance within the realm of most civil law jurisdictions. A file, however, that indicates that no procedures have been undertaken against a particular cleric risks injurious consequences to the diocese:

A file containing accusations against a priest, even if unsubstantiated, will indicate to civil authorities that the diocese has been put on notice as to the priest's behavior and this may result in punitive damages against the diocese if the priest's guilt is proved.⁵⁷

Policies in regards to confidential records must be clear

56. Ibid.

57. Ibid.

and consistently implemented. As has been illustrated, careful observation of norms concerning limited access to confidential records safeguards the right of the cleric to privacy and good reputation, which reinforces the Church's teaching in regards to human dignity. But such limitation of access is also, as Ioppolo explains, a protection for the Church within the civil law domain:

[I]t is imperative that the policy be adhered to strictly. If a diocesan policy limits access to church files, but the church does not diligently enforce that policy, a court may determine the policy to be a sham and disregard pleas for confidentiality.⁵⁸

Policy formulation should be implemented with formal promulgation as particular law, in accordance with c. 8, § 2.⁵⁹

There are policies for dioceses and religious orders which can help protect the confidentiality of information in the possession of the Church or one of its ministers. Some of these policies can be strengthened if they are promulgated under the authority of the Code of Canon Law by particular ecclesiastical legislation and designed so appeal and final judgment of the policy rests with the tribunal.⁶⁰

58. Ibid.

59. "Leges particulares promulgantur modo a legislatore determinato et obligare incipiunt post mensem a die promulgationis, nisi alius terminus in ipsa lege statuatur."

60. Ibid., p. 38.

As has been noted, the list of documents that are to be maintained in the secret archives is not exhaustive. It would seem that the individual diocesan bishop would therefore be free to place other reports, documents or information into the secret archives, when the right to a good reputation and confidentiality is in danger of being violated, and to lessen the possibility of scandal.

Such documents could conceivably include personnel records or psychic reports, and the like. Canonically, once placed in the secret archives, these documents would be secure and confidential.⁶¹

As E. Rinere explains, by location in these archives, they can be considered removed from the external forum: "In fact, it can be said that at its root, the intent of the law with respect to these secret archives is that in the world of facts and documentation - the external forum - the secret archives do not exist."⁶²

The serious limitation of access that is given to these documents does not in any way grant complete protection of access from the public, specifically civil law: "The strict confidentiality given to the secret archives in canon law

61. E. Rinere, "The Confidentiality of Written Documents in Canon Law" in Confidentiality in the United States, p. 131.

62. Ibid.

is a protection in civil law, but it does not lead to civilly protected confidentiality."⁶³ For this reason, it has been suggested by canonists such as Rinere, that the provisions of c. 489, § 1, on the periodic destruction of the acts of criminal cases be adapted and applied to "any documentation that could be derogatory to a person's reputation and that such materials be kept only as long as is necessary."⁶⁴

Conclusion

The precautions of the Code concerning accessibility to the secret archives continues the theme of respect for persons and their inherent dignity that has been identified as a major insight of the 1983 Code of Canon Law. As applied to clerics, the bishop has been reminded of the limitations of access to confidential materials in regards to clergy of his diocese, documents which could jeopardize the right to a good reputation and privacy guaranteed to all the Christian faithful by virtue of c. 220. Proper respect for the norms regarding the secret archives, the procedures for admission and the persons who have proper

63. Ibid.

64. Ibid.

authorization to enter them, underlines the spirit of trust and confidence that should exist between the bishop and his clergy. The respect of the bishop for the rights of the clerics within his diocese will hopefully result in the careful implementation of the requirements of the Code that promote respect for their good name. Such a respect will also hopefully foster a sense of openness on the part of the clergy in approaching their bishop for guidance when particular issues or problems of a confidential nature need be addressed, a type of relationship envisioned by the Second Vatican Council:

On account of this common sharing in the same priesthood and ministry then, bishops are to regard their priests as brothers and friends and are to take the greatest interest they are capable of in their welfare both temporal and spiritual.⁶⁵

The knowledge that his psychic privacy and pertinent records will be respectfully treated with proper concern for confidentiality will also encourage the cleric to seek psychological assistance when needed, since he may rest

65. "Propter hanc ergo in eodem sacerdotio atque ministerio communionem, Episcopi ut fratres et amicos suos habeant Presbyteros, eorumque bonum, tam materiale quam praesertim spirituale ipsis pro viribus cordi sit" (Vatican Council II, Decree on the Ministry and Life of Priests, Presbyterorum Ordinis, December 7, 1965, in A.A.S. 58 (1966), p.1002; English translation in Flannery, Documents of Vatican II, p. 876).

assured that there will be limited access to this information. Perhaps most importantly, each cleric will know that he, as a member of the Christian faithful, has a right which is being properly defended, and that he is being treated in the image of God with his rightful dignity respected and esteemed.

CONCLUSION

This dissertation has attempted to make recommendations in regard to the responsibility to conserve proper confidentiality of records which relate to the diocesan clergy.

An attempt was made to trace the development of this natural right to privacy and good reputation within the context of the human rights tradition which has been invigorated in the last one hundred years by various significant papal encyclicals.

A particular contribution was made by Pope John XXIII in his groundbreaking encyclical Pacem in terris, which for the first time in the social teaching tradition of the Roman Catholic Church enumerated several human rights which should be esteemed and acknowledged by all forms of societies and governments. This listing, as we observed, included the rights of good reputation and privacy.

These rights received prominence and further importance in virtue of their inclusion in the revised Code of Canon Law (1983) in the form of c. 220, which was largely based on article no. 26 of the Vatican Council document Gaudium et spes. Although few specific

references are given to the implementation of this right of confidentiality for diocesan clergy, it was seen that some principles from religious law which have developed primarily in response to the development of psychological screening and testing for vocations are quite adaptable, with obvious modifications, to the relationship of bishop to diocesan cleric.

It was also seen that the canonical institute known as the "secret archives" has been retained in the new law. This institute, in virtue of its providing a limitation of accessibility, presents some pertinent safeguards to the diocesan cleric for proper confidentiality of records that may be maintained in this location. But beyond the law and beyond canonical institutions, a proper and healthy implementation of the right of confidentiality will require a growth in attitudes, attitudes within the diocesan cleric and the diocesan bishop.

As J. Coriden has correctly observed, "Rights which are declared but undefended are a mockery; when the claims cannot be vindicated, the rights are useless."¹ Responsibility for the protection of rights evolves to both parties, the person who lays hold to a right and the person by law charged with its protection. The attitude

1. Coriden, "A Challenge: Making the Rights Real", p. 3.

toward the inherent responsibilities of both parties is paramount.

Clerics, as well as all members of the Christian faithful, will be unable to defend their rights if they do not know them. T. P. Doyle, in describing the purpose of the Code, has stated:

The law is meant to promote and safeguard [...] [the] supernatural end for the sake of the faithful who are the Church. By keeping this in mind, we can see the canons not as a collection of restricting rules, but as a guide to living the Christian life within a specific community, the Catholic Church.²

Therefore to know the new legislation (and the rights contained therein) is to acknowledge and strengthen the communion of love which is the Christian community. As Paul VI declared in his address to the Rota on February 8, 1973: "[T]he Church's juridical activity is, as it were, a sacramental sign of salvation just as the church herself is [...] (which) can have no other aim but to manifest and serve the life of the Spirit."³ When each member of the

2. T. P. Doyle, Rights and Responsibilities: A Catholic Guide to the New Code of Canon Law, New York, Pueblo Pub. Co., 1983, p. 5.

3. "[T]ota Ecclesiae activitas iuridica est ad modum signi sacramenti salutis [...]. [A]ctivitas iuridica Ecclesiae non potest habere alium finem nisi manifestare et inservire vitae Spiritus" in A.A.S. 65 (1973), pp. 97-98; English translation in The Pope Speaks, 18(1973-74), p. 77.

Christian faithful knows his rights (and responsibilities) within the community, and is willing to vindicate those rights which appear violated, he or she can best uphold the image of "man" as presented by the Declaration on Religious Liberty as the fully acting person:

It is in accordance with their dignity that all men, because they are persons, that is, beings endowed with reason and free will and therefore bearing personal responsibility, are both impelled by their nature and bound by a moral obligation to seek the truth.⁴

This same attitude must be that of the bishop, concerned that justice be observed in all his relations with the clerics of his diocese. Again Pope Paul VI was adamant on the role of justice in canon law:

There is no true peace except in justice. And true justice is not to be found in a legislation that is imposed by one or another group because of its strong position in society. It is found, on the contrary, in the concern for assuring even

4. "Secundum dignitatem suam homines cuncti, quia personae sunt, ratione scilicet et libera voluntate praediti ideoque personali responsibilitate aucti, sua ipsorum natura impelluntur necnon morali tenentur obligatione ad veritatem quarendam" Vatican Council II, Dignitatis humanae, December 7, 1965, in A.A.S. 58 (1966), p. 45; English translation in Flannery, Documents of Vatican II, p. 801.

better protection for natural rights.⁵

The development of attitudes sensitive to the proper protection and promotion of rights will also concomitantly see the development of concern for procedures of vindication of rights. The revised code has provided, in cc. 1732-1739, a procedure for recourse against administrative decrees. But within these canons themselves there exists an admonition that alternative means be found to resolve disputes:

It is very desirable that whenever someone feels injured by a decree, there not be a contention between this person and the author of the decree but that care be taken by common counsel to find an equitable solution between them, perhaps through the use of wise persons in mediation and study so that the controversy may be avoided or solved in some suitable means.⁶

In this way, through appropriate conciliation efforts,

5. "Il n'est de vraie paix que dans la justice. Et la vraie justice n'est pas dans un juridisme imposé par les uns ou les autres en raison de leur position de force dans la société, mais dans le souci d'assurer toujours mieux la protection de ces droits naturels" (A.A.S. 61 (1969), pp. 712-713; English translation in The Pope Speaks, 14 (1969-70), p. 374).

6. "Valde optandum est ut, quoties quis gravatum se decreto putet, vitetur inter ipsum et decreti auctorem contentio atque inter eos de aequa solutione quaerenda communi consilio curetur, gravibus quoque personis ad mediationem et studium forte adhibitis, ita ut per idoneam viam controversia praecaveatur vel dirimatur" (c. 1733, §1).

conflicts may be resolved or even avoided in some suitable way, while protecting the rights of both parties. With all members of the people of God striving to build up the Kingdom, acknowledging the dignity of our common humanity, we shall see implemented the vision of Lumen gentium, (no. 41), with the "fullness of Christian life and the [...] perfection of love, and by this holiness a more human manner of life is fostered also in human society."⁷

7. "[O]mnes christifideles cuiuscumque status vel ordinis ad vitae christianae plenitudinem et caritatis perfectionem vocari, qua sanctitate, in societate quoque terrena, humanior vivendi modus promovetur" (A.A.S. 57 (1965), p. 45; English translation in Flannery, Documents of Vatican II, p. 397).

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BIOGRAPHICAL NOTE

Kevin E. McKenna was born March 12, 1950 in Rochester, New York. He completed his seminary studies at St. Bernard's Seminary, Rochester, in 1976 and was ordained to the priesthood March 4, 1977. He received a M.Div. degree (1976) and M.A. degree (1981) from St. Bernard's Seminary.

In 1982 he was assigned to graduate studies in canon law at the Gregorian University, Rome, receiving the Licentiate in 1984. After serving as vice-chancellor in the Diocese of Rochester for four years, he was assigned in 1988 to doctoral studies in canon law at Saint Paul's University, Ottawa.

THE RIGHT OF CONFIDENTIALITY
AND DIOCESAN CLERGY PERSONNEL RECORDS

By Kevin E. McKenna

ABSTRACT

One of the difficulties facing administrators within the Roman Catholic Church today is the question of confidentiality and the personnel records which are maintained for the clerics who serve the Church. Bishops throughout the United States have entrusted to certain priests the responsibility for personnel placements while reserving to themselves, as canonically appropriate, the actual formalities of assignments. Many dioceses have instituted "personnel boards", generally elected from the ranks of the local presbyterate who often assist the "director of priest personnel" in the placement of the local clergy. Such procedures for placement have been hailed as an effort to involve the clerics in the selection of their own assignments as well as involve the presbyterate in more concrete consultation. But, at the same time, there is a risk that certain matters of a confidential nature, including psychological records and reports which have been administered to clerics within the diocese will potentially be more accessible to a greater number of individuals.

This dissertation attempts to develop some canonical responses to the question of confidentiality as it relates to clergy personnel records by examining some safeguards that have developed within the Church's legal system to protect individual privacy and the right to a good reputation.

To its great credit, the 1983 Code of Canon Law has accepted and expanded the notion of rights for members of the Church largely through the encouragement of the Fathers of the Second Vatican Council. Formalized into universal legislation for the church are the rights of the Christian faithful, rights of the laity and rights of clerics. Listed within the rights of all the Christian faithful are human rights, specifically recognized, including the right to privacy and the right to a good reputation (c. 220).

To put this right of privacy and reputation into a broader context, this thesis demonstrates a natural development from a personalism characteristic of the social encyclicals of recent pontiffs of the Roman Catholic Church, beginning with Leo XIII's Rerum novarum (1891) through to the more recent papal writings such as John Paul II's Redemptor hominis (1979). It can be shown that the continued affirmation of the dignity of man has served as the cornerstone of the development of the section of human rights within the Code (Ch. 1).

The second chapter attempts to analyze the question of the human rights of privacy and good reputation by detailing the process of "canonization" or incorporation of these rights into the legal system of the Church. Of primary focus is the development of c. 220 which had in its history two different coetus, or study groups, during the process of drafting the new Code.

The third chapter demonstrates the applicability of c. 220 to members of the diocesan clergy by analyzing principles regarding confidentiality which have emerged primarily from the law for religious. Included in this section is a study of psychological testing as it has been introduced into religious life, and some principles regarding testing which have been issued by the Holy See. Of interest particularly is the use of c. 220, mentioned specifically in c. 642 in regards to screening procedures for admission into novitiate.

Canonists and psychologists have wrestled with the consequences of contemporary psychotherapeutic interviews and certain personality tests which have often contained substantial revelation of matters which pertain strictly to the domain of manifestation of conscience. In seminary and novitiate screening procedures which often involve self-report inventories, aptitude, achievement and personality tests have raised questions concerning the possible

invasion of privacy. The Holy See has been cautious in its recommendation of such procedures and two principles have emerged towards more careful protection of individual rights in this area: relevance and informed consent.

The last chapter reviews a canonical institution which has been present in the ecclesial life of the Church for a few centuries, the "Secret Archives". By such a secured facility, certain documents of a confidential nature may be stored for limited access thus also assuring the cleric of confidentiality.

The respect of the bishop for the rights of the clerics within his diocese will hopefully result in the careful implementation of the requirements of the Code that promote respect for privacy and good reputation. The knowledge that his psychic privacy and pertinent records will be respectfully treated will also encourage the cleric to seek psychological assistance when needed, since he may rest assured that there will be limited access to this information.