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PRIESTS, RELIGIOUS, AND PUBLIC OFFICE IN THE
1983 CODE OF CANON LAW

by

Christopher Gaffney, C.Ss.R.

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

Ottawa, Canada, 1990

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BIOGRAPHICAL NOTE

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He began his studies in canon law at Saint Paul University, Ottawa, in January, 1984, receiving his Licentiate in Canon Law in 1986.

ABBREVIATIONS

AAS	Acta Apostolicae Sedis
ASS	Acta Sanctae Sedis
<u>CIC</u> (1917)	1917 Code of Canon Law
<u>CIC</u> (1983)	1983 Code of Canon Law
JBC	Jerusalem Biblical Commentary
LG	Lumen Gentium
J. Mansi	Sacrorum Conciliorum nova et amplissima collectio
PL	Patrologiae cursus completus (series latina)
US Commentary	The Code of Canon Law: A Text and Commentary commissioned by the Canon Law Society of America

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INTRODUCTION

It was Cardinal Newman who observed that natural though it might be to suppose that an idea will always be the exact image of itself in all the stages of its history, experience does not bear out the anticipation.^{1/}

Faced with an idea so apparently ancient and so deeply set in a centuries-old canonical tradition, namely, that clergy and religious should not aspire to public office, one might be forgiven for anticipating in any study of the subject a repetitive line of research which states that the New Testament, the Fathers of the Church, the medievals, and the church of today have all spoken, as it were, with one voice on the matter.

In the following study we shall, in fact, attempt to detail the legislation as it appears at different stages of history and, from what previous research has already uncovered, we might anticipate a remarkable constancy in the idea of a clerical prohibition from public office. That does not mean our enquiries are pointless. We shall have to

1. J. H. NEWMAN, An Essay on the Development of Christian Doctrine, Harmondsworth, Penguin Books, 1973, p. 120.

scutinize the idea carefully, as Newman suggested, in order to discover its true image at different stages of its history.^{2/} Furthermore, in the face of such a mass of legislative material from different epochs and diverse cultures, we shall be well advised to recall that the principal purpose of understanding the canons of previous generations is to help us in our grasping of the present. In this perspective the underlying question which faces us in this study is the selfsame question asked by the Christian community in different historical contexts: whether the contemporary legislation regarding clerics, religious, and public office expresses and embodies a style of life commanded or recommended by the Gospel?

Problems are best grasped and understood in questions which can open the mind to a stimulating discussion and a healthy reassessment of thinking on a particular issue. For that reason, we should be prepared to face those questions which have been raised recently, both in religious and secular circles, concerning the participation of priests and religious in public office. As Fr. Robert Ogle has observed, the church has good reason to be careful about allowing

2. Ibid, p. 121.

priests and religious to assume public political office.^{3/} But, as recent cases have shown, a discernment on this issue is not a simple matter. In spite of sincere efforts on all sides to maintain a balance between the good of the community and the conscientious convictions of individuals seeking to live out their vocation, such serious and painful conflict has arisen that justice demands we look carefully again at the moment when life meets law. That means we must consider canon 285, par. 3 of the 1983 Code of Canon Law and examine how best it should be interpreted to further justice ruled by charity.

In the interpretation of law, of course, more is required than a search for the meaning of the law, the mens legislatoris, in the moment of promulgation. Good interpretation demands a sensitivity to the different stages of the law making process. It is an art which is constantly aware that laws have their roots in the perceived values of a community and takes note of the particular values a legislator seeks to uphold in the law for the benefit of the community. Accordingly, the method of the dissertation shall be to situate the legislation regarding the participation of clerics and religious in public office in

3. R. J. OGLE, North/South Calling, Saskatoon, Sask., Fifth House in association with Novalis, 1987, p. 151.

its historical context and to try and discover some of the theological and social values that helped shape the law itself. Thus, in tracing the origins of this legislation to the earliest days of Christianity, chapter one shall seek both to situate the discipline in the perspective of sacred history and in the context of contemporary Judaism and the Roman Empire. We shall examine certain scriptural and early disciplinary texts of the Fathers in order to determine whether a stance was shaped in the community concerning participation in public office and how that particular stance became explicit in the first directives of the community.

With the integration of Christianity into the social structure of the Empire, the ministry and social involvement of clerics attracted a civil law attention. In chapter two, therefore, we shall examine to what extent the Roman civil law considered this issue from the fourth to the tenth centuries. We shall consider the grant of exemption accorded to clergy from municipal duties and explore the criterion for such an exemption before turning to those canonical texts issued up to the eleventh century.

In chapter three we shall focus on the legislation in the period of the development of the scientific study of canon law. First we shall attempt to discover whether an

increase in the legislative activity of the papacy and of various councils led to the development of much new legislation concerning the participation of clergy and religious in public office. Secondly, we shall consider canon 139 of the 1917 Code which dealt with the issue of participation in public office and appears to have been based on a centuries-old canonical tradition.

Chapter four will examine the legal position regarding the issue of public office as set down in canon 285, par. 3 of the 1983 Code of Canon Law. We shall look for the proper meaning of the words of the law by attempting to situate the text within its true context before considering the interpretation and practical application of the canon in the life of the church today and possible developments for the future.

CHAPTER ONE

THE EARLY COMMUNITY AND PUBLIC OFFICE

Our subject is canon 285 par. 3 which forbids clerics from assuming any public office (officia publica) which entails a participation in civil power (civilis potestas).1/

The canon is an ecclesiastical law forming part of the church's principal legislative document,2/ the Code of Canon Law, which has its roots in the juridical and legislative heritage of revelation and tradition.3/ In its revised form, the Code has been described as an effort to translate the doctrine and ecclesiology of the Second Vatican Council into canonical language.4/

1. CIC(1983), canon 285, par. 3 reads: "Officia publica, quae participationem in exercitio civilis potestatis secumferunt, clerici assumere vetantur."

2. See JOHN PAUL II, Apostolic Constitution, Sacrae disciplinae leges, January 25, 1983, in AAS, 75(1983), part II, pp. vii-xiv. Hereafter cited as Sacrae disciplinae leges.

3. That the church's legislative activity is founded on the heritage of revelation and tradition has been indirectly highlighted in recent studies. See R. E. BROWN et al., Peter in the New Testament, Minneapolis, Augsburg, 1973, ix-118p.

4. See Sacrae disciplinae leges, p. xi.

The ecclesial nature of the Code would of itself suggest that canon 285, par. 3 embodies a continuity which links a past juridical activity, the labours of the recent Council, and the present Magisterium's legislative vision.^{5/} Such a continuity provides the framework and wider context of this investigation. However, since the origins of this institute are to be found in the very earliest days of the Christian community, it will be necessary to examine at the outset its three principal sources: scripture, patristic teachings, legislative decrees. In looking to these sources, our primary concern is to construct a historical overview of the legislation on this subject and establish a juridical perspective thoroughly grounded in tradition.

A. THE EARLY DISCIPLINE

The Acts of the Apostles and the tradition of the early Christian community portray the birth of the church as an event in sacred history. As J. Daniélou writes:

The essential facts of the events are these: on the one hand, a mission of the Spirit (Acts 2:4), the creator and sanctifier;

5. For a scriptural treatment of the link between church, apostolic leadership and continuity of discipline, see R. E. BROWN, The Churches the Apostles Left Behind, New York, Paulist Press, 1984, pp. 61-74.

on the other hand, the object of this mission as related to the community established by Christ during his public life: it was on the Twelve gathered together (Acts 2:1) that the Spirit descended; and, finally, the Twelve were invested by the Spirit with an authority and power which made them preachers and dispensers of the riches of the risen Christ.^{6/}

While maintaining the perspective of sacred history, it is vital that an investigation into the community's attitude to public office situate Jesus and his first followers in the context of contemporary Judaism and the Roman occupation of Israel. It is against the background of this complex society that the Acts of the Apostles provide us with an insight into the self-understanding, development, and internal organization of the Jerusalem community.^{7/}

With regard to the internal constitution of the group, we may simply note that Acts refer to this gathering as ecclesia, which denotes an official assembly.^{8/} The

6. J. DANIELLOU, "The Origins to the End of the First Century", in The First Six Hundred Years, J. DANIELLOU and H. MARROU, London, Darton, Longman and Todd, 1964, p. 4.

7. K. BAUS, Handbook of Church History, London, Burns & Oates, 1965, vol. 1, pp. 77-85.

8. The term was also used to denote the congregation of the Israelites when gathered together for religious purposes. See W. BAUER, "Ecclesia", in A Greek-English Lexicon of the New Testament, translated by W. Arndt and W. Gingrich, Chicago and London, The University of Chicago

concrete nature of this assembly and an awareness among its members that the same ecclesia is present in different places is evident from an early internal organization. It is this rudimentary organization, together with the pre-eminent position accorded to Peter, James, and those who witnessed the resurrection, which has led scholars to assert that the community, from its earliest days, began to assume its own unique structure.^{9/}

Following the fall of Jerusalem in 70, the Christian community became dispersed and gradually established itself in both the eastern and western worlds. Over the next century, there was a considerable development in the church's constitution. For instance, three grades of the ministry, bishop, presbyter, and deacon, were consolidated and conditions for admission into a particular ministry laid down. Ecclesiastical provinces began to take shape and a system of synodical government began to emerge.^{10/}

The roots of the community, however, were still firmly planted in Judaism as it flourished at the time of the Roman

Press, 1979, pp. 240-241. J. DANIELLOU, op. cit., p. 12, argues that the first Christians understood themselves to be the new Israelites gathered together as the new People of God.

9. J. DANIELLOU, op. cit., pp. 12-16.

10. See K. BAUS, op. cit., pp. 346-365.

occupation. Indeed, the roots of the Judaism of this period are, according to P. Carrington, still visible today in two great modern communities:

“ The old Judaism left two principal sons or successors; one was the tradition of the Law in the Pharisee schools, which gave birth to modern Judaism: the other was the gospel of Jesus in the apostolic schools, which gave birth to catholic Christianity. There were other successors, of course, but they had no future. These are both with us.¹¹”

For this reason, therefore, the legal traditions of the present day Jewish and Catholic communities have roots which stretch back to a period when Israel was occupied by the Romans and beyond. It is interesting to note, for example, that the term officium, employed in CIC (1983), canon 285, par. 3 is a Roman legal term current during the time of Christ. In one sense, therefore, the term can be said to provide a link with that period of the community's history known as the pre-paschal milieu. It is here where our study begins.¹²

11. P. CARRINGTON, The Early Christian Church, Cambridge, Cambridge University Press, 1957, vol. 1, p. 238.

12. The designation "pre-paschal milieu" is used by some Scripture scholars to refer to the community formed by Jesus and his disciples. See R. LATOURELLE, Finding Jesus Through the Gospels, New York, Alba House, 1979, pp. 157-169.

1. The Pre-Paschal milieu

In referring to public office, both canon 139, par. 2 of the 1917 Code and canon 285, par. 3 of the 1983 Code employ the Roman legal term officium, which was widely used in legal circles in the time of Christ.^{13/} Since the principles of Greek and Roman law form part of the contextual background of the pre-paschal milieu, it is important to examine this legal term closely from the perspective of Roman law.

The first book of the Digest reveals that Roman public law conceived of officium as a position firmly established by law, conferred in accord with the law and entailing some participation of power, be it coercitio (power of coercion), iurisdictio (power of jurisdiction), or imperium (full power of the state).^{14/} The term officium

13. This is not to say the meaning of the term is the same in the different texts. CIC(1917), canon 139,2 reads: "Sine apostolico indultu medicinam vel chirurgiam ne exerçant; tabelliones seu publicos notarios, nisi in Curia ecclesiastica, ne agant; officia publica, quae exercitium laicalis iurisdictionis vel administrationis secumferunt, ne assumant." While canon law employs the term officium, it does not, however, ascribe to it the same comprehension as Roman law.

14. See Digest, 1, 10-20.

also denoted the official duties of a person employed in public service, the duties incumbent on every Roman citizen, as well as the bureau itself of a magistrate, together with its personnel.^{15/}

In addition, officium was a frequently used term in Roman private law where it denoted a moral duty originating in family relationship or friendship (officium amicitiae); it also designated a duty connected with the defense of a third party's interests (officium tutoris, curatoris).^{16/}

The term, straddling as it did the world of public and private law, comes more clearly into focus when we view the civis Romanus from an aspect of legal rights and duties. Four rights are a constant in Roman legal history: the right to suffrage, the right to stand for public office, the prerogative of appeal, and the private law rights of commercium and conubium.^{17/} The formal legal duties of the citizen were military service, liability for taxation, guar-

15. See F. DEUTSCH, "Ancient Roman Law and Modern Canon Law", in The Jurist, 29(1969), p. 265.

16. See A. BERGER, "Officium", in Encyclopaedic Dictionary of Roman Law, Philadelphia, The American Philosophical Society, 1953, p. 607.

17. See ibid., "Commercium", p. 399; "Conubium", p. 415.

dianship, and acting as judge or juror. Each one of these rights and duties may be correctly referred to as an officium.^{18/}

However, it is important to note that two more general terms were employed to refer to those rights and responsibilities which devolved on every citizen, namely, "munera" in the West, and "leitourgia" in the East.^{19/} Each of these is considered to be an officium. One further important distinction is made in the Digest. Munera, the public offices which every citizen was obliged to fulfill and which were considered a burden, were distinguished from public offices (magistratus) which were considered to be a privilege and an honour.^{20/}

In light of the above, it would appear that the term officium embraced both munera and magistratus in Roman law. The question which now faces us is this: did Jesus forbid his followers to assume officia, that is, the public offices of munera or magistratus?

18. See J. A. CROOK, Law and Life in Ancient Rome, London, Thames and Hudson, 1967, p. 255.

19. See M. ROSTOVTZEFF, The Social and Economic History of the Roman Empire, Oxford, Clarendon Press, 1926, pp. 333-335.

20. See A. BERGER, op. cit., "Munera", p. 589; "Magistratus", p. 571.

Certainly, it is safe to say that Jesus, who had occasion to stand trial before a Roman Governor, was obliged in his lifetime to pay taxes and associated with tax officials, was fully aware of the social and economic implications of munera and magistratus.^{21/} We may also assert that nowhere in the scriptures does he directly prohibit his followers from either.^{22/} As to whether he was concerned to address such issues indirectly, however, is a matter of discussion among scripture scholars.

Jesus was undoubtedly familiar with the various nuances of the problem of relationship to the state as it presented itself to a Jewish nation which had lost full civil autonomy.^{23/} While the Gospels reveal no direct prohibition against public office, scripture scholars have been at pains to show that, in his preaching of the Kingdom, Christ shows no inclination to set up two distinct orders: one earthly and human, the other a divine order remote from earthly or

21. See D. TIDBALL, The Social Context of the New Testament: A Sociological Analysis, Grand Rapids, Mich., Zondervan, 1984, pp. 76-89.

22. In his preaching of the Kingdom, however, Christ does implicitly condemn any public office used to abuse personal dignity. See L. BOFF, Jesus Christ Liberator, translated by P. Hughes, Maryknoll, N.Y., Orbis Books, 1978, pp. 72-79.

23. See O. CULLMANN, The State in the New Testament, London, SCM, 1957, p. 14.

human concerns. This attitude put him at odds with the Pharisees and their theocratic ideal of Judaism.^{24/} Thus, scripture scholars have demonstrated the importance of pronouncements which, subsequently, provided guidelines for the church:

Next they sent to him some Pharisees and some Herodians to catch him out in what he said. These came and said to him, "Master, we know you are an honest man, that you are not afraid of anyone, because a man's rank means nothing to you, and that you teach the way of God in all honesty. Is it permissible to pay taxes to Caesar or not? Should we pay, yes or no?" Seeing through their hypocrisy he said to them, "Why do you set this trap for me? Hand me a denarius and let me see it." They handed him one and he said, "Whose head is this? Whose name?" "Caesar's", they told him. Jesus said to them, "Give back to Caesar what belongs to Caesar - and to God what belongs to God." This reply took them completely by surprise.^{25/}

This particular text underwent a re-interpretation as the community's expectation of an imminent end of the world faded. In its pre-paschal form, it is concerned with the relative feebleness of Rome compared to the power of the

24. For the involvement of Jesus in civic life and politics, see "The Revolution Theory from Reimarus to Brandon", in Jesus and the Politics of His Day, E. Bammel and C. Moule (eds.), Cambridge, Cambridge University Press, 1984, pp. 11-68.

25. Mark 12: 13-17.

Kingdom.^{26/} In this form it reflects, perhaps, the Lord's opposition to the Saduccean outlook which surrendered all hope for the establishment of the Kingdom of God in the face of Roman domination.^{27/}

Against the later backdrop of an expanding church, however, the text was viewed as addressing the issue of loyalty to the civil authority and obedience to God. Indeed, there is little doubt that in its re-interpreted form it was regarded as sanctioning the principle that a person's loyalty to the civil authority need not contradict his obedience to God.^{28/} Thus, this and other pronouncements, together with some Pauline texts, appear to have provided guidelines for the early church and gradually shaped a basic stance in the growing community regarding both munera and

26. See E. J. MALLY, "Mk. 12: 13-17," in JBC, p. 48.

27. See O. CULLMANN, op. cit., p. 15. See also J. L. ORTEGA, "Notas sobre las relaciones entre la Iglesia y el Estado segun el Nuevo Testamento", in Ius Canonicum, 23(1983), pp. 319-338.

28. See R. SCHNACKENBURG, The Gospel According to Mark, London, Sheed and Ward, 1971, p. 80. There is a clear recognition in the reply of Jesus that the civil government can claim a certain autonomy and rights. But in not specifying what precisely belongs to God and what belongs to Caesar there is also an insistence that a balance must exist between the legitimate rights of each. It is important, however, to place this teaching within the context of the message of the Kingdom of God which Jesus preached as a new relationship between men and women within a just, peaceful, and reconciled society.

magistratus.29/

What, then, can we say of the Lord's attitude to public office? We may summarize our findings in the following way. The weight of scripture scholarship favours the view that in his proclamation Jesus did not advocate a division of the world into two separate areas of jurisdiction, the one belonging to Caesar and the other to God. This is evident in the response of Christ in Mk 12. 13-17, "Render to Caesar what is Caesar's and to God what is God's", regarding the payment of tax to the Romans. The system of taxation in question was known as the tribute. Zealots did not pay the tax, Herodians paid it as part of their collaboration policy, Pharisees paid but expressed their dislike of the system. A positive answer to the question would have involved Jesus in alienating these three groups: a negative answer would have been overtly anti-Roman. His pointed answer, "Render to Caesar what is Caesar's and to God what is God's", makes it clear that the God of the Christians is Lord of the spiritual, social, and political spheres.

29. According to R. SCHNACKENBERG, op. cit., p. 80, this Markan pronouncement is so fundamental that it retains its validity in diverse situations, yet requires a new application in each. An example of a Pauline text is found in 2 Tim 2: 3-4.

The implication of the saying of Christ in Mk 12. 13-17 appears to be that the civil authorities have a certain autonomy and various rights and responsibilities. Such an acknowledgement of autonomy carries with it the recognition of the need for involvement in public office. Although Jesus is critical of those who abuse the responsibility of public office, there do not appear to be any pronouncements directly forbidding the disciples from assuming public office.

Against this background, therefore, it would seem legitimate to assert that a prohibition by the Lord against his disciples holding public office, whether magistratus or munera, appears highly unlikely. However, we would be well advised to take our examination a little deeper and look to the life of the primitive church for signs of a continuity of tradition.

2. The primitive church

It helps clarify our purpose to recognize that the primitive church was influenced by three quite separate, but contemporary, social institutions: the city community (politeia), the household community (oikonomia), and the voluntary association (koinonia).^{30/} Our concern is with

30. See D. TIDBALL, op. cit., pp. 76-89.

the relationship of the primitive church to the first of these institutions, the city community, and, even more specifically, with one precise aspect of that relationship: did the early Christians accept or seek public office? That is the question we will seek to answer by looking at the New Testament and patristic writings.

a. New Testament writings

It is certainly important for our purpose to note in the New Testament writings an early tradition of submission to the authorities in the state for the sake of conscience.^{31/} This is particularly evident when St. Paul calls for obedience to the imperial authorities:

You must all obey the governing authorities. Since all government comes from God, the civil authorities were appointed by God, and so anyone who resists authority is rebelling against God's decision, and such an act is bound to be punished.^{32/}

It is a view echoed in the first letter of Peter

31. See O. CULLMANN, op. cit., p. 113.

32. Romans 13: 1-2. Some commentators have argued that Paul is concerned in this passage not only with the powers of the state but with the invisible powers that he believed stand behind the government of any state. For a treatment of this matter, see C.K. BARRETT, The Epistle to the Romans, London, Adam & Charles Black, 1975, pp. 244-245.

addressed to the Christians of the Dispersion:

For the sake of the Lord, accept the authority of every social institution: the emperor, as supreme authority, and the governors as commissioned by him [...] God wants you to be good citizens, so as to silence what fools are saying in their ignorance.^{33/}

The conviction, however, that public offices and civil authority are reflections of God's authority runs side by side with an apparent hostility to the state. Peter and John, for example, have reservations about obedience to the Sanhedrin of the day:

So they called them in and gave them a warning on no account to make statements or to teach in the name of Jesus. But Peter and John retorted, "You must judge whether in God's eyes it is right to listen to you and not to God. We cannot promise to stop proclaiming what we have seen and heard."^{34/}

A good many other New Testament passages point to this apparent ambivalence on the part of the early community towards the state.^{35/} Nonetheless, the New Testament writings do display, on the whole, a regard for civil authorities as occupying a place appointed by God himself.

33. 1 Peter 2: 13-14, 17.

34. Acts 4: 18-21.

35. In Luke's Gospel, for example, Jesus continually emphasizes God's involvement in human affairs. See R. CASSIDY, Jesus, Politics, and Society: A Study of Luke's Gospel, Maryknoll, N.Y., Orbis Books, 1978, pp. 20-33.

b. Patristic writings

The Pauline teaching on submission to the civil authorities for the sake of conscience is clearly discernible in patristic writings.^{36/} Clement of Rome, for example, set out to develop this teaching and, in spite of persecutions, showed himself patriotically proud of the Empire and prepared to pray for the grace of obedience to those who exercised officium in the politeia. In a letter to the church in Corinth, Clement specifically raised the issue of obedience to governmental authority:

[...] grant that we may be obedient to Thy almighty and excellent name, and to our rulers and governors on earth. Thou, Lord, hast given the authority of the Kingdom to them through Thy all-powerful and unspeakable might, that we, acknowledging the glory and honour given them by Thee, may be subject to them and in no way resist Thy will. To them, Lord give health, peace, concord, and firmness, that they may administer without offense the government which Thou hast given them.^{37/}

36. See W. K. LOWTHER CLARKE (ed.), The First Epistle of Clement to the Corinthians, London, S.P.C.K., 1937, p. 29.

37. SANCTI CLEMENTIS ROMANI, Ad Corinthios Epistulae, versio latina antiquissima, D. MORIN (ed.), Oxford, J. Parker, 1894, pp. 56-57. "[...] oboedientes factos omnia potenti et mirifico nomini tuo, principibus etiam et ducibus qui sunt super terram. Tu, Domine, dedisti potestatem regni per magnificum et inenarrabile imperium tuum, ut cognito datam, nobis a te gloriam et honorem subditi sint, nihil resistentes voluntati tuae: quibus das nobis salutem et pacem et concordiam, tranquillitatem, ut agant quod a te

However, there is a clear indication in the Fathers of the same ambivalent attitude we noted in the New Testament writings. On the one hand, some apologetic texts set out to show that Christians can integrate with society and pose no political or social threat; on the other hand, a more militant approach held out the promise that corrupt civil governments, notably the Roman Empire, would be punished.^{38/}

While the patristic texts appear to provide no conclusive evidence that Christians rejected all forms of public office, they do reveal that the acceptance of positions requiring an idolatrous oath of loyalty to the emperor, or those which had pagan rites attached to them, or were a temptation to immorality, constituted a serious problem for some members of the community.^{39/}

illis datum est regnum sine offensione." Translation as in F. X. GLIMM, "The Letter of St. Clement of Rome to the Corinthians", in The Fathers of the Church, vol. 1, p. 56.

38. See J. SCHEID, "Le délit religieux dans la Rome tardo-Républicaine", in Le délit religieux dans la cité antique: Table ronde: Rome, 6-7 Avril, 1978, vol. 48, Rome, École française de Rome, 1981, pp. 117-171, for an appreciation of the legal difficulties involved in separating religious and political spheres in the Empire particularly in the Christian era.

39. Certain practices in the army are known to have been regarded by Christians as idolatrous. See E. S. RYAN, "The Rejection of Military Service by the Early Christians," in Theological Studies, 13(1952), pp. 1-29.

Tertullian (155-220), for example, shows little inclination for compromise when the undertaking of munera or magistratus involves a Christian in the performance of idolatrous practices:

A Christian may be pressed to the offering of sacrifice and to the straight denial of Christ under the threat of torture and punishment. Yet, the law of Christianity does not excuse even that compulsion, since there is a stronger obligation to dread the denial of faith and to undergo martyrdom than to escape suffering and perform the sacrificial rites required.^{40/}

His conviction that the church and the state have little, if anything, in common leads him to extend to public offices in general the principles he has enunciated on military service:

The foregoing principles I wish to have also applied to the other occasions for wearing crowns in some official capacity (it is with reference to such occasions especially that people are wont to plead compulsion), since for this very reason we must either refuse public offices lest we fall into sin, or we must endure martyrdom in order to sever our connection with them.^{41/}

40. TERTULLIAN, De Corona, Chapter 11, in PL, vol. 2, col. 93: "Nam et ad sacrificandum et directo negandum necessitate quis premitur tormentorum sive poenarum: tamen nec illi necessitate disciplina connivet, quia potior est necessitas timendae negationis et obeundi martyrii, quam evadendae passionis et implendi officii." Translation as in R. ARBESMANN The Fathers of the Church, New York, Fathers of the Church, Inc., 1959, vol. 40, p. 258. Hereafter cited as Fathers of the Church.

41. Ibid., vol. 2, col. 93: "Vel ipsam praestruxerim et ad

In his De Idololatria, Tertullian refers directly to the issue of magistratus and officium. His remarks, directed at Christians holding positions of military and civil authority, displayed a certain cynicism towards those who thought it possible to exercise such offices and still obey the rule of avoiding material co-operation in sacrifices:

Mindful of this rule, we can render our services even to magistrates and powers, like the patriarchs and others before us, who attended upon idolatrous kings up to the borders of idolatry. A discussion lately arose whether a servant of God should undertake the administration of any position of dignity or power, if he could keep himself unharmed from every kind of idolatry, either by some grace or by his adroitness...[as Daniel and Joseph]. Let us believe that it is possible for a man to succeed in going through the show of any office in purely nominal fashion, avoiding sacrifices, or the lending of his authority to sacrifices; without contracting for victims, or assigning care of temples; nor seeing to the income of temples; nor giving public entertainments at his own or at public expense,...] binding no one, imprisoning no one, torturing no one; is it credible that this is possible?42/

caeteras officialium coronarum caussas, quibus familiarissima est advocatio necessitatis: cum idcirco aut officia fugienda sint, ne in delictis incidamus; aut et martyria toleranda sint, ut officia rumpamus." Translation as in E. QUAIN, Fathers of the Church, vol. 60,

42. TERTULLIAN, De Idololatria, chapter 17, PL, vol.1, col. 687: "Hujus regulae memores etiam magistratibus et potestatibus officium possumus reddere secundum patriarchas et caeteros majores, qui regibus idololatriae apparuerunt. Hinc proxime disputatio suborta est, an servus Dei alicujus dignitatis aut potestatis administrationem capiat, si ab

In the wake of the Decian persecution, however, Saint Cyprian (c. 205-258) refers specifically to bishops who had entered secular administrations:

* Many bishops, who ought to be a source of encouragement and an example to the rest, contemning their divine charge came under the charge of secular kings; after abandoning their thrones and deserting their people, they wandered through foreign provinces and sought market places for gainful business [...] they increased their capital by multiplying usuries.^{43/}

It is, in fact, in the late first and early second century texts that the problem of clerical involvement in secular administrations first begins to be discussed.^{44/} In

omni specie idololatriae intactum se, aut gratia aliqua, aut astutia etiam praestare possit [...]. Credamus itaque succedere alicui posse, ut in quoque honore, ut in solo honoris nomine incedat, neque sacrificet, neque sacrificiis auctoritatem suam accomodet, non hostias locet, non curas templorum deleget, non vectigalia eorum procuret, non spectacula edat de suo aut de publico, aut edendis praesit: [...] neminem vinciat, neminem recludat, aut torqueat; si haec credible est fieri posse." Translation as in E. B. PUSEY (ed.), A Library of Fathers of the Holy Catholic Church, Oxford, J. H. Parker, 1842, vol. 10, p. 244.

43. ST. CYPRIAN, De Lapsis, in PL, vol 4, coll. 470-471: "Episcopi plurimi, quos et hortamento esse oportet caeteris et exemplo, divina procuratione contempta, procuratores rerum saecularium fieri, derelicta cathedra, plebe deserta, per alienas provincias oberrantes, negotiationis quaestuosae nundinas aucupari [...] usuris multiplicantibus foenus augere."

44. See, F. CLAEYS-BOUUAERT, "Clerc", in Dictionnaire de droit canonique, Paris, Letouzey et Ané, 1942, vol. 3, p. 827.

this same period, there was a gradual departure from the practice of applying the term clerus to the entire Christian community and the restriction of its use to those involved in specific ministries of the church.^{45/} Cyprian, in fact, employs the term clerus in this way when writing to the people of Furni to protest the appointment of a presbyter as tutor:

My colleagues who were present here and our fellow priests who were with us and I were greatly disturbed, dearly beloved Brethren, when we had learned that our brother, Geminus Victor, on his death bed, had appointed Geminus Faustinius, the priest, as tutor in his will although long ago it was decreed in a Council of Bishops that no one should appoint in his will a tutor or a guardian from the clerics and ministers of God because everyone honoured by the divine priesthood and consecrated for the clerical ministry ought only to serve the altar and the Sacrifices and to have time for prayers and petitions. For it is written: "No one serving as God's soldier entangles himself in worldly affairs, that he may please him whose approval he has secured."^{46/}

45. See 1 Peter 5: 3.

46. ST. CYPRIAN, Letter LXVI, PL, vol. 4, coll. 397-399: "Graviter commoti sumus ego et collegae mei qui praesentes aderant, et compresbyteri nostri qui nobis assidebant, fratres charissimi, cum cognovissemus quod Geminus Victor frater noster de saeculo excedens Geminum Faustinum presbyterum tutorem testamento suo nominaverit, cum jam pridem in concilio episcoporum statutum sit ne quis de clericis et Dei ministris tutorem vel curatorem testamento suo constituat, quando singuli divino sacerdotio honorati et in clerico ministerio constituti non nisi altari et sacrificiis deservire et precibus atque orationibus vacare debeant.

Unfortunately, we do not know to which council of bishops Cyprian is referring. However, as J. Hoffman points out, the reference is not to legislation directed at the clergy: the prohibition is directed at the actions of the layperson and not the cleric.^{47/}

Eusebius (263-337) records, however, a letter which conveys the impression that clerics possessing public offices were frowned upon. In a denunciation of the heretical bishop of Antioch, Paul of Samosata, he tells how Malchion wrote:

Nor [do we judge him] because he minds high things and is puffed up, clothing himself in worldly dignities, and preferring to be called ducenarius rather than bishop, and strutting in the market places. [...]48/

Scriptum est enim: 'Nemo militans Deo obligat se molestiis saecularibus, ut possit placere ei cui se probavit'." Translation as in R. Donna, The Fathers of the Church, vol. 51, pp. 3-4. Regarding the Council mentioned, Migne comments: "Nulla, quod sciam, istius concilii mentio habetur alibi quam in hac epistola."

47. J. HOFFMAN, op. cit., p. 5. It is interesting to note that Cyprian, in reinterpreting the christian assembly along Jewish lines, placed a considerable emphasis on the cultic purity required of priests who led the eucharist. See T. F. O'MEARA, Theology of Ministry, New York, Paulist Press, 1983, p. 102.

48. EUSEBIUS, Ecclesiastical History. The Greek text can be found in E. BURTON, Historia Ecclesiastica, Oxford, Typographia Academica, 1838, p. 523. Translation as in R. E. Deferrari, Fathers of the Church, vol. 29, p. 144.

It should be noted that the ducenarius was a high ranking public official who acted as procurator in the service of Zenobia, Queen of Palmyra.^{49/} The condemnation of Paul however, was for his heretical views and not for his holding of officium.

CANONICAL OBSERVATIONS

This brief survey reveals that the Lord himself did not directly prohibit his followers from public office. In the expanding primitive church, however, public offices which involved the recipient in idolatrous practices, constituted a serious problem. No one solution was applied but certain texts of scripture, together with disciplinary texts of the Fathers, began to shape a stance in the community which became explicit in the first directives urging clerics to avoid public office.

While the earliest discipline focuses on the avoidance of idolatry, a later concern focuses more sharply on the avoidance of civilian pursuits by those called to the ministry.^{50/} It is not difficult to see a reflection of these patristic views in canon 19 of the Synod of Elvira (305) which forbade clerics from leaving their ministerial work

49. See J. HOFFMAN, op. cit., p. 6.

50. See C. J. CADOUX, The Early Church and the World, Edinburgh, T. & T. Clark, 1955, 675p.

negotiandi causa, or to wander around in the provinces seeking gainful markets.^{51/}

Two canonical observations, however, are of crucial importance here. Firstly, the Fathers of the Church were primarily concerned with discipline as distinct from legislation.^{52/} Secondly, the Synod of Elvira makes no mention of clerics in the restrictions it attaches to public offices.^{53/} It seems reasonable, therefore, to assert that, in the present state of our knowledge, we know of no certain law in the primitive church prior to the fourth century forbidding a cleric from assuming a public office.^{54/}

51. This national Synod was held in Elvira, Spain, in or around the year 305. See K. HEFELE, A History of the Christian Councils, translated by W. Clark, Edinburgh, T. and T. Clark, vol. 1, 1883-1896, pp. 118-126. Canon 19 reads: "Episcopi, presbyteri, et diaconi de locis suis negotiandi causa non discedant, nec circumeuntes provincias quaestuosas nundinas sectentur: sane ad victum sibi conquirendum aut filium aut libertum aut mercenarium aut amicum aut quemlibet mittant, et si voluerint negotiari, intra provinciam negotientur." Council of Elvira, Canon 19, in J. MANSI, Sacrorum Conciliorum Nova et Amplissima Collectio, 53 vols. in 60, Parisiis, 1901-1927, vol. 2, col. 9.

52. That the Fathers were not legislators is an important point developed in J. GAUDEMET, L'Eglise dans l'empire romain, Paris, Sirey, 1958, pp. 47-49.

53. See H. SCHROEDER, Disciplinary Decrees of the General Councils, St. Louis, Herder, 1937, p. 91. Canons 2, 3, 4, and 56, attach restrictions, such as refusal of communion, to those assuming certain minor public offices. The restrictions, however, were not directed specifically towards the clergy.

54. See J. HOFFMAN, op. cit., p. 7.

B. THE EARLY LEGISLATION

The existence of canon law in the very early days of the church, under one form or another, has been the subject of several studies.^{55/} In line with these studies, we may legitimately group under the general heading "early ecclesiastical legislation" all those rules of discipline which were commonly referred to as "canons" and designated as "apostolic", "ancient", or "ecclesiastical".^{56/}

We are dealing in this part of the study with those earliest canons concerning the recognition of clergy and monks, and by their assumption of public office. The period under consideration opens with the Synod of Arles, convoked in 314, and closes with the Council of Chalcedon in 451.

Before looking to the details of the early legislation, however, it is important to note, firstly, the precise meaning attached to the term "canon" during this period and, secondly, to look briefly at the emerging character of the clerical and monastic vocations.

55. See J. DAUVILLIER, Les temps apostoliques, Paris, Sirey, 1970, 744p.

56. J. TAYLOR, "Canon Law in the Age of the Fathers", in J. HITE (ed.), Readings, Cases, Materials in Canon Law, Collegeville, Liturgical Press, 1980, p. 40.

1. The legal perspective

The perspective of the earliest compilations of canons in the church may be described as apostolic and universal.

Justin Taylor writes:

[...] the word canon referred in the first place not to a particular enactment of a competent lawgiver in the church, but to a rule of conduct which had been received generally in the church and was considered to have been handed down from earlier times, even from the Apostles themselves. [...] It was a rule of the universal church and had always been so. It had been observed everywhere since the time of the apostles, and if it had been "made" it was made by them. After that, it was simply "found".^{57/}

The authority of the early canons, therefore, was derived not from any legislative activity but from an acknowledgement that they were of apostolic origin. Furthermore, the recognition of apostolicity, as Taylor points out, conferred a notion of universality on rules developed and formulated to meet local circumstances:

A local community had no intention to do other than what the universal church received as proper and in accordance with the rule received everywhere. [...] For it was to be presumed that the Apostles would have been of one mind. So rules which descended from them would be uniform. In fact, we find that

57. Ibid., p. 40. The Apostolic Canons are a series of 85 canons forming the concluding chapter of the Apostolic Constitutions, a large collection of the early ecclesial laws attributed to the Apostles, but actually dating from

canonical rulings emanating from church authorities which were regarded as repositories of apostolic tradition did receive widespread acceptance.^{58/}

These twin notions of apostolicity and universality are particularly evident in the Apostolic Tradition of Hippolytus, which was compiled around the year 217, and in the earliest compilations of canons.^{59/}

In looking, then, to this canonical legislation three points need to be borne in mind. Firstly, the canons were not regarded as innovative legislation but restatements of apostolic teaching. Secondly, their authority was derived from custom and tradition. Thirdly, since local synods were concerned with rules observed in the church from the earliest days, the canons of such synods were regarded as universally binding.

the latter half of the fourth century and, almost certainly, of Syrian origin. The first fifty, translated into Latin by Dionysius Exiguus in the 6th century, became part of the canon law of the Western Church. The Council in Trullo (692) recognized their authority in the East.

58. Ibid, p. 41. Taylor cites as evidence of this the fact that the Epistle of Clement of Rome to the Corinthians was accepted as authoritative far beyond Corinth and was even read in the liturgy.

59. The influence of the Traditio Apostolica was most felt in the East since the latin version was incomplete. It was not designed to meet the needs of a particular community but was seen as a universal norm by which any community could test the conformity of their liturgical actions with the apostolic tradition. See G. DIX, The Treatise on the Apostolic Tradition, London, S.P.C.K., 1937, pp. xv-li.

2. The clerical life

The question as to whether ministry was regarded as an office in the early church is a matter of some controversy.⁶⁰ This problem, however, of the origins of the bishop, priest, and deacon, does not concern us here. It will be sufficient for our purposes to establish the broad outlines of the clerical life up to the fifth century.

It is generally accepted that until the middle of the second century the term clerus was applied to the whole community.⁶¹ From that period onwards, though, it appears to have been applied to the orders of bishop, presbyter, and deacon. With the increasing episcopalization of leadership, however, and the development in the third century of new ministries, the term embraced the so-called minor orders of subdeacon, acolyte, lector, doorkeeper, and exorcist. By the fourth century, a division of the clergy into two ranks,

60. Two main views are represented in the discussion. One posits the establishment of a formal ministry by Christ himself. The other envisages the historic, traditional, ministry of the church as a development in the life of the community. For a brief analysis of these two points of view, see W. H. C. FREND, The Early Church, SCM Press, London, 1982, pp. 39-42.

61. 1 Peter 5:3 uses the term in this sense regarding the attitude of the seniores to the faithful: "Neque ut dominantes in cleris, sed forma facti gregi et animo."

the clerici superioris ordinis and those inferioris ordinis appears to have been established.^{62/}

Throughout the period under consideration, appointment to the orders of presbyter and deacon, together with the minor orders, belonged to the bishop.^{63/} The process, involving as it did a good deal of consultation with the community, paved the way for the establishment of certain canonical impediments to orders and the lower grades of the clergy. K. Baus writes:

[...] anyone who had once been obliged to perform public canonical penance was incapable of receiving holy orders; similarly, baptism received in sickness (baptismus clinicorum), which was considered to show a lack of courage to profess the faith, excluded from ecclesiastical office; finally, voluntary self-mutilation was regarded as an impediment to orders. [...] ^{64/}

Little is known about the details of training and ecclesiastical tasks of the clergy in the third century but, over the following two centuries, disputes between the respective grades led to a gradual delineation of roles and a concern to establish an ordered form of scholastic and

62. These different clerical grades are listed by Bishop Cornelius in a catalogue of Roman clergy sent to Fabius of Antioch. See EUSEBIUS, Historia Ecclesiastica, Tübingae, Ludov. Frid. Fues., 1852, 6, 43, pp. 240-244.

63. See K. BAUS, in op cit., vol. 2, pp. 281-284.

64. Ibid., vol. 2, p. 351.

pastoral instruction. In brief, presbyters were empowered to administer baptism and celebrate the Eucharist in the absence of the bishop. Deacons were regarded as cooperators of the bishop playing a special role in economic administration.^{65/}

Under Constantine, the special status accorded to the clergy within the church was recognized by the state.^{66/} This led to the granting of certain rights, duties, and privileges, which will be discussed later in this study. Of particular significance was the recognition by the state of the judicial role of the bishop. In fact, the extension of this role into the civil sphere marked an important landmark in the integration of the clerical life into the social and administrative structure of the Empire.

65. See J. GAUDEMET, L'Église dans l'empire romain, Paris, Sirey, 1959, p. 103. Early canonical texts do demonstrate a carefully structured subordination of deacons to presbyters also. Those deacons who served as principal assistants to bishops do appear, however, to have been accorded a superior status to presbyters. For a full treatment of the canonical status of deacons, see J. W. POKUSA, "The Diaconate: A History of Law Following Practice", in The Jurist, 45(1985), pp. 95-135. The Greek terms diakonos, presbyter, and episkopos, were in place after 100 but there is no definite proof that the terms referred to an identical ministry in the churches of Antioch, Alexandria, and Rome. See T. F. O'MEARA, op cit., p. 92.

66. For the text of this decree, see T. MOMMSEN (ed.), Theodosiani libri XVI cum constitutionibus sirmonianis, Berlin, Weidmanns, 1905, 1, 27, 1. Hereafter cited as Codex Theodasianus.

3. The monastic life

The rise of an ascetic movement in the third century, coupled with the emergence of the eremetical way of life, laid the foundations of monasticism in both East and West. A charting of its rapid spread is beyond the scope of this study but, in order to situate the earliest canonical legislation in its true context, it is important to note the underlying ideal, general structure, and relationship of the monastic vocation to the wider body of the church.^{67/}

While the underlying motives of the monastic vocation are found in a complex of social, political, and ascetical ideals, the doctrine of perfection was central to its growth and development. Indeed, in its many different manifestations at this period, a common denominator lay in the basic ideal of following Christ in a radical way. Around this ideal were structured certain forms of the common life, such as common prayer, common meals, and shared work and possessions.^{68/}

67. For an invaluable summary of the sources of Eastern and Western monasticism, see K. BAUS, op. cit., vol. 2, pp. 793-801.

68. In the estimation of D. KNOWLES, St. Benedict showed himself to be a legislator of great originality and genius by basing the somewhat restless search for perfection of the

In its beginnings monasticism was, then, something of a separatist and individualistic movement which was not directly under the control of the hierarchy.^{69/} Not surprisingly, this caused tensions in the community and led some bishops to seek ways of effectively binding monasticism to the ecclesia.^{70/} Indeed, the desire to incorporate monasticism as a state of life within the community is discernible in the legislation of the early synods and councils which we must now consider.^{71/}

early monks on a "Rule to which absolute obedience was vowed, applied by an abbot to whom obedience was paid, in a monastery from whose family circle only death could separate the monk who had once joined himself to it." D. KNOWLES, The Monastic Order in England, Cambridge, Cambridge University Press, 1950, p. 7.

69. In the estimation of H. CHADWICK, The Early Church, Harmondsworth, Penguin Books, pp. 174-183, the practical problem of keeping the ascetics from divorcing themselves from the bishop and the local church was a prominent motive underlying Athanasius' Life of Antony with its stress on the orthodoxy of the saint. He argues that St. Basil was also concerned about the indifference of the monks to the institutional church and "sought to check this by instituting monastic communities with a Rule under which the authority of the local bishop was safeguarded."

70. K. S. LATOURETTE argues in op. cit., p. 355, that although the monks were restive under constituted authority, the movement simply proved too popular to be frowned upon by the leadership of the church and enjoyed an extensive popular support.

71. For details of anti-monastic currents at this time, see K. BAUS, op. cit., pp. 390-393.

C. FIRST COUNCILS AND SYNODS

A need for the bishops of specific regions to meet and discuss matters of importance for the church became evident from the end of the second century. The response of the bishops to this need, in the shape of synodal assemblies and councils, was a major formative element in the establishment of a number of ecclesiastical provinces and patriarchates.^{72/} Thus, by the middle of the third century, the proceedings of local meetings invariably reflect the influence of the great churches of Alexandria and Antioch in the East, and of Rome in the West.

In the following section, we will look to canons drawn up at three such assemblies of bishops: the Synod of Arles (314), the Synod of Sardica (343), and the Council of Chalcedon (451).

1. Synod of Arles (314)

As early as the second century, a community of Greek

72. See H. CHADWICK, *op. cit.*, p. 63. In the synodal model of church, based on a eucharistic model of the church, the bishop was ministerially joined in faith and action to different groups.

Christians was firmly established in the Rhone valley.^{73/} From this community, grouped around the bishopric of Lyons, several other bishoprics were established among which was that of Arles where, on August 1, 314, Constantine convened a synod. Convoled at the request of the Donatists, angered by their condemnation in the Synod of Rome,^{74/} its twenty-two canons have little connection with Donatism and cover a wide range of ecclesiastical discipline.^{75/} Canon 7 is of particular interest to our study:

Concerning provincial governors who, as members of the faithful, advance to the governorship; it is decreed, that when they have been promoted, they will receive letters of communion so that wherever they exercise their authority, they will be under the surveillance of the bishop of the same area. When they begin to act contrary to Christian teaching, but not until that time, let them be

73. Arles, a city on the Rhone, was linked by a canal to the Mediterranean. No previous gathering had attracted such a representative gathering of clergy from the West. This Council may, in fact, be regarded as a general council of the West and a prototype for the future Council of Nicea. See J. O'DONNELL, The Canons of the First Council of Arles, Washington, Catholic University of America Press, 1961, p. v.

74. This Synod was opened at the Lateran Palace on October 2, 313, and lasted for only three days. It ended with the condemnation of Donatus, Bishop of Casae-Nigrae in Numidia.

75. The heretical nature of Donatism lay in its charge that the mediation of grace through the church and sacraments was vitiated if the administrator of the sacraments fell into serious sin. See W. FRENCH, The Donatist Church, Oxford, Clarendon Press, 1952, 360p.

excluded from communion. Those who take posts in municipal administrations are to be treated in like manner.^{76/}

The praesides referred to were those public officials who held the office of governor of a province.^{77/} In all probability the municipal officials mentioned were curatores^{78/} and correctores.^{79/} These latter, while subject to the penalty of excommunication, were not obliged by the canon to furnish letters of communion. The term disciplina, used in many senses in early Christian literature, indicates here the totality of moral and disciplinary regulations in force

76. Council of Arles, Canon 7, in J. Mansi, vol. 2, coll. 471-472: "De praesidibus, placuit ut cum promoti fuerint, litteras accipiant ecclesiasticas communicatorias; ita tamen, ut in quibuscumque locis gesserint, ab episcopo eiusdem loci cura de illis agatur, et cum coeperint contra disciplinam agere, tum demum a communione excludantur. Similiter et de his rem publicam agere volunt." Translation as in J. O'DONNELL, op. cit., p. 67.

77. At this period the title was a general one and referred to all governors, both imperial and senatorial, whether of senatorial or equestrian rank. There is some evidence that Christians were to be found in these positions as early as 100. See A. BERGER, "Praeses" in Encyclopaedic Dictionary of Roman Law, Philadelphia, The American Philosophical Society, 1953, p. 646.

78. These officials were appointed by the emperor for the supervision and administration of public institutions. See ibid., "Curatores", p. 69.

79. The title given to certain imperial officials supervising the administration of certain municipia. See ibid., "Correctores", p. 117.

at the time.^{80/} Thus, the offence contra disciplinam consisted of any act against Christian precepts on the part of a Governor or municipal official and not simply of their participation in pagan worship.^{81/}

That Christians could now aspire to the office of praeses signals the end of persecution and the resolution of problems of idolatry connected with high public office. A new era of church relations with the state had begun.

Nonetheless, in the demand that provincial governors receive letters of communion from their proper bishop and that they be presented to the bishop of the province assigned to them, J. O'Donnell sees a continuing awareness among the bishops of the spiritual dangers of high office:

There is no note of subserviency to the emperor in this decree of Arles. While acknowledging and recognizing the favours which Constantine bestowed on the church and his part in convening the Council and, as it were, yielding on this point of governmental service, the church still held firmly to the underlying principle which motivated the resistance and opposition of the Christians of the third century. There could be no compromise with Christian laws.^{82/}

80. See V. MOREL, "Le développement de la discipline", in Revue d'histoire ecclésiastique, 35(1939), p. 248.

81. See K. HEFELE, Histoire des Conciles, Paris, Letouzey et Ané, vol 1, p. 285.

82. See J. O'DONNELL, op. cit., p. 69.

While the two canons do not concern the activities of clerics, their significance lies, firstly, in the encouragement they give Christians to participate in public life and, secondly, in the relationship they envisage between the bishop and public officials. The bishop is to assume a position of vigilance and surveillance over Christian governors: he is to excommunicate at once those officials, at municipal or higher levels, who act contrary to Christian teachings. Thus, the legislation of Arles does not exclude public officials from the church by reason of their office but for offences, judged by the bishop to be contrary to church discipline.^{83/}

2. Council of Sardica (343)

A tendency for matters of discipline and doctrine to become entwined, so evident at the Synod of Arles, was also a notable feature of the council held at Sardica in 343.^{84/}

83. See G. RUHBACH, Die Kirche angesichts der Konstantinischen Wende, Darmstadt, Wissenschaftliche Buchgesellschaft, 1976, pp. 129-140. The legislation of the council of Arles reveals an increasing episcopal centralization of the church.

84. The council opened in the autumn of 343 at Sardica, now Sofia, in Bulgaria. Pope Julius had petitioned the Emperors, Constans and Constantius, to convoke an assembly to settle the case of Athanasius and other problems arising from the Arian heresy. From an existing list of signatures,

The threefold aim of the council, set out in the synodical letter addressed to Pope Julius,^{85/} embraces both matters of doctrine and discipline: the preservation of Nicene doctrine,^{*} the attainment of justice for the victims of Eusebian oppression, and the re-establishment of jurisdictional order.^{86/}

An examination of the documents of the council reveals that a major concern was the question of episcopal visits to the imperial palace and, in canons eight to twelve, we see an attempt to prohibit self-seeking representations by individual bishops, to specify legitimate causes of petition, and to impose an acceptable manner of representation.^{87/}

it is known that seventy-six bishops attended from the East and ninety-seven from the West. Owing to disagreements, the two groups never met in a unified assembly and the twenty-one canons are the work of the western bishops, under the presidency of Hosius of Cordova, who had led the Orthodox party at Nicea. See V. C. DE CLERCQ, Ossius of Cordova, Washington, Catholic University of America Press, 1954, 561p.

85. Pope St. Julius I, who became Pope in 337, was a major influence in the struggle against Arianism and showed remarkable statesmanship in advancing the prestige of the See of Peter. He died in 352.

86. See H. HESS, The Canons of the Council of Sardica, Oxford, Clarendon Press, 1958, p. 7. The Eusebian movement was, in fact, a violent fundamentalist movement with little toleration for those who advocated progress in doctrinal understanding.

87. Ibid., pp. 128-136.

It is a concern which, in the opinion of H. Hess, illustrates the intense personal animosity which had arisen between the Nicene and pro-Arian bishops in the years following the Council of Nicea:

This personal battle was waged with the weapon of deposition and in most cases with imperial support. Against this weapon there was no defence and no appeal with the possible exception of another council, and that not without imperial approval. The political factor thus entered in with the frequent interference of the state in the affairs of the church.^{88/}

Under the leadership of Hosius of Cordova, a number of bishops attempted to curb the jockeying for power and influence at court by limiting episcopal representations to the Emperor.^{89/} Canon 8, for example, draws a clear distinction between ambitious representations and the obligation of interceding for others:

For bishops are in the habit of coming to the Imperial Court, especially the Africans, who, as we have heard, do not accept the wholesome advice of our colleague and brother bishop Gratus,^{90/} but so utterly despise it that some continually bring many different,

88. Ibid., p. 129.

89. See J. FRIEDRICH, Die Unechtheit der Canones von Sardica, Munich, Verlag der K. Akademie, vol. 2, 1902-1903, pp. 417-476.

90. Gratus was Bishop of Carthage and a member of the Synod. His criticism was, therefore, levelled at his own countrymen.

and for the church utterly useless, petitions; not, as it should be, for the care of the poor, the laity, and the widows, but in order to gain some worldly honours and advantages.[...] If, then, dear brothers, this seems good to you all, direct that no bishop shall come to Court, with the exception of those whom our pious Emperor himself by letter summons thither.^{91/}

Undoubtedly, the primary motive for this legislation lay in a desire to strengthen the church's ability to maintain its own discipline.^{92/} Indirectly, however, it prohibits clerics who are bishops from seeking public offices (saeculares dignitates) for motives of greed and

91. Council of Sardica, Canon 8, in J. Mansi, vol. 3, col. 25: "Episcopi, et maxime Afri, qui, sicut cognovimus sanctissimi fratris et coepiscopi nostri Grati salutaria consilia spernunt atque contemnunt, ut non solum ad comitatum multas et diversas Ecclesiae non profuturas preferant causas, neque ut fieri solet aut oportet, ut pauperibus aut viduis aut pupillis subveniatur, sed et dignitates saeculares et administrationes quibusdam postulent. [...] Si ergo vobis, fratres carissimi, placet, decernite, ne episcopi ad comitatum accedant, nisi forte hi, qui religiosi imperatoris litteris vel invitati vel evocati fuerint." It is important to note that the structure of the Sardican canons differs from both those of Eastern and Western Councils which report synodical decisions in a concise legal form. In this particular canon, for example, there is first given the name of the speaker, "Ossius episcopus dixit"; then follows the account of self-seeking episcopal visits to the imperial court for which a restrictive rule is needed. This is followed by a proposed remedy and a request for approval by the bishops. The full text of the canon, in addition to prohibiting a bishop from going to court, unless he is invited or summoned by letters from the emperor, also imposes restrictions on the nature of petitions to be made. See V. DE CLERCQ, op. cit., pp. 385-386.

92. See H. HESS, op. cit., pp. 68-69.

grasping temporal advantage. And it is here that we find a distinct development in the legislation regarding clerics and public office. Bishops are prohibited from seeking public office not because of any link to idolatry, or because such offices divert ministerial energies away from the church, but because they are a temptation to greed and self-seeking.^{93/} It is a theme which was to find its way into the deliberations of the bishops over a hundred years later at the Council of Chalcedon.

3. Council of Chalcedon (451)

Undoubtedly, the principal deliberations of the Council of Chalcedon ended in the sixteenth session with the final declaration subscribed to by no less than 355 bishops.^{94/}

93. See J. HOFFMAN, Civil Offices for Clerics, Washington, Catholic University of America, 1966, p. 12. H. Hess, in op. cit., p. 128, writes: "The kind of petition condemned throughout the discussion is that of the designing favour seeker, who 'against the judgement of all has wished to serve ambition rather than God' (canon 11), and has sought 'even to obtain worldly dignities and offices for certain persons' (canon 8). It is acknowledged that such requests cannot be made 'without the reproach and ill will of all' (canon 10), and 'because of the shamelessness of a few the holy and reverend episcopal name has frequently been judged adversely' (canon 11)." The emphasis of the legislation is on the service of diakonia demanded by the Gospel in marked contrast to the position of administrator typified, in the view of the council, by the self-seeking bishop.

94. The Council opened on October 8, 451, at the church of St. Euphemia the Martyr, in Chalcedon, a city in Asia

However, the twenty-eight canons, drawn up in the fifteenth session, were to exercise considerable influence in the development of church discipline.^{95/} Two of them, canons 3 and 7, are of particular importance to our study, since they represent the first universal legislation touching on the subject of clerics and public office.^{96/} Canon 3, which was

Minor. Summoned by the Emperor Marcian, at the suggestion and with the consent of Pope Leo the Great, the bishops drew up a christological dogma in opposition to Nestorianism, which held that there are two persons in Christ, and to the Monophysite doctrine of Eutyches that the two natures of Christ coalesce in one. The formula adopted by the Council Fathers may be stated as follows: Jesus Christ, God's Logos made Man, is a single Person in two natures, which exist in this one Person without confusion, without change, without division, and without separation. See K. RAHNER and H. VORGRIMLER, "Chalcedon", in Theological Dictionary, Freiburg, Herder, 1965, p. 71. For an appreciation of the theological background of the Council, see R. SELLERS, The Council of Chalcedon, London, S.P.C.K., 1953, pp. 207-332.

95. The minutes of the sixteenth session record that the Emperor's commissioners and the papal legates left Chalcedon at the end of the fourteenth session prior to the drawing up of the canons. Their absence can only be explained by their foreknowledge of canon 28, which assigned to the patriarchate of Constantinople equal rights with the Roman See, and a rank next to it. In a letter to all the bishops who had attended the Council, dated March 21, 453, Pope Leo rejected this canon. From a canonical point of view, it is interesting to note that his rejection was based on the obligation to preserve the regulations and acquired rights arising from the Council of Nicea, and not from a fear of encroachment on his own authority. See Pope St. LEO, Letter 114, Ad episcopos qui in Sancta Synodo Chalcedonensi congregati fuerunt, in PL, vol. 54, coll. 1027-1031.

96. The universal legislation of Chalcedon must, of course, be viewed in the context of legislation previously enacted by the local synods. In addition to those already

proposed in substance by the Emperor Marcian in the sixth session, reads as follows:

It has become known to the Holy Synod that some members of the clergy, from shameful covetousness, hire other people's property, and occupy themselves in worldly business for the sake of gain, disparaging the service of God, and going about among the houses of secular people, and taking in hand the administration of property from the love of gain: therefore, the holy and great Synod decrees that for the future no bishop, cleric, or monk shall hire goods, or transact business, or mix himself in secular affairs, unless he is called by the laws to be a guardian of minors, without being able to put off the duty, or when the bishop of the city gives him a commission, for God's sake, to take charge of the affairs of orphans or of unprotected widows, or of those persons who are in especial need of assistance of the church. And if anyone in future transgresses these regulations, he shall be subjected to ecclesiastical penalties.^{97/}

mentioned, reference should be made to canons 6 and 80 of the Apostolic Canons (380), which assert that clerics are not to undertake secular offices and should be concerned for the affairs of the church. See Apostolic Canons, Canon 6 and Canon 80, in J. Mansi, vol. I, coll. 30 and 46 respectively. In 397, the African bishops at the Council of Carthage forbade clerics to be imperial administrators (procuratores) or to make their living ullo turpi vel inhonesto negotio. See Third Council of Carthage, Canon 15, in J. Mansi, vol. 3, col. 883.

97. Council of Chalcedon, Canon 3, in J. Mansi, vol. 7, coll. 384-385: "Pervenit ad Sanctam Synodum, quia de his qui in clero connumerantur, quidam propter turpis lucri gratiam, alienarum possessionum conductiones et causas saeculares suscipiunt, et seipsos quidem a ministeriis sanctis per desidiam separant, ad domos autem saecularium concurrunt, et substantiarum eorum gubernationes avaritiae causa suscipiunt. Decrevit ergo sancta et magna synodus, neminem deinceps eorum, hoc est, episcopum, sive clericum, aut monachum, conducere possessiones, aut misceri saecularibus

The text of the canon differs slightly from the ordinance proposed by Marcian.^{98/} A proviso was added by the bishops that a cleric could discharge the office of guardian of infants, widows, and orphans, only in a case where he could not legally decline it, or had been expressly given the charge by the bishop.^{99/}

In forbidding clerics and monks to undertake secular administrations, the canon indirectly ruled out the assumption of a public office.^{100/} The bishop, however, is accorded a certain flexibility and latitude in the matter and may, in given circumstances, grant permission for a cleric to involve himself directly in secular affairs. This

procuracionibus: nisi forte qui legibus ad minorum tutelas aetatum, sive curationes, inexcusabiles attrahuntur, aut cui ipsius civitatis episcopus ecclesiasticarum rerum comiserit gubernacula, vel orphanorum, ac viduarum quae indefensae sunt, et earum personarum, quae maxime ecclesiastico indigent adminiculo, propter timorem Dei. Si quis vero transgressus fuerit statuta, correptioni ecclesiasticae subjaceat."

98. The Emperor did, in fact, propose three ordinances: on the erection of convents, on clergy and secular affairs, and on the removal of clergy from one church to another. For the Acta of this session, see Council of Chalcedon, Session 6, in J. Mansi, vol. 7, coll. 174- 178.

99. See C. HEFELE, op. cit., p. 389. The legislation is an example of the flexibility accorded both to circumstances, on the one hand, and the authority of the bishop on the other.

100. See J. HOFFMAN, op. cit., p. 18.

latitude, as H. Schroeder points out, arises from the very nature of the prohibition:

It is to be noted that our canon, or for that matter any other canon dealing with this subject, does not condemn secular occupation per se, so long as it does not interfere with the ministerial duties of the cleric; what it does condemn is the secularity of the motive back of the occupation. As a matter of fact, some African synodal decrees even suggest that a cleric work at some trade, provided it can be done absque officii sui detrimento.^{101/}

The key, then, to the interpretation of this canon would appear to lie in the Emperor's viewpoint, expressed in his speech to the bishops at the sixth session before announcing this particular ordinance, that avarice was a root cause of dissension in the church.^{102/} In this light, the canon is not so much concerned with public office in itself, as with the greed and self-seeking it can give rise to in the lives of clerics and monks.

The lifestyle of clerics and monks who have left

101. H. SCHROEDER, Disciplinary Decrees of the General Councils, St. Louis, Herder, 1937, pp. 91- 92. At the Fourth Synod of Carthage, in 398, the clergy were ordered to earn their living by a trade (artificium) without prejudice to their office. See Fourth Council of Carthage, Canon 51, in J. Mansi, vol. 3, col. 945.

102. The Emperor expressly attributed the errors in the church to avaritia vel pravis studiis quorundam. See Council of Chalcedon, in J. Mansi, vol. 7, col. 130.

their state of life to serve in the military or some secular office is the concern also of canon 7. It reads:

We have decreed that those who have been once received into the number of the clergy, or have become monks, must not serve in war, or enter a secular calling: those who venture to do so, and do not repent so as to return to the calling which they had previously chosen for the sake of God, shall be anathematized.^{103/}

There is an obvious similarity between this canon and canon 80 of the Apostolic Canons which deals with the issue of a bishop, priest, or deacon taking up military service:

A bishop or priest or a deacon giving himself over to the army and wishing to retain both, namely, the Roman civil office (magistratum) and the priestly ministry, is to be deposed. The things which are Caesar's, give to Caesar; and the things which are God's, to God. (Matt 22:21).^{104/}

Nevertheless, it is important to note that canon 7

103. Council of Chalcedon, Canon 7, in J. Mansi, vol. 7, col. 386: "Eos qui semel in clero taxati fuerint, sive in monasteriis deputati, decrevimus neque ad militiam, neque ad honores saeculares venire. Eos autem, qui hoc fuerint facere, et non eius rei poenitere maluerint, ut ad hoc idem revertantur, quod ante obtentu proposuerunt sibi, anathematizari."

104. See Apostolic Canons, Canon 80, in J. Mansi, vol. I, col. 46: "Diximus non oportere episcopum vel presbyterum seipsum ad publicas administrationes demittere, sed in ecclesiasticis negotiis versari. Vel ita non facere persuadeatur, vel deponatur." For the Greek text see F. X. FUNK, (ed.), Didascalia et Constitutiones Apostolorum, Paderborn, F. Schoeningh, 1905, vol. 1, p. 588, as canon 81.

of Chalcedon, unlike canon 82 of the Apostolic Canons, is not directed simply to those clerics and monks who have involved themselves in the military life or some secular dignity.¹⁰⁵ An immediate concern, therefore, is with those who have made a new choice in life, namely, to be involved in military or secular affairs precisely as laypersons. K. Hefele bases this interpretation on the fact that while the Apostolic Canons threaten the cleric with deposition from office, the legislation of Chalcedon prescribes the penalty of excommunication. He comments:

As generally an offence which, in the case of clerics, drew deposition after it, was, in the case of laypersons, punished with excommunication, it is clear that our canon [...] selects a more severe punishment, that of excommunication, because it has in view those clerics who have not merely taken military service, etc., but, at the same time, have laid aside their clerical dress and put on secular clothing. One who has laid aside the clerical dress is, for the first crime, deposed and degraded, and if he has further taken military service, etc., then the second punishment, that appointed for laypersons, is also inflicted upon him.¹⁰⁶

H. Schroeder contends that the canon regards those who turn aside from their state of life as eo ipso laicized and,

105. The term honor was used to refer to the dignity and privileges attached to the power of a magistrate. It was frequently used in place of the term magistratus. The canon stresses the secular nature of these privileges. See A. BERGER, "Honor", in op. cit., p. 488.

106. K. HEFELE, op. cit., p. 392.

for that reason, prescribes the penalty reserved for laypersons.^{107/} Interestingly, this view seems to be contradicted by the local legislation of the Synod of Angers (453) restating the Council teaching: the cleric who involves himself in the military life or secular pursuits is to be deposed from his church.^{108/} However, the Synod of Tours (461), in a similar restatement of legislation, imposed a penalty of excommunication.^{109/}

CONCLUSION

The legislation of the fourth and fifth centuries concerning public office marks a continuity and a development both when considered from the point of view of the whole community and when viewed from the standpoint of

107. See H. SCHROEDER, in op. cit., p. 96. It is interesting to note that there is a clear distinction between penalties applied to clerics and those applied to laypersons.

108. The main business of the Synod of Angers, held in 453, was to consecrate Talasius as bishop of the See. Leo, Archbishop of Bourges, presided and, together with the newly consecrated bishop and five other local bishops, drew up twelve disciplinary canons. Canon 7 states: "Clerici quoque, qui relicto clero se ad saecularem militiam, et ad laicos contulerint, non injuste ab ecclesia, qua reliquerunt, amoveantur." Synod of Angers, Canon 7, in J. Mansi, vol. 7, col. 901.

109. The Synod of Tours was held November 18, 461, under

clerics and monks.

With regard to the community as a whole, a continuity with an earlier discipline is discernible in a continuing awareness of the spiritual dangers attached to officium. In the legislative perspective of the Synod of Arles, however, the principal danger no longer resides in the realm of pagan worship, or in the fact of participation in government, but in the offence contra disciplinam. Christians in public office must not compromise their Christian principles in the execution of their duties.

The gradual emergence of a distinct clerical state and the division of that state into two groups, the clerici superioris ordinis and the clerici inferioris ordinis, is clearly reflected in the legislative attention of the Councils of Sardica and Chalcedon. When the special rank of the first group was eventually recognized by the state, a particular temptation to power, greed, and influence manifested itself. Thus, the legislation views public office as primarily a temptation to greed and self-seeking in the lives of the clerici superioris ordinis.

the presidency of St. Perpetuus, Archbishop of Tours and attended by nine other bishops. Canon five reads: "Si quis vero clericus, relicto officii sui ordine, laicam voluerit agere vitam, vel se militiae tradiderit, excommunicationis poena feriatur." Synod of Tours, Canon 5, in J. Mansi, vol. 7, coll. 945-946.

While an awareness of the temptation to greed and avarice underlies the legislation applied to the clerici inferioris ordinis in this matter, there is also concern about a secularity of motive. This is particularly evident in the legislation of Chalcedon which seeks to underscore the radical choice made by those embracing the clerical or monastic state. The legislation we have examined, however, displays a certain flexibility and latitude and, in certain circumstances, acknowledges the power of bishops to grant exceptions.

Such, then, was the canonical viewpoint regarding clerics, monks, and public office up to the end of the fifth century. However, with the integration of Christianity into the social structure of the Empire, the matter soon attracted civil law attention. In the following chapter, therefore, we will examine this civil law perspective before turning to developments in the canon law of the church.

CHAPTER TWO

FOUNDATIONS OF THE MEDIEVAL LEGISLATION

Chapter one was devoted, firstly, to the early disciplinary outlook of the church concerning public office and, secondly, to the specific application of the legislation to clerics and monks up to the close of the fifth century.

The period we have considered roughly coincides with the integration of Christianity into the Roman Empire. K. S. Latourette distinguishes two main periods in this process of integration, divided by the reign of the Emperor Constantine, 306-337:

In the first of these Christianity was making its way as a religion without formal official toleration and latterly in the face of strenuous efforts of the Emperors to extirpate it. Under Constantine began the official steps by which Christianity became the state religion. Beginning with the reign of Constantine, and except for the brief reaction under Julian, Christianity was sponsored by the government and eventually became the state religion.^{1/}

1. K. S. LATOURETTE, History of the Expansion of Christianity, Grand Rapids, Mich., Zondervan Publishing House, 1976, vol. 1, p. 67. The process of integration, of course, is quite distinct from that of conversion and refers to a formal acceptance of Christianity by various authorities.

The change of status of Christianity from a persecuted group to the sole official cult sponsored by the government brought about a corresponding shift in the area of civil legal attention. This shift of perspective in the second stage of integration forms the backdrop to this chapter. Our aim is to chart developments in the Roman law concerning the involvement of clerics and monks in public office, before turning to the work of the medieval canonists. Roman law concepts were to have a profound effect on medieval canonistic theory.^{2/} Special attention will be paid, therefore, to those aspects of Roman law which influenced canonists in their approach to this subject.

Firstly, then, we shall consider the civil legislation concerning clerics, monks and public office, which was issued as the church established itself in the Empire. The period which directly concerns us opens with the accession of the Emperor Constantine in 313 and closes with the fall of the Constantinian dynasty in 363.

2. B. TIERNEY considers that in the field of political thought Roman law doctrines can hardly be considered separately from the gradual integration of the church in the middle of the fourth century into the Roman Empire with any profit. See "Some Recent Works on the Political Theories of Medieval Canonists", in Church Law and Constitutional Thought in The Middle Ages, London, Variorum Reprints, 1979, pp. 620-625.

A. CIVIL LEGISLATION OF THE CONSTANTINIAN ERA

It is generally accepted that the legislative activity of the Emperor Constantine in the last thirteen years of his reign reflected a religious policy which steered the Christian religion from a position of equality to one of pre-eminence.^{3/} K. Baus has concisely summarized the first group of Constantinian decrees establishing this position of equality:

They began with the decree to the inhabitants of the eastern provinces: their principal item can be summarized as regulations on the restitution to be made to Christians for the injustices of which they had been the victims. The individual points were removal of all degrading and damaging judicial sentences, such as privation of earlier rank in the public service and reduction to the state of slavery, the restoration to individual Christians or their heirs of property that had been confiscated or sold, the restoration of Christian communities to their former property rights, even if such property was now in the possession of the fiscus (imperial treasury) or, through purchase or gift, had come into other hands.^{4/}

3. For a detailed analysis of Constantine's religious policy, see A. KEE, Constantine versus Christ, London, SCM, 1982, 185p. T. F. O'Meara is of the opinion that the integration of the Roman culture with Christianity brought order, modest diversity, and liturgical membership where before there had been pneumatic discernment, ministerial diversity, and charismatic individuality. See T. F. O'MEARA, Theology of Ministry, New York, Paulist Press, 1985, p. 104.

4. K. BAUS, op. cit., vol. 2, p. 5.

These first decrees of Constantine's reign highlight a legislative openness to Christian influence which was to grow throughout the whole Constantinian era. This openness is most apparent in decrees which deal with family life, respect for human life, legal protection for converts from Judaism, and the ratification of decisions of bishops in civil suits.^{5/}

It would be untrue to assert, however, that Constantine and his successors used their position as supreme legislators to change the existing social order. Indeed, a profound esteem for the Roman system of law on the part of the Constantinian emperors limited their own personal influence in this area, ^{6/} for throughout the

5. See T. MOMMSEN (ed.), Theodosiani libri XVI cum constitutionibus sirmonianis, Berlin, Weidmanns, 1905. Hereafter cited as Codex Theodosianus. Special protection of the law was extended towards Christian Jews in 16,2,5. A particular sign of Constantine's early openness to the Christian community lies in his strong prohibition of divination in 16,10,1.

6. In this respect it is also important to acknowledge the position of the civitas in the Empire in this period as virtually a tiny state in itself with its own considerable autonomy safeguarded by the tradition of Roman law. P. HUGHES, A History of the Church, London, Sheed & Ward, 1965, pp. 38-44, describes the Empire as a "federation of self-governing municipalities." By the fifth century, however, the idea that the inhabitants of the civitas were citizens of one state, under the central government in Rome, held sway throughout the Empire.

Constantinian era, a growing relationship between church and state brought about an intermingling of civil and ecclesiastical legislation. In the following section, however, we shall restrict ourselves to those civil decrees, issued by Constantine and his immediate successors, which explicitly deal with clerics, monks, and public office.

1. Decrees of the Emperor Constantine (306-337)

In looking to the civil legislation in the Constantinian era and assessing its impact, we should note that the Emperor, in his dealings with the church, was particularly concerned to shape an image of Constantinus Victor in the troubled world of ecclesiastical affairs.^{7/} Two of his early decrees show his determination in this regard. The first, issued in 313, may be regarded as the forerunner of legislation on the matter of clerics and public office:

We have learned that clerics of the Catholic church are being harassed by a faction of heretics, that they are being burdened by nominations and by service as tax receivers, as public custom demands, contrary to the privileges granted them. It is Our

7. See R. H. STORCH, "The Eusebian Constantine", in Church History, 40(1971), pp. 145-155. Under Constantine the liturgy, for example, became imperial in character reflecting a more inward looking ecclesiology and a sacralization of the clergy.

pleasure, therefore, that if Your Gravity should find any person thus harassed, another person shall be chosen as a substitute for him and that henceforward men of the aforesaid religion shall be protected from such outrages.^{8/}

Two points should be noted. Firstly, a new relationship of the Christian community with the city community (politeia), following the Edict of Milan (313), appears to have resolved problems attached to general Christian involvement in public offices. Indeed, the civil legislative attention has now shifted to the involvement of clerics and monks. Secondly, the decree refers to those offices (munera) which were considered a burden. Therefore, it does not prohibit clerics from holding offices (magistratus) which were considered an honour.^{9/}

The second decree, sent in 319 to Octavianus, the Governor of Luciania and Bruttium, states quite clearly the

8. Theodosianus 16, 2,1: "Haereticorum factione conperimus ecclesiae catholicae clericos ita vexari, ut nominationibus seu susceptionibus aliquibus, quas publicus mos exposcit, contra indulta sibi privilegia praegraventur. Ideoque placet, si quem tua gravitas invenerit ita vexatum, eidem alium subrogari et deinceps a supra dictae religionis hominibus huiusmodi iniurias prohiberi." The translation of this text and all subsequent texts quoted as in C. Pharr, Theodosian Code, Princeton, Princeton University Press, 1952, pp. 440-441.

9. See A. BERGER, "Magistratus", in Encyclopaedic Dictionary of Roman Law, Philadelphia, The American Philosophical Society, 1953, p. 571.

principle of clerical exemption from certain civic duties:

Those persons who devote the services of religion to divine worship, that is, those who are called clerics, shall be exempt from all compulsory public services whatever, lest, through the sacrilegious malice of certain persons, they should be called away from the divine services.^{10/}

The interpretatio of this law, found in the Codex Theodosianus, is of some importance. Its rationale lies in freeing those involved in the church's ministry from civil burdens so that they "shall zealously serve the church." ^{11/} Clerics, it should be noted, were not the only group to be granted the privilege of exemption from municipal duties.^{12/} The criterion for previous group exemptions, however, appears to have been that a particular task, performed by an individual or corporation, clearly

10. Theodosianus, 16,2,2: "Qui divino cultui ministeria religionis impendunt, id est hi, qui clerici appellantur, ab omnibus omnino muneribus excusentur, ne sacrilego livore quorundam a divinis obsequiis avocentur."

11. Ibid., 16,2,2: the Interpretatio reads: "Lex haec speciali ordinatione praecipit, ut de clericis non exactores, non allectos facere quicumque sacrilega ordinatione praesumat, quos liberos ab omni munere, id est ab omni officio omnique servitio iubet ecclesiae deservire."

12. Two groups referred to in the Digest are the conductores and the coloni, the tax farmers and the farmers of the imperial demesnes, respectively. See Digest, De iure immunitatis, 50,6,10,11.

contributed to the good of the state.^{13/} An exemption, granted in order that the church may be adequately served, certainly illustrates the new relationship between Christians and the politeia.

The grant or refusal of exemption from public duties was a frequent cause of legal strife for successive administrations.^{14/} It was probably, therefore, no surprise to Constantine to find himself, in the year 320, addressing a problem raised by the Praetorian Prefect, Bassus. In the wake of the decree on clerical exemption, the ranks of the clergy had suddenly begun to swell both in the city of Rome itself and in the provinces:

We command [...] that the former, who in evasion of public duties have taken refuge in the number of the clergy after the issuance of the law, shall be completely separated from that body, shall be restored to their orders and to the municipal councils, and shall perform their municipal duties.^{15/}

13. This is certainly the criterion underlying a rescript of the Emperor Hadrian quoted in the Digest: "Divus Hadrianus rescripsit immunitatem navium maritimarum dumtaxat habere, qui annonae urbis serviunt." Ibid., 50,6,5.

14. See, for example, Theodosianus, 12,1,149; 14,4,1.

15. Ibid., 16,2,3: "Ideoque praecipimus his [...] qui post legem latam obsequia publica declinantes ad clericorum numerum confugerunt, procul ab eo corpore segregatos curiae ordinibusque restitui et civilibus obsequiis inservire."

While the principle that clerics be exempt from public offices in order to serve the church appears to have been upheld during this period, a decree sent in 326 to the Praetorian Prefect, Ablavius, attempts to ensure that the principle of civic responsibility also be upheld:

[...] if there should be a dispute about the name of any person between a municipality and the clergy, if equity claims him for public service and if he is adjudged suitable for membership in the municipal council through either lineage or wealth, he shall be removed from the clergy and shall be delivered to the municipality. For the wealthy must assume secular obligations, and the poor must be supported by the wealth of the churches.^{16/}

Recent studies have revealed that the period of the Late Empire was one of repression directed at maintaining the authority of the state over the individual.^{17/} Against

16. Ibid., 16,2,6: "[...] si inter civitatem et clericos super alicuius nomine dubitetur, si eum aequitas ad publica trahat obsequia et progenie municeps vel patrimonio idoneus dinoscetur, exemptus clericis civitati tradatur. Opulentos enim saeculi subire necessitates oportet, pauperes ecclesiarum divitiis sustentari."

17. See, for instance, M. ROSTOVITZ, The Social and Economic History of the Roman Empire, Oxford, Clarendon Press, 1926, pp. 469-478. Constantine's conception of his own role and identity as the thirteenth apostle is evident in the grafting of court customs onto the liturgy. An imperial style eucharist set places aside for the more important members of the community, made a sharper distinction between the roles of the clergy and the laity, and portrayed Christ as the emperor of heaven rather than the shepherd and protector of the weak.

this background, it can be seen that the decree is typical of many provisions in the Theodosian Code which seek to lock persons in their social strata in order to secure their contribution to the coffers of the Empire. An impoverished Empire could ill afford to tolerate any substantial drop in taxation revenue.^{18/} Nevertheless, in spite of the procrustean solution proposed, the decree upholds the principle of clerical exclusion.

One further decree of the Emperor Constantine is of interest in that it provides an insight into the comprehension of the term "cleric" in the legislation of this period. In 330 a decree sent to the Governor of Numidia, Valentinus, stated:

Lectors of the divine scriptures, subdeacons, and the other clerics [...] according to the practise of the Orient, shall by no means be summoned to the municipal councils, but they shall possess fullest exemption.^{19/}

2. Decrees of the Emperor Constantius (337-361)

The question of clerics and public offices continued to attract considerable civil legal attention after the

18. See C. STARR, Civilization and the Caesars, Ithaca, N.Y., Cornell University Press, 1954, pp. 360-382.

19. Theodosianus, 16,2,7: "Lectores divinatorum apicum et hypodiaconi ceterique clerici [...] et de cetero ad similitudinem Orientis minime ad curias devocentur, sed immunitate plenissima potiantur."

death of Constantine. Of some interest to our study is a decree of Constantius issued in 349 to Severianus, Pro-Consul of Achaea:

* All clerics must be exempt from compulsory service as decurions and from every annoyance of municipal duties. Their sons, moreover, must continue in the church, if they are not held obligated to the municipal councils.^{20/}

The decree indicates explicitly that clerical exemption from munera embraced the duties of the decurion.^{21/} Thus, we can state that at this period clerics were formally exempted from membership in the municipal council, collection of the imperial taxes, responsibility for unpaid taxes, and maintenance of the public post.^{22/}

Another decree of Constantius would appear to

20. Ibid., 16,2,8: "Curialibus muneribus adque omni iniquitudine civilium functionum exsortes cunctos clericos esse oportet, filios tamen eorum, si curiis obnoxii non tenentur, in ecclesia perseverare."

21. Theodosianus, De decurionibus, 12, 1-184.

22. Theodosian Code, "Municipal council", p. 588. During this period, the Empire was divided into four parts: Oriens (Constantinople), Illyricum (Sirmium), Italia (Milano), and Gaul (Trier). There were fourteen dioceses and one hundred and seventeen provinces under the supreme authority of the emperor and the executive government of a Crown Council (sacrum consistorium) and four prefects. The chancellor of the Crown Council held the title "magister officiorum".

indicate that clerical exemption was a much sought after privilege. This decree, dated 361, was sent to the Praetorian Prefect, Taurus, and attempts to deal with the problem of those seeking to qualify for exemption by joining the ranks of the clergy:

If provosts of the state storehouses and persons who are going to accept a magistracy, and also provosts of the peace and receivers of the various taxes in kind suppose that they should aspire to a position in the church, after they have undertaken the duties of administration or honour imposed upon them, first of all, the bishops of the celestial law themselves must oppose such action, and they must exert themselves that such persons be recalled to their proper services. If the bishops should neglect this matter, the said men shall be dragged back by the decurions, with the support of the office staff of the judge.^{23/}

CANONICAL OBSERVATIONS

A principle of clerical exemption from municipal duties was clearly established in the Constantinian era. It is important to note, however, that the clerical exemption was

23. *Ibid.*, 12,1,49: [...] "Si praepositi horreorum iique, qui suscepturi sunt magistratum, praepositi etiam pacis seu susceptores diversarum specierum ad ecclesiam crediderint adspirandum, postquam officia inpositae sollicitudinis aut honoris adgressi sunt, ipsos primum antistites supernae legis conveniet reluctari ipsisque primum adnitentibus eosdem ad obsequia congrua revocari; aut, si hoc neglexerint, a curialibus iudiciali officio suffragante retrahendi sunt."

specifically concerned with burdens (munera) and did not prohibit clergy from public dignities or offices (magistratus).

Unlike the ecclesiastical legislation of this period, the civil law makes no mention of clerical greed or power seeking. The grant of exemption was accorded on the basis that it would free those involved in ministry to serve the church more zealously and was applied in both East and West. With the collapse of the Western Roman Empire, however, the influence of the Roman civil law was largely restricted to the East. Thus, in attempting to establish the foundations of the medieval canonical legislation on the subject of public office, it is the Empire in the East which will largely concern us in the following section.

B. CIVIL AND ECCLESIASTICAL LEGISLATION IN THE LATER EMPIRE

On the abdication of the Emperor Diocletian, in 305, the Roman Empire was split into two halves, pars orientalis, or eastern half, and the pars occidentalis, or western half. Although for a time the Empire was reunited, by the year 500 the Western Roman Empire had collapsed and Germanic kingdoms were established in those areas of Western Europe and North Africa once ruled by Rome. Studies have shown that the Germanic invasions left the major cities of Europe

underpopulated and virtually in ruins, while the country areas suffered the chaos arising from plagues, famines, and war.^{24/} Nevertheless, this was a period of expansion for the church as the missionary monks preached the Gospel with considerable success in Germany, the Netherlands, and Anglo-Saxon England. The new national churches, under the influence of the growing monastic movement, developed an ecclesiology which was regional and ethnic in character. Newly established monasteries became outposts of civilization keeping alive the rich heritage of both the Roman Empire and the church.^{25/} By the sixth century, the Western Empire had dissolved into a grouping of Germanic states.^{26/} In the East, however, the emperors, with

24. Some of the early Germanic Kingdoms, such as those of the Ostrogoths in Italy and the Franks in Gaul, tended to preserve much of the Roman inheritance. See G. BARRACLOUGH, The Crucible of Europe, London, Thames & Hudson, 1976, pp. 9-42.

25. See K. S. LATOURETTE, A History of the Expansion of Christianity, Exeter, The Paternoster Press, 1971, pp. 22-222. It was these same monasteries which laid the foundation of the economic recovery of Europe in the Middle Ages. They were the accepted training grounds for business, government, as well as the arts. Indeed, a feudal world took shape in the monasteries of this period which were often larger than any of the surviving cities of the Dark Ages.

26. The equilibrium of the ancient world was also disturbed by the rise of Islam which, by the seventh century, had completely disrupted the Germanic kingdoms. See G. BARRACLOUGH, op. cit., p. 10.

their capital at Constantinople, retained control of the eastern Mediterranean from the Balkans, through Asia Minor, Syria and Palestine, to Egypt. While the position of the church was firmly established, there were frequent doctrinal disputes which, because the emperor was seen as "the protector of Holy Church", became a matter of imperial concern and no little threat to the state.^{27/} Thus, the canonical legislation of the various councils and synods was of particular importance for the survival of the Empire and the affairs of church and state were merged to an extraordinary degree.

A great crisis for the Empire and the church came in 626 when Constantinople almost fell to a siege of Persians and Avars. In the century that followed, the Empire managed to withstand the northward thrust of Islam, thus allowing the Christian kingdoms of the West to develop and avoid being absorbed into the Arab world.^{28/}

27. K. S. LATOURETTE, op. cit., pp. 223-262.

28. For a brief account of the complex migrations and settlements of the Sassanids of Persia and the Barbarians, see D. HAY, The Medieval Centuries, London, Methuen, 1967, pp. 12-28.

In the West the emergence of a concept of Christian kingship among the Germanic peoples in the sixth and seventh century indicates a fusion of Christian, Roman and Germanic cultures.. The role of the King was held to include the protection and patronage of the church and, although synods and councils were not a regular feature as in the East, a body of legislation arose designed to strengthen Christian belief.^{29/}

In the following sections we shall examine the civil legislation of the Emperor Justinian and the ecclesiastical legislation of the Second Council of Nicea (787) and of some important local Councils. But, firstly, we should note some civil decrees issued prior to the fall of Rome in 455.

1. Later Roman legislation

By the eighth century, the Franks controlled the whole of western Europe except for the Iberian peninsula, southern Italy, and the British Isles. While church and state often worked hand in hand, early western

29. See *ibid.*, pp. 31-57. Carolingian society was, to a large degree, a clerical society in the sense that the moral tone and political outlook was set by the clergy. Government was centred on the royal court, the palace court and the chancery. The chancellor was always a cleric who also fulfilled the role of chaplain (kapellan) for spiritual affairs in the empire.

Christendom was marked by a separation between cultural leadership which was ecclesiastic and monastic, and political power which was in the hands of the kings. Out of this creative interplay was to come the great flowering of medieval civilization.

In 397, the Emperors Arcadius and Honorius felt constrained to write to Theodorus, a Praetorian Prefect, concerning no less a cleric than the Bishop of Rome:

The privileges which were conferred upon the venerable church by previous sainted Emperors must not be impaired. Furthermore, due enforcement shall also guard as inviolable the privileges conferred upon the Bishop of the City of Rome, so that the church shall not assume the performance of any extraordinary public service or any compulsory public service of a menial nature.^{30/}

History does not tell us what "extraordinary public service" or compulsory public service "of a menial nature" the Bishop of Rome had been asked to perform, if any. The two terms, nonetheless, are of interest. "Extraordinary public services" actually referred to the collection of extraordinary taxes, and the conscription of labour.^{31/}

30. Theodosianus, 11,16,21: "Privilegia venerabilis ecclesiae, quae divi principes contulerunt, inminui non oportet: proinde etiam quae circa urbis Romae episcopum, observatio intemerata custodiet, ita ut nihil extraordinarii muneriis ecclesia vel sordidae functionis agnoscat."

31. See ibid., 11,16,1.

For an understanding of menial public services, however, reference may be made to a decree of the Emperors Valerian, Theodosius, and Arcadius, issued in 390, to the Praetorian Prefect, Valerius:

We prohibit persons excepted by law from undertaking those compulsory services which are called menial. [...] In order that there may not be any hidden secret as to what the list of compulsory public services of a menial nature is, the following enumeration indicates them and designates them by the appropriate names. [...] the baking of bread, [...] burning lime, [...] contributing boards or wood, [...] delivering charcoal, [...] repairing either public or sacred buildings, [...] constructing bridges or highways [...]. 32/

By the middle of the fifth century, civil legislation on the subject appears to be motivated by a concern to strengthen the failing infrastructure of the Empire. This is particularly evident in a decree of the Emperors Theodosius and Valentinian, issued in 439, to the Praetorian Prefect, Maximus, which betrays an impatience with clerical

32. Ibid., 11,16,17: "[...] si quidem ea munera, quae sordida nuncupantur, exceptas lege prohibeamus obire personas [...]. Ac ne in occulto lateat quae sit, munerum enumeratio sordidorum vocabulis ipsis signata respondet [...] nullam excoctionem panis agnoscet [...] excoquendae ab eo calcis sollicitudo [...] non conferendis tabulatis obnoxia, non lignis [...] carbonis ab eo inlatio non cogetur [...] nullam sollicitudinem publicarum aedium vel sacrarum constituendarum reparandarumve suscipiet [...] pontium vel viarum constructione [...]."

exemption:

Veneration for the Catholic religion shall be preserved in augmenting the status of each of the cities, and we both renew the statutes of the ancients and of Our Fathers and decree by Our own laws that which must be observed so that public losses may not be created by a general diminution of decurions, while the number of clergy is being superabundantly augmented. For there is no doubt that when a decurion is admitted to the service of the venerable ministry and his compulsory services have not been fulfilled, the burden of such compulsory public service is thrown back on a few persons and cannot be endured [...] the substance belonging to their municipality is weakened.^{33/}

While the decree is aimed at rectifying this situation, it stops short of pressing clerics into public office by placing the burden on a substitute:

Wherefore, We decree by the present law that if any person before the day of the issuance of this sanction has undertaken the office of cleric and has not fulfilled the compulsory and obligatory public services of his own city, he shall indeed remain in the religious ministry which he has obtained, but he shall be compelled to assume, through a substitute, all his compulsory public services

33. Ibid., Liber Legum Novellarum Divi Valentiniani, 3,1: "In augendo statu urbium singularum servata catholicae religionis veneratione tam praecedentia veterum parentumque nostrorum statuta renovamus quam nostris legibus observanda decernimus, ne passim inminutione municipum, cum numerositas ex abundanti clericatis augetur, publica damna generentur."

as well as those of his patrimony.^{34/}

This same decree goes on to prohibit decurions from entering the ministry and sets down a number of provisions designed to ensure that municipal senates "will be supplied" and ministers will "not be lacking for the services of the venerable religion." ^{35/}

The Constantinian era and the last years of the unified Roman Empire may be regarded somewhat as a period of bureaucratic despotism. While there were genuine efforts to establish a policy of decentralization, the establishment of an absolute state ensured that each person stayed within his own station, was obedient to the government,

Non dubium est enim, cum non expletis muniis ad obsequium venerabilis ministerii curialis admittitur, relisum in paucos publicae functionis onus nequaquam posse tolerari et rursum migrantibus patrimoniis curialium ad personas, quae functionibus municipalibus non tenentur, propriam civitatis nutare substantiam."

34. Ibid., 3,1:"Propterea praesenti lege decernimus, ut quisque ante huius sanctionis diem suscepit clericatus officium non expletis urbis propriae muniis ac muneribus, in ea quidem quam meruit religionis observatione perduret, sed omnia per suffectum tam personalia quam patrimonii onera cogatur agnoscere."

35. See ibid., 3,1. The terminology of this decree is interesting. T. F. O'Meara writes: "The abstract latin, ministerium, can easily become an office, even a rather servile one, and was, in fact, replaced in western Christianity by officium."

and fulfilled his compulsory public duties.^{36/} Exemption from public duties was, nonetheless, frequently granted to different groups in order that they could better serve the state. The exemption granted to clerics was, therefore, not unusual: it differs from previous exemptions, however, in that its grant was intended to benefit the church, rather than the state, by freeing clerics for the divine service.

By the fifth century, the exemption granted to clerics from munera appears to have included the usual civic burdens, as well as those offices which were regarded as an honour and a privilege. A widespread abuse of the privilege led, however, to legislation forbidding certain classes of persons from entering the ranks of the clergy.^{37/}

Undoubtedly, the later legislation of this period must be set against the backdrop of an empire in decline. Rome had been sacked in 410 by the Visigoths and was to fall once again in 455, this time to the Vandals. Indeed, the civil legislation we have considered did not remain in effect in the West much beyond the death of the Emperor Majorian in the year 461.^{38/}

36. See Theodosian Code, p. xix.

37. See Theodosian Code, The Novels of Majorian, 7,7.

38. See W. ULLMANN, Law and Politics in the Middle Ages, London, Sources of History, 1975, 320p.

2. The Novels of Justinian

The legislative work of the Emperor Justinian relating to religion is of particular importance in the establishment of those principles which governed the relationship between Basileia and Sacerdotium in the Later Empire.^{39/} It was a relationship which was underscored, as some recent studies have revealed, by the Emperor's belief that the lifestyle of the clergy was inextricably linked to the moral elevation of society.^{40/} Thus, Justinian states in the praefatio to his sixth Novel:

The priesthood and the Empire are the two greatest gifts which God, in His infinite clemency, has bestowed upon mortals; the former has reference to Divine matters, the latter presides over and directs human affairs, and both, proceeding from the same principle, adorn the life of mankind; hence nothing should be such a source of care to the emperors as the honour of priests who constantly pray to God for their salvation. For if the priesthood is everywhere free from blame, and the Empire full of confidence in God is administered equitably and judiciously, general good will result, and whatever is

39. See A. GEROSTERGIOS, Justinian The Great, Belmont, Mass., Institute for Byzantine and Modern Greek Studies, 1982, p. 14. The Emperor, who reigned from 527-565, is generally credited with the inauguration of a policy of restoring political, religious, and legislative unity to the Empire.

40. See ibid., pp. 155-182. See also J. BARKER, Justinian and the Later Roman Empire, Madison, University of Wisconsin Press, 1966, pp. 185-201.

beneficial will be bestowed upon the human race. Therefore We have the greatest solicitude for the observance of the divine rules and the preservation of the honor of the priesthood which, if they are maintained, will result in the greatest advantages that can be conferred upon us by God, as well as in the confirmation of those which we already enjoy, and whatever we have not obtained we shall hereafter.^{41/}

It is in the context of this special reverence and respect for the clergy that we must view a significant development in the legislation regarding public office. While the Theodosian Code exempted the clergy from certain munera, the legislation of Justinian specifically prohibited clergy and monks from certain public offices.^{42/} Novel 123

41. R. SCHOELL and G. KROLL (eds.), The Code of Justinian, in Corpus Iuris Civilis, Berlin, Weidmanns, 1928, Novel 6, Praefatio, p. 35: "Maxima quidem in hominibus sunt dona dei a superna collata clementia sacerdotium et imperium, illud quidem divinis ministrans, hoc autem humanis praesidens ac diligentiam exhibens; ex uno eodemque principio utraque procedentia humanam exornant vitam. Ideoque nihil sic erit studiosum imperatoribus, sicut sacerdotum honestas, cum utique et pro illis ipsis semper deo supplicent. Nam si hoc quidem inculpabile sit undique et apud deum fiducia plenum, imperium autem recte et competenter exornet traditam sibi rempublicam, erit consonantia quaedam bona, omne quicquid utile est humano conferens generi. Nos igitur maximam habemus sollicitudinem circa vera dei dogmata et circa sacerdotium honestatem, quam illis obtinentibus credimus quia per eam maxima nobis dona dabuntur a deo, et ea, quae sunt, firma habebimus, et quae nondum hactenus venerunt, adquirimus." The translation of this text and all subsequent texts taken from P. Scott, Corpus Iuris Civilis, Cincinnati, The Central Trust Company, 1932, vol. 7, "The Enactments of Justinian", p. 30. Hereafter cited as Novellae.

42. See T. MOMMSEN, Codex Theodosianus, 16,2,2.

reads:

We do not permit a deacon, a steward, or any other member of the clergy, no matter what his rank may be, or any monk attached to a church or monastery, to be appointed a receiver or collector of taxes, a recorder of public or private property, a superintendent of a household, or an attorney to conduct litigation; nor do we allow him to act as a surety for any of the above mentioned purposes; and formulate this rule in order that religious establishments may sustain no injury, or the holy services of the church be interfered with.^{43/}

The prohibition clearly applies to all levels of the clergy.^{44/} J. Hoffman suggests that the prohibition of these particular offices arose simply from the fact that they were the ones most occupied by clerics.^{45/} Certainly, since each of the offices mentioned would have involved the cleric in some aspect of public or private liability, Justinian's particular choice of prohibited offices was

43. Novellae 123, 6: "Alium autem fieri susceptorem aut exactorem fiscalium funtionum aut conductorem publicorum aut alienarum possessionum aut curatorem domus aut procuratorem litis aut fideiussorem pro talibus causis episcopum aut oeconomum aut alium clericum cuiuslibet gradus aut monachum proprio nomine aut ecclesiae aut monasterii subire non sinimus, ut non per hanc occasionem et sanctis domibus damnum fiat et sacra ministeria impediuntur." "Steward" refers to the Oeconomus ecclesiae, a clerical administrative assistant of the bishop with a particular interest in church property.

44. See "Oeconomus ecclesiae", in A. BERGER, op. cit., p. 667.

45. See J. HOFFMAN, op. cit., p. 21.

most probably influenced, in some measure, by his stated desire of restricting injury to public institutions.^{46/}

In Novel 131, issued in 545, the Emperor declared that he regarded the decisions of the four Ecumenical Synods to be as holy as the Sacred Scriptures themselves and placed their canons on an equal footing with the laws of the state. Since whatever the canons forbade, the law of the state also forbade, we may presume a connection between Novel 123 and the canonical legislation.^{47/} Certainly, the emphasis on

46. The notion of personal liability was highly developed in Roman law. A good example is found in the actio tutelae, a bonae fidei action, in which a tutor had to account for any loss suffered by his ward through negligent administration of the estate. Any procurator and conductor acted under mandate and was certainly liable for dolus, deliberate breach of faith, and a conviction in the actio mandati resulted in legal infamia. See J. CROOK, Law and the Life of Rome, London, Thames and Hudson, 1967, pp. 206-249. Clearly, Justinian did not want the clergy exposed to the stringent repercussions, social and legal, imposed in cases of infamia. See "Infamia", in A. BERGER, op. cit., p. 500.

47. Novellae, 123, 1: "Sancimus igitur vicem legum obtinere sanctas ecclesiasticas regulas, quae a sanctis quatuor conciliis expositae sunt aut firmatae, hoc est in Nicaena trecentorum decem et octo et in Constantinopolitana sanctorum centum quinquaginta patrum et in Epheso Prima, in quo Nestorius est damnatus, et in Calcedone, in quo Eutychis cum Nestorio anathematizatus est. Praedictarum enim quattuor synodorum dogmata sicut sanctas scripturas accipimus et regulas sicut leges servamus." The intermingling of Roman civil law and canon law meant that clerics were often called upon to serve as arbiters in secular disputes. See K. S. LATOURETTE, op. cit., pp. 22-222.

preventing any interference with the holy services of the church echoes the legislation of Chalcedon.^{48/}

While the legislation of Novel 123 displays connections with previous enactments of ecclesiastical and civil law, its emphasis on prohibition rather than exemption from public office represents an important innovation in the law.

3. The Second Council of Nicea (787)

In the two hundred years following the death of the Emperor Justinian, the issue of clergy and public office appears to have received little legislative attention. Apart from the Council of Toledo, ^{49/} which, in 633,

48. Council of Chalcedon, Canon 3, in J. Mansi, vol. 7, coll. 384-385.

49. The Council of Toledo (633) was a national synod for Spain. It was convoked by King Sisenandus and held under the presidency of Isidore of Seville. The Council issued 75 canons. Canon 31 reads: "Saepe principes contra quoslibet majestatis obnoxios, sacerdotibus negotia sua committunt. Et quia sacerdotes a Christo ad ministerium salutis electi sunt, ibi consentient regibus fieri judices, ubi jurejurando supplicii indulgentia promittantur, non ubi discriminis sententia praeparetur. Si quis ergo sacerdotum contra hoc commune consultum discussor in alienis periculis extiterit, sit reus effusi sanguinis apud Christum, et apud ecclesiam perdat proprium gradum." Council of Toledo, Canon 31, in J. Mansi, vol. 10, col. 628. The Synod also restated clerical exemption in canon 47. See J. Mansi, vol. 10, col. 631. It should be noted that the convocation of the council by King Sisenandus reflects the contemporary notion that assemblies of this kind were simultaneously assemblies of the kingdom at which royal decisions were made binding under penalty of excommunication. Interestingly, in the year of the Council of Toledo an elective monarchy was introduced in Spain.

sanctioned the appointment of priests as civil judges, it was not until the Second Council of Nicea, in 787, that the need was felt for legislation on the matter.^{50/} Canon 10, drawn up in the eighth session, deals with the subject in the verbose manner so typical of this council:

Since certain members of the clergy, disregarding the canonical ordinances, leave their own diocese and go over into other dioceses, especially into the diocese of this royal city, taking up their abode with princes and holding divine service in their oratories, attention is called to the fact that it is not permitted to receive such persons into any residence or church without the approval of their own bishop and that of the bishop of Constantinople. If anyone does this without such approval and so continues, let him be deposed. With regard to those who have done this with the knowledge of the aforesaid bishops, it is not lawful for them to assume secular responsibilities, since this is forbidden by the canons. If anyone be found holding the office of those who are called maiores (that is, stewards of the estates of high personages), let him either resign it or be deposed. Let him rather be the instructor of the children and the servants, reading the

50. Attended by 375 bishops, the Second Council of Nicea was summoned by the Empress Irene and her son Constantine to deal with the problem of iconoclasm. It opened in the church of St. Sofia, September 24, 787. The bishops declared that salutation and honour ought to be paid to images, but not the worship of latría, which belongs to God alone. The controversy points to a gap which was developing between the church in the West and the church in the East. "The West, which by now no longer understood the Greek language, could not distinguish between veneration and adoration. Where the Easterners recommended the former, the Westerners thought they meant the latter." See R. P. MCBRIEN, Catholicism, London, Geoffrey Chapman, 1980, vol. 2, pp. 623-624. At the eighth session, which was held in Constantinople on October 23, 787, 22 disciplinary canons were issued.

Sacred Scriptures to them, for to this end he was ordained. 51/

It is important to note that the canon refers to existing 'canonical ordinances prohibiting clerical involvement in secular responsibilities (saeculares curas). The statement must be viewed in the context of the first canon of the Council which reads:

Clerics shall observe the holy canons, and we recognize as such those of the Apostles and of the six ecumenical councils; further, those drawn up by the synods locally assembled to promulgate those of the said ecumenical councils, and the canons of our holy fathers. For all these, being enlightened by the same Spirit, defined such things as were expedient. Accordingly, those whom they anathematized, we likewise anathematize; those whom they

51. Council of Nicea, "Canon 10", in J. ALBERIGO, (ed.), Conciliorum Oecumenicorum Decreta, Friburgi, Herder, p. 146. "Quoniam quidam clericorum parvipendentes canonicam constitutionem, relinquunt parochiam propriam, et ad alias parochias convolant, et maxime in hac Deo servanda regia urbe sese apud principes locant, in eorum oratoriis missas facientes: hos absque proprio episcopo et Constantinopolitano antistite non licet suscipere in qualibet domo vel ecclesiae: quod si hoc fecerit, et ita perseveraverit, deponatur. Quotquot autem cum conscientia praedictorum hoc fecerint sacerdotum, non licet eis mundanas et saeculares curas suscipere, praesertim cum hoc agere prohibeantur a sacris canonibus. Quisquis autem apparuit eorum, qui dicuntur maiores, curam tenere, aut desinat, aut deponantur: potius autem maneat ad magisterium tam puerorum quam famulorum, relegens eis divinas scripturas: ad hoc enim etiam sacerdotium consecutus est." Hereafter cited as Conciliorum Oecumenicorum Decreta. It is interesting to note a tendency in the legislation of this council to simply reiterate the teachings of earlier councils.

deposed, we also depose; those whom they rejected, we also reject; and those whom they delivered over to punishment, we subject to the same penalty.^{52/}

Thus, the interpretation of canon 10 is to be sought in the legislation of previous councils and synods which it clearly reflects. Certainly, the counsel to shun the company of princes and be content with instructing the servants and children unites the twin motives underlying earlier legislation, namely, the avoidance of self-seeking and dedication to the ministry of the church. While the bishops specifically single out the office of estate steward, the comprehension of saeculares curas is to be found in already existing canons.^{53/} This invocation of prior legislation to regulate contemporary disciplinary problems in the

52. Council of Nicea, "Canon 1", in Conciliorum Oecumenicorum Decreta, p. 138. "[...] tenemus tam scilicet illorum qui ab almis et laudabilissimis apostolis sancti Spiritus tubis editi sunt, quam eorum qui a sex sanctis et universalibus sinodis, atque his conciliis quae localiter collecta sunt, in expositionem huiusmodi decretorum promulgati sunt; nec non et eorum qui a sanctis patribus nostris prolati fuisse probantur. Ab uno enim eodemque Spiritu illustrati definerunt quae expediunt. Et quidem quos anathemati transmittunt, et nos anathematizamus: quos vero depositioni, et nos deponimus: quos autem segregationi, et nos segregamus."

53. The term "Maior" was commonly used to designate a person of a higher official rank. See "Maior", in A. BERGER, op. cit., p. 573.

matter demonstrates, in the opinion of J. Hoffman, that the prohibition from holding public office was well known in the church of the eighth century.^{54/}

4. Local councils

A brief review of the legislation formulated by local synods and councils in the century following the Second Council of Nicea reveals little development in the law. This is largely the result of a theological emphasis on christological dogma which tended to obscure ecclesiological considerations. Thus, the Council of Frankfort, held in 794, prohibited monks from engaging in secular matters (saecularia negotia).^{55/} Likewise, the Council of Fréjus, which met in 796, draws and builds on the Pauline image of the soldier on active service to underline an almost

54. See J. HOFFMAN, op. cit., p. 23.

55. Canons of the Council of Frankfort, canon 11, in A. WERMINGHOFF, (ed.), Monumenta Germaniae historica: Concilia, Hannoverae, Impensis bibliopoli Hahniani, 1906-1908, vol. 2, p. 168, (hereafter cited as Monumenta Germaniae historica): "Ut monachi ad saecularia negotia neque ad placita exercenda non exeant, nisi ita faciant, sicut ipsa regula praecepit." Held at Frankfort on the Main, this Council appears to have been attended by some 300 bishops from Germany, Gaul, and Aquitaine. There were also representatives from Spain, Italy, and England. Its principal concern was the heresy of Elipandus, Archbishop of Toledo, who held that Christ was not the proper but adoptive Son of God. Fifty-six canons were issued.

priestly involvement in saecularia negotia.^{56/} The underlying motives for the prohibition would appear to be contained in canon 10 of the Council of Mainz, which, in 813, appealed to clerics to see the love of money as the root of all evil, to shun public offices and occupations, and to put aside all ambitious designs.^{57/}

56. Council of Frejus, Canon 5, in ibid., p. 191: "Ut saecularia negotia ultra modum mensurae nulli liceat exercere. Ait enim apostolus: Nemo militans Deo implicat se negotiis secularibus, ut ei placeat, cui se probavit (2 Tim: 2-4). Intueri quapropter subtilis libet, cuius nos esse regis milites gratulamur. Et quia in castris dominicis militamus, sollicite pensare constringimur, quibus armis muniti cum tanto adversario certaminis bella adgressi pugnare valeamus, ut expediti ab omni praesentis saeculi impedimento, intrepidi in prima acie persistentes, post palmam victoriae triumphatricis gloriae coronam ab eo rege, qui nos de antiquo hoste triumphavit, suscipere mereamur." The errors of Elipandus, Archbishop of Toledo, were also the main business of this council. Attended by Paulinus, Patriarch of Aquileia, and his suffragans, the council published a definition of faith and 13 canons.

57. Council of Mainz, Canon 13, in ibid., p. 284: "Ministri autem altaris Domini vel monachi, nobis placuit, ut a negotiis saecularibus omnino abstineant. Multa sunt negotia saecularia; de his pauca perstringimus, ad quae pertinet omnis libido non solum in inmunditia carnis, sed etiam in omni carnali concupiscentia, quicquid plus iusto appetit homo: turpe lucrum, munera iniusta accipere vel etiam dare, pro aliquo saeculari conquestu precio aliquem conducere, contentiones et lites vel rixas amare, in placitis saecularibus disputare, excepta defensione orfanorum aut viduarum, conductores aut procuratores esse saecularium rerum, turpis verbi vel facti ioculatorem esse vel iocum saeculare diligere, aleas amare, ornamentum inconveniens proposito suo querere, in deliciis vivere velle, gulam et ebrietatem sequi, pondera iniusta vel mensuras habere, negotium iniustum exercere. Non tamen iustum negotium est contradicendum propter necessitates diversas, quia legimus sanctos apostolos

That clerical involvement in secular pursuits was something of a problem in ninth century Germany appears a reasonable conclusion to draw from the legislation of the Council of Aachen, held in 816. In Canon 131 the bishops paint a graphic picture of foul-mouthed clerics, so involved in secular occupations, that they are too tired to stand and lead the various liturgical prayers. The council legislation reveals a concern regarding the poor education of the diocesan clergy and a desire that they be better prepared to take their place in feudal society as well as in the church.^{58/}

negotiasse, et in regula sancti Benedicti praecipitur praevidere, per quorum manus negotium monasterii transeat. Canes et aves sequi ad venandum in omnibus quibuslibet sit causis superfluum esse. Ecce talis et his similia ministris altaris Domini necnon et monachis omnino contradicimus, de quibus dicit apostolus: Nemo militans Deo implicat se negotiis saecularibus (2 Tim: 2-4)." The object of this council, which opened June 9, 813, was to restore ecclesiastical discipline. To this end the thirty bishops and twenty-five abbots read the Gospels, the Canons of the Church, and the pastoral of St. Gregory. A total of fifty-six canons were published.

58. Council of Aachen, Canon 131, in *ibid*, p. 408: "[...] Sunt etenim quidam clericorum, qui in saecularibus negotiis, et disceptationibus pene totum infatigabiliter deducunt diem et, mox ut ecclesiam ad divinum officium peragendum intraverint, ita fatigati videntur, ut nec orationi vacare nec ad psallendum stare queant, sed potius sedentes non divinis, sed vanis solent instare loquelis ac saecularia verba et, quod id faciunt, et, quod dictu nefas est, turpia et obscena invicem proferunt [...]." Held in Aachen (Aix-La-Chapelle) in September 816, this council set out to draw up two rules of life, one for canons and the other for nuns. Both rules are extremely long and are thought to have been composed by Almary, deacon of Metz.

A marked continuity in the legislation is particularly evident in the proceedings of the Council of Paris, which, in 829, drew up three books of canons.^{59/} In repeating the prohibition against public office or involvement in secular affairs, canon 29 appeals to the directives of the Fathers and the legislation of the Council of Chalcedon.

CANONICAL OBSERVATIONS

In the period we have examined, from the fourth to the ninth century, a civil law attention to the issue of clerics and monks assuming public office is clearly discernible in the grant of exemption from municipal duties. From the time of the Emperor Constantine, the criterion for exemption reflected a concern of the ecclesial community and the discipline of the Fathers that ministers of the church

59. Council of Paris, canon 28, in *ibid.*, p. 630: "[...] Qui sacris officiis ob meritorum praerogativam sunt adplicati, dedecus et valde periculosum est terrenis actionibus turpibusque lucris eos implicari. Conperimus igitur nonnullos praesbiteros et monachos, desertores ordinis sui, quod non sine magno animi merore prosequimur, adeo vilicationes et negotiationes diversaeque turpia lucra sectari, ut illud videatur impletum, quod dicitur: Et erit sicut populos sic sacerdos (Isaiah 24: 2). Quod et leges divinae et iura canonica condemnant, quantumque etiam id religioni Christianae contrarium sit, manifestum est [...]." Called by Louis le Débonnaire, the council met June 6, 829, and was attended by four metropolitans and twenty-five bishops. The acta of the council are divided into three Books of Canons.

should avoid civilian pursuits which would distract them from the demands of the ministry. Thus, the civil law exemption was based on the pastoral need of the church to be adequately served. This criterion remained in place in the East throughout the whole period we have considered. In the West, however, the breakdown of the infrastructure of the Empire and successive invasions brought about the virtual demise of Roman civil legislation.

The civil exemption of the Roman law embraced those municipal duties which were regarded as a burden (munera). There is some evidence, however, that by the fifth century the exemption was regarded as embracing those public dignities or offices known as magistratus. This would seem to have been the case in the time of the Emperor Justinian when legislation was enacted prohibiting clerics and monks from assuming certain public offices, which were traditionally regarded as dignities and honours. It is important to note, however, that the prohibition does not appear to have been based on the criterion of pastoral need, as was the exemption, but on a jurisprudence which acknowledged that clerics assuming certain public offices could well involve the church in some form of public or private liability. The civil prohibition, therefore, was concerned with restricting the liability of the church con-

sidered from the civil law perspective of a public institution.

Both the civil and ecclesiastical law of this period reflect the influence of the first universal legislation to touch on this matter, namely, canons 3 and 10 of the Council of Chalcedon. As in the Council, the underlying motive of the legislation is not so much concerned with public office as with the concomitant temptation to avarice, greed, and power seeking.

The prohibition against clerics and monks holding public office seems to have been well in place, both in the Eastern Empire and the Western Christian Kingdoms, in the ninth century. The issue received very little canonical attention in the tenth century. While the prohibition continued to be recognised, bishops exercised considerable discretion in the matter and monks and clerics occupied many important public positions during the early Middle Ages.

With the revival of the Roman law in the eleventh century, however, a renewed canonical attention to the matter occurred as the Corpus Iuris Canonici gradually took shape. In the following section, therefore, we will consider the writings of three canonists whose pioneering work played an important part in the formation of the

Corpus, namely, Ivo of Chartres, Burchard of Worms, and Gratian.

C. MEDIEVAL CANONICAL LEGISLATION

1. The Decretum of Burchard of Worms

In a period when the rediscovery of ancient manuscripts containing many church laws was slowly bringing about a new point of departure in the study of canon law, the Decretum of Burchard, Bishop of Worms, became an important manual of canon law in Germany, France, and Italy.^{60/}

The Decretum was primarily intended as a doctrinal primer for clerics; in Book II, it deals with the obligations of the clerical way of life and touches on the question of clerics in public office.^{61/}

In a first reference to clerics involved in activities foreign to the clerical state, Burchard drew the

60. Burchard (c. 965-1025) became Bishop of Worms in 1000. An active and influential bishop, he was particularly concerned with asserting the authority of the Church in matters spiritual and resisted secular interference as tensions began to challenge the supposed unity of Regnum and Sacerdotium.

61. Burchard's Decretum is divided into twenty books and

attention of his readers to the third canon of the Council of Chalcedon. He set down, however, only the first part of the canon which prohibited the cleric from mixing himself in secular affairs.^{62/} The final part of the canon, which refers directly to various public offices and prohibits the cleric from assuming them without a special commission from the bishop of the city, is not to be found in the Decretum.^{63/}

instructs bishops on a whole range of spiritual and jurisdictional matters. As a bishop, Burchard showed himself to be a pastoral and practical canon lawyer in his Lex familiarum Wormatiensis which, in a review of current manorial law, attempts to protect the rights of the peasants in the diocese of Worms. His interest also centred on a radical social reform of feudal society.

62. J. A. PROVOST discerns in the work of the early medieval compilers a tendency to focus primarily on "secular activities by clerics, especially their involvement in business affairs." This could account for Burchard's omission of canon 7 of the Council of Chalcedon which is directly concerned with public office. See J. H. PROVOST, "Clergy and Religious in Political Office in the American Context", in The Jurist, 44(1984), p. 279.

63. The text as cited by Burchard reads: "Pervenit ad sanctam synodum quod quidam, qui in clero videntur electi, propter lucra turpia conductores alienarum possessionum fiant, et saecularia negotia sub cura sua suscipiant: Dei quidem ministerium parvi pendent, saecularium vero discurrentes per domos, et propter avaritiam patrimoniorum sollicitudinem sumentes. Decrevit itaque sanctum concilium, nullum deinceps, non episcopum, non clericum, non monachum, aut possessiones conducere, aut negotiis saecularibus se miscere, praeter ecclesiasticarum rerum sollicitudinem." Burchard of Worms, Decretum, II, c. 145.

A still more puzzling omission is any reference to canon 7 of Chalcedon, which deals directly with the issue of clerics and monks following a secular calling.^{64/} Burchard's reasons for these omissions are now largely a matter of conjecture. The full text of Chalcedon was certainly available to him; this would seem to point to the omission of the second part of canon three and the complete disregard of canon seven as one of deliberate choice. J. Hoffman is of the opinion that Burchard's editing of canon 3 simply points to the fact that his main concern was to treat of the prohibition against clerics engaging in secular occupations and not the issue of public office.^{65/} Regarding the omission of canon 7, he writes:

This omission creates several questions. Was the law forbidding civil offices so well established that Burchard need not cite it? Was this period without abuses of this kind? On the other hand, had a contrary custom arisen that clerics readily fulfilled public offices? ^{66/}

64. It is interesting to note that during this period in the German Empire the secular power of bishops and abbots was well established and many ecclesiastics held high public office. See K. S. LATOURETTE, op. cit., pp. 223-262. Burchard may well have made the prudent legal judgement that the values behind the original legislation were no longer held.

65. See J. HOFFMAN, op. cit., p. 27.

66. Ibid., p. 26.

A partial answer to these questions may well be found in the fact that in the same book of the Decretum Burchard does draw attention to canon 15 of the Third Council of Carthage^{*} (397) which reads:

Moreover, it is resolved that bishops and priests and deacons and clerics are not to be tenants of estates, nor public officials (procuratores), nor are they to seek their livelihood by any shameful or dishonest business transactions; because they ought to remember what has been written: no one serving God is to involve himself in worldly transactions (2 Tim 2: 3-4).^{67/}

In citing this canon, however, Burchard is less concerned with a contemporary application of the law than making its content known to his own generation. In fact, the Decretum of Burchard and the Decretum of Ivo of Chartres, whose work we shall now consider, are best viewed from a pioneering reassertion of an ecclesiastical tradition found in the re-discovered ancient manuscripts.

2. The Decretum of Ivo of Chartres

A brief examination of the sixth book of Ivo's Decre-

67. Council of Carthage, Canon 15, in J. Mansi, vol. 3, col. 883: "Item placuit, ut episcopi et presbyteri et diaconi vel clerici non sint conductores, neque procuratores, neque ullo turpi vel inhonesto negotio victum quaerant: quia respicere debeant scriptum esse: nemo militans Deo, implicat se negotiis saecularibus."

tum reveals that on the subject of clerical legislation, he is, for the most part, content to draw heavily on Burchard's work.^{68/} This is evidenced partly by the fact that canon three of Chalcedon is cited in precisely the same truncated version adopted by his predecessor and reference made, as in Burchard's Decretum, to canon 15 of the Third Council of Carthage.^{69/}

The Decretum, reflecting the steady rediscovery of canonical texts, also draws on a letter of Cyprian to the community in Furni expressing his disquiet at the appointment of a priest to the public office of tutor.^{70/}

Unlike Burchard, however, Ivo is not content to cite only the ancient texts regarding the issue of clerics and public office. In a section, which probably reflects Ivo's

68. St. Ivo of Chartres (c.1040-1116) was educated in Paris and, after some years as prior of the Canons Regular at Beauvais, was ordained Bishop of Chartres in 1090. His three major canonical treatises, the Collectio Tripartita, the Council of Panormia, and the Decretum, established him as the most influential canonist of his day. Much of his energies, however, were directed to a solution to the Investiture problem. He was imprisoned in 1092 for his opposition to the marriage intentions of King Philip I but, on his release, continued to voice moderate yet firm opinions on the libertas ecclesiae in matters spiritual.

69. See IVO OF CHARTRES, Decretum, VI, c. 218.

70. ST. CYPRIAN, Letter LXVI, PL, vol. 4, coll. 397-399.

interest and involvement with the Investiture controversy, he makes reference to a letter of Urban II, a contemporary Pope.^{71/} The main burden of the letter is to situate clerics in a position of obedience to their bishop and to label as an abuse the exercise of secular power over the cleric.^{72/} The Pope expressly forbids clerics from placing themselves under a secular authority, except where their legitimately appointed bishop also wields secular power, and at the same time imposes a canonical penalty on those who do so.^{73/}

The inclusion of Urban's letter in Ivo's Decretum provides an insight into the contemporary canonical position

71. The Investiture controversy centred around the claim of the Emperor and various princes to invest either a bishop or an abbot with the ring and staff, symbols of ecclesiastical office, and to receive homage before consecration. The dispute was at its height in the late 11th century.

72. Urban II (c.1035-1099) was elected Pope in 1088. A former prior of Cluny he prohibited investiture in 1088 and, at a Synod held in Clermont in 1095, forbade bishops and clerics from becoming vassals of the Emperor or, indeed, of any layman. The canonical legislation of his pontificate repeatedly threatened excommunication of the one investing and one invested.

73. The prohibition, which was renewed by the Synods of Rouen (1096), Poitiers (1100), and Troyes (1107), reads in part: "Nosse te volumus quia nulli saeculari Domino potestatem in clericos habere licet; sed omnes clerici episcopo soli esse debent subjecti. Quicumque vero aliter praesumpserit, canonicae procul dubio sententiae subiacebit." IVO OF CHARTRES, Decretum, VI, c. 408.

regarding clerics and public office. Firstly, the imposition of the penalty made the assumption of a public office by a cleric a practical impossibility. Secondly, by placing the letter in the context of ancient legislation, Ivo makes it clear that Urban is doing no more than restating an ancient rule of the church which derives its authority from its traditional nature. Thirdly, since there is no question in Ivo's mind of an innovative legislation, it seems reasonable to suppose that the law forbidding clerics from assuming public office was not deemed to have been extinguished by a contrary custom. This would seem to have been the state of affairs when Gratian, whose innovative approach to canon law we must now examine, took up his work.

3. The Decretum of Gratian

The completion of Gratian's Concordia discordantium canonum at Bologna about the year 1140 left the Church in possession of a collection of manuscripts, the ius antiquum, far more comprehensive than any of the collections of the preceeding two centuries.^{74/} Since Gratian incorporated

74. Not a great deal is known about Gratian's life. He was a Camaldolese monk and, while living in the monastery of Saints Felix and Nabor, taught law at Bologna. His Decretum contains decisions of the Lateran Council of 1139

into his work the greater part of early Church legislation already touched upon in this study, we need not dwell on the citations concerning clerics and public office to be found in the Decretum.^{75/}

Some recent studies, however, have suggested that not only is Gratian's collection a presentation of the old law with a new twist but that the Decretum, in whole or in part, can only be understood if its connection with the developments within the Church at the time it was composed are grasped. In this section, therefore, we will refer to the findings of these and other studies in an attempt to place what was, in effect, a ius novum in context.

Gratian included in his collection a large number of the earliest references to the issue of clerics and public office. Thus, we find that Cyprian's letter to the community in Furni, quotations from the Fathers of the

which indicates that the work was composed after that year. he probably died around the year 1179. His work earned him the title of "father of the science of canon law" and medieval canonists looked upon him as the "Magister".

75. Gratian's choice of title underscores his intention of adopting a reforming methodological approach. In S. Kutner's view, with this one work "the age of searching for a norm of harmony of sources came to an end. [...] With all its obvious deficiencies, the book demonstrated that it was

Church, and detailed reference to the Councils of Antioch, Sardica, and Toledo are included. No mention is made, however, of Roman law texts concerning the exemption of clerics from officium.^{76/}

In three separate capitula Gratian cites letters of Pope Innocent I, Gelasius I, and Gregory I, concerning clerics who had served as officials in the Emperor's curia, or as advocates and soldiers. Taken together, the letters appear to point to the assumption of public office as constituting, by the fifth and sixth centuries, a canonical impediment to Orders or entry into the clerical state. With

possible by a process of reasoning and organization to cast all the apparently unwieldy mass of canons into a system, however imperfect, of jurisprudential thought; that it was legitimate for such organized thought to find a place, as a discipline of its own, somewhere between sacred theology and the legal science which, in the wake of the restoring of the full Corpus iuris civilis, had just then been reborn in the city of Bologna, where Gratian's own monastery stood. The theology of monasticism continued to emphasize the Fathers and the place of the liturgy whereas the theology of the schools placed more emphasis on the analytic and dialectical. S. KUTTNER, "An Interpretation of Medieval Canon Law", in Gratian and the Schools of Law, London, Variorum Reprints, 1983, pp. 2-15.

76. Unlike his predecessors, Gratian does not include Roman law texts in his work. Indeed, he scrupulously deleted extracts from the law of Justinian when quoting from earlier collections. See S. CHODOROW, Christian Political Theory and the Church in the Mid-Twelfth Century: the Ecclesiology of Gratian's Decretum, Berkeley, University of California Press, 1972, p. 15.

regard to priests and clerics acting as judges, the decretum makes reference to the canons of the fourth and eleventh Councils of Toledo, which forbid them to be adjudicators in cases involving a discriminatory sentence.^{77/}

In a recent study, S. Chodorow asserts that Gratian's own title for his work, the Concordia discordantia canonum, indicates that he himself saw his role as that of a reformer of the church's legal system. He insists that if we are to establish the context of his work, we must look for the reasons which led Gratian to undertake such a massive reform.^{78/}

According to Chodorow, Gratian was certainly concerned with presenting the legal tradition of the church in a

77. See Decretum Magistri Gratiani: Ed. Lipsiensis 2a. post Aemilii Ludovici Richter curas ad librorum manu scriptorum et ed. romanae fidem recognuit et adnotatione critica Aemilius Frieburg, Lipsiae, ex Officina B. Tauchritz, 1928, c. 6, c. 29, C. XXIII, q. 8. Hereafter cited as Decretum Gratiani.

78. S. CHODOROW, in op. cit., p. 5, argues that because Gratian was a Camaldolese monk, scholars have assumed he was not a man of the world. "In fact, all studies of Gratian's work have been based on this assumption, and making this assumption has freed scholars from considering what effect, if any, the events of Gratian's times had on his ideas and interests. Yet, it is true that medieval canon lawyers, both before and after Gratian, played an active role in the politics of their times or at least that their collections were profoundly affected by events and political ideas."

manageable form and even to establish a new science of canon law.^{79/} He maintains, however, that this was not the whole of the Magister's purpose:

The reform movement of the eleventh century had focused attention on the earthly church. Early in the movement's history, leaders of the reform were concerned with the structure and moral condition of the church. After the Investiture Contest started, the emphasis shifted to the church's place in the world order. The new reformers of the twelfth century wanted to return the attention of the hierarchy to the constitutional and moral state of the church. In the Decretum, Gratian expressed the views and concerns of the reformers. He organized the law of the church according to subject, treating the legal and moral condition of candidates for the clergy. He sets forth the constitutional law of a community whose essential purpose is spiritual.^{80/}

For S. Chodorow, then, the true context of the Decretum is to be found in the new reformer's view of ecclesiastical community.^{81/} In a church which had won its independence from secular authority, Gratian and others were beginning to look upon the church as a political community

79. See ibid., p. 248.

80. See ibid., p. 248.

81. B. TIERNEY is of the opinion that the substantial content of medieval canonistic teaching was influenced more by their working experience of the structure of medieval societies than by any disposition to press abstract principles to logical conclusions. See B. TIERNEY, Church Law and Constitutional Thought in the Middle Ages, London, Variorum Reprints, 1979, p. 609.

in its own right and develop a political theory of the church based on earlier works dealing with secular kingdoms.

The ecclesiology of the Decretum, in the opinion of S. Chodorow, views the church as an independent community, an entity separate from the secular community, over which the episcopal rulers exercised a wholly independent authority. The ramifications of this view of the church as a juridical community possessing its own jurisdiction, its own constitution, and its own juridical powers, are particularly evident in Gratian's understanding of the term negotia secularia which, as Chodorow points out, manifests itself in a discussion on the jurisdiction of episcopal judges:

According to the Magister, the bishops' exclusive right to hear cases involving clerics does not derive from imperial privilege but from the very nature of the prelate's jurisdiction as it is defined in the New Testament. The biblical text is from Paul's second letter to Timothy, "In the army, no soldier gets himself mixed up in civilian life" (2 Tim 2:4). As Clement had said, "God does not wish you [the bishop] to be involved in secular affairs." But a distinction must be made, says Gratian, between secular business and the business of secular men. Since clerics may be engaged in secular business, as in the administration of church property, it is clear that bishops may judge concerning secular business if it is the business of a cleric. Episcopal jurisdiction is defined in terms of persons instead of types of affairs, and this definition stems from Saint Paul, not from

Theodosius or Charlemagne.^{82/}

Indeed the Magister makes a distinction between the secular business of clerics and the secular business of secular men.^{83/} In S. Chodorow's view this is particularly evident in his discussion on the power of clerics to shed blood:

Gratian's opponents are imaginative as well as imaginary, and they bring forth yet another objection to the use of force by prelates: Bishops ought not to implicate themselves in secular business. The relevant biblical passage comes from 2 Timothy 2:4: "No man being a soldier to God, entangleth himself with secular business. Gratian answers in effect that this text refers only to some bishops [...] Bishops who accept imperial lands or offices are bound to pay the tribute due to the secular lord and to perform the duties required by their titles. Bishops who

82. Ibid., p. 220.

83. Decretum Gratiani, C. 11, q.1, dict. post c. 47, "Ex his omnibus datur intelligi, quod clericus ad publica iudicia nec in civili, nec in criminali causa est producendus, nisi forte civilem causam episcopus decidere noluerit, vel in criminali sui honoris cingulo eum nudavert. 1. Illud autem quod in epistola Clementis dictum est: 'Non cognitorem secularium negotiorum te vult Deus esse,' ex episcopali unctione intelligendum est. Non enim in episcopum ungitur, ut cognitor secularium negotiorum resideat, sed ut procurator animarum et distributor spiritualium existat. Prohibetur ergo secularibus negotiis occupari, non ad tempus sequester fieri. Vel secularia iudicia non de rebus secularibus sed secularium virorum intelligenda sunt. Iudicia de rebus secularibus secularia appellantur iuxta Apostoli: 'Secularia igitur iudicia si habueritis contemptibiles qui sunt in ecclesia constituit.' (1 Cor.

renounce the regalia and are content to live on tithes and other legitimate ecclesiastical revenues should not have anything to do with the secular community.^{84/}

There does appear some reason to suppose that Gratian is using the phrase negotia secularia here to refer to the business of the secular world and his distinction between the two types of bishops highlights the reformers view of the church as an entity complete in itself.^{84/}

CANONICAL OBSERVATIONS

The greater part of Western Church legislation concerning the involvement of clerics in business affairs and public office is to be found in the Decretum. Inasmuch as the laws contained in the Decretum were regarded as

6:4) Iudicia vero secularium secularia appellantur in epistola Clementis, quod ex subsequentibus datur intelligi, cum dicitur: 'Hec opera, que tibi minus congruere diximus, exhibeant sibi invicem vacantes laici.' Prohibentur ergo clerici a cognitione negotiorum secularium virorum, non secularium causarum. Negotia quippe clericorum, sive criminalia sive civilia fuerint, non nisi apud ecclesiasticum iudicem ventilanda sunt."

84. For a detailed analysis of Gratian's understanding of the sacrament of orders and a summary of his ecclesiological outlook, see L. ÖRSY, "Bishops, Presbyters and Priesthood in Gratian's Decretum", in Gregorianum, 44(1963), pp. 788-826.

having the authority of the source cited, their inclusion in the compilation reflects a concern that clerics should devote themselves fully to the service of God. There is a clear indication that such involvement was regarded as leading to clerical avarice and greed.

In the opinion of S. Chodorow, Gratian is always interested exclusively in some aspect of the ecclesiastical constitution. From this perspective his underlying motive in citing these texts is ecclesiological: the creation of a free and independent ecclesia. This thesis, however, is not universally accepted by scholars.^{85/} In the present state of our knowledge, therefore, we can assert that the Decretum indicates the sources and various applications of the ancient legislation concerning clerics and public office. It does not contain any significant development in the law.

CONCLUSION

An examination of Roman law reveals a civil law

85. In the opinion of the majority of scholars, Gratian's main purpose was to highlight a concordance and harmony among the canons. See, for example, W. ONCLIN, "La contribution du Décret de Gratien et des Décrétalistes à la solution des conflits de lois", in Studia Gratiana, 2(1954), pp. 118-150.

attention to the issue of clerics, monks, and public office. In the time of Constantine (306-337) and throughout the Constantinian era clergy and monks were not prohibited from public dignities or offices (magistratus). A principle of clerical exemption from municipal duties (munera) was, established on the basis that it would free those involved in ministry to serve the church more zealously. The sixth century Theodosian Code maintained the principle of exemption from munera but added a specific prohibition from certain public offices. This civil prohibition, however, does not appear to have arisen out of concern for the pastoral ministry of the church. Its aim was to restrict the liability of the church considered as a public institution.

In the early medieval period, canonical legislation reflects the legislation of canons 3 and 10 of the Council of Chalcedon (451). There was very little development in the realm of ecclesiology and, for the most part, ecclesiastical structures remained unchanged. While the revival of Roman law in the eleventh century appears to have renewed canonical attention to the issue of clerics and public office, it does not appear to have exercised a direct influence over medieval legislation. The underlying motive of church legislation, both at universal and local levels, continued to focus less on the public office itself as on the temptation to avarice and greed posed by positions of

influence. Exceptions from the prohibition were, however, granted and throughout this period many clerics and monks in both East and West were to be found in a variety of public offices. .

CHAPTER THREE

PUBLIC OFFICE IN THE VARIOUS CODIFICATIONS OF LAW

The period that opens with the Decretals of Gregory IX (1234) was, as regards legislation concerning priests and religious and their involvement in public office, quite different from the periods we have examined in the first two chapters. The earliest legislation consisted of disciplinary rules which were referred to as "apostolic", "ancient", or "ecclesiastical".^{1/} Later legislation, promulgated over the centuries by a succession of councils and synods, arose not so much from any sense of a need for new legislation but more from a desire to restate in a contemporary manner the apostolic teaching.^{2/} In the thirteenth century, however, the legislative activity of the Popes through decretals, and of the councils through constitutions, gave rise to an innovative body of law accepted universally in the West as the valid legal order

1. See J. TAYLOR, "Canon Law in the Age of the Fathers", in J. HITE, (ed.), Readings, Cases, Materials in Canon Law, Collegeville, Liturgical Press, 1980, p. 40.

2. Ibid., p. 40.

of Christendom.^{3/}

In this chapter we shall first refer to the legislation contained in the Decretals of Gregory IX (1234) and the Liber Sextus of Boniface VIII (1298), before tracing the development of the law regarding the involvement of priests and religious in public office through the Tridentine period to the promulgation of the 1917 Code of Canon Law. It will help in our understanding of the legislation to review beforehand the state of canon law in the thirteenth century and its influence on the understanding of the nature of the church.

A. THE FIRST OFFICIAL COLLECTIONS

1. Canon law and the understanding of the church

The scientific study of canon law in the thirteenth century was developed principally at the universities of

3. A concept of law as eternal and indestructible is not immediately evident to the modern mind. G. TELLENBACH writes of the medieval attitude to positive law: "It is most significant of the medieval attitude to law that positive law was not made but discovered. The King collects around him the great men of his court and inquires of them what the law is; they reply by giving their opinion, but in so doing they do not feel themselves to be making a decision, but only to be revealing what has always been." G. TELLENBACH, Church, State and Christian Society, translated by R. F. Bennett, Oxford, Blackwell, 1948, p. 22.

Paris and Bologna, by the glossators, the decretists, and the decretalists.^{4/} Faced with both the academic demands of the university faculties and the needs of the courts, the decretists utilized the scholastic method to order the vast amount of material into glosses, quaestiones, treatises, and summae.^{5/} An increase in the legislative activity of the papacy and of various councils, however, led to the development of much new legislation and the need for detailed codifications. These were undertaken by a succession of decretalists whose work culminated with the publication of the Liber decretalium Gregorii IX on September 5, 1234, and the Liber Sextus on March 3, 1298. In the opinion of H. Jedin, it was these two codifications which shaped not only the understanding of the church in the thirteenth and fourteenth centuries but also provided a model for the legislative activity of kings and princes that was in progress everywhere.^{6/}

The canonists and theologians of the thirteenth and

4. A glossator was the writer of a "gloss" which was a word or comment inserted between lines or in the margin to explain a word, or words, in the text. The decretists were commentators on the Decree of Gratian, while the decretalists commented on the collections of decretals.

5. See H. JEDIN, Handbook of Church History, Burns & Oates, London, 1965, vol. 4, p. 224.

6. Ibid., p. 225.

fourteenth centuries do not appear to have felt the need to develop a comprehensive ecclesiology. It is possible, however, to discern in the writings of the period a basic assumption which underlies particular questions considered by the two disciplines. H. Jedin comments:

The canonists did not develop a comprehensive theory of the church as legislator; rather, they presupposed this, so to speak, and in their lectures, disputations, and commentaries were more concerned with the thousand particular problems that resulted from the ceaseless alteration of the structures. Theology also knew no real treatise on the church but understood quite well that the legislative church of the jurists was to be identified with the church experienced in faith, which, as the corpus Christi mysticum, to use an expression of Aquinas, constituted the proper ontological basis for all the ways of life in Christendom that became visible in the law.^{7/}

In the light of recent studies, it seems reasonable to situate the legal texts we shall consider against the background of a developing understanding of the church as an hierarchical order of divine institution.^{8/} They must also

7. Ibid., p. 226. The writer also notes that Aquinas described the ecclesial hierarchy as a ladder of descending illumination. He held that the higher order illumines the lower order and thus reflects the pattern of the Trinity.

8. The Middle Ages was a period of rapid development in the spheres of communal organization, of economic conditions, of papal and monarchical power, of administrative and judicial institutions. An understanding of the church as an hierarchical order of divine institution should be viewed

be viewed in the context of a canon law which gradually paid less and less attention to the laity as constituting the church and made the clerical state its principal concern.^{9/} In addition, it should be recognized that legislation concerning the involvement of clerics in secular affairs reflected contemporary thinking on the relationship of the ecclesiastical and temporal spheres. In the following section, therefore, we shall look briefly at fourteenth century thought regarding the issue of church and state.

against the backdrop of an hierarchic conception of society. J. HUIZINGA, The Waning of the Middle Ages, Harmondsworth, Penguin Books, 1968, p. 55, writes: "The functions or groupings, which the Middle Ages designated by the words 'estate' and 'order', are of very diverse natures. There are, first of all, the estates of the realm, but there are also the trades, the state of matrimony and that of virginity, the state of sin. At court there are the "four estates of body and mouth": the bread masters, cup-bearers, carvers, and cooks. In the church there are the sacerdotal orders and monastic orders. Finally, there are the different orders of chivalry. That which, in medieval thought, establishes unity in the very dissimilar meanings of the word, is the conviction that every one of these groupings represents a divine institution, an element of the organism of Creation emanating from the will of God, constituting an actual entity, and being as venerable as the angelic hierarchy."

9. Studies of monastic reform during this period, for example, have revealed the extent to which the legislative activity of the papacy and councils was concerned with ecclesiastical organization. The effects of monasticism on the ecclesiology of the day reflects a belief that the monastic structure could benefit enfeebled dioceses and revitalize a demoralised clergy. See D. KNOWLES, The Religious Orders in England, Cambridge, Cambridge University Press, 1962, pp. 9-10.

2. Church and state in the fourteenth century

The legislation we are considering belongs to a period of immense social change. It will not be necessary to pursue here in detail the revolutionary thinking of scholars such as Marsilius of Padua,^{10/} William of Ockham,^{11/} and John Wycliffe,^{12/} on the relationship of church and state. Rather, in our consideration of the legislation concerning

10. Marsilius of Padua (c. 1275) studied at the University of Padua and became, in 1313, rector of the University of Paris. His major work, Defensor pacis, put forward radical principles on the relations of church and state, such as the idea that the state is the great unifying power to which the church must be subordinated. He was excommunicated by John XXII in 1327.

11. William of Ockham (c. 1300) entered the Franciscans and both studied and lectured at Oxford University. A nominalist philosopher he was greatly concerned with the issue of poverty and the relations between the spiritual and secular powers. In attempting to define the competence of the secular and spiritual powers his emphasis on mutual independence in reciprocal assistance was far-sighted and in touch with an emerging reality. His anti-papal stance and opinion that the church, emulating Christ's poverty and powerlessness, should renounce all functions in the world led to his excommunication in 1331.

12. John Wycliffe (c. 1332) was born at York and spent most of his life working at Oxford University. A philosopher and politician, his complex teachings are still in need of an unpolemical clarification. His indictments of the church of his day were based on his understanding of the ancient church and left little room for a hierarchy and ecclesiastical property in their contemporary form. Referred to as the "Morning Star" of the reformation, the Council of Constance (1415) ordered his writings to be burned and his bones dug up and excommunicated.

clergy, religious, and public office, suffice it to keep in mind three important findings of recent historical research relating to the fourteenth century.

Firstly, at that time the issue of church and state was much broader than the relationship of imperium and ecclesia. Historians have discerned a new emphasis placed on the individual, on the role of a responsible laity, and that of the community as the source of political and spiritual authority. H. Jedin writes:

There was no longer a question solely of relations of Emperor and Pope, but of the clerical and lay community and the place of man, who was both believer and citizen, in them.^{13/}

Secondly, a tendency in some thinkers to view established institutions as irrelevant provoked a legislative and polemical response which emphasized the stable position of the individual in the institution of both church and state. R. W. Southern summarized the position as follows:

The solidarity between secular and ecclesiastical hierarchies, which became closer as the threats from below became more perilous, is the most important factor in the exterior history of the medieval church during its last two centuries. [...] This explains why the

13. H. JEDIN, op. cit., p. 356.

English government, for example, encouraged anti-papal legislation in detail, but drew back from a more general attack and especially from anything with a subversive tendency. King and aristocracy became the chief supporters of conservatism in the church. While the old identity of interest between pope and clergy became weakened, a new identity of interest between all supporters of the hierarchical principle, whether secular or spiritual, took over the task of safeguarding the achievements of the eleventh-century reformers.^{14/}

Thirdly, it is important when considering medieval canonical texts to situate them within the context of the medieval understanding of law. G. Tellenbach writes:

[...] a distinction between law and religion was foreign to the Middle Ages, despite all the distinctions which were made between secular and ecclesiastical law. Secular law, too, was considered a gift of God, and was felt to have a religious sanction, for in the middle ages no difference between law and morality was admitted. [...] It was an accepted fact that law in general remains eternally the same and must rule unchallenged, though its demands in any particular case were less easily defined.^{15/}

In considering the legal texts of the thirteenth and fourteenth centuries, then, this tension between the eternal nature of law and the flexibility of law in particular cases

14. R. W. SOUTHERN, Western Society and the Church in the Middle Ages, Harmondsworth, Penguin Books, 1976, pp. 51-52.

15. G. TELLENBACH, op. cit., p. 24.

should be borne in mind. Such a flexible approach is evident in the Decretals of Gregory IX which we shall now consider.

3. The Decretals of Gregory IX

The Liber decretalium Gregorii IX was promulgated on September 5th, 1234, as the universal law of the church.^{16/} A product of the new scientific approach to the study of canon law, it reflects the decretalists' concern with particular problems of ecclesiastical discipline and organization. Thus, Title 50 of the third book, which treats of the issue of clerics and public office, deals explicitly with clerics who assume the public offices of

16. Gregory IX (c.1155-1241), a nephew of Innocent III, had shown himself to be an exceptional student in canon law at the Universities of Paris and Bologna. His desire to unify the decretal legislation of the previous century led him to commission the Spanish canonist Raymond of Peñafort (d. 1275) to systematize no less than two thousand papal and conciliar decrees into five general categories. Entitled Liber decretalium extra decretum vagantium because it contained decretals not in Gratian's decree, it became the first universal corpus of church legislation. Influenced by the compilation of Bernard of Pavia's Brevairium Extravagantium, Raymond followed the division adopted in Justinian's codification and divided his material into five books under the headings judex, judicium, clerus, conubium, and crimen. Each book was then subdivided into titles which, in their turn, were further subdivided into canons. The collection firmly established the classical juridical doctrine of the church, namely, that the church is a visible, hierarchically structured organization with all authority vested in the bishop of Rome.

secular prefect, public notary, and judge.^{17/} Following the practice of Gratian and earlier compilers, the phrase "saecularia negotia" is employed to refer both to clerics involved in secular business occupations as well as to those involved in public office.^{18/} The subject matter of the title may be divided into two parts: past legislation drawn from the new compilations of canons, and the new legislation issued by the Third and Fourth Lateran councils. It is this new legislation which concerns us here.

According to Canon 12 of the Third Lateran Council, clerics are prohibited from assuming the offices of advocate, town procurator, or judge.^{19/} They are further enjoined not to exercise any secular authority in the

17. It is interesting to note the influence of the scholastic methodology on canon law. Applying the scholastic method, scientific canonists first set down the text of canons before noting both parallel and conflicting texts. This was followed by a solutio together with text references and the glosses of other canonists. It was this scientific approach which eventually gave rise to the apparatus glossarum, a continuous commentary on an entire collection of law in the Corpus Juris Canonici.

18. That it was standard canonical practice at this period to treat business occupations and public office under the same heading is evident in the title, Ne Clerici vel Monarchi Saecularibus Negotiis Se Immisceant. See Decretales D. Gregorii Papae IX, suae integritati una cum Glossis restituae, cum privilegio Gregori XIII, Pontif. max., et aliorum Principum, Romae, 1582, III, 50.

19. The Third Lateran Council, convoked by Pope Alexander III, opened on March 5, 1179. The council was effective in

service of secular rulers:

Clerics in subdeaconship and upwards and also those in minor orders, if they are supported from the revenues of the church, shall not act as advocates in legal matters in the presence of a secular judge, unless such matters concern their own cause or the cause of the church or that of unfortunate people who are unable to handle it themselves. Neither shall any cleric presume to accept the office of general procurator of a town or assume secular authority under princes or other seculars that he may become their justiciary. If anyone acts contrary to this, which is the teaching of the Apostle: "No soldier gets himself mixed up in civilian life" (2 Tim 2-4), let him be deposed from the ecclesiastical ministry, since, having neglected the clerical office, he devoted himself to secular affairs that he might please the powers of the world. But should a religious act contrary to any of the foregoing instructions, we decree that an even severer punishment be meted out to him.^{20/}

in its main purpose of removing the traces of schism caused by the claims of the anti-pope Callixtus III (1168-1178) and his predecessors. The aims of the Fourth Lateran Council, convoked by Innocent III, is clearly set out in the bull of Convocation Vineam Domini Sabaoth: vices were to be uprooted, virtues planted, abuses eliminated, morals renewed: heresies to be suppressed, the faith to be strengthened; and peace to be implanted so that Europe could hasten to the help of the Holy Land. The council opened on November 1, 1215, and completed its work in one month. While its political decisions were of a temporary nature, its legislative activity had a profound influence on the church. Fifty-nine of the seventy decrees of the council were incorporated into the Liber Extra of Gregory IX.

20. The Third Lateran Council, Canon 12, in Conciliorum Oecumenicorum Decreta, Freiburg, Herder, 1962, p. 194. "Clerici in subdiaconatu et supra et in minoribus quoque

In his analysis of canon 12 of the third Lateran council, J. Hoffman writes:

The reason for this canon was neglect of the clerical office and preoccupation with secular affairs. From the wording of the canon we can conclude that the clerical neglect involved not a combining of the sacred and the secular but rather a total abandonment of the sacred office.^{21/}

In citing this canon, therefore, the Liber decretalium Gregorii IX apparently wished to emphasize the traditional prohibition against involvement in saecularia negotia. However, the legislation is especially directed to those who, putting their ministry to one side, totally involve themselves in secular affairs. It should also be noted that in appealing to this particular canon which permits an exception for a cleric to be an attorney for himself, for

ordinibus si stipendiis ecclesiasticis sustentantur, coram iudice saeculari advocati in negotiis fieri non praesumant, nisi propriam vel ecclesiae suae causam fuerint prosecuti aut pro miserabilibus forte personis, quae proprias causas administrare non possunt. Sed nec procuraciones villarum aut iurisdictiones etiam saeculares sub aliquibus principibus vel saecularibus viris, ut iustitiarii eorum fiant, clericorum quisquam assumere praesumat. Si quis adversus hoc tentaverit, quoniam contra doctrinam Apostoli est dicentis: 'Nemo militans Deo implicat se negotiis saecularibus' et saeculariter agit, ab ecclesiastico fiat ministerio alienus, pro eo quod, officio clericali neglecto, fluctibus saeculi, ut potentibus saeculi placeat, se quisquam aliquid praedictorum audeat attentare."

21. J. HOFFMAN, op. cit., p. 39.

the church, or for the less fortunate, the Decretals are concerned with maintaining exceptions in the law.

It seems reasonable to assume, then, that the principal legislative concern of the Decretals was, as in canon 12 of the third Lateran council, the total abandonment of the sacred ministry. Title 50, however, adds a new element by forbidding clerics to act as judges in iudicium sanguinis or hold the office of secular prefect, illustrating that contemporary canonical opinion was in line with canonical tradition in maintaining that certain public offices should be avoided by clerics and religious.^{22/}

For the most part, the Liber decretalium Gregorii IX is content to emphasize the legislation of the third and fourth Lateran councils. One innovative piece of legislation, though, is found in the prohibition against clerics in major orders from exercising the office of notary. Those who assumed the office of notary or who accepted public legal

22. Decretales, "Ne Clerici vel Monachi Saecularibus Negotiis Se Immisceant", III, 50. "Iubemus etiam sub interminatione anathematis, ne quis sacerdos officium habeat vicecomitis aut praepositi saecularis." The phrase iudicium sanguinis refers to the passing of a sentence of death by a judge. While the fourth council of Toledo allowed clerics to exercise the office of judge, they were forbidden to pass a sentence of death. See Council of Toledo, in J. Mansi, vol. 10, col. 628.

instruments from clerics acting contrary to the law, were to be punished with excommunication. The reason for the prohibition from the office of notary is not entirely clear but there is good reason to believe that it was an attempt by the church to limit ecclesiastical liability in civil disputes.^{23/} This new legislation was repeated in the decretals of Boniface VIII which we shall now consider.

4. The Liber Sextus of Boniface VIII

The Liber Sextus was promulgated on March 3, 1298. Intended by Boniface VIII to form a complement to the Decretals of Gregory IX, this new codification contained a comprehensive list of decretal laws issued in the intervening years together with authoritative applications and interpretations of the legislation.^{24/}

The routine employment of clerics as civil judges in

23. For a treatment of canonical legislation regarding the office of notary, see J. B. BRUNINI, The Clerical Obligations of Canon 139 and Canon 142, Washington, The Catholic University of America, 1937, pp. 24-27. The first prohibition is found in a letter of Innocent III written in 1211. Since the law made no distinction between the ecclesiastical and civil courts, the glossators held that the prohibition extended to both.

24. Boniface VIII (c.1234-1303) was born at Anagini and christened Benedetto Caetani. His mother was a niece of

the thirteenth century gave rise at the local level to a lively debate on the pastoral implications of such an involvement.^{25/} At the level of the papal curia, however, a preoccupation with the organization and development of the Inquisition focussed canonical attention less on wider pastoral issues than on the specific role and jurisdiction

Alexander IV and the family was also related to Nicholas II. A central aim of his pontificate was peace in Europe and the liberation of the Holy Land from the Turks. His bulls Ausculda Fili (1301) and Unam Sanctam (1302) established him as one of the great upholders of papal supremacy. Repeated attempts to have him posthumously declared a heretic have not obscured his outstanding juristic and administrative gifts which, combined with his great energy and enthusiasm, made him an influential figure in his own time and beyond. The codification of the Liber Sextus, so called because it was "the sixth book" after Gregory's five, was undertaken by a commission of three under the direction of William of Mandagout, Archbishop of Embrun. It contained 251 decretals of Boniface VIII, 108 decretals of his predecessors, and the canons of the first and second councils of Lyons. After publication of the Liber Sextus, the stipulations of the Liber decretalium Gregorii IX, retained their legal force.

25. In England, for example, the records show that abbots were employed as circuit judges. According to D. KNOWLES, The Religious Orders in England, Cambridge, Cambridge University Press, 1962, p. 276, the abbot of Ramsay was a justice in 1217, the abbot of Croyland in 1239, and the abbots of Colchester and Peterborough in 1257. "This employment roused the wrath of Grosseteste, who is repeatedly found urging the archbishop or legate to take action against a practise which was to him an infringement of the liberties of the church and a sin against the canons and the Rule." T. F. O'MEARA, op cit., p. 113, writes: "In the thirteenth century an ecclesiastical office contained two things: the work and the dignity following upon the work." Involvement in secular affairs was considered, therefore, to be contrary to the dignity of an ecclesiastical office.

of ecclesiastical judges.^{26/}

Boniface VIII was himself recognized by his contemporaries for his ability as a legislator and judge.^{27/} His own understanding of the judicial role, when exercised by clerics, appears to have accorded the clerical judge with jurisdiction in both the ecclesiastical and temporal spheres.^{28/} This represented a clear departure from an

26. The origins of the Inquisition are to be found in the bull Ad abolendam of Alexander III which was included in the Decretals of Gregory IX. According to this, the bishop of a diocese, as ordinary judge, was to seek out heretics in his diocese and prosecute them on his own authority, rather than wait for formal accusation. In the reign of Boniface VIII the Inquisition was, for the most part, in the hands of the Dominican and Franciscan judges. J. GUIRAUD writes of these ecclesiastical judges: "The Sovereign Pontiffs had an equally high idea of the inquisitor, as was demanded by his grave office. They insisted he should be of a certain age. Clement V, at the Council of Vienne in 1311, decided, as did many of his predecessors, that the minimum age required in the inquisitor was forty years. They also required proofs of intelligence and honour. Alexander IV in 1255, Urban IV in 1262, Clement IV in 1265, Gregory X in 1273, Nicholas IV in 1290, insisted on the required qualities of mind, purity in morals, and the most scrupulous uprightness. Similarly in the case of knowledge, an inquisitor had to possess a thorough knowledge of theology and canon law." J. GUIRAUD, The Medieval Inquisition, London, Burns, Oates, and Washbourne, p. 76.

27. See K. BAUS, Handbook of Church History, Burns & Oates, London, 1965, vol. IV, pp. 267-280.

28. Liber Sextus Decretalium Bonifacii Papae VIII suae integritate una cum Clementinis et Extravagantibus, earum Glossis restitutus, Romae, 1582, "Ne Clerici vel Monachi Saecularibus Negotiis Se Immisceant", III, 24. With regard to the concept of the church and idea of the state, K. BAUS

established canon but, in the opinion of J. Hoffman, it should be viewed from a practical standpoint as an exercise of discretionary power residing in the higher authority in order to meet new contemporary needs.^{29/}

A similar use of discretionary power can be seen in the approach of the Liber Sextus to the question of clerics and the office of notary.^{30/} A decree of Innocent III, in 1211, clearly forbade all clerics in major orders from acting as notaries and established a penalty of excommunication and deprivation of benefice.^{31/} It appears

writes, "The claims of Boniface VIII and John XXII to authority in the secular domain were excessive and not in accord with the doctrine of the two powers developed from the time of Pope Gelasius I (492-496) and still accepted by Innocent III. According to this theory, the ecclesiastical and secular powers are mutually independent but related to each other; the spiritual power is nobler but is not possessed of superior authority. The pretensions of Boniface VIII and John XXII were likewise historically obsolete, for the West had achieved maturity and the age of a universalism and clericalism occasioned by the situation was past." See K. BAUS, op. cit., p. 355.

29. J. HOFFMAN, op.cit., p. 47.

30. Concilium Lateranense IV, Constitutio 16, De indumentis clericorum, in Conciliorum oecumenicorum decreta, p. 219: "Clerici officia vel commercia saecularia non exercent, maxime inhonesta, mimis, ioculatoribus et histrionibus non intendant et tabernas prorsus evitent, nisi forte causa necessitatis in itinere constituti; et aleas vel taxillos non ludant, nec huiusmodi ludis intersint."

31. See J. B. BRUNINI, op. cit., p. 25.

the glossators and most authors held that this prohibition extended to both the ecclesiastical and civil courts. Boniface VIII, however, relaxed this legislation and allowed clerics to function as notaries in cases of heresy.^{32/}

CANONICAL OBSERVATIONS

It would appear that the Decretals of Gregory IX and the Liber Sextus of Boniface VIII reflect an approach to the issue of clerics and public office firmly established in law and general practice since the Council of Chalcedon in 451. There is a clear reiteration of the general prohibition against assuming public office, as well as an underlying rationale which viewed such offices as incompatible with the clerical state and a source of clerical greed. At the same time, however, both the Decretals and the Liber Sextus, as we have seen in this brief examination of clerics acting as judges and notaries, admit of a certain number of exceptions and accord the cleric's ordinary fairly wide discretionary powers in the matter.

In general terms it seems fair to assert that there was

32. See R. J. STACK, Clerics and Civil Offices, Washington, The Catholic University of America, 1962, pp. 39-40.

no significant change, during the period we have considered, in the legislation regarding clerics and their assumption of public office. But it is important to temper this conclusion with an awareness of the fact that an unchanged legal text provides no exact means of measuring or assessing a changing intellectual or cultural context. There is little doubt that in the fourteenth century accepted ways of thinking were being called into question and, as G. Leff has pointed out, virtually every facet of knowledge, within a common binding framework of absolute suppositions, underwent a series of reinterpretations:

For it was precisely in those areas where practice and experience increasingly conflicted with precept and presupposition that the transformation from a medieval to a nonmedieval outlook occurred.^{33/}

Fundamental changes of outlook, of course, do not occur overnight in a society. In the following section, therefore, as we review a period of legislation, which opens with the Council of Trent, we should be aware of a radical change of legislative context within the church. In the late sixteenth and seventeenth centuries, the full implications of the changes that were set in motion in the fourteenth century were finally being recognized.

33. G. LEFF, The Dissolution of the Medieval Outlook, London, Harper & Row, 1976, p. 146.

B. FROM THE COUNCIL OF TRENT
TO THE 1917 CODE

The opening of the Council of Trent on December 13, 1545, took both the secular and ecclesiastical world by surprise.^{34/} It was to last eighteen years and went about its deliberations during a period of rapid social and political change.^{35/} For our purposes it is helpful to distinguish three major periods in the evolution of the council. H. Jedin describes these in the following terms:

The first two periods of the council of 1545-1547 and 1551-1552 were directed towards Germany, the country in which the reformation had originated, and the council's aim during these two periods was to find a political solution to the conflict. The third and last period of the council -- 1562-1563 -- was quite different in character from the first two periods. It was no longer directed towards Germany, but towards the rapid advance of Calvinism in France. It was, moreover, no

34. H. JEDIN, op. cit., p. 13.

35. H. G. KOENIGSBERGER and G. L. MOSSE have highlighted the radicalism present in European society at this period: "The Catholic-Protestant conflict had, in the last resort, furthered the growth of the nation state, though it had also laid the groundwork for the theories which were to prove revolutionary in the next century. The reformers had made desperate efforts not to destroy the traditional forms of government, but in the spread of the Reformation these forms were now challenged. [...] Radicalism continued to flourish, even if it often remained underground." H. G. KOENIGSBERGER and G. L. MOSSE, Europe in the Sixteenth Century, Edinburgh, Longman, p. 287.

longer part of a great political plan but, with certain limitations, a council with the aim of reforming the church.^{36/}

In all three periods of the council there appears to have been no direct discussion on the issue of clerics, religious, and public office. Certainly no new legislation was issued on the subject. The third period of the council, however, represented a sustained reflection on the vocation of clerics and stressed the witness value of a life dedicated to the pastoral ministry:

There is nothing that leads others to piety and to the service of God more than the life and the example of those who have dedicated themselves to the divine ministry. For since they are observed to be raised from the things of this world to a higher position, others fix their eyes upon them as upon a mirror and derive from them what they are to imitate.^{37/}

A brief overview of the legislation enacted concerning

36. ID., Crisis and Closure of the Council of Trent, London, Sheed & Ward, pp. 179- 180.

37. Translation as in H. J. SCHROEDER, Canons and Decrees of the Council of Trent, St. Louis and London, B. Herder, 1960, p. 152. The original latin text reads: "Nihil est, quod alios magis ad pietatem et Dei cultum assidue instruat, quam eorum vita et exemplum, qui se divino ministerio dedicarunt. Cum enim a rebus saeculi in altiorem sublatis locum conspiciantur, in eos tamquam in speculum reliqui oculos conjiciunt, ex iisque sumunt quod imitentur." Concilium Tridentinum, Decreta de vita et honestate clericorum innovantur, Sessio XXII, c. I, in Canones et decreta sacrosancti oecumenici Concilii Tridentini, Romae, Typis S. Congregationis de Propaganda Fide, 1855, p. 127.

clerics and religious would seem to indicate that, in the view of the council, those dedicated to the ministry should not involve themselves primarily in secular occupations.^{38/}

With regard to the secular clergy, the council fathers insisted that clerics with benefices should be subject to a decree of residence to ensure a regular pastoral care in the parishes. Priests were to be appointed to parishes only after due enquiry into their qualifications and to devote themselves to a conscientious ministry, especially by teaching the catechism and by carefully prepared preaching. Great stress was laid on the need to establish seminaries for the education and training of young men, especially from the poorer classes, for the clerical life.^{39/}

38. In the sixth session of the council some of the bishops were at pains to point out, however, that the financial situation of the pastoral clergy was responsible for many of the abuses. Hence, they concluded, the material position of the clergy needed to be improved. It is interesting to note that a renewed emphasis on the personal conversion of the priest helped bring about a participative theology of ministry in that the bishop of Rome and his vicars, the local bishops, came to be seen both as the guardians and the source of ministry. See H. JEDIN, op. cit., pp. 317-369.

39. Guillaume du Prat, Bishop of Clermont, blamed a too free use of canonical exemptions for abuses of pastoral ministry in the parish situation. "In the diocese of Clermont, which counts over eight hundred parishes, scarcely sixty parish priests perform their ministry in person and the rest do so through substitutes". H. JEDIN, op. cit., p. 331.

Turning their attention to religious, the council fathers again laid stress on the witness value of a life separated from secular concerns. Emphasis was laid on the requirements of residence and a strict observance of the vows.^{40/} Bishops were accorded greater powers of supervision and legislation was enacted concerning the enclosure, attendance at the eucharist, and the sacrament of penance.^{41/}

In the twenty-second session of the council a general renewal of past decrees concerning the life and conduct of clerics, secular and regular, was issued:

[...] the holy council ordains that those things which have in the past been frequently and wholesomely enacted by the supreme pontiffs and holy councils concerning adherence to the life, conduct, dress, and learning of clerics, as also the avoidance of luxury, feasting, dances, gambling, sports, and all sorts of crime and secular pursuits shall in the future be observed under the same or greater penalties to be imposed at the discretion of the ordinary, nor shall appeal suspend the execution of that which pertains to the correction of morals.^{42/}

40. See H. J. SCHROEDER, op. cit., pp. 425-436.

41. Ibid., pp. 483-497.

42. Translation as in H. J. SCHROEDER, op. cit., p. 153. "[...] statuit sancta synodus, ut quae alias a summis pontificibus et a sacris conciliis de clericorum vita, honestate, cultu doctrinaeque retinenda, ac simul de luxu, comessationibus, choreis, aleis, lusibus, ac quibuscumque criminibus, necnon saecularibus negotiis fugiendis copiose

While this decree does not constitute a direct prohibition regarding public office in itself, the use of the words saecularibus negotiis would appear to re-echo the prescriptions of past conciliar legislation prohibiting clerics and religious from public office.^{43/} From the standpoint of our study, therefore, the legislation of Trent represents no significant change regarding the issue of public office. However, it is important to recognize the emergence of a highly centralized legislative structure which placed the existing legislation in a different context. This will become apparent when, in the following section, we review some legislative developments regarding clerical involvement in public offices prior to the 1917 Code.

ac salubriter sancita fuerunt, eadem in posterum iisdem poenis, vel majoribus arbitrio ordinarii imponendis observentur, nec appellatio executionem hanc, quae ad morum correctionem pertinet, suspendat." Decreta de vita et honestate clericorum innovantur, op. cit., p. 127. It is interesting to note that some of the Curial prelates kept up a strong resistance to any alteration in the old law regarding clerical legislation. Certainly, there was a determined effort to restrict the multiplication of canonical interpretation of both existing and Tridentine legislation as can be seen from the acta of the council. See H. JEDIN, op. cit., p. 364.

43 See R. J. STACK, op. cit., pp. 44-45. A particular concern of the council fathers was to call clerics to a careful observance of existing norms through an emphasis on the interior spiritual life as the main object of priestly ministry.

1. Developments prior to the 1917 Code

In the years between the closure of the council of Trent and the publication of the 1917 Code, even though the issue of clerics, religious, and public office attracted some legal attention, particularly at the local level,^{44/} for the purposes of this study we shall confine ourselves to two areas of legislative activity: firstly, the legislation as applied to the missionary situation, then, secondly, the legislation regarding elective offices.

a. The missionary situation

On June 6, 1622, Gregory XV created the Congregation for the Propagation of the Faith. The first secretary of the new Congregation, F. Ingoli, set in motion a policy designed to regulate the relationship of the missionaries both to their sponsoring government and to the host nation. S. Neil records how F. Ingoli first set himself to acquire the fullest possible information about the state of the missions in every part of the world. His next step was to have a major influence on the clerical and religious

44. A detailed list of particular legislation issued in the seventeenth and eighteenth centuries can be found in R. J. STACK, op cit., pp. 47-52.

legislation in mission countries:

Then he decided on certain lines of action. Missionary work must be freed from the stranglehold that Spain and Portugal had been able to maintain on it. Many more bishoprics must be created, and bishops must stand in a much closer relationship to Rome. Far more secular clergy must be employed, in order to keep the balance with the religious orders. An indigenous clergy must be developed as rapidly as possible in every part of the world. The Christian faith must be delivered from those colonial associations which condemned it to be everywhere and in permanence a foreign religion.^{45/}

Such an appraisal of the missionary situation represented a thoughtful and constructive approach to the question of how the church ought to relate to modern governments. It was a policy which, sensitive to an anti-colonial feeling in many countries, tried to assess the perceptions of a host government faced with Catholic clergy actively involving themselves in political affairs. As J. H. Provost comments:

At the level of the Roman Curia, the Congregation for the Propagation of the Faith had a twofold purpose for instructing its missionaries not to become involved in secular, and especially, political affairs. One was the witness to a higher life and the wholehearted commitment they were to have to the gospel; the other was more pragmatic, not

45. S. NEIL, A History of Christian Missions, Harmondsworth, Penguin, 1964, p. 179. T. F. O'Meara op cit., writes: "The missions were no longer the world of the third and fourth centuries when Europe was evangelized through new local churches and their bishops. The faith was propagated in the seventeenth century as an extension of Rome."

to turn local officials against the missionaries.^{46/}

Thus, the Congregation urged missionaries in a circular dated January 15, 1622, to be sensitive to the danger of alienating themselves from local officials by involvement in secular affairs.^{47/} The very fact that such warnings were deemed necessary would seem to point to the fact that missionaries felt the need to participate actively in the local political situation. Such was the case in Goa when, in 1658, Alexander VII directly intervened and forbade priests from involving themselves in the electoral process.^{48/}

Two points should be noted. Firstly, a new approach to missiology and the actual missionary situation were shaping a new context for the existing legislation regarding public offices. While the actual legislation remained unchanged, the underlying motives for it were shifting from a fear of

46. J. H. PROVOST, "Clergy and Religious in Political Office in the American Context", in The Jurist, 44(1984), pp. 226-235.

47. SACRA CONGREGATIO DE PROPAGANDA FIDE, Encyclical letter, "De spirituali regimine christifidelium Goae et insularum adiacentum", January 15, 1622, in Collectanea Sacrae Congregationis de Propaganda Fide, vol. 1, 1907, Romae, Ex typographia Polyglotta S. C. De Propaganda Fide, n. 1, p. 1. Hereafter cited as Collectanea.

48. ALEXANDER VII, Apostolic Constitution, Sacrosancti, January 18, 1658, in Collectanea, n. 129, pp. 39-41.

clerical greed to a positive strategy of church-state relations. Secondly, new democratic systems of government were now appearing throughout the world. Whereas existing legislation regarding clergy, religious, and public office, had been framed in the context of appointive offices, a new phenomenon of elective office was emerging. In the following section, we will consider this new reality in political life from the perspective of canonical legislation.

b. Elective offices

Reviewing the political structure of English society in the eighteenth century, J. H. Plumb writes:

One of the major preoccupations of the Justices of the Peace and of the aldermen and burgesses, as well as of the aristocracy, the landed gentry, and even the clergy, was the endless political intrigue and patronage hunting which was associated with elections to the House of Commons. The unreformed House of Commons consisted of 513 members for England and Wales and 45 for Scotland. Each English county returned two members and every freeholder with 40 shillings per annum was allowed to vote in their election.^{49/}

Elective offices became a stable feature of government throughout Europe in the eighteenth and nineteenth centuries and, in an age of enlightened despots, the church found

49. J. H. PLUMB, England in the Eighteenth Century, Harmondsworth, Penguin, 1963, p. 37.

itself facing a double-edged problem with regard to clerics and public office. Clerics who were elected to public office after obtaining the required ecclesiastical permissions, were often required to take an oath of office required by the secular government. J. H. Provost examined this problem as it showed itself at the time of the reunification of Italy:

[...] the question arose as to priests serving in various public offices (including mayor of the town), and the oath of office required by the secular government. In a fairly nuanced series of responses, which opened the way for Catholics to participate in Italian government under certain safeguards, the Apostolic Penitentiary responded that clerics were not permitted to assume or exercise civil or lay offices without permission from the proper church authorities, and they were never permitted to take the oath required by the government.⁵⁰

The dilemma has no direct bearing on the substance of the legislation regarding public office but must be borne in mind when considering the application of the law. While certain exceptions were still available, the prohibition against clerics taking an oath before a secular official raised a new obstacle.

A review of the general and particular legislation of

50. J. H. PROVOST, loc cit., p. 282.

the eighteenth and nineteenth centuries reveals little change in the substance of the law. Elective offices, however, substantially changed both the motive and context of the law. Exceptions had now to be considered more from the standpoint of the safeguarding of religion and the promotion of the common good than from the personal desires of an individual clerical applicant. This last point is illustrated in a pastoral letter of the American Bishops at the Ninth Provincial Council of Baltimore in 1858.^{51/} The context of the letter was a meeting between the bishops of the south and north, who were becoming increasingly nervous about the threat of civil war. A post-war council repeated the same prohibition but there is evidence in the document that the bishops were experiencing some difficulty in balancing a general prohibition against political involvement with the responsibility of safeguarding the rights of the church and the common good.^{52/}

51. See Pastoral Letter of the Archbishop and Bishops of the Province of Baltimore, May 9, 1858, Baltimore, John Murphy & Co., 1858, pp. 12-13. Civil war between the north and south broke out in 1861 and ended in April 1865 with the unconditional surrender of the southern armies at the Appomattox courthouse.

52. CONCILII PLENARII BALTIMORENSIS III, "Decretum 83, Monita de rebus politicis a clero arcendis", in Acta et decreta Concilii Plenarii Baltimorensis, Baltimore, Typis Joannis Murphy, 1884, p. 44.

For several years before the publication of the 1917 Code of Canon Law, the church found itself under increasing pressure to become involved in the political process. In Hungary, for instance, anti-Catholic legislation forced the bishops to consider the option of promoting candidates more favourable to the church. Leo XIII supported this position and sanctioned the involvement of priests if the safeguarding of religion and the common good left no other option.^{53/}

CANONICAL OBSERVATIONS

From the perspective of this study, it would appear that three traits in the church's approach to the issue of clerics, religious, and public office, are discernible immediately prior to the publication of 1917 Code. Firstly, a marked concern that the reform of the clerical and religious life, undertaken by the Council of Trent, be strictly followed. Clerics and religious were, therefore, under a general prohibition against involvement in public offices so as to free them for higher things not pertaining to this passing world. Secondly, the general prohibition admitted of exceptions. Thirdly, a new relationship with

53. LEO XIII, Encyclical letter, Constanti Hungarorum, September 11, 1893, in ASS, 26(1893-1894), pp. 129-136.

modern governments had forced the church to examine the the existing legislation in a different context. We will now consider the fruits of that reflection in the 1917 Code of Canon law.

C. THE 1917 CODE OF CANON LAW

On May 27, 1917, the Codex Iuris Canonici was promulgated by Benedict XV.^{54/} In Book II of the 1917 Code, De Personis, the clergy, religious, and members of societies of the common life were prohibited from seeking or accepting public office, whether appointive or elective.^{55/} In the following overview, we shall, firstly, examine the text of

54. Preparations for the reorganization of the collections in the Codex Iuris Canonici began in March, 1904, when Pius X appointed a commission of 16 cardinals to undertake the work. The work was completed in July, 1916, and became legally effective on May 19, 1918. Comprising 2414 canons, it was divided into five books which follow the division adopted by early Roman jurists: General Norms, Persons, Things, Procedures, and Penalties. The main purpose of the commission was to offer the church, after wide consultation, a complete codification of existing universal church law in a distilled and easily accessible form. There was, therefore, comparatively little new legislation in the 1917 Code and over twenty-five thousand citations of earlier texts set the work in the context of a centuries old legal tradition.

55. The late seventeenth and eighteenth century had seen the gradual evolution of the democratic constitutional state. J. RATZINGER observes that such a system depends on a separation of powers meant to bring about a division, limitation, and control of power: "A major element in this is the system of representation, which includes the periodic transfer of power. An essential element is the inviolability of the law, the independence of the administration of

the legislation regarding appointive and elective public offices as set out in the four paragraphs of canon 139.56/ Secondly, we shall attempt to trace the interpretation and application of this canon in both general and particular law.

a. Canon 139, par. 1

In a letter to the people of Furni to protest the appointment of a presbyter as tutor, Cyprian made reference

justice from the organs of the exercise of power." J. RATZINGER, Church, Ecumenism, and Politics, Slough, St. Paul Publications, 1988, pp. 186-187. The democratic system of representation -- a radical departure from the hierarchic Roman and medieval systems -- meant that previously appointive public offices were often designated as elective. This new situation created an entirely new context for church legislation regarding clerics and public office.

56. CIC(1917), canon 139, par. 1, "Ea etiam quae, licet non indecora, a clericali tamen statu aliena sunt, vitent. Par. 2, Sine apostolico indulto medicinam vel chirurgiam ne exercent; tabelliones seu publicos notarios, nisi in Curia ecclesiastica, ne agant; officia publica, quae exercitium laicalis iurisdictionis vel administrationis secumferunt, ne assumant. Par. 3, Sine licentia sui Ordinarii ne ineant gestiones bonorum ad laicos pertinentium aut officia saecularia quae secumferant onus reddendarum rationum; procuratoris aut advocati munus ne exercent, nisi in tribunali ecclesiastico, aut in civili quando agitur de causa propria aut suae ecclesiae; in laicali iudicio criminali, gravem personalem poenam prosequente, nullam partem habeant, ne testimonium quidem sine necessitate ferentes. Par. 4, Senatorum aut oratorum legibus ferendis, quos deputatos vocant, munus ne sollicitent neve acceptent sine licitia Sanctae Sedis in locis ubi pontificia prohibitio intercesserit; idem ne attentent aliis in locis sine licentia tum sui Ordinarii, tum Ordinarii loci in quo electio facienda est."

to St. Paul in his second letter to Timothy, "No soldier gets himself mixed up in civilian life because he must be at the disposal of the man who enlisted him."^{57/} The influence of this ancient patristic discipline and its application of the Pauline text can be seen in the opening paragraph of canon 139:

The clergy shall avoid those things which, although they are not unbecoming, are nonetheless alien to the clerical state.^{58/}

The 1918 Code prohibited clerics from assuming specific activities on the grounds that they were either unbecoming (indecora) or foreign (alienus) to the clerical state. In canonical usage, the term (indecora) suggested that while activities in this category were not intrinsically evil, they tended to debase the dignity of the cleric. Those activities which were described as foreign (alienus), however, were not considered incongruous with the ministry of the cleric.^{59/}

57. 2 Tim 2:4. See ST. CYPRIAN, Letter LXVI, in PL, vol. 4, coll. 397-399.

58. Under the heading De clericis in genere the 1917 Code had two distinct titles, one concerned with clerical rights and privileges (canons 118-123), other dealing with the obligations of clerics (canons 124-144).

59. The same classification is retained in the 1983 Code. See CIC(1983), canon 285.

The prohibition contained in the first paragraph of this canon, therefore, was limited to those activities which were considered inconsistent with the spiritual mission of the cleric.^{60/} A cleric was defined, in the light of canon 108, par. 1 and canon 968, par. 1 as a baptized male who has been dedicated to the ministry by reception of first tonsure.^{61/} In virtue of canon 592 which directed that, unless the context or the very nature of the matter indicated otherwise, religious were also bound by the clerical obligations of the Code, the whole of canon 139 was applied to both male and female religious.^{62/} A similar incorporation by reference was employed in 679, par. 1 which asserted that members of the societies of the common life were subject to the same prohibition.^{63/}

60. See J. ABBO and J. D. HANNAN, The Sacred Canons, St. Louis, Herder, 1952, vol. 2, p. 198.

61. For a detailed analysis of the comprehension of the term "cleric" in CIC(1917) and pre-Code legislation, see J. DONOVAN, The Clerical Obligations of Canon 138 and 140, Washington, D.C., The Catholic University of America, 1948, pp. 2-7.

62. CIC(1917), canon 592 reads: "Obligationibus communibus clericorum, de quibus in cann. 124-142, etiam religiosi omnes tenentur, nisi ex contextu sermonis vel ex rei natura aliud constet."

63. CIC(1917), canon 679, par. 1 reads: "Sodales societatis, praeter obligationes quibus, uti sodales, obnoxii sunt secundum constitutiones, tenentur communibus clericorum

In the four paragraphs of canon 139 specific occupations or activities, designated as alien to the clerical state, were listed. The list was made up of business activities and secular occupations which had been specifically prohibited by prior legislation. This enumeration, however, was not considered by the commentators to be exhaustive.^{64/} The canon divided the designated activities into two classes: those which could only be taken up after receipt of an apostolic indult and those which could be practised with the permission of the ordinary.^{65/} Canon 139, par. 2 concerned itself with those activities which required an apostolic indult.

b. Canon 139, par. 2

Canon 139, par. 2, read as follows:

Without an apostolic indult they shall not practice medicine or surgery, act as recorders or public notaries, except in ecclesiastical curias; accept public offices which involve

obligationibus, nisi ex natura rei vel ex sermonis contextu aliud constet, pariterque stare debent praescriptis can. 592-612, nisi constitutiones aliud ferant."

64. See J. ABBO and J. D. HANNAN, op. cit., p. 198.

65. An indult is a favour granted by way of indulgence usually for a defined period of time. The favour may take the form of a dispensation, a faculty, a permission etc. See L. ÖRSY, "General Norms", in J. CORIDEN, T. GREEN, D. E. HEINTSCHEL (eds.), The Code of Canon Law: A Text and Commentary, New York, Paulist Press, 1985, pp. 64-68.

secular jurisdiction or duties of administration.^{66/}

By virtue of this canon, no cleric could practise medicine or take part in surgery. It was also forbidden for him to act as a public notary unless he exercised that office in an ecclesiastical curia. The cleric was also forbidden to accept any public office which involved lay jurisdiction or administration. The placing of the phrase "sine apostolico indultu" at the head of this section was generally taken to mean that an apostolic indult was required by the cleric for all those offices enumerated in the paragraph.^{67/}

We may note in passing a salient point of textual interpretation regarding the phrase medicinam vel chirurgiam ne exercent. Since the latin verb exercere connotes the habitual or repeated exercise of an action, it was generally held that occasional acts of medical attention were not forbidden by the law.^{68/} In advancing the opinion that clerics may act as notaries in the drawing up of various

66. See J. ABBO and J. D. HANNAN, op. cit., p. 198.

67. See L. ÖRSY, loc. cit., pp. 223-224.

68. See J. ABBO and J. D. HANNAN, op. cit., p. 198.

civil documents in instances involving ecclesiastical persons, J. B. Brunini advocates a similar flexibility with regard to the office of public notary.^{69/}

The third prohibition contained in canon 139, par. 2 concerns public offices which entail the exercise of lay jurisdiction or administration. The term "lay jurisdiction" was defined by canonists as the civil power of governing subjects through laws, decrees, mandates, precepts, sentences and the like.^{70/} "Lay administration" was understood to refer to the ordinary direction of subjects for the common good and in the daily carrying out of civil legislation.^{71/} While the canon itself does not list specifically prohibited offices, canonists gradually drew up lists of forbidden occupations together with opinions as to what exceptions might legitimately be sanctioned within the terms of the law.

R. Naz, a French canonist, argued that an apostolic indult was required before a cleric could exercise the

69. See J. B. BRUNINI, op. cit., pp. 25-27.

70. See J. ABBO and J. D. HANNAN, op. cit., p. 171, cites the traditional canonical definition: "Jurisdictio est potestas publica circa aliorum regimen seu gubernationem."

71. See J. B. BRUNINI, op. cit., p. 23.

offices of government minister, prefect or governor of a province, mayor or deputy-mayor. These offices he considered to involve lay jurisdiction. Turning to other offices involving lay administration, he was of the opinion that no cleric could act as a bailiff of the court or controller of taxes. The canon did not, in his view, prohibit clerics from accepting teaching posts in public schools or universities since these posts did not involve the exercise of civil jurisdiction.^{72/}

J. B. Brunini, commenting on this canon from an American perspective, listed the following examples of forbidden offices: mayors, judges, sheriffs, attorneys-general, prosecuting attorneys, governors, tax commissioners, state superintendents of schools, heads of municipal and state departments.^{73/} F. X. Wernz and P.

72. See R. NAZ, Traité de droit canonique, Paris, Letouzey et Ané, 1947, vol. 1, p. 305.

73. See J. B. BRUNINI, op. cit., p. 23. A decree from the Sacred Consistorial Congregation, November 11, 1910, required that permission be obtained from the Holy See before accepting these offices. See SACRED CONSISTORIAL CONGREGATION, "Decretum Docente Apostolo", November 11, 1910, in AAS, 2(1910), p. 910. On June 3, 1918, however, the Code Commission indicated that this was no longer the case and permission could be obtained from the ordinary. See PONTIFICIA COMMISSIO AD CODICIS CANONES AUTHENTICE INTERPRETANDOS, "Dubia circa canonem 139", June 3, 1918, in AAS, 10(1918), p. 344.

Vidal considered that the prohibition of canon 139, par. 2 included the office of senator and deputy in Italy where, in virtue of a decree of the Sacred Consistorial Congregation, June 30, 1914, clerics were forbidden to accept or solicit such offices without permission of the Holy See.^{74/}

Similar lists of prohibited offices can be found in the commentaries of F. X. Wernz and P. Vidal,^{75/} E. F. Regatillo,^{76/} and A. Vermeersch.^{77/} These canonists, in common with most contemporary commentators, favoured the opinion that canon 139, par. 2 was concerned only with those public offices which involved a direct and immediate exercise of the power of jurisdiction or administration. J. B. Brunini sums up the importance of this interpretation by asserting that those clerics who exercised political administration simply by means of a vote were not, therefore, subject to canon 139, par. 2. For the same reason

74. See F. X. WERNZ and P. VIDAL, Ius Canonicum, Romae, Pontificia Universitas Gregoriana, 1928, vol. 2, pp. 150-153.

75. Ibid., pp. 150-153.

76. E. F. REGATILLO, Interpretatio et Iurisprudentia Codicis Iuris Canonici, Santander, Sal Terrae, 1949, vol. 2, pp. 43-45.

77. A. VERMEERSCH, Epitome Iuris Canonici, Louvain, H. Dessain, 1933, vol. 1, p. 226.

he concluded that clerics elected as members of parliament or any elected state assembly were not included per se under this paragraph.^{78/}

Finally, it is important to note a disagreement among canonists regarding public offices which were merely consultative in character. While the majority appear to have held that such offices were not forbidden by canon 139, par. 2. F. X. Wernz and P. Vidal adopted a stricter interpretation. Since non-jurisdictional duties of an advisory nature in cities or states generally involved the burden of rendering an account, such offices could hardly be accepted licitly, in their opinion, without permission of the ordinary.^{79/}

c. Canon 139, par. 3

The third paragraph of canon 139 deals with those activities and offices which can be taken up by clerics only following the permission of the ordinary:

Without permission of the local ordinary they

78. See J. B. BRUNINI, op. cit., p. 23.

79. F. X. WERNZ and P. VIDAL, op. cit., p. 152: "Munera vero civilia etsi non iurisdictionalia, velut consiliarii in municipiis aut provincia, cum plerumque sint plus vel minus coniuncta cum onere reddendarum rationum, vix fieri potest ut ea licite acceptunt sine Ordinarii licentia."

shall not act as agents in property transactions of lay persons or assume secular offices that carry with them the obligation of rendering an account. They shall not exercise the office of procurator or lawyer except in an ecclesiastical court, or in a secular court when there is a question of their own case or of their own churches. Clerics shall not have any part at all in criminal cases in secular courts where a grave penalty is imposed, not even as witnesses, unless they are forced to act as such.^{80/}

In employing the phrase "sui Ordinarii", the text of the canon indicated that the secular clergy were to obtain the required permission from their bishop. Exempt religious, however, were obliged by the law to obtain permission from their proper ordinary, namely, the major superior.^{81/}

80. For many commentators the purpose of this canon was to safeguard clerical decorum and limit distractions in the ministerial work of the priest. See, for example, C. AUGUSTINE, A Commentary on the New Code of Canon Law, St. Louis, Herder, 1919, vol. 2, p. 86.

81. CIC(1917), Canon 198 lists those designated by the law as ordinaries. J. H. PROVOST considers the reference in this canon to the local ordinary represents a certain openness to the involvement of clerics in these offices: "There was a centralizing tendency in the 1917 Code, evident in the requirement of an apostolic indult to hold non-legislative offices. The fact that the local ordinary rather than the Holy See could give permission [...] would seem to be an exception to this centralization, and to indicate some openness toward the involvement of clergy in keeping with the decisions taken prior to the Code concerning clergy in France." See J. H. PROVOST, loc. cit., p. 287. Reference should be made to CIC(1917) canons 613-620 with regard to the privilege of exemption.

The law enumerated those specific activities and offices requiring permission of the ordinary. Without such a permission, a cleric could not administer the property of lay persons, assume a public office which obliged him to render an account to secular authorities, act as procurator or advocate, or appear as a witness in a secular criminal trial involving the possible infliction of grave personal punishment.

The commentators provided lists of the types of public office which usually involved the rendering of an account to the secular authorities. C. Augustine, for example, listed the guardianship of orphans, widows, and the offices of president, director, treasurer, or secretary in a bank.^{82/} R. Naz underlined the fact that the prohibition also applied to banks and cooperative unions, even though the organization had been formed for social or charitable purposes.^{83/} J. B. Brunini advanced the opinion that the phrase "rendering an account" applied not only to financial transactions or goods involved, but also displayed a concern for the quality of justice shown by the cleric in his

82. See C. AUGUSTINE, op. cit., p. 91.

83. R. A. NAZ, op. cit., p. 306.

exercise of a public office such as, for example, arbitrator in a labour dispute.^{84/}

Some exceptions included in the law should be noted. The cleric did not require permission to act as a procurator or advocate in an ecclesiastical court. Furthermore, canon 139, par. 3 did not require the involvement of the ordinary in those cases in which the cleric acted on his own behalf or on behalf of his own church. The permission to appear as a witness in a secular criminal trial was not required in cases of necessity.

The commentators were, for the most part, in agreement with regard to the meaning and extent of those exceptions contained in the law. As to the offices of procurator and advocate, the phrase "propria causa" was generally interpreted as including the interest of close relatives of clerics.^{85/} In virtue of the exception contained in the text regarding the appearance of a cleric as a witness, it was generally held that a legitimate summons from the civil

84. See J. B. BRUNINI, op. cit., p. 139. This opinion does not appear to have been generally considered by other commentators but is certainly in line with canonical tradition.

85. See C. AUGUSTINE, op. cit., p. 91.

authority would constitute a case of necessity.^{86/}

d. Canon 139, par. 4

On May 9, 1913, the Sacred Consistorial Congregation, issued a decree allowing clerics to stand as candidates for elected political offices in France under certain circumstances.^{87/} According to the decree, however, they were prohibited from placing themselves as candidates unless they had obtained both the permission of their own ordinary and the ordinary of the place where the election was to take place.

The final paragraph of canon 139 virtually repeated this legislation and added a proviso that permission of the Holy See was required in specific places:

They shall not solicit or accept the office of senators or legislative representatives, referred to as deputies, without permission

86. R. NAZ, op. cit., p. 306: "Il est même interdit de porter témoignage dans une instance criminelle, ce qui doit s'entendre, en l'espèce, d'un témoignage à charge. Toutefois en cas de nécessité, par exemple pour obéir à une sommation urgente, l'autorisation de témoigner est raisonnablement presumée."

87. SACRED CONSISTORIAL CONGREGATION, Decree, De sacerdotibus ad munus deputati in Gallia concurrentibus, May 9, 1913, in AAS, 5(1913), p. 238. This decree took the form

of the Holy See in those places where a pontifical prohibition is in force; in other places they must not strive for such offices without the permission of their own ordinary and the ordinary of the place where the election is to be held.

By virtue of this canon, therefore, a cleric was forbidden to accept or solicit the offices of senator and deputy without permission of his own ordinary. The term sollicitare denoted the conducting of oneself as a candidate, or putting one's name forward as a candidate.^{88/} The prohibition from accepting (acceptare) an office was interpreted as referring both to the acceptance of an office to which one has been elected with or without one's own consent, and to the act of allowing a third party to put one's name forward as an electoral candidate.^{89/}

In the case of a secular cleric, permission could be granted by his bishop. The commentators, however, seem

of a declaration that the concession granted by Pius X was still in effect and part of the church's public law. For this first concession allowing clerics to stand in civil elections, see SACRED CONGREGATION FOR EXTRAORDINARY ECCLESIASTICAL AFFAIRS, Reply, De clericis candidatis in proximis electionibus ad deputatorum comitia in Gallia, April 12, 1906, in ASS, 39(1906), p. 192.

88. See J. ABBO and J. D. HANNAN, op. cit., p. 198-200.

89. See J. B. BRUNINI, op. cit., p. 62.

to have been a little unsure about the powers of religious superiors in this matter. A. Larraona, for example, reviewed the matter at some length before concluding that major superiors of non-exempt clerical religious congregations had the powers of ordinaries regarding this canon.^{90/} In the case of a cleric of an exempt religious congregation, it was generally accepted that permission could be granted by the major superior.

In addition to the permission of his own ordinary, canon 139, par. 4 obliged the cleric to obtain the permission of the ordinary of the district where the election was due to take place. A religious was always bound, therefore, to obtain a double permission: that of the major superior and that of the bishop in whose diocese the election was to be held. The same was true for a secular cleric who presented himself for election in a diocese other than his own. For an election held in his own diocese, however, the secular cleric required a single permission from his own ordinary.

The commentators dealt with a practical situation not

90. See A. LARRAONA, "Quaestio Canonica", in Commentarium pro Religiosis, 4(1923), pp. 113-119.

envisaged by the legislator. In employing the singular person "ordinarius" when referring to the ordinary of the place where the election was to take place, the text clearly did not envisage a situation in which the electorate was spread over several dioceses. In such a situation, from whom must permission be sought?

J. Chelodi was of the opinion that the cleric should seek the permission of the ordinary of the place where the centre of the election was focussed.^{91/} As J. H. Provost commented, such a solution could only be applied in places where a principal town and the surrounding rural areas constituted the electoral district. While such a configuration was common in Europe, in countries such as the United States it was almost impossible to determine the legal centre in a state-wide election.^{92/} J. B. Brunini considered the issue to have important implications and drew together some of the canonical questions commonly

91. J. CHELODI, Ius Canonicum de Personis, Vicenza, Societa Anonima Tipografica, 1942, p. 199: "Sed quis Ordinarius loci si electores per plures dioeceses distribuuntur, ut facile evenire potest ubi systema viget, quod vocant, proportionale? Casus non expresse praevisus duplicem admittit solutionem: aut omnes consulere Ordinarios aut illum tantum cui subest locus in quo lege centrum electionis est. Hoc alterum sufficere videtur."

92. J. H. PROVOST, loc. cit., pp. 226-235.

raised in the United States:

What is to be considered the centre of election in a populous state wherein are situated two or more dioceses? Would a cleric desirous of presenting himself as a candidate for the Senate of the United States have to secure the permission of all the ordinaries? Would the permission of a majority of the ordinaries be sufficient? Could a single negative vote overrule the decision of the other ordinaries?^{93/}

In actual fact the situation was even more complicated in some European countries such as Italy, for example, where members of parliament were elected to represent specific groups of citizens spread throughout the country. After considering the opinion of a number of authors, J. B. Brunini concluded:

[...] the permission of the ordinary of the place in which the vast majority of the votes are domiciled is sufficient. This opinion is at least probable and has the support of a number of authors, but the opinion demanding the permission of all the ordinaries is also probable.^{94/}

By virtue of canon 139, par. 4 clerics were obliged, in those countries where a pontifical prohibition against their being candidates for election to legislative office was in force, to seek the permission of the

93. See J. B. BRUNINI, op.cit., p. 61.

94. Ibid., p. 61.

Holy See before soliciting or accepting the office of senator or deputy. J. B. Brunini, in a careful study of this matter, concluded that following the Lateran Pact of 1929 there were no countries in which a pontifical prohibition was in force.^{95/} Prior to that date, Italy was the only country where permission of the Holy See was required.^{96/}

The commentators, particularly in the United States, were also concerned to establish the legal position regarding public offices which did not appear to be envisaged by the legislator. J. H. Provost cites an example

95. The Lateran Treaty, signed on February 11, 1929, contained a bi-lateral recognition on the part of Italy and the Holy See. On the one hand, Italy recognized the Vatican City as a sovereign state and, on the other hand, the Holy See recognized the Italian state with Rome as its capital. A concordat was drawn up at the same time with provisions for relations with the clergy, Catholic education, and marriage law. It should be noted that the concordat stipulated that, under Italian civil law, a cleric required a nihil obstat from his ordinary before presenting himself as a candidate for elected public office. See Concordato Fra la Santa Sede e l'Italia, February 11, 1929, in AAS, 25(1933), pp. 389-413.

96. J. B. Brunini, writing in 1937, suggested that Italy was, in fact, the only country ever to have had a pontifical prohibition imposed. He finds no evidence to conclude that such a prohibition, as suggested by some commentators, was ever imposed in France or Bosnia-Herzegovina, a country which was incorporated into Yugoslavia after the First World War. See J. B. BRUNINI, op. cit., p. 60. In 1957, however, the Holy See prohibited clerics in Hungary from accepting or soliciting elected legislative office. Those

of just such a public office:

In the United States there are some agencies which were not covered by either the prohibition of holding non-legislative offices which exercise lay jurisdiction or administration (canon 139, par. 2), or the restrictions on running for a legislative office (canon 139, par. 4). For example, a local school board is elective, but not legislative; it depended on the authority of the board relative to the superintendent or other administrator whether the board itself exercised jurisdiction or administration, and the extent to which members of the board were held to render an account in the sense of canon 139, par. 3.97/

There is little one can add to this observation except to recognise that the law was unclear with regard to such offices. A similar lack of clarity was felt by some canonists with regard to the issue of appointive offices. The text of canon 139, par. 4 would seem to indicate that the primary concern of the legislator was the election of

clerics already holding an office in the Hungarian Parliament were duly instructed to tender their resignations within one month. See SACRED CONGREGATION OF THE COUNCIL, Decree, Participatio activa rebus politicis in Hungaria sacerdotibus prohibetur, July 16, 1957, in AAS, 49(1957), p. 637. An Excommunicationis declaratio was issued seven months later naming three secular priests, Richard Horvath, Nicholas Beresztocy, and John Mate, as failing to comply with this decree. See SACRED CONGREGATION OF THE COUNCIL, Excommunicationis declaratio, February 15, 1958, in AAS, 50(1958), p. 116.

97. J. H. PROVOST, loc. cit., p. 287.

clergy to public office. Throughout the world, however, many countries provided for appointment to legislative office as a senator, deputy, or member of parliament. Thus, the question was asked: does the legislator in canon 139, par. 4 provide for the situation in which a cleric could be appointed to legislative office?^{98/}

The answer of the commentators appears to have focussed on canon 20, which dealt with a lacuna iuris.^{99/} The past history of legislation regarding clerics and public office was felt to reveal a recurring prohibition from the holding of public office. Also, it appeared that the clear intention of the legislator was that permission must be

98. See J. B. BRUNINI, op. cit., p. 62. An interesting insight into clerical involvement in the contemporary American political scene is provided by an aside of C. AUGUSTINE, op. cit., p. 92: "There is not much danger in our country that clergymen will be elected to Congress; but if one wished to become a candidate, he would need the permission of his own ordinary as well as that of the ordinary of the district--if this were located in a different diocese--for which he sought to be elected." The reference may well be to an early fear in a number of states of clerical domination in political affairs which led them to declare clergy ineligible for election. At the outbreak of the Second World War, however, only two states, Maryland and Tennessee, maintained clerical ineligibility in their constitutions.

99. CIC(1917), canon 20, reads: "Si certa de re desit expressum praescriptum legis sive generalis sive particul-

sought by the cleric from his ordinary before the exercise of any public office. Thus, it was generally accepted that, in order to safeguard the interests of the church, a cleric would need the permission of his ordinary before accepting or soliciting an appointment to legislative office.^{100/}

An important exception should be noted regarding cardinals, archbishops, and residential or titular bishops. According to a decision of the Pontifical Commission for the Authentic Interpretation of the Code, April 25, 1922, they were required to obtain permission from the Holy See before accepting the office of senator or deputy. It was generally held that a bishop would also, in virtue of this interpretation, require permission before seeking such an office. Permission was not required, however, in those cases where a public office was held ex officio and the Holy See had expressed some approval of the situation. It is interesting to note that on the same day the Commission, in a second reply, stated that local ordinaries should prefer severity to leniency in granting permission to priests who

aris, 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."

100. See J. B. BRUNINI, op. cit., p. 62.

wish to run for legislative positions.101/

CONCLUSION

From a systematic standpoint, a detailed analysis of canon 139 must be viewed in the context of Book II, De Personis, of the 1917 Code and its tendency to describe the constitutional structure of the church in individualistic terms. As W. Aymans has observed:

From the systematic standpoint the greatest weakness of Book II, De Personis, consisted in its individualistic tendency. Considering that this section deals with the structures of the church, it is obviously unsatisfactory to

101. PONTIFICIA COMMISIO AD CODICIS CANONES AUTHENTICA INTERPRETANDOS, Dubia circa canonem 139, April 25, 1922, in AAS, 14(1922), p. 313: "I. An S.R.E. Cardinales, Archiepiscopi, Episcopi sive residentiales, sive titulares, ad normam canonis 139, par. 4 munus senatorum aut deputatorum sollicitare vel acceptare possint. II. An Ordinarii locorum in concedenda licentia sacerdotibus, qui se candidatos ad deputatorum comitia sistere cupiunt, potius difficiles quam faciles se praeberere debeant. Res.: Ad Ium. Negative et ad mentem. Mens est: Si vi constitutionis civitatis, Cardinales, Archiepiscopi, Episcopi sint de iure senatores, et Sancta Sedes aliquo modo id probaverit, Cardinales, Archiepiscopi, Episcopi possunt sine speciali licentia Sanctae Sedis huiusmodi munus explere, dummodo per Vicarium generalem aliove modo suis obligationibus satisfaciant. In quolibet autem alio casu Cardinales, Archiepiscopi, Episcopi sive residentiales, sive titulares indigent venia Sanctae Sedis.

Ad 2um. Affirmative ad Iam partem, negative ad 2am."

examine these solely from the standpoint of the law of persons. The 1917 Code describes the constitutional structure of the church in terms of the legal determination of the rights and duties of certain offices. The prevailing impression is bound to be that of a hierarchy of offices, or of an hierarchically organized community of offices, as constituting the legal substance of the church's structure.^{102/}

A history of the canonical texts concerning clergy and religious and public office reflects, as we have seen in this chapter, a gradual and developing understanding of the church as an hierarchical order of divine institution. While the canonists of the thirteenth and fourteenth centuries did not feel the need to develop a comprehensive ecclesiology, the missionary situation of the sixteenth century shaped a new context for the existing legislation regarding clerical participation in public office. The texts of the legislation remained largely the same; the context, however, shifted from a fear of clerical greed to the larger perspective of church-state relations.

A similar process can be observed in the eighteenth and nineteenth centuries. There was little change in the substance of the law but a substantial change in the motive and context of the legislation. While the law focussed on

102. W. AYMANS, "Ecclesiological Implications of the New Legislation", in Studia Canonica, 17(1983), p. 76.

the individual rights and duties of clerics and religious, exceptions from the law were considered from the standpoint of safeguarding the institution of the church and the promotion of the common good. This same legislative outlook was clearly discernible in canon 139 of the 1917 Code of Canon Law.

We shall examine, in the following chapter, the legislation concerning the participation of clerics and religious in public office in the context of the Second Vatican Council. In this context the basic structure of the church is determined more by the conciliar understanding of the organization of the whole people of God than by the classification of offices with particular rights and duties. As we shall see, this new ecclesiological perspective brings with it important canonical consequences.

CHAPTER FOUR

PUBLIC OFFICE IN THE 1983 CODE

In the previous chapter we examined the content of the law concerning clerics, religious, and public office in the 1917 Code of Canon Law.

The purpose of this fourth chapter is to examine the current legal position regarding the issue of public office as set down in canon 285, par. 3 of the 1983 Code of Canon Law.^{1/} Firstly, therefore, in accord with the interpretative formula described in canon 17 we shall analyse the actual text of the law.^{2/} In a second section,

1. The full text of canon 285, par. 3 reads: "Par. 1: Clerici ab iis omnibus, quae statum suum dedecent, prorsus abstineant, iuxta iuris particularis praescripta. Par. 2: Ea quae, licet non indecora, a clericali tamen statu aliena sunt, clerici vitent. Par. 3: Officia publica, quae participationem in exercitio civilis potestatis secumferunt, clerici assumere vetantur. Par. 4: Sine licentia sui Ordinarii, ne ineant gestiones bonorum ad laicos pertinentium aut officia saecularia, quae secumferunt onus redendarum rationum; a fideiubendo, etiam de bonis propriis, inconsulto proprio Ordinario, prohibentur: item a subscribendis syngraphis, quibus nempe obligatio solvendae pecuniae, nulla definita causa, suscipitur, abstineant." Unless specified otherwise all references to canons are to the 1983 Code.

2. Canon 17 reads: "Leges ecclesiasticae intellegendae sunt secundum propriam verborum significationem in textu

we shall expand the investigation to the proper meaning of the words of the law by attempting to situate the text within its true context. Finally, in light of the data found in these two sections we shall consider the interpretation and practical application of canon 285, par. 3 in the life of the church of today.

A. TEXTUAL OVERVIEW OF CANON 285, PAR. 3

Canon 285, par. 3 is situated in Book II, De Populo Dei, of the 1983 Code of Canon Law. The first two paragraphs of the canon exhort clerics to shun whatever is unbecoming or alien to their state. This is followed in the third paragraph by a specific prohibition:

Clerics are forbidden to assume public offices which entail a participation in the exercise of civil power.

Religious and members of societies of apostolic life are not directly considered in this canon. By virtue of the

et contextu consideratam; quae si dubia et obscura manserint, ad locos parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum." This canon guards against a narrow legalism. It sets the starting point of our study of canon 285, par. 3 namely, the ordinary significance of the words of the text in legal and common parlance. There is a reminder, however, of the subtlety of canonical interpretation which seeks out a fuller understanding of the words in the mind of the legislator, the purpose of the law, and the circumstances surrounding its enactment.

legislative device of incorporation by reference, however, the legislation is applied to religious by canon 672 3/ and to societies of apostolic life by canon 739.4/ The prohibition does not apply to permanent deacons in virtue of canon 288.5/ Likewise, it follows from the prescriptions of canons 710 and 713 that lay members of secular institutes are not bound by the provisions of canon 285, par. 3.6/

A careful reading of the 1977 schema, De Populo Dei, which dealt with the rights and duties of the faithful, reveals that the prohibition contained in the promulgated version of the canon is somewhat more forceful than that contained in earlier drafts. The 1977 draft text read as

3. Canon 672 reads: "Religiosi adstringuntur praescriptis cann. 277, 285, 286, 287 et 289, et religiosi clerici insuper praescriptis can. 279, par. 2; in institutis laicalibus iuris pontificii, licentia de qua in can. 285, par. 4 concedi potest a proprio Superiore maiore."

4. Canon 739 reads: "Sodales, praeter obligationes quibus, uti sodales, obnoxii sunt secundum constitutiones, communibus clericorum adstringuntur, nisi ex natura rei vel ex contextu sermonis aliud constet."

5. Canon 288 reads: "Diaconi permanentes praescriptis canonum 284, 285, par. 3 et 4, 286, 287, par. 2 non tenentur, nisi ius particulare aliud statuatur."

6. Clerical members of secular institutes are, however, subject to the provisions of canon 285, par. 3. Canon 711 reads: "Instituti saecularis sodalis vi suae consecrationis

follows:

Bishops are not to assume public offices, especially those which entail a participation in the exercise of civil power, without the permission of the Holy See, nor other clerics unless they have obtained permission from the same Holy See in places where the pontifical prohibition is in effect, or in other places from both their own ordinary and the ordinary of the place in which they intend to exercise the power of administration.^{7/}

This proposed text substantially maintains the perspective of the 1917 Code in that there is a distinct emphasis placed on the requirement of obtaining permission. Since the 1980 schema made no change to the 1977 text, this emphasis appears to have been regarded as acceptable by those involved in the wide-ranging consultations regarding the draft text.^{8/} A minor textual alteration was made,

propriam in populo Dei canonicam condicionem, sive laicalem sive clericalem, non mutat, servatis iuris praescriptis quae instituta vitae consecratae respiciunt."

7. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Schema Canonum Libri II de Populo Dei, Romae, Typis polyglottis Vaticanis, 1977, canon 146, par. 2 p. 67: "Officia publica, ea praesertim quae participationem in exercitio laicalis potestatis secumferunt, ne assumant, Episcopi sine licentia Sanctae Sedis, nec alii clerici nisi obtenta, in locis ubi intercesserit prohibitio pontificia, licentia eiusdem Sanctae Sedis, in aliis vero locis licentia tum Ordinarii proprii, tum Ordinarii loci in quo potestatem administrationemve exercere intendunt."

8. See ID., Schema Codicis Iuris Canonici (Patribus Commissionibus reservatum), Libreria Editrice Vaticana, 1980, Canon 260, par. 2 p. 58.

however, in the final draft of the Code presented to Pope John Paul II on April 22, 1982. The words "ea praesertim" were deleted, possibly because the consultors took the view that all public offices involve the exercise of civil power.^{9/}

Following the review of the canon by Pope John Paul II and seven experts, there was a notable shift of perspective away from the requirement of obtaining permission to assume public office involving the exercise of civil power. Rather the focus of the promulgated text of canon 285, par. 3 is, by contrast, on a straightforward prohibition against assuming such offices. Reviewing this change of perspective, J. H. Provost comments:

The practical difference is not great, in that in the case of either a permission or a dispensation the action of a higher authority is needed. The new text, however, has a more chilling effect on the willingness of a higher authority to act: it is supposed to be easier to obtain a permission than a dispensation.^{10/}

In the opinion of R. Smith, the shift in perspective

9. See ID., CIC Schema Novissimum iuxta placita Patrum Commissionis emendatum atque Summo Pontifici praesentatum, Typis Polyglottis Vaticanis, 1982, canon 289, par. 2 p. 50.

10. J. H. PROVOST, "Clergy and Religious in Political Office in the American Context", in The Jurist, 44(1984), p. 293.

from the requirement of permission to one of direct prohibition was unexpected and a surprise both to bishops and canonists.^{11/} Certainly, it would appear that when compared to the final draft text of 1982 the promulgated text reflects a more restrictive approach to the issue of clerics and public office than had been deemed appropriate by the representatives of conferences of bishops throughout the world.^{12/}

There is, then, in the 1983 Code a shift in perspective from that of the 1917 Code on the issue of clerics, religious, and public office. In the following section, therefore, it will be helpful to make a brief comparison between the text of CIC (1917), canon 139, par. 2 and canon

11. See R. SMITH, "Political Involvement and the Revised Code", in Between God and Caesar, M. KOLBENSCHLAG (ed.), New York, Paulist Press, 1985, p. 107.

12. Ibid., p. 108. R. The author writes: "Keep in mind that this formulation (1977 schema) had been approved by worldwide consultation of bishops and was not seen as a question needing discussion." This argumentation, however, should be balanced against a careful analysis of the consultation process. It is interesting to note, for example, that only one hundred and thirty-four responses were received to the consultation on Penal law, sixty-five regarding Administrative procedure, and one hundred and seventy-two regarding portions of the schema on Sacramental Law. A further seventy-six general observation on the draft were received. For a careful analysis of the consultation process and the factors contributing to a lack of response, see F. G. MORRISEY, "The Revision of the Code of Canon Law", in J. F. HITE (ed.), Readings, Cases, Materials in Canon Law, Collegeville, Liturgical Press, 1980, p. 246.

285, par. 3.

1. Public offices in the 1917 and 1983 Codes

CIC (1917), canon 139, par. 2 states:

Without an apostolic indult they shall not practice medicine or surgery, act as recorders or public notaries, except in ecclesiastical curias; accept public offices which involve secular jurisdiction or duties of administration.^{13/}

In comparing this text with canon 285, par. 3, three textual divergences are apparent. Firstly, the phrase "ne assumant" in the 1917 text is replaced in the 1983 Code by the verb "vetantur". As R. Smith observes, the employment of the verb "vetare", meaning to forbid, can reasonably be assumed to represent a more emphatic prohibition than that contained in canon 139, par. 2 of the 1917 Code.^{14/}

Secondly, it should be noted that whereas canon 139, par. 2 had specified public offices which involve the

13. CIC(1917) canon 139, par. 2 reads: "Sine apostolico indultu medicinam vel chirurgiam ne exerceant; tabelliones seu publicos notarios, nisi in Curia ecclesiastica, ne agant; officia publica, quae exercitium laicalis iurisdictionis vel administrationis secumferunt, ne assumant."

14. The verb "vetare" means not to suffer, not to permit, to oppose, forbid, prohibit. See "vetare", in C. T. LEWIS, An Elementary Latin Dictionary, Oxford, Clarendon Press, 1953, p. 915.

exercise of lay jurisdiction or lay administration, no such specification is found in the 1983 text. Canon 285, par. 3 uses instead the phrase civilis potestas. Since the terms "lay jurisdiction" and "lay administration" both denote the exercise of civil power (civilis potestas), one may reasonably assert that the prohibition contained in canon 285, par. 3 embraces those public offices which involve the exercise of lay jurisdiction and administration.^{15/} However, as the phrase civilis potestas is less specific it would appear to admit of a wider comprehension than the terms "lay jurisdiction" and "lay administration".

Thirdly, it should be noted that in canon 139, par. 2 the phrase "sine apostolico indultu" provided both for exceptions in the law as well as designating the authority to whom application for any exception should be made. Canon 285, par. 3, however, omits any direct reference to the possibility of an exception and makes no mention of an apostolic indult. R. Smith comments:

There are still possibilities of exceptions,
but the law does not include how one goes

15. Canonical writers have generally assumed that the terms "lay jurisdiction" and "lay administration" both involve the exercise of civil power. The former because it involves the direct governing of subjects and the latter because it involves the carrying out of civil legislation. See J. ABBO and J. D. HANNAN, The Sacred Canons, St Louis, Herder, 1952, Vol. 2, p. 198.

about applying for those exceptions.^{16/}

A comparison, then, between canon 139, par. 2 and canon 285, par. 3 reveals that the prohibition contained in the current legislation is verbally stronger, more emphatic, and less specific with regard to exceptions than the prior legislation. We shall now consider the texts of parallel canons and their relationship to canon 285, par. 3.

2. Religious and Public Office

Canon 672 states:

Religious are bound by the provisions of canons 277, 285, 286, 287 and 289, and, moreover, religious clerics are bound by the prescriptions of canon 279, par. 2; in lay institutes of pontifical right, the permission mentioned in can. 285, par. 4 can be granted by a major superior.

By law, the consent of the diocesan bishop to establish a religious house in the diocese carries with it the right of the institute to engage in works proper to the institute.^{17/} In canon 672, however, the law places restrictions on the types of works and activities that any religious may undertake. Thus, in virtue of this canon, male and female religious are prohibited from assuming

16. R. SMITH, in op. cit., p. 108.

17. See CIC(1983), canon 611.

public offices which involve the exercise of civil power.^{18/}

A similar incorporation by reference was employed in the 1917 Code where canon 592 directed that, unless the context or very nature of the matter indicated otherwise, religious were also bound by the clerical obligations of the Code.^{19/} Thus, in virtue of canon 139, par. 2 religious were prohibited from assuming certain types of public office without an apostolic indult. It should be noted that canon 672 is more specific than canon 592 of the 1917 Code in that the former explicitly applies the prohibition to religious. This has the effect of eliminating a certain vagueness in canon 139, par. 2 which lent itself to a greater variety of interpretations.

It would seem reasonable to suppose from a textual analysis of canon 672 that developments in the life of the church and its mission account for the more specific legal attention paid to religious and public office in the current

18. Taking into account the nature of the prohibition, it may be presumed that the provisions of canon 285 par. 3, apply both to male and female religious. Canon 606 reads: "Quae de institutis vitae consecratae eorumque sodalibus statuuntur, pari iure de utroque sexu valent, nisi ex contextu sermonis vel ex rei natura aliud constet."

19. CIC (1917), canon 592: "Obligationibus communibus clericorum, de quibus in cann. 124-142, etiam religiosi tenentur, nisi ex contextu sermonis vel rei natura aliud constet."

legislation. Firstly, we may note that as well as binding religious to the prescriptions regarding public office, the canon also binds them to the provisions of canon 287 par. 1, which exhorts clerics to promote social justice:

Most especially, clerics are always to foster that peace and harmony based on justice which is to be observed among all peoples.^{20/}

In its wording, canon 287 reflects the social teaching of Vatican II contained in the constitution on the church in the modern world, Gaudium et spes,^{21/} the call for peace based on justice in the encyclical letter of John XXIII, Pacem in terris,^{22/} and the insistence of Paul VI in Populorum progressio on the need to strive positively for a just order in society.^{23/} Indeed, the 1983 Code represents

20. CIC (1983), canon 287 par. 1 reads: "Clerici pacem et concordiam iustitia innixam inter homines servandam quam maxime semper foveant."

21. The social teaching of the Second Vatican Council encouraged all Christians to participate in the work for justice in the world. See CONCILIIUM VATICANUM II, Constitutio Pastoralis de Ecclesia in mundo huius temporis, "Gaudium et spes", December 7, 1965, in AAS, 58(1966), no. 90, p. 1112.

22. The phrase "peace and harmony based on justice" in canon 287, par. 1, recalls an emphasis in Pacem in terris on the civil, political, and economic rights of the human person which, in the mind of John XXIII, must be acknowledged if peace in the world is to be attained. See JOHN XXIII, Litterae encyclicae, Pacem in terris, April 11, 1963, in AAS, 55(1963), pp. 260-265.

23. In the encyclical Populorum progressio Paul VI laid

a determined effort to provide a framework for conciliar and post-conciliar teaching on the duty of clerics and religious to foster peace and justice.^{24/}

Secondly, we may observe the impact of the church's teaching on social justice in the area of the public witness of religious. D. O'Connor writes:

Invariably, since Vatican II, Catholic religious and clergy who are in politics or public office have cited the church's social teaching as the basis of their activities. [...] Social justice has been a concern of the church, especially from the pontificate of Leo XIII to that of John Paul II. Since Vatican II, the church has been seeking to define its life also in terms of its impact on human development. Gaudium et spes helped the church come to the conviction that there can be no explanation of what the church is apart from its impact on the social, political, and economic life of society.^{25/}

stress on his belief that peace is not to be found simply in the absence of war but in a positive striving for a just order. See PAUL VI, Litterae encyclicae, Populorum progressio, March 26, 1967, in AAS, 59(1967), pp. 257-299.

24. For a detailed analysis of the theme of social justice in the 1983 Code, see T. T. GRANT, "Social Justice in the 1983 Code of Canon Law: An Examination of Selected Canons", in The Jurist, 49(1989), pp. 112-145.

25. D. O'CONNOR, "Religious in Politics", in Review for Religious, 41(1982), p. 841. Fr. O'Connor quotes one female religious, a state senator, as asserting: "Though I may not be able to use gospel language on the house floor or in committee meetings [...] I am nonetheless making the church's teaching present and striving for the reconciliation it seeks to promote by reordering relationships and structures." For an account of this statement from Sr.

Certainly, it can be said that the ecclesiology of Vatican II has brought about a renewed perception among religious of the thrust of their apostolic ministry and witness.^{26/} It will be necessary, in a later section, to examine this renewed perception in greater detail when considering the context of canon 285, par. 3. For the moment, however, it will be sufficient to observe that the more specific application of the prohibition against religious assuming public office in canon 672 is part of a complex interplay of values in the area of the apostolate, which is necessarily reflected in the legal norms.^{27/}

3. Permanent deacons and public office

The issue of permanent deacons and public office is

Eileen Dunn, an Arizona state senator, see J. CASTELLI, "Priests, Nuns, Ministers in Politics", in Commonweal, 104(1977), p. 400.

26. In a survey conducted in 1984 by the Leadership Conference of Women Religious and the Conference of Major Superiors of Men, central administrators were asked to list the number of members who were currently serving, or had recently served, in elective or appointive public offices at city, council, or national level. An estimated total of 125 sisters were found to have assumed some sort of public office. Interestingly, in the sample of 130 male communities only one listed a member as exercising a public office. For details of this survey, see M. KOLBENSCHLAG, "Introduction: The American Experience", in op. cit., p. 107.

27. For a brief treatment of the creative tension and interplay between spirit and norm and its effect on the relationship of bishops and religious, see E. McDONOUGH,

treated in canon 288. The canon states:

Permanent deacons are not bound by the prescriptions of canons. 284, 285, par. 3 and 4 286, 287, par. 2 unless particular law determines otherwise.

Thus, in virtue of this canon, permanent deacons are subject to an exception from the prohibition of canon 285, par. 3. This exception, together with the determination regarding particular law, raises three important points.

Firstly, the exception encourages a more nuanced reading of the text of canon 285, par. 3. Since permanent deacons are clerics, it seems reasonable to infer that the assumption of a public office cannot, in itself, be regarded as unbecoming ("indecora") or alien ("alienus") to the clerical state.^{28/} It follows, therefore, that canon 285,

Religious in the 1983 Code, Chicago, Franciscan Herald Press, 1985, pp. 70-73.

28. It should be noted that the comprehension of the term "clerus" has been subject to considerable change. In the early centuries the term was applied to the whole community. The late first and second centuries saw the term applied to those involved in specific church ministries. CIC (1917), canon 108, par. 1, and CIC (1917), canon 968, par. 1, described a cleric as a baptized male, who had been dedicated to the ministry by reception of first tonsure. Out of a real concern to reflect the ecclesiological teachings of Vatican II and locate those called to the sacred ministry within the People of God as "christifideles", the 1983 Code views clerical status as an ecclesiastical law condition for the ordained. Thus, canon 266, par. 1 states that a person becomes a cleric through the reception of the diaconate. See PAUL VI, *Motu proprio*,

par. 1 and 2 do not fall within the scope of this investigation. This, in turn, allows us to assert that the prohibition against assuming public office in canon 285, par. 3 is not based on the inherent incompatibility of public office with the clerical state.^{29/}

Secondly, the clause "nisi ius particulare aliud statuat" in canon 288 clearly indicates that, in the mind of the legislator, the issue of deacons and public office should be sensitively situated in the particular pastoral

"Ad pascendum, 15 August, 1972, in AAS, 64(1972), pp. 534-540.

29. In the "Relatio" prepared by the Secretariat of the Commission for the Revision of the Code in 1981, three proposals were made regarding this legislation. Firstly, that the law should be framed in a positive manner and deacons, as clerics, obliged to observe all clerical obligations unless, in a particular case, the legitimate authority of the church should grant an exception. Secondly, it was suggested that while deacons should be exempted from certain clerical obligations, a phrase should be added specifying that "the ordinary, considering attendant circumstances, could prescribe otherwise". Thirdly, it was proposed that while permanent deacons should not be bound to observe the canons concerning clerical dress and business affairs, a special prohibition should be included concerning partisan politics or running for union office. The discussion would seem to indicate that members of the Commission were conscious of the incongruity of granting an exception from the prohibition from public office to those who were clerics. See Relatio complectens synthesim animadversionum ab em.mis atque exc.mis Patribus Commissionis ad Novissimum Schema CIC exhibitarum, cum responsionibus a Secretariis et Consultoribus datis (Patribus Commissionis stricte reservata), Typis Polyglottis Vaticanis, 1981, p. 69.

and cultural context in which it arises. This legislative approach must be seen in the perspective of the ecclesiological principle communio ecclesiarum, stated in Lumen gentium, and expressly adopted by the 1983 Code in canon 368.30/ Since a particular church forms a constitutive element of the church, we must be particularly sensitive to the legal implications of a reference by the legislator to particular law. At the very least, in the case of canon 288 a similar sensitivity to the cultural and pastoral context should temper and modify our understanding of the text of the universal law applied to clerics, other than to permanent deacons, in canon 285, par. 3.

Thirdly, the exception accorded to permanent deacons reflects the long-established practice in canonical legislation of granting exceptions to clerics from the prohibition regarding public offices.^{31/}

30. Such an approach opens the way to a mature interpretation and application of the law. J. A. CORIDEN comments: "Conditions within the human believing community qualify the application of law. Whether that community is a nation, province, region, diocese, vicariate, or a religious community, its texture and the nature of its members weigh on the judgements involved in interpreting the law. Wise and considerate leaders evaluate such factors, at least implicitly or informally, but it is a step which should never be omitted." J. A. CORIDEN, The Art of Interpretation, Washington, Canon Law Society of America, 1982, p. 10.

31. See, for example, Council of Chalcedon (451), canon 3, in J. Mansi, Vol 7, coll. 384-385. The legislation provided

In conclusion, it should be noted that in virtue of canon 672, permanent deacons who are religious are nevertheless bound by the prescription of canon 285, par. 3. Furthermore, since canon 1035, par. 1 distinguishes between permanent and transitional deacons, we may assert that transitional deacons are also bound by the prohibition of canon 285, par. 3.32/

4. Societies of Apostolic Life

Canon 739 states:

Besides the obligations which they have as members according to the constitutions, the members are bound by the common obligations of clerics, unless something else is evident from the nature of the matter or context.

The canon is situated in the section on Societies of apostolic life in Book II, De Populo Dei. Although the text does not expressly state to whom the canon is addressed, we may conclude from the context that it is directed to societies of apostolic life.33/

for an exception regarding clerics assuming the public office of guardian of infants, widows, or orphans.

32. Canon 1035, par. 1 reads: "Antequam quis ad diaconatum sive permanentem sive transeuntem promoveatur requiritur ut ministeria lectoris et acolythi receperit et per congruum tempus exercuerit."

33. In virtue of canon 732, societies of apostolic life share many of the general norms applied to institutes of

Canon 737 states that the obligations and rights of clerical and lay members of societies of apostolic life flow from a definitive incorporation into the society as defined in the constitutions approved by the church.^{34/} In addition to these obligations, in virtue of canon 739, clerical members of such societies are also bound to the common obligations of clerics. The canon, however, provides for exceptions when certain obligations common to all clerics clearly do not apply either from the nature of the matter or the context.^{35/}

Clearly, since clerical members of societies of apostolic life are bound by the common obligations of clerics, we may state that they are bound by the prescription of canon 285, par. 3. A question arises, however, concerning permanent deacons who are incorporated

consecrated life in the 1983 Code. Thus, societies of apostolic life are to be designated clerical or lay according to the description given in canon 588.

34. Canon 737 reads: "Incorporatio secumfert ex parte sodalium obligationes et iura in constitutionibus definita, ex parte autem societatis, curam sodales ad finem propriae vocationis perducendi, iuxta constitutiones."

35. According to S. L. HOLLAND, cases of incardination in which a society has its own proper apostolic works give rise to significant areas of difference from other clerics. See S. L. HOLLAND, "Societies of Apostolic Life", in US Commentary, p. 537.

into a clerical society and who are bound by the common obligation of clerics "nisi ex natura rei vel ex contextu sermonis aliud constet." Such members are clerics but are not canonically religious.^{36/} It would appear, therefore, that they are not bound by the provisions of canon 672. They are, however, permanent deacons and hence are subject to an exception from the prohibition of canon 285, par. 3.

CANONICAL OBSERVATIONS

In looking to the interpretation and application of canon 285, par. 3 our first aim is to search out the meaning of the words. We shall, therefore, summarize our principal canonical observations according to the terms employed by the legislator.

1. "Clerici": The term "clerici" embraces all bishops, priests, and deacons. In the 1983 Code, this bears an important ecclesiological implication, since entrance to the clerical state is by ordination to the sacred ministry; the Second Vatican Council had located sacred ministers within

36. Canon 607, par. 2. The canon describes two basic characteristics of religious life. Firstly, it is a society in which members, according to proper law, pronounce public vows. Secondly, the members live a life in common.

the people of God as themselves being christifideles. Thus, the term clerus must be regarded as an ecclesiastical law condition of ordained members of the people of God. It refers to the juridical status of sacred ministers which, of its nature, is changeable and not to the unchangeable elements of ordination.^{37/}

This observation leads to an important corollary. By employing the term clerus, the legislator signifies his intention of focussing on a particular mode of service of ordained ministers within the people of God. He is not directly concerned with the nature and effects of ordination. In addition, it is an accepted axiom of law that any restriction of the free use of rights is for the sake of the community.^{38/} It follows, therefore, that in the mind of the legislator the underlying purpose of the prohibition contained in canon 285, par. 3 is to promote a particular mode of service of ordained ministers (clerici) within the people of God for the common good of all the faithful.^{39/}

37. See J. H. PROVOST, "The People of God", in US. Commentary, pp. 131-133.

38. L. ÖRSY, "On Ecclesiastical Laws Revisited: Glossae on Canons 8-24", in J. HITE (ed.), Readings Cases, Materials in Canon Law, Collegeville, Liturgical Press, 1980, p. 246.

39. While it is true that the Pope is the legislator of the

In light of the exception accorded to permanent deacons in canon 288, the term clerici in canon 285, par. 3 effectively refers to bishops and priests, since deacons preparing for ordination to priesthood do not usually remain long in that state. It would appear, therefore, that the legislator favours the view that the assumption of public offices by bishops and priests does not, as a general rule, promote ministerial service within the people of God. However, by excepting permanent deacons from the prohibition, the legislator acknowledges that, since the assumption of public office is not incompatible with the clerical state, it nevertheless could be incompatible with the deacon's ministerial service. Indeed, by specifically referring to particular law in canon 288, the legislation reflects the view that whether involvement of deacons in public office promotes or devalues their ministerial service will depend largely on local circumstances.

By extension, in virtue of canons 672 and 739, the term clerici in canon 285, par. 3 effectively embraces members of religious institutes and societies of apostolic

Code, the phrase "mens legislatoris" is not to be interpreted in a personalistic way. J. A. Coriden writes: "The mens legislatoris is a manifestation of the sensus ecclesiae. Instead of the personal intention of the author of the law, it is a living evolving interpretation based on what the mind of the church is." J. D. CORIDEN, op. cit., p. 24.

life. It would appear, therefore, that the legislator favours the view that, as a general rule, the assumption of public office by religious and clerical members of societies of apostolic life does not promote their ministry within the people of God.

Since religious who are not ordained enjoy the status of laity, it can be seen that the prohibition of canon 285, par. 3 extends both to clergy and laity alike. We may conclude, therefore, that the legislator does not favour the hard and fast rule that public offices are open to the laity and forbidden to the clergy. On the contrary, a closer scrutiny of the term clerici in the text of canon 285, par. 3 has revealed an extremely nuanced approach to the issue. In the view of the legislator, the assumption of public offices is not inherently incompatible with the nature of ordination or the consecrated life. Public offices may be assumed by some members of the clergy, namely, permanent deacons who are not religious. They may also be assumed by the laity, excluding those laity who are religious. By employing the mechanism of a disciplinary law, the legislator indicates that his prime concern is not to restrict individual rights but to promote the common good. In certain circumstances a dispensation may be granted to those members of the clergy and laity who are prohibited by law from assuming public offices, which involve a participa-

tion in civil power.

2. "Vetantur": In canon 285, par. 1 and 2 clerics are exhorted to refrain completely ("prorsus abstineant") from unbecoming activities and to avoid ("vitent") what is alien to the clerical state. Paragraph 3 states that clerics are forbidden ("vetantur") to assume public offices.

The verb "vetare" is used sixteen times in the 1983 Code. It is employed in disciplinary canons, particularly those which deal with matters of a serious nature.^{40/} Since we may presume a consistency of language in the Code, it would appear that the use of this word in canon 285, par. 3 indicates a matter of serious import. Furthermore, since there is no parallel use of the term in canon 139, par. 2 of the 1917 Code which states less vigorously that clerics are not to assume ("ne assumant") public offices, it may reasonably be supposed that changed conditions in the church and society have led to a more emphatic prohibition.

Clearly, use of the verb "vetare" indicates that canon

40. See, for example, canon 1331 concerning censures applied to excommunicated persons. With regard to clerics, see canon 1333. An indication of the force of the term is, perhaps, best seen in canon 630, par. 5, which treats of the supreme law of conscience.

285, par. 3 is a disciplinary law.^{41/} Three points may be noted here. Firstly, as we have already observed, disciplinary laws refer primarily to areas of conduct affecting the good of the faithful. The principal aim of the legislator is to promote the welfare of the community. In interpreting canon 285, par. 3 therefore, it will be necessary to consider the law principally from the perspective of the health of the community. It would be unfair to the legislator and poor canonical practice to approach an interpretation of this canon from the exclusive perspective of personal rights.^{42/}

Secondly, since canon 285, par. 3 restricts the free use of rights, it must be interpreted strictly. The same strict interpretation must be applied to canons 672 and

41. It is interesting to note that in the majority of canons which employ the verb "prohibere", the prohibition is qualified in some way. See, for example, canon 289, which prohibits clerics from military service "without the permission of their own ordinary". Of the canons which employ the verb "vetare", however, only two contain a qualifying clause, namely, canon 1265, which treats of fund raising by private persons for ecclesiastical institutions, and canon 286, which treats of the prohibition against clerics conducting business and trade.

42. Canon 18: "Leges quae poenam statuunt aut liberum iurium exercitium coarctant aut exceptionem a lege continent, strictae subsunt interpretationi." In the case of a particular law, framed according to the exception in canon 288, a strict interpretation should be applied. See L. ORSY, op. cit., p. 246.

739. Likewise, the exception accorded to deacons in canon 288 is subject to a strict interpretation.

Thirdly, it is within the power of the diocesan bishop to grant a dispensation from the prescriptions of canon 285, par. 3. This faculty is granted to him in canon 87, par. 1 as often as he judges that a dispensation will contribute to the spiritual good of the faithful.^{43/} The faculty to dispense from universal disciplinary laws, however, must always be viewed in light of the theological-canonical principle of ecclesiastical communion.^{44/} We shall examine the ramifications of this principle in a later section.

43. Canon 87, reads: "Episcopus dioecesanus fideles, quoties id ad eorundem spirituale bonum conferre iudicet, dispensare valet in legibus disciplinaribus tam universalibus quam particularibus pro suo territorio vel suis subditis a suprema Ecclesiae auctoritate latis, non tamen in legibus processualibus aut poenalibus, nec in iis quarum dispensatio Apostolicae Sedi, aliive auctoritati specialiter reservatur." For a summary of the rights and responsibilities of diocesan bishops, see T. J. GREEN, A Manual for Bishops: Rights and Responsibilities of Diocesan Bishops in the Revised Code of Canon Law, Washington, D.C., NCCB, 1983, pp. 27-71.

44. The theological principle of hierarchical communion and its bearing on the functions (munera) conferred on bishops is succinctly stated in canon 375 par. 2. "By the fact of their episcopal consecration, bishops receive along with the function of sanctifying also the functions of teaching and of ruling, which by their very nature, however, can be exercised only when they are in hierarchical communion with the head of the college and its members."

3. "Officia publica": Since the legislation of canon 285, par. 3 is concerned with the engagement of clerics in civil society, it is important that our understanding of "public office" take into account both the ecclesiastical and secular comprehension of the term.

Historically, the canonical, civil, and common law traditions derive their understanding of public office from Roman public law. In the perspective of the Digest, "officium" was a position firmly established by law and entailing some participation of power, be it "coercitio" (power of coercion), "iurisdictio", (power of jurisdiction), or "imperium", (full power of the state).^{45/} This understanding of public office, as we observed in the first three chapters, may be legitimately applied to practically all the canonical legislation we have considered from the earliest times to the 1917 Code.^{46/}

H. C. Black provides a succinct description of the contemporary legal understanding of the characteristics of

45. See Digest, I, 10-20.

46. TERTULLIAN (155-220), for example, in one of the earliest examples of ecclesiastical discipline concerning public office employs the term officium with the same basic connotation as CIC (1917), canon 139, par. 2. See TERTULLIAN, De Corona, Chapter 11, in PL, Vol. 2, col. 93.

public office:

Essential characteristics of "public office" are: (1) authority conferred by law, (2) fixed tenure of office, and (3) power to exercise some portion of the sovereign functions of government: the key test is that the "officer" is carrying out sovereign functions.^{47/}

In addition to isolating the essential characteristics of public office, civil law has also sought to clarify those essential elements which must be in place before a particular public position can be designated as a "public office". H. C. Black writes:

The essential elements required to establish a public position as a "public office" are: the position must be created by constitution, legislature, or through authority conferred by legislature. A portion of the sovereign power of government must be delegated to the position, duties and powers must be defined, directly or impliedly, by the legislature or through the legislative authority. The duties must be performed independently without control of a superior power other than law, and the position must have some permanency and continuity.^{48/}

47. See H. C. BLACK, "Public Office", in Black's Law Dictionary, St. Paul, Minn., West Publishing Company, 1979, p. 1107.

48. Ibid., p. 1107. Webster defines "Public officer" as follows: "Person holding a post to which he has been legally elected or appointed and exercising government functions" See P. B. GOVE (ed.), "Public officer", in Webster's Third New International Dictionary, Springfield, Mass., G. and C. Merriam Company, 1961, p. 1836.

There can be little doubt that the contemporary civil law understanding of the characteristics and essential elements of public office reflects the classical notion of distinct branches of government: executive, legislative, and judicial. The assumption of a public office is viewed as a participation in one or other of these branches. This notion of public office is clearly discernible in canonical tradition and, since we may presume a consistency of language and coherence of meaning in canon law, there is no reason to doubt that this understanding of the term may be ascribed to canon 285, par. 3.

4. "Participatio": canon 285, par. 3 prohibits clerics from those public offices which "entail a participation in civil power." It is important, therefore, to be clear and precise as to what exactly constitutes such participation. The latin verb "participare" is usually translated as, "to share in, partake of, participate in." The noun "participatio" means, "a participation, a share".^{49/} H. C. Black describes the legal understanding of the act of participation as follows:

To receive or have a part or share of, to partake of, experience in common with others,

49. C. LEWIS and C. SHORT, op. cit., s.v. "participare", p. 584.

to have or to enjoy a part or share in common with others.⁵⁰

In light of this understanding of the term "participatio", canon 285, par. 3 is concerned only with those public offices which require the exercise of some portion or share in executive, legislative, or judicial power. Clearly, such participation embraces a broad range of activities and, in a later section, we shall attempt to be more specific as to which offices are prohibited by the legislation. For the moment, however, it will suffice to recognise that, by employing the term "participatio", canon 285, par. 3 makes a careful distinction between persons in public employment and public officials. Since the criterion of public office is a participation in civil power, it follows that not all persons in public employment are public officials. The prohibition of canon 285, par. 3 applies, therefore, quite specifically to participation in public office and not to involvement in public employment.

5. "Civilis potestas": the term "potestas" means, "power, capacity, force".^{51/} Civilis, an adjective, is usually translated as "of citizens, of the state, civil,

50. H. C. BLACK, op. cit., pp. 1007-1008.

51. Ibid., s.v. "potestas", pp. 630-631.

civic."^{52/} Thus, the phrase "civilis potestas" denotes the capacity, the right, the power or force that pertains to the state considered as a body of citizens or community. H. E. Black considers the capacities and rights which belong to the state under the general heading of "constitutional power". Such power he defines as follows:

The right to take action in respect to a particular subject matter or class of matters, involving more or less discretion, granted by the constitution to the several departments or branches of government, or reserved to the people. Powers in this sense are generally classified as legislative, executive, and judicial; and further classified as enumerated (or express), implied, inherent, resulting, or sovereign powers.^{53/}

Canonical tradition has always acknowledged the existence and rights pertaining to constitutional power. Indeed, canon 365, in treating of the diplomatic responsibilities of legates, points to the rights of the church and the rights of the state and the need to promote and foster relations, which respect both the authority of the Apostolic See and the state.

The phrase "civilis potestas" in canon 285, par. 3 refers, then, to the constitutional power of the state. Such power, to be truly constitutional, must be acquired and

52. Ibid., s.v. "civilis" p. 132.

53. H. C. BLACK, op. cit., pp. 1053-1054.

exercised according to the constitution. This last point is important when considering public offices. The exercise of a public office demands, of necessity, the power required for its accomplishment. In the perspective of canon law, then, no office can be designated "public", which is not based on legitimate constitutional power.

B. CONTEXTUAL OVERVIEW OF CANON 285, PAR. 3

Our purpose in this section is to investigate further the value or values that the legislation concerning clergy and religious and their involvement in public office in the 1983 Code seeks to uphold. Such a purpose arises quite naturally from a reflection on the law-making process. L. Örsy writes:

First, the legislator comes to the discovery of a value that could benefit the community. Then, he formulates a "norm of action" for obtaining it. Finally, the community acts on the norm, and the value is appropriated.^{54/}

It was apparent from the textual analysis of canon 285, par. 3 that a primary value the legislator is seeking to uphold for the benefit of the community in this law is the promotion of the ministerial service of bishops, priests,

54. L. ÖRSY, Marriage in Canon Law, Wilmington, Michael Glazier, 1986, p. 42.

and religious. The "norm of action" which has been adopted to promote their particular ministerial service is the prohibition against participation in public office formulated in canon 285, par. 3.55/ In order, then, to help the community act on this norm and appropriate its underlying value, it will be necessary to reflect on those documents which give specific reasons for prohibiting such involvement.

An examination of the documents of the Second Vatican Council reveals that no specific prohibition of clerics and religious from a participation in public office was issued. However, in the years following the council, the Holy See issued three documents which dealt with this issue in the perspective of the conciliar image of the church. First, then, we shall examine each of these documents. Following that, we shall look at some recent statements of John Paul II concerning participation in public office. Finally, we shall list those points which have emerged from our

55. There is a constant need to discover and reassess the value behind a norm in order to determine its vital strength or weakness as a law. J. A. CORIDEN writes: "An understanding of the end or purpose for which the law was enacted is vital to the proper understanding of the law itself, since it is of the essence of any law to be a means to an end. The circumstances in which a law was made, the historical circumstances surrounding the legislative act, is often the best indication of the law's purpose." J. A. CORIDEN, op. cit., p. 22.

investigation and form part of the legislative context of canon 285, par. 3.

1. "The ministerial priesthood" (1971) 56/

The document on the ministerial priesthood issued by Paul VI following the 1971 Synod of Bishops, contained a section dealing explicitly with the participation of priests in secular activities. Drawing on the discussions of the bishops, specific guidelines were listed for the life and ministry of priests. It is these guidelines which concern us here.

In the view of the bishops, the light of faith enables one to appreciate and understand that the priestly ministry is not only a fully valid ministry but, indeed, more excellent than others. For this reason, in the ordinary course of events, the bishops concluded that priests should devote all their time to priestly ministry. Furthermore, they judged that participation in secular activities was not to be considered either the principal objective or

56. SYNODUS EPISCOPORUM, "Documenta de sacerdotio ministeriali et de iustitia in mundo", November 30, 1971, in AAS, 63(1971), pp. 897-942. Hereafter cited as De sacerdotio ministeriali. It should be noted that synodal documents are not law. They should be regarded, however, as statements of policy and a guide for the interpretation and application of a law. See J. H. PROVOST, loc. cit., p. 290.

particular concern of priests.^{57/} However, since the church is bound to proclaim issues of justice and denounce instances of injustice,^{58/} it was the firm view of the synod that priests in their ministry should prepare themselves for certain eventualities:

Priests should [...] select a definite pattern of action, when it is a question of the defense of fundamental human rights, the promotion of the full development of persons and the pursuit of peace and justice [...]. In circumstances in which there legitimately exist different political, social, and economic options, priests like all citizens have the right to select personal options. But since political options are by nature contingent and never in an entirely adequate and perennial way interpret the gospel, the priest, who is the witness of things to come, must keep a certain distance from any political office or involvement [...]. Moreover, care must be taken lest this option appear to Christians to be the only legitimate one or become a cause of division among the faithful.^{59/}

57. J. H. PROVOST, loc. cit., p. 290.

58. De sacerdotio ministerali, p. 912: "Ministerium sacerdotale, etiam si cum ceteris operositatibus conferatur, non modo ut navitas humana plene valida considerandum est, quin immo ceteris operositatibus praestantius, quamvis hoc eximium bonum tantum sub fidei luce prorsus intellegi possit. "

59. Ibid., pp. 912-913: "Presbyteri debent [...] viribus definitam agendi rationem seligere, cum agitur de primariis humanis iuribus defendendis, de personis integre promovendis, de causa pacis et iustitiae provehenda. [...]"

The synodal bishops, however, explicitly excluded priests from any leadership role or militant activity in any political party:

Leadership or active militancy on behalf of any political party is to be excluded by every priest unless, in concrete circumstances, this is truly required by the good of the community, and receives the consent of the bishop after consultation with the priests' council and, if circumstances call for it, with the episcopal conference.^{60/}

The requirement that a priest obtain permission from his ordinary before becoming actively involved in a political party appears to have been a deliberate extension of canon 139, par. 4 of the 1917 Code which required a priest to obtain permission from his ordinary before running for

In illis adiunctis, in quibus diversae optiones politicae aut sociales aut oeconomicae legitime exstant, presbyteri, sicut omnes cives, ius habent proprias optiones faciendi. Sed cum optiones politicae natura sua contingentes sint et Evangelium nunquam omnino congruentes et perenniter, interpretentur, presbyter, qui testis est eorum, quae futura sunt, certa quadam ratione, se removeat a quolibet politico officio vel studio. [...] Insuper curandum est, ne eius optio quasi unica legitima christianis appareat vel causa discidii inter christifideles fiat." Translation as in T. Grant, loc. cit., p. 130.

60. Ibid., p. 913: "Assumptio muneris ad moderationem pertinentis (leadership) vel actuose militandi modus pro aliqua factione politica excludi debent a quolibet presbytero, nisi id in concretis extraordinariisque circumstantiis bono communitatis reapse postuletur, de consensu quidem Episcopi, consultis Consilio Presbyterali et --si casus ferat-- Conferentia Episcopali." Translation as in J. H. Provost, loc. cit., p. 291.

legislative office.^{61/} With regard to the actual process of obtaining permission, however, it should be noted that the synod was careful to include two canonical structures which had been established in the wake of the Vatican Council. J. H. Provost writes:

The priests' council was to be consulted by the bishop before giving his consent. If circumstances called for it, the bishop was to consult with the conference of bishops before giving his permission. The synod did not specify what those circumstances might be, but it also clearly left the granting of permission in the hands of the local ordinary and did not restrict it to the Apostolic See.^{62/}

The guidelines outlined in "The Ministerial Priesthood" were specifically directed to priests.^{63/} In 1978, however, the Sacred Congregation of Religious and Secular Institutes conducted a study on the role of religious in the mission of the church. Since it specifically considered the issue of political involvement, it is important to note here the findings of the study which were published in 1980.

61. J. H. PROVOST, loc. cit., p. 291.

62. Ibid., p. 291.

63. The legal status of the synod of bishops is described in canons 342 and 348. For a treatment of the relationship between the theological and legal definition of the synod, see J. RATZINGER, Church, Ecumenism and Politics, Slough, St. Paul Publications, 1988, pp. 46-62. The author is

2. "The prophetic role of religious in the promotion of human progress" (1980) 64/

Since our main concern is with the participation of religious in public office, it will suffice to note those parts of the document, "The prophetic role of religious in the promotion of human progress" which touch on the direct involvement of religious in political movements.

The principal concern of this document was that religious men and women should not devalue their prophetic mission and contribution in the church.^{65/} A true Christian prophet was described as someone who can never fully identify with any one political system because of an intense awareness of the human weakness that lies at the heart of every political ideology.^{66/} For that reason,

concerned to emphasize the place the 1983 Code allots to the synod in the systematic presentation of church law.

64. SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, "The Prophetic Role of Religious in the Promotion of Human Progress", in Consecrated Life, 4(1980), pp. 416-429. Hereafter cited as "The Prophetic Role".

65. An underlying theme of The Prophetic Role was the relationship of religious to the local church. For a treatment of this question, see L. ÖRSY, "A Theology of the Local Church", in Review for Religious, 36(1977), pp. 666-682.

66. The Prophetic Role, loc. cit., p. 418.

religious were exhorted not to be swayed by the trappings of some political ideology, nor take on activities or ways of acting proper to other vocations such as the lay vocation. In this regard, the document stressed that religious must safeguard their own charism and not confuse their vocation with that of those called to secular institutes.^{67/}

In dealing with the issue of religious and involvement in politics, the document re-emphasized its definition of the true prophet. It described the religious who stands apart and is critically aware of the limitations of all political movements as the one who exercises a prophetic role.^{68/} In light of this criterion of prophecy, it concluded that any active involvement in political parties on the part of religious should be discouraged.^{69/} It is a theme that can also be discerned in another document on the vocation to the consecrated life which we will now review.

3. "Religious and human promotion" (1983)

The particular concern of the 1983 study was the role of religious in the mission of the church for the promotion

67. Ibid., pp. 412-413.

68. Ibid., pp. 415-420.

69. Ibid., p. 426.

of the human person.^{70/} The document reflected the teaching of Vatican II in Gaudium et spes that the church believes it can contribute much to humanizing the human family through each of its members and its community as a whole.^{71/} It noted that religious have a special role to play in humanizing the world and then went on to treat sensitively of the problems and difficulties that they have to endure when called upon to intervene in unjust situations. There was a clear acknowledgement that religious may sometimes have to involve themselves in the working world and in politics but a recognition that political involvement often poses difficult problems. Thus, the document in seeking to establish criteria governing a possible involvement sought to clarify the term "politics":

Politics can be understood in the wider and more general sense as the dynamic organization of the whole life of society. [...] Looked at in this way, the role of religious in activi-

70. SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, "Religious and Human Promotion", in Canon Law Digest, 9(1983), pp. 379-410. Hereafter cited as "Religious and Human Promotion". This study was completed in 1978 but only published in 1980.

71. T. F. O'MEARA writes of the conciliar image of ecclesial ministry: "When we compare two ecumenical councils, Trent and Vatican II, we see a move from defining church and ministry in terms of the eucharist to a wider perspective including liturgy and pluriform mission [...]. Christians do not enter the world as ministers because they have been consecrated as liturgists. Just the opposite is true.

ties and works is profoundly meaningful in its encouragement of and commitment to those cultural and social changes which contribute to human promotion. [...] But if politics means direct involvement with a political party, then certain reservations must be made in view of the vocation and mission of religious in the church and in society, so as to arrive at correct criteria governing a possible involvement.^{72/}

After clarifying the term "politics", the study listed certain reservations which it was felt should be kept in mind so as to arrive at correct criteria governing the possible involvement of religious in politics.^{73/} It stated that religious, conscious of the witness of their vocation, should not be deluded into thinking that they would have greater influence on the development of persons and peoples by substituting a political involvement in the strict sense for their own specific tasks.^{74/} Furthermore, since the establishment of the kingdom of God within the very structures of the world is a theme of great interest for the whole Christian community, the study emphasized that it

Offices and roles in the liturgy are justified by public service." T. F. O'MEARA, Theology of Ministry, New York, Paulist Press, 1983, pp. 200-201.

72. "Religious and Human Promotion", loc. cit., p. 395.

73. Ibid., pp. 395-396.

74. Ibid., p. 395.

should also be of interest to religious. But their interest, it was suggested, should be directed to the formation of young people into architects of human and social development rather than their own personal involvement in the political sphere.^{75/} Indeed, in the view of this study, religious who make the love of God their fundamental option will be seen as credible Gospel experts, even when they stand apart from certain political options, and as agents of peace and fraternal solidarity, rather than men and women who take sides.

The study recognized that certain problems were arising in the church because some religious judged that in their particular circumstances there was a need for political involvement. It, therefore, suggested certain reservations which should always be kept in mind when attempting to arrive at correct criteria governing the direct involvement of religious in the political sphere:

If exceptional circumstances require it, the individual cases must be examined so that, with the approval of the authorities of the local church and the religious Institutes, decisions can be made that are beneficial to the ecclesial and secular community. But the priority of the specific mission of the church

75. Ibid., p. 18.

and of religious life must always be kept in mind as well as the methods proper to it.^{76/}

It can be seen, then, that this document, reflecting the teaching of the Vatican II decree Christus Dominus, linked religious life to the hierarchical apostolate and emphasized the special relationship which binds it to the pastoral responsibility of the church.^{77/} It is a theme that can also be discerned in some of the statements of John Paul II which we will now review.

4. John Paul II and public office

In his encyclical Evangelii nuntiandi Paul VI spoke of a religious reductionism which seeks to restrict the activity of the church to the sanctuary.^{78/} His plea that the church does not circumscribe its activity to the religious realm and dissociate itself from humanity's temporal problems has been taken up by John Paul II and,

76. Ibid., p. 18.

77. CONCILIUM VATICANUM II, "Decretum de pastorali Episcoporum munere in Ecclesia (Christus Dominus)", October 28, 1965, in AAS, 58(1966), pp. 673-701. For a commentary on this decree, see H. VORGRIMLER (ed.), Commentary on the Documents of Vatican II, New York, Herder, 1968, vol. 2, pp. 166-300.

78. PAUL VI, Apostolic Exhortation, Evangelii nuntiandi, December 8, 1975, in AAS, 68(1976), pp. 5-76.

indeed, has played a significant part in his ministry.^{79/} However, in some of the addresses in which he has spoken of the church's ministry of social justice he has also warned clergy and religious of the need to clarify their particular role in the church's mission. For example, in an address in 1979 to the Mexican bishops at Puebla he underlined his belief that secular activities belong properly, although not exclusively, to laypersons:

It is necessary to avoid supplanting the laity, and to study seriously just when certain ways of substituting for them retain their raison d'être. Is it not the laity who are called by the virtue of their vocation in the church, to make their contribution in the political and economic areas, and to be effectively present in the safeguarding of human rights?^{80/}

On another occasion, he told a gathering of priests in Mexico City:

You are not social directors, political leaders or functionaries of a temporal power. So I repeat to you: let us not pretend to serve the gospel if we try to "dilute" our charism through an exaggerated interest in the broad field of temporal problems [...]. Do not

79. For an insight into the mind of John Paul II regarding his ministry in the church, see W. J. HUNSTON, The Mind of John Paul II: Origins of His Thought and Action, New York, Seabury, 1981, 415p.

80. POPE JOHN PAUL II, "Opening address of the Puebla Conference", in J. EAGLESON and P. SCHARPER (eds.), Puebla and Beyond: Documentation and Commentary, Maryknoll, Orbis, 1979, p. 69.

forget that temporal leadership can easily become a source of division, while the priest should be a sign and factor of unity, of brotherhood. The secular functions are the proper field of action of the laity, who ought to perfect temporal matters.^{81/}

A close examination of John Paul's statements regarding the role of clergy and religious in the social mission of the church reveals a fairly constant reassertion of the themes he expounded at Puebla.^{82/} From a canonical point of view, it is important to note how John Paul has personally responded to priests and religious who have become involved in political activity which entails a participation in public office public office. J. A. Komonochak has carefully reviewed the Pope's activities in this area:

Pope John Paul II [...] has taken steps to discourage and ban direct political activity by priests and religious, the best known cases being those of Jesuit Fr. Robert Drinan, the priests holding government positions in Nicaragua, three Sisters of Mercy -- Agnes Mary Mansour, Elizabeth Morancy and Arlene Violet -- as well as a priest in the Canadian Parliament, Fr. Robert Ogle. The Pope's motivation for these disciplinary interventions is apparently complex, aimed at avoiding several

81. ID, "Address to Priests in Mexico City", in Origins, 8(1978-1979), pp. 548-549.

82. ID, "Opening Address of the Puebla Conference", in J. EAGLESON and P. SCHARPER (eds.), Puebla and Beyond: Documentation and Commentary, p. 69.

dangers: the possibility of scandal involved in the support of controversial legislation or public policies; the confusion of Christian principles of social action with political ideologies and their reduction to political programs; the compromising of the unifying role of the priest and the loss to both the church and the world of the witness to the transcendent given by the religious. He does not entirely preclude the possibility of the clergy and religious engaging in social and political activities: but it is clear that for him these activities are typically the role of the laity.^{83/}

Undoubtedly, the approach of John Paul II to the issue of public office and political involvement is both complex and nuanced. From his statements and disciplinary interventions, however, it would seem fair to conclude that he makes a clear distinction between the roles of clergy and laity. Echoing the teaching of Lumen gentium, John Paul II frequently emphasizes that a secular character is proper and common to laypersons.^{84/} While he puts great stress on the need for the ordained and religious to involve themselves in the church's ministry of justice, he has clearly asserted that, except in extraordinary circumstances, such a ministry excludes the assumption of public office or militant participation in political parties.

83. See J. A. KOMONCHAK, "Clergy, Laity, and the Church's Mission in the World", in M. KOLBENSCHLAG (ed.), op. cit., pp. 149-150.

84. Ibid., p. 150.

C. MEANING AND APPLICATION OF CANON 285, PAR. 3

The structure of our examination of the canonical legislation regarding clerics and religious and participation in public office has, throughout this study, been patterned on three stages of the law-making process. Thus, one stage in our study of the long history of the prohibition from assuming public office has been to consider the value or values the legislator, at different periods, intended to uphold for the benefit of the community by means of the law. Another stage has involved an examination of the different norms of action formulated over the centuries to reach these values. Finally, we have attempted to observe how the church in history has understood and acted on these norms.

In this section our purpose is to state the meaning and to discuss the application of canon 285, par. 3 of the 1983 Code of Canon Law. Such an exercise, as J. A. Alesandro has observed relies on many tools:

The interpretation of the law must rely on [...] the canonical tradition, the theological underpinnings of the norms, the textual background of the conciliar decrees and of the canons themselves, the applicability of the pastoral directives to the concrete situation, and even analogies in the law.^{85/}

85. J. A. ALESANDRO, in US Commentary, p. 8.

These are the tools we have used in this study and, in order to facilitate the interpretation of the current legislation concerning clerics and religious and public office, we will list our findings and observations under three main headings. Firstly, we will list those values which, in different periods, the legislator has sought to uphold by the law. Then, taking note of the interpretation and applications of those norms of action which have been utilized by the church in the past to promote those values, we shall restate the pastoral concerns which appear to underlie the present law before setting down the concrete practical significance of the current norms. Finally, we will outline some criteria and indicate some existing canonical structures which, in the perspective of the findings of this study, can contribute to the orientation and solution of some pastoral problems posed by canon 285, par. 3.

1. Underlying ecclesial values of the legislation

- a. Early church

There appears to have been no actual legislation in the church prior to the fourth century forbidding clerics or monks from assuming public office. The patristic discipline, however, urged all Christians to avoid imperial public

office because this implied certain idolatrous practices such as worship of the emperor.

St. Cyprian (c. 205-258) discouraged priests from assuming public office and recorded his own personal concern and that of his presbyterium that the burden of such offices would keep priests from exercising the ministry of the altar. As scriptural authority for his stance, he cited the words of St. Paul in the second letter to Timothy: "No soldier gets himself mixed up in civilian life because he must be at the disposal of the man who enlisted him." The same concern for the integrity of clerical service is observable in canon 19 of the Synod of Elvira (305) which forbade clerics from leaving the service of the altar causa negotianda.

Under the Emperor Constantine (306-337), both clerics and laypersons held public office. A concern within the community about the spiritual dangers of public office is discernible in canon 7 of the Synod of Arles (314) which warned of the offence contra disciplinam, namely, any action against Christian precepts on the part of a Christian office holder.

Canon 3 of the Council of Chalcedon (451), in forbidding clerics and monks to undertake secular administrations, indirectly prohibited their participation

in public office. The legislation focussed on the temptation to greed and self-seeking which involvement in civil administrations constituted for the cleric. By emphasizing the radical choice made by those who embraced the clerical and monastic states, canon 3 disclosed a concern within the church about a secularity of motive on the part of clerics and monks in public offices and other occupations.

In the Constantinian era, the civil law accorded certain exemptions to clerics and monks in order to free them to serve the church. This emphasis on the pastoral need of the church was also evident in the ecclesiastical legislation of the period such as, for example, the Second Council of Nicea (787) which was not so much concerned with public office as with the concomitant temptation to greed, avarice, and power-mongering.

b. Medieval period

Throughout the medieval period, canonical legislation concerning clerics and monks and public office restated, for the most part, the legislation of the Council of Chalcedon (451). Since clerics and monks regularly participated in public office, the church's legislation focussed less on public office itself as on the temptation to avarice and greed posed by positions of secular influence.

c. Prior to the 1917 Code

Prior to the 1917 Code of Canon Law, there was no significant change in the legal texts concerning public office. However, whereas the existing legislation had been framed in the context of appointive offices and a Christian milieu, the emergence of elective offices and a vast missionary expansion in the sixteenth century shifted the main focus of attention from the personal ministry of the cleric to the missionary endeavours of the church universal. Reflecting the traditional perspective of the church, the Council of Trent expressed a general feeling that clerical legislation should ensure that clergy and religious would be separated from secular concerns and free themselves for higher things not pertaining to this world.

d. The 1917 Code of Canon Law

In placing clerical participation in public office under the heading of those activities alien to the clerical state, the 1917 Code of Canon Law showed a sensitive and highly nuanced concern for both ministerial values and the common good of the church. The legislator carefully balanced a traditional uneasiness regarding the incongruity of public office and the clerical state with a pastoral desire to meet the ministerial demands of extraordinary situations. By

applying the device of an apostolic indult in some situations and permission from the ordinary in others, the legislator displayed a concern for flexibility regarding the questions of how church authorities should relate in this matter to the civil administrations, on one hand, and to individual clerics and religious on the other.

e. The 1983 Code of Canon Law

By adopting a centuries-old legal tradition concerning the issue of public office and placing it in the perspective of the conciliar image of the church, the 1983 Code of canon law displays an ecclesial sensitivity for the pastoral welfare of the community at the universal and the local levels. In the conciliar perspective, the casting of the legislation in the form of a disciplinary law indicates an appreciation of the need for flexibility and a desire that the issue of clerical and religious participation in public office be situated in the context of ministry within the whole people of God and the particular cultural and pastoral context in which it arises. It further indicates that the principal aim of the legislator in regulating the ministry of ordained clerics and religious is to promote those forms of ministry which will best serve the welfare of the community, since disciplinary laws refer to areas of conduct affecting the common good of the faithful. In addition, it

emphasizes the value the church places on the theological-canonical principle of ecclesiastical communion in approaching issues of this nature. Furthermore, by exempting permanent deacons who are canonically clerics from the prohibition and including those religious who are laypersons, canon 285, par. 3 sensitively underlines a belief that this issue belongs in the context of the universal call to all Christians to share in the threefold mission of the church according to their particular vocation.

It is in the context of these pastoral values and concerns that we shall list, first, our comments regarding the application of canon 285, par. 3 and, second, those criteria to be taken into account when granting a dispensation to bishops, priests or religious from the prohibition contained in the canon.

2. Application of the current norms

a. Those subject to the prohibition

1. Canon 285, par. 3 prohibits bishops, priests, and transitional deacons from any activity which relates to a public office entailing participation in civil power. By canon 288 permanent deacons are exempted from the prohibition unless particular law determines otherwise.

2. All male and female religious are forbidden by canon 672 from engaging in these same activities. The prohibition, then, notwithstanding the exception provided in canon 288, would apply to those permanent deacons who are incorporated into an institute with rights and duties defined by law. Novices who have been ordained to the priesthood and transitional deacons are bound by the common obligations of clerics and for this reason are also bound by the provisions of canon 285, par. 3. Novices, including permanent deacons, are effectively included in the prohibition by canons 646-653 which describe the nature and purpose of novitiate formation and, in particular, by canon 652, par. 5 which states that novices are not to be occupied with studies and duties not directly designed to serve this formation.

3. Clerical members of societies of apostolic life are prohibited from participation in public office by canon 739 which binds them to the common obligations of clerics. Unless the proper law of the society states otherwise, lay members may participate in public office. Since, in view of canon 735, par. 1 the admission, probation, incorporation and training of candidates is determined by the proper law of each society, candidates who are permanent deacons as well as those who are laypersons may also participate in

public office unless the proper law states otherwise.

4. Since, according to canon 266, par. 3 the norm for those ordained in secular institutes is diocesan incardination, priests and transient deacons who are members of such institutes are bound by the provisions of canon 285, par. 3. Unless the proper law of the institute provides otherwise, members who are permanent deacons are not bound by the prohibition from public office. The same applies to candidates who are permanent deacons as well as laypersons.

b. Nature and type of prohibited offices

1. The prohibition of canon 285, par. 3 applies to public offices entailing participation in the exercise of civil power. An essential criterion of public office is that the "officer" is empowered to carry out sovereign functions. An office may, therefore, be described as "public" if it possesses authority conferred by law, carries a fixed tenure of office, and embodies the power to exercise some portion of the sovereign functions of government at the national or local level. In canonical tradition, sovereign functions properly belong to those offices which exercise the executive, legislative, and judicial dimensions of government.

2. In employing the term "participatio", canon 285, par. 3 signifies that the prohibition specifically applies to any offices involving a constitutional sharing in executive, legislative, or judicial power at all levels of government. The act of participation in legal terms designates any part or share of an action. Thus, canon 285, par. 3 refers to public offices which involve either a direct or indirect exercise of sovereign functions. Examples of such offices are: government ministers, attorneys-general, prefects or governors of a province, members of parliament, senators or deputies, mayors and municipal councillors, judges and magistrates.

3. It is clearly impossible to provide an exhaustive list of prohibited offices and canon 285, par. 3 does not attempt to do so. However, for a particular office to fall under the prescriptions of the prohibition the following essential characteristics must be present: the creation of the office must arise from the constitution or legislature, or through authority specifically conferred by the legislature; a portion of sovereign power must be delegated to the office and the duties and powers of the office defined, directly or implicitly, by the legislature or through legislative authority; the office must have some permanency and continuity and be performed independently

without control of a superior power other than the law. It should be noted that since canon 285, par. 3 specifically refers to a participation in public office the prohibition does not apply to any other class of involvement in public employment such as, for example, a state employed teacher, a nurse or a member of a royal commission of inquiry.

c. Dispensations from canon 285, par. 3

Canon 285, par. 3 is a universal disciplinary law and, under the provisions of canon 87 par. 1 is subject to the dispensing power of the diocesan bishop and, at times, of other ordinaries (canon 88, par 2). This power, however, as is the case with all the functions and powers (munera) conferred on a bishop at his ordination can be exercised only when he is in hierarchical communion with the head of the college and its members. The following points regarding the exceptions provided in law to canon 285, par. 3 are made, therefore, in the context of the power of governance exercised by the bishop in the particular church which, when it remains in communion with all the other particular churches, makes effective the presence of the whole church.

1. The diocesan bishop can dispense from the prohibition applied to priests in canon 285, par. 3 in virtue of canon

87, par. 1 which states that he may dispense from universal and particular law as often as he judges a dispensation will contribute to the spiritual good of the faithful. It is presumed that such participation would be either for the spiritual good of the clerics or religious concerned or for the faithful as a whole.

2. Canon 381, par. 2 indicates that those persons who head communities other than a diocese mentioned in canon 368 are equivalent in law to a diocesan bishop. In light of canon 368, therefore, those persons who head a territorial prelature, a territorial abbacy, an apostolic vicariate, an apostolic prefecture, or an apostolic administration which has been erected on a stable basis also have the power to dispense from the prohibition of canon 285, par. 3.

3. In view of the fact that canon 138 states that ordinary executive power is to be broadly interpreted it would seem that a broad interpretation should be given to the power of dispensation from participation in public office since the right is not restricted to an individual case. A strict interpretation, however, should be applied to the application of the dispensation (canon 92).

4. The diocesan bishop, according to canon 91, exercises the power of dispensing for his own subjects, even though he is outside his own territory or they are absent from his

territory. It follows, then, that the diocesan bishop can validly grant a dispensation from canon 285, par. 3 in favour of subjects working in the diocese as well as those working in other dioceses. The same applies to anyone who is equivalent in law to a diocesan bishop.

5. In virtue of canon 91 which states that one who has the power of dispensing can exercise it on his own behalf, a diocesan bishop and those equivalent in law can dispense themselves from the prohibition against assuming public office.

6. Since canon 285, par. 3 is a disciplinary law, in light of canon 87 a dispensation from participation in public office is reserved to the personal decision of the diocesan bishop or his equivalent in law. However, in virtue of canon 137, par. 1 which states that ordinary executive power can be delegated both for a single act and for all cases, unless the law provides otherwise, the diocesan bishop may delegate his power to dispense in this matter to other local ordinaries collaborating with him.

7. Religious, in virtue of canon 678, par. 1 are subject to the authority of bishops in matters of the apostolate. Since only a bishop, or the Holy See, may dispense from the prohibition contained in canon 285, par. 3 one or the other necessary parties to any decision regarding an individual

religious and participation in public office. However, in exercising an external apostolate, religious are also subject, according to canon 678, par. 2 to their own superiors and must remain faithful to the discipline of the institute. Canon 678, par. 3 seeks to preclude any conflict or tensions in this area by directing diocesan bishops and religious superiors to proceed in organizing works of the apostolate after consultation with each other. Therefore, since such participation could be considered to be a form of the apostolate, any decision in this area should only be taken after due consultation between the diocesan bishop and the proper authorities of the institute.

8. Canon 103 states that members of religious institutes and societies of apostolic life acquire a domicile in the place of the house to which they are attached and with it, in light of canon 107, par. 1, a proper bishop. Clearly, the proper bishop can dispense a religious domiciled in his diocese. He may also dispense a priest or religious subject to him who is working temporarily in another area or diocese. In the opinion of J. H. Provost, the dispensation could also be given by the bishop in the place where a religious sought to participate in a public office.^{86/}

86. J. H. PROVOST, loc. cit., p. 298.

9. A dispensation granted from the provisions of canon 285, par. 3 is subject to cessation according to the reasons given in law. The diocesan bishop is empowered to revoke the dispensation (canon 79). The dispensation would also cease if there were a certain and complete cessation of the motivating clause. If a diocesan bishop has granted a dispensation from the prohibition of canon 285, par. 3 with the provision "ad beneplacitum nostrum" or some equivalent terminology, the dispensation ceases with the termination of his authority (canon 81). The dispensation can also cease, according to the provisions of canon 83, through the lapse of a period of time or a change of circumstances.

CONCLUSION

An examination of canon 285, par. 3 shows that the 1983 Code of Canon Law contains a notable change in perspective from canon 139 of the 1917 Code. The focus is no longer, as it was in the 1917 legislation, on the requirement of obtaining permission to assume public office involving the exercise of civil power but rather on a straightforward prohibition against assuming such offices.

It is important to note, however, that the 1983 Code has set the legislation concerning priests, religious and

public office into a doctrinal context. Thus, while the law prohibits clerics and members of societies of apostolic life from assuming public office, the principles employed in the interpretation of the canon must, as we have seen in this chapter, be taken from the theological sources of the Second Vatican Council.

From a systematic standpoint, canon 285, par. 3 reflects the conciliar notion of communio. In light of this notion a disciplinary law is viewed as a mechanism which excludes an individualistic interpretation wholly concerned with the rights and duties of certain offices in favour of a communitarian emphasis on the welfare of the whole people of God. Thus, the principal concern of the legislator in canon 285, par. 3 is not to restrict personal rights but to provide for the welfare of the community. For that reason the legislation admits of exceptions, in virtue of the law, which safeguard a sensitivity to different cultural and pastoral contexts required by the communio ecclesiarum.

GENERAL CONCLUSION

Since change is an inexorable law of life, it would be naive to assert that canon 285, par. 3 shall be the last word concerning the participation of clerics and religious in the exercise of civil power. The legislation contained in the 1983 Code is, however, the first legislative word on the issue in the context of an understanding of the church as communio, the people of God. In this perspective the canon, correctly interpreted and applied, could prove to be a somewhat unexpectedly creative tool in any pastoral discernment on the involvement of priests and religious in public office.

From a study of canon 285, par. 3 in the context of the 1983 Code of Canon Law and in the light of its links with the previous Code of 1917 and earlier legislation, we can indicate two effects of the conciliar and post-conciliar legislation which should enter into any discernment on this issue:

1. Welfare of the community: This is a central value canon 285, par. 3 seeks to uphold. The vision of the Vatican Council expressed in canon 223, par. 1 teaches that the welfare of the community is best served by encouraging

those conditions which allow groups and their individual members ready access to their own fulfillment.^{1/} In the application of canon 285, par. 3, therefore, the community will be well served if the following canonical structures are employed to ensure that a correct balance is maintained between the welfare of the group and the rights of the individual:

a. The presbyteral council: it would be pastorally prudent on the part of the bishop, as was indicated by the 1971 Synod of Bishops, to utilize the presbyteral council provided for in canon 495 in any discernment concerning the participation of an individual priest in public office.^{2/} In line with the spirit of the 1983 Code, this would ensure the discernment takes place in the context of the principle of subsidiarity, does justice to the coordination of pastoral activities of the local church, and recognizes the legitimate authority of the diocesan bishop.

b. The pastoral council: canon 212, par. 3 recog-

1. For a treatment of the conciliar emphasis on the dignity and freedom of each individual person and the duty of the wider community to respect this dignity, see B. HARING, Morality is for Persons, New York, Farrar, Straus and Giroux, 1971, 214p.

2. SYNODUS EPISCOPORUM, "Documenta de sacerdotio ministeriali et de iustitia in mundo", November 30, 1971, in AAS, 63(1971), pp. 897-942.

nizes the right of all the faithful to express an opinion about what is for the good of the church. Since the nature of a public office involves the wider community and the question of the relationship of church and state, it is important, with regard to the issue of clerics, religious, and public office, that this right be recognized and those of the faithful who so desire are provided with an opportunity of expressing their opinion on the matter. The pastoral council provided for in canon 511 to investigate under the bishop all those things which pertain to pastoral works, to ponder them, and to propose pastoral conclusions about them may well be the best vehicle to ensure that the right to public opinion is respected in this matter. Involvement of the council would ensure that a pastoral policy on the subject of involvement in public office is evolved in a collegial manner enabling, in particular cases, the pastoral council to furnish the bishop with a well-informed recommendation.

2. Hierarchical communion: in general terms, a theological vision of the church as communio is the basis for any discernment of a juridical character. Since experience has shown that the participation of priests and religious in public office requires a particularly sensitive discernment at universal and local levels, the conciliar principle of

hierarchical communion expressed in canon 375, par. 2 should be taken into account in any discernment on the matter. This would suggest that individual bishops, in line with canon 447, should not hesitate if pastoral necessity requires it, to bring the matter before the conference of bishops.

Conference of bishops: any discernment regarding a dispensation from canon 285, par. 3 will involve the diocesan bishop's taking account of the extraordinary character which, according to canon 90, par. 1, attends the juridical act of dispensation no matter who grants it. The personal correspondence regarding particular cases is not readily available. However, in the case of Fr. Robert Ogle, the Congregation for the Clergy, while not excluding the possibility of a dispensation, concluded that a dispensation from the prohibition contained in canon 285, par. 3 was not esteemed justified on behalf of the Holy See or of the ordinary. In a letter to Fr. Ogle on February 15, 1984, Archbishop Angelo Palmas, the then Apostolic Pro-Nuncio in Canada, stated that the Congregation judged that canon 90 was not applicable to his case as a just and reasonable cause had not been proved. The letter further stated that there was no evidence that the conditions envisaged by canon 87 were present, namely, that the spiritual welfare of the faithful would be served by a

dispensation from the prohibition against participation in the exercise of civil power.^{3/}

It is evident, then, from this correspondence that in any discernment on this issue certain criteria need to be adopted in order to establish precisely when, in an individual case, a just cause is present and a dispensation would best serve the welfare of the community. Clearly, since the Congregation for the Clergy felt able to deliver a judgment in the case of Fr. Ogle, it has adopted what it considers to be suitable criteria designed to ensure, as directed by canon 205, that a communio in regimine is maintained in the church. The precise nature of the criteria followed by the Congregation are, however, unclear and the implementation of some recent decisions of the Holy See has

3. R. J. OGLE, North/South Calling, Saskatoon, Sask., Fifth House in association with Novalis, 1987, appendix, p. 16. Fr. Ogle, a member of the Canadian House of Commons from 1977 until his resignation in 1984 in compliance with a directive from the Congregation of the Clergy, writes: "The most astonishing thing about this letter, apart from its message and the impersonal style of its delivery, was the statement that 'just and reasonable cause has not been proved' when no request to demonstrate 'just and reasonable cause' had ever been made. Indeed, repeated assurances had been given that the local bishop's permission was sufficient." However, the official statement regarding Rev. Robert Drinan, S.J., may be found in Origins, 10(1980-1981), pp. 15-16. Those regarding Sister Mary Agnes Mansour may be found in Origins, 12(1982-1983), pp. 621, 676-680.

led to the suggestion that present procedures need to be revised for the sake of communio. For this reason it seems sensible to suggest that the conference of bishops in consultation with the Holy See, could help individual bishops and their various consultative councils in a discernment on canon 285, par. 3 by drawing up a set of criteria suitable for their region.^{4/} Such a dialogue may also foster a constructive relationship with the Holy See in this matter.

Clearly, it is impossible to determine a universally valid formula which will be applicable in every case of an individual who seeks a dispensation from the prohibition contained in canon 285, par. 3. A universal formula would not, as this study has attempted to show, accord with the traditional flexibility of the law in this matter nor be faithful to the theological principles of the 1983 Code.

Recent cases of priests and religious have revealed certain tensions between the universal and local churches in this matter. While such tension has often proved to be

4. In this regard it is instructive to read the comments of Fr. Miguel D'Escoto and Fr. Ernesto Cardenal. See T. CABESTRERO, Ministros de Dios, ministros del pueblo: testimonio de 3 sacerdotes en gobierno revolucionario de Nicaragua: Miguel D'Escoto, Ernesto Cardenal, Teofilo Cabastrero., Bilbao, Desclee De Brouwer, 1983, pp. 36-101.

painful for all those involved, there is every hope that we can learn from the process and by interpreting canon 285, par. 3 in light of the theological and technical-juridical synthesis employed by the legislator pay due regard for canonical equity and the salvation of the individual which is the supreme law of the church.

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SUMMARY

The subject of this study is canon 285, par. 3 of the 1983 Code of Canon Law which forbids clerics from assuming any public office (officia publica) which entails a participation in civil power (civilis potestas). This canon represents a notable shift of perspective away from the requirement in the 1917 Code of obtaining permission to assume a public office involving the exercise of civil power. The emphasis is now on a straightforward prohibition with no direct reference to exceptions in the law. It is the hypothesis of this study that while canon 285, par. 3 is verbally stronger, more emphatic, and less specific with regard to exceptions than the prior legislation, when interpreted and applied in the context of the church as communio, it reflects an extremely nuanced approach to this issue on the part of the law which does not favour the hard and fast rule that public offices are open to the laity and closed to the clergy.

The methodology of the dissertation is structured on the recognition that canon 285, par. 3, like all human laws, came into existence because someone, the legislator, perceived a value which could benefit the community, formulated a norm to achieve that value, and finally asked the community to act on the norm and appropriate the value.

SUMMARY

Thus, the study lists those values which, in different periods, the legislator has sought to uphold by legislation concerning clerical and religious participation in civil power. It finds that the value underlying the contemporary law is the ministerial health of the communio.

A textual and contextual analysis of canon 285, par. 3 concludes that the legislator signifies his intention of focussing on the juridical status of sacred ministers which, of its nature, is changeable and not on the unchangeable elements of ordination. In this light, there appears to be no direct link between the prohibition from public office and the nature and effects of ordination. Furthermore, since permanent deacons are exempted from the prohibition in virtue of canon 288, it seems reasonable to infer that the prohibition from public office is not based on the incompatibility of such offices with the clerical state and encourages a pastoral flexibility and sensitivity.

In a concluding section, the study treats of the power of diocesan bishops to dispense from canon 285, par. 3 which, when considered in the context of communio, highlights the necessity of employing such structures as the presbyteral council, the conference of bishops, and the pastoral council, in the evaluation and application of the canon.