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The Reform of Canon Law in the Light of Vatican II

SAMUEL R. WILEY, S.J.

THE final battle lines were yet to be drawn in the Ypres and Somme offensives of the First World War when, on Pentecost Sunday of 1917, Pope Benedict XV promulgated the new Code of Canon Law. For the first time in over 600 years the entire body of the church's laws, an accumulation of profundities and contradictions, had at last been reduced to manageable size. Clarity emerged where obscurity had reigned, and almost infinite complication was replaced by classic simplicity. It was the first experiment of the Church in the relatively modern art of codification and it was for the most part successful. As with all human endeavors, the Code had its defects and canonists were quick to point out the doubts and minor inconsistencies. But for bishops and clergy who had struggled in the Minoan maze that was pre-code law, the new *Codex Juris Canonici* was a triumph of labor and grace.¹

But while the format of the law was modernized and simplified in the new Code, its content remained by and large a summary of past law. Even today, forty-seven years and a Second World War later, the Code remains substantially unchanged. Pope John XXIII was keenly aware of this fact and in the same announcement which revealed his plan for

¹The new Code of Canon Law, although promulgated on Pentecost Sunday of 1917, did not go into effect until one year later, on Pentecost Sunday, May 19, 1918.

convoking a General Council of the Church, he also manifested his intention of updating the Code of Canon Law² Furthermore he proceeded to establish a special commission of cardinals and bishops to carry out his purpose, and this commission has just lately been reinforced by Pope Paul VI, who has thereby confirmed the resolution of his predecessor.³

Despite the fact that the actual textual changes in the Code itself have been limited to three rather minor excisions, the Church has not been at a legal standstill for the past forty-seven years. As a matter of fact, she has witnessed a rather constant and growing legal activity. To be convinced of this fact, one has but to peruse the five solid volumes of the *Canon Law Digest*. These volumes contain a vast amount of new law which as yet has not been formally incorporated into the Code.⁴

To mention but a few of the interesting items in the last volume of this collection, there is the decree restoring the

² Pope John's first intimation of his intention of convoking an ecumenical Council occurred in a solemn allocution to the cardinals present in Rome at ceremonies held in St. Paul's-outside-the-Walls on January 25, 1959; in the same allocution he stated that this event would happily lead to the long-awaited up-dating of the Code of Canon Law (*Acta Apostolicae Sedis*, 27 Feb., 1959, pp. 65-69). In a subsequent allocution to the First Plenary Session of the Central Commission for the Ecumenical Council, the same Pope spoke as follows: "Veniet, et cito, juris canonici codicis renovandi tempus..." (Allocution of June 12, 1961, in A.A.S. LIII [1961] pp. 495-499).

³ The first commission was appointed by Pope John XXIII on Mar. 28, 1963, just two months before his death. Pietro Cardinal Ciriaci, Prefect of the Sacred Congregation of the Council, headed the commission. The *Osservatore Romano* (French edition) of May 1, 1964, lists the names of all those who have been appointed by Pope Paul VI as consultants to the new Code Commission. Among them are His Excellency, Most Rev. Luis del Rosario, S.J., Archbishop of Zamboanga and the Rev. George Vromant, C.I.C.M. of San Carlos Seminary, Makati, Rizal.

⁴ T. Lincoln Bouscaren, S.J. and James I. O'Connor, S.J., *The Canon Law Digest*, 5 vols. (Milwaukee, Bruce Publishing Company). The latest volume contains documents affecting the Code of Canon Law which were published up to the beginning of 1963. Of particular value is the cumulative Index at the end of the latest volume which covers all the preceding four volumes.

catechumenate for adults; an instruction setting forth the norms on co-education; some very precise and full instructions on the selection and training of candidates for the religious life and the priesthood, with an insistence on the intellectual and psychological qualities demanded in the candidates for these states. A strong reminder is also given to all confessors and spiritual directors of their responsibility to prevent unworthy candidates from advancing to major orders. The rector or superior of the seminary is instructed that if a subject comes to him and has been told by his confessor or director that he has no vocation, then no further questions are to be asked, but his departure is to be facilitated.

Private replies contained in this collection are also a source of further knowledge. One finds here indulgences for partial relaxation of the eucharistic fast in the matter of solid food for inmates of prisons and mental institutions; a dispensation from fast and abstinence for personnel and passengers at sea; the will to be drawn up by novices even though they have not attained their majority. The recent *motu proprio*, "*Pastorale Munus*", has made part of the ordinary power of bishops many faculties which heretofore had to be obtained from Rome.⁵ Thus there are faculties for a wider delegation of the power to confirm; for the celebration of Mass at any hour and place; for bination on week-days and trination on Sundays and holydays. In many areas the time for fulfilling the precept of paschal communion has been considerably extended. Under certain circumstances holy communion may be brought to the sick in the afternoon; last July the prohibition against cremation was mitigated and no longer need a priest refuse Christian burial or the sacraments to a Catholic who has requested cremation provided he did not do so out of hatred for the faith or as a practical denial of Christian dogma.⁶ A recent news item tells us that permission has been granted for the fulfillment of the Sunday Mass obligation on days other than Sunday.⁷ These and other changes far too numerous

⁵ A.S.S. LVI (1964), pp. 5-12.

⁶ Cf. "Instruction du Saint-Office" in *Osservatore Romano* (French edition) of 9 October 1964, p. 2.

⁷ *Boletín eclesiástico de Filipinas* XXXVIII (1964), p. 572.

to mention have become part of the actual law but have not found their way into the text of the Code. Obviously a need for revision is patent. The basic question is, what form will this renovation take?

The impetus to renovation inspired by the opening of the ecumenical Council has had a corresponding echo among canonists and theologians who are interested in the *aggiornamento* of church law as well. This article represents an effort to put in very brief form some of the suggestions which have been made.⁸ Writers on this subject seem to fall into two groups not unlike the two tendencies observed among the Fathers assembled in the Council. The more conservative approach would be satisfied with a reform which incorporates recent changes into the Code while preserving the general pattern of the present law, namely a single, universal code for the entire Latin Church divided into five books according to subject matter. Two facts of recent legal history in the Church are cited by this group to support their view. They are the codification of the Oriental Law, and the Roman Synod which Pope John XXIII called prior to the convocation of the present general council. A reform of the Code in accordance with this tendency would simply mean a reworking of the Code so as to include all recent legislation digested into Code form, together with such additional canons as might be necessary to formulate in legal language whatever decrees may be passed by the ecumenical Council now in session. Using the tech-

⁸ Among the recent articles on this subject are the following: John A. Abbo, "The Revision of the Code", *The Jurist* XX (1960), 371-397; Pio Ciprotti, "Il Codice di Diritto Canonico e il Suo Aggiornamento", *Ephemerides Juris Canonici* XVII (1961), 9-21; Antonino D. Jorio, O.F.M.Cap., "L'Aggiornamento del Codice di Diritto Canonico", *Laurentianum* IV (1962), 417-442; Frederick R. McManus, "The Second Vatican Council and Canon Law", *The Jurist* XXII (1962), 259-286; Klaus Morsdorf, "Der Codex Juris Canonici und die Nichtkatholischen Christen", *Archiv für katholisches Kirchenrecht* (1961), pp. 31-58; Ladislav M. Orsy, S.J., "Reform of Canon Law", *America*, 2 Nov., 1963, pp. 514-517; Ladislav M. Orsy, S.J., "Vie de l'Eglise et Renouveau du Droit Canon", *Nouvelle Revue Theologique* (1963), pp. 952-956; J. D. Conway, "Revising Canon Law", *Commonweal*, 24 April 1964, pp. 143-46; E. Stokes, S.J., "The Aggiornamento of the Code of Canon Law", *Chicago Studies* (1963), pp. 269-285.

nical improvements incorporated into the Oriental Code and some of the innovations introduced into the Synod of Rome, which at times reverted to a more hortatory phrasing of the law, the reform of the Code would then consist in an enlargement of its content where necessity should indicate it as well as an adherence to its traditional division and style. New canons would have to be framed to express the norms governing new institutions such as the secular institutes or the terminal diaconate. But the general format of one universal law expressed in concise legal terms and ordered in accord with the present division of matter would remain.

This brings us to the second possibility, namely, a more profoundly radical restructuring of the law which would go to the very basis of the present legal pattern and revise it on the lines of modern secular law.⁹ Historians of Canon Law are well aware of how much it has borrowed from Roman Law and in some cases from Germanic and Visigothic law. Can the Church of today not profit from the experience of modern states as well, and in particular from the legal traditions of the English common law, whose spirit informs the legislation of so many countries today? It is recognized that modern states do not have just one law, but various types of law. In the first place are the constitutions, either written or unwritten, and these lay down the basic principles of the particular form of government. Of their nature they demand a certain degree of stability and hence they are rarely or at least with difficulty subjected to change. After them come a larger body of laws which might be termed ordinary general laws for the public welfare as a whole. They are usually passed by a bicameral or unicameral legislature, which is ordinarily an elective body or congress. Finally there are entire series of minor regulations, lesser ordinances of all kinds, more local in nature, which help to make the life of the ordinary citizen safer and more peaceable. These laws proceed from lesser bodies such as municipalities and towns; their life-span is often short and they are more easily adapted to the changes of everyday life.

⁹ On this topic see the articles of Orsy cited above.

What a contrast to this is found in the Church. In its single Code are contained, in a manner of speaking, all human ecclesiastical laws of universal application. Side by side with canons which express the divine law, like the hierarchical nature of the Church, or substantial matters of positive law, like the election of a pope, or the force of an ecumenical council, are a host of lesser rules and regulations that have to do with ecclesiastical protocol or the dress and customs of the lower clergy. Substantial and accidental, important and unimportant are all thrown together with hardly an indication of their differing import and obligatory force. Is such a legal situation really practicable or desirable? Is this the unity that is demanded? Or, to paraphrase Pope John, does not the new wine of the Spirit which the Church is beginning to taste in the present Council demand that it be encased in casks which are not a mere legal patchwork, but an entirely new fabric? Not a few theologians and canonists feel that now is the time to undertake this task; they consider that this was in truth the vision so clearly comprehended by Pope John when, together with the calling of the ecumenical council, he asked at the very same time for a renovation of the entire law of the Church.

The final event which must of necessity shape any reform of the Code, be it merely legal and technical, or more profound and substantial, is the ecumenical Council itself. The approval of the Constitution on the Sacred Liturgy toward the end of the second session indicated that the Council was finally off the ground, and the more rapid voting and debating procedures of the current session give added proof that the successors of the Apostles are going ahead with their task. Obviously no reform of the Code can take place until this more essential groundwork is completed. Indeed, in the voting of the past weeks, the Council has expressed its mind very decidedly, and these decisions, once approved by the Supreme Pontiff, must of necessity find further implementation in the legal apparatus of the Church. Chief among these are the amendments voted on at the 88th General Assembly, held on 24 September 1964, wherein by overwhelming majorities the conciliar Fathers affirmed that:

the bishops dispersed throughout the world enjoy infallibility when at the same time they teach in communion with each other and with the Pope; this infallibility embraces the entire deposit of revelation;—the infallibility of the Pope in virtue of his office and the infallibility of the episcopal body when together with the Pope it exercises the supreme magisterium...¹⁰

These doctrinal affirmations of Vatican II complete the doctrine of papal infallibility set forth in the First Vatican Council and from them flows the corollary responsibility of the episcopal body for the government of the entire Church. This truth was dramatically highlighted by the high proportion of favorable votes in favor of the following propositions: "That the Pope and the bishops succeed Peter and the other Apostles in the task of governing the Church; that the bishops succeed the Apostles by divine institution; . . . that the Pope and the bishops constitute a collegiate body which succeeds the apostolic college; and that the episcopal college only enjoys authority with the Pope, whose primacy remains intact. . . ."¹¹

Thus a new emphasis is given to the collegiate responsibility of the entire episcopate for the welfare of the universal Church. What form will this responsibility take? Clearly some legal framework must be elaborated to implement this conciliar statement. One obvious possibility is the formation of a permanent or semi-permanent senate of bishops whom the pope will consult regularly concerning the more important matters of church government. Such a body, meeting with a certain frequency, will give a more universal outlook to the Church and a more widespread representation at its center. What other forms this growth of episcopal function will assume is not readily apparent. But even before the conciliar voting on the decrees referred to above, recent years have borne witness to the growing importance of the bishops as the center of church activities. In almost every nation there have sprung up episcopal councils and conferences; these meet at certain definite times to consider the problems that jointly

¹⁰ *Osservatore Romano* (French edition), 2 Oct., 1964, p. 9.

¹¹ *Ibid.*, p. 4; also *Divine Word News Service*, 20-E-1964 (Sept. 21 to 25).

concern them. Some episcopal conferences such as the National Catholic Welfare Conference of the American bishops and the German hierarchy's *Misereor* have not hesitated to embark on activities which are international in scope.¹² All these serve to confirm one in the conviction that future legislation will be strongly influenced by these national bodies of bishops. But as certain authors have remarked, this too presents a problem. While Roman authority has been accepted by individual bishops when it regulates the norms for governing their dioceses, the exercise of any jurisdiction by national conferences of bishops causes concern to many local ordinaries.¹³ And yet a limited measure of such jurisdiction would seem to be most acceptable to the laity who already have frequent cause to complain of local diversities in fast and abstinence, in the types of participation or lack of it at Mass, in the wide variety of fees, in the use of the vernacular according to the norms permitted by the Constitution on the Liturgy and in similar matters of discipline.

Even more important is the cooperation of the episcopate in the world-wide apostolate for the conversion of the non-Christian world. In this connection many would hope for a special type of law for the missions which would codify and clarify the instructions, decrees, and rescripts issued by Propaganda Fidei both before and after the Code. It would constitute an adaptation of the common law to missionary circumstances and conditions.¹⁴ This is of some importance when one considers that the territory under the jurisdiction of Propaganda Fidei in 1960 comprised 702 ecclesiastical districts (227 in Africa, 332 in Asia, 81 in America, 53 in Oceania and 19 in Europe) which include 1,196,647,000 people, of whom Catholics number some 37 million souls. This is the task of conversion which today faces the whole Church.¹⁵ Just recently, as if in response to this missionary challenge,

¹² Cf. article by Roman Hoffman, OFM.Con., "International Episcopal Co-operation" in *The Jurist* XXIII (1963), 1-33.

¹³ Conway, *op. cit.*, p. 146.

¹⁴ Abbo, *op. cit.*, p. 391.

¹⁵ *Ibid.*, quoting from Musaragno, "La Chiesa nei territori dei Missioni", *Osservatore Romano*, 17 April 1960.

Roman sources reported that the Philippine episcopate had officially announced its intention of constituting a Philippine society for the foreign missions on the occasion of the 400th anniversary of the evangelization of the archipelago.¹⁶

It has also been recommended that some special provisions of law be made for those exceptional circumstances which arise when portions of the Church are cut off from communication with Rome and fall under an inimical government.

SOME SPECIFIC REQUESTS FOR REFORM

Whether the reform of the Code be profoundly structural or not, there are many areas wherein changes have been specifically advocated. In the pages which follow, nothing will be said of recent liturgical developments since these of their nature are outside the scope of canon law although at times they do impinge upon it. Neither is explicit mention made of the laws governing religious nor the marriage law for the simple reason that both of these subjects demand much more than a cursory treatment. Hence a brief indication will be given of other areas where changes have been recommended with a slightly extended treatment of two more important topics, the diaconate and the laity.

Sniffing the oncoming breath of opportunity in the fresh outlook generated by the reign of Pope John and his Council, Conway suggests that the whole system of government by indults, a feature of the bureaucratic Roman Curia, should be abolished.¹⁷ He advocates that clear and broadly defined powers be conceded to the bishops since they rightly have these through their apostolic office for the good of souls. Let these be used in conformity with local needs, of which the bishops themselves are in a better position to judge. The ancient system of privileges retained in principle by the present Code should be completely re-thought in the light of modern pastoral concerns. Their jealous retention by many groups, religious orders and individuals should not interfere with the normal channels of jurisdiction or with an effective ministry

¹⁶ *Ossevatore Romano* (French Edition), 26 June 1964, p. 3.

¹⁷ Conway, *loc. cit.*

to souls. The age of privilege ought to disappear. He suggests further that the titles of bishops be defeudalized and that the gaudy garb, coats-of-arms and honorific titles disappear together with "the tattered remnants of chapters of canons whose privileges and prebends are even less edifying than their desultory chant."¹⁸

The present Code would seem to have obscured the force and benefits of custom; in reality custom is a vital function in the development of the law and of legal institutions. It reflects the liberty of the children of God and the law should allow a decent flexibility for local authority to consent readily to a reasonable usage.

Some find difficulty with the ancient concept of illegitimacy and recommend that it be deleted on the grounds that it is contrary to the dignity and rights of a human person to be marked for life as a second-class member of the Church because of circumstances completely beyond his control. Pius XI tried but with only partial success to excise the whole system of intricate privileges which surround the legalism of indulgences. This impeded reform should be carried to its conclusion. It is advocated that a usage now in vogue in several European countries be extended to the entire Church. It consist of allowing very young children to receive their first communion as soon as they are able to understand its meaning *without* the fearful necessity of preparing for confession at the same time. It is readily admitted now that the distinction between light and serious sin in young children is very nebulous. Yet the fear and nervousness of approaching confession is often the main preoccupation with first communicants. Allow them rather to receive the Body of Christ in joyful faith and then with advancing years instruct them more fully on the need and manner of confessing their sins. Thus the reception of the Eucharist will no longer be associated with the anxiety that precedes first confession.

Many would like to see a general permission in certain circumstances for the faithful to receive holy communion under both species. Such occasions would be weddings, first com-

¹⁸ *Ibid.*, p. 144.

munion, religious profession, etc.¹⁹ This practice, even though on a limited scale, would also foster a climate of union with the Orthodox Churches. It is recommended that the laws of fast and abstinence should be completely hortatory, and not oblige under pain of sin. Holydays of obligation when they coincide with working days are the occasions of mad scrambles at Masses, especially in urban areas; many simply cannot get to Mass at all. Is not a change desirable? There is pretty fair agreement that the entire concept of servile work needs redefining in the light of modern conditions. One suggestion is that apart from necessary occupations, we should rest on Sunday from that work by which we ordinarily earn our living during the week. This would give free scope to the amateur gardeners, tinkerers and do-it-yourself men, who are now in a much inferior legal position to the golfers, boxers, tennis *aficionados* and the like—to say nothing of the bull-fighters!

The concept of removable and irremovable parishes ought to be simplified and one single norm established for all with more stringent obligations to enforce stability on religious who undertake the care of souls in parishes.²⁰ The whole system of benefices, that concept whereby most ecclesiastical offices have some sort of actual or potential fund attached to them so that those who labor *in spiritualibus* may be supported *in temporalibus* is a feudal economic hangover which no longer fits our age. Its results are the unjust dispersal of wealth, poor administration and, when the fund is at a low ebb, often real poverty, so that side by side in the same diocese we have some priests near destitution and others far better off when both are engaged in serving the same Lord by the same title of service in the same diocese.²¹ In other words, equal reward for equal labor, or the application of social justice within the Church itself. This of course would strengthen the trend toward centralization of Church funds,

¹⁹ Abbo, *op. cit.*, p. 393.

²⁰ Cf. George R. Evans' article: "Stability in the Parochial Office in the United States of America", *The Jurist* XXIII (1963), p. 237.

²¹ Cf. Orsy, *op. cit.*

but it is difficult to see how else an efficient and more equitable distribution of Church property can be obtained.

A sore point in the law for those who have a lively concern for ecumenism is the relationship with baptized non-Catholics. At present all the baptized are considered to be *per se* subject to the laws of the Church. Exemptions are very few (the form of marriage and, in marriages between two non-Catholics, disparity of cult). Would it not be more indicative of an ecumenical spirit if persons baptized and raised in the Protestant Churches, and who have never been Catholics, be explicitly exempt from the positive laws of the Church?²² Aside from the rules for mixed marriages, would it not be possible to make it clear that Mass can be offered for baptized Protestants, for example, on the occasion of the death of a non-Catholic chief of state, since most Protestants are not formally excommunicated although the law treats them as if they were?²³ For those living in a pluralistic society, the reasons for participating in non-Catholic services should be broadened, and the manner in which Catholics should participate in the weddings and funerals of Protestant neighbors and relatives ought to be revised. Private responses indicate that even the best man and the maid of honor do not actively participate in a public worship service of a Protestant denomination. Why then should secondary bridesmaids, ushers, etc., be any more restricted?

In certain quarters a need is felt for a law which would emphasize the prohibition of discrimination under any form in Catholic schools, churches, religious communities, seminaries and associations of the faithful because of racial, ritual, political or national prejudices. And could not one suggest the possibility of abolishing the entire system of Mass stipends, the annoying and indiscriminate juggling of fees for the administration of the sacraments? There are more modern means of supporting the Church without retaining a system that is not edifying, and has an unsavory history of abuses, many of them in our midst.²⁴

²² Conway, *loc. cit.*

²³ *Ibid.*

²⁴ Cf. Orsy, *op. cit.* and Conway, *loc. cit.*

One of the sensitive areas which has prompted many requests for a change is the matter of prohibited books. Opinions run all the way from those who would maintain the present law to those who would abolish censorship entirely. It creates great problems for conscientious people, and yet in some countries it is apparently more honored in the breach than in the observance.²⁵ The commission which formed the present Code actually intended to abolish the Index of Forbidden Books, which receives no explicit mention in the Code itself. But subsequent practice of the Holy See nullified this effort and it is still with us. One suggestion is to put the whole matter in the form of an exhortation, as has been done in the Roman Synod, and then educate people to accept their responsibility in this regard. Certainly the classes of forbidden books can be reduced. Permission to read them has now been greatly facilitated through the ample faculties granted to every residential bishop through the *motu proprio*, "Pastorale Munus," of last December. The faculty in question (#40) reads in part as follows: The bishop "can concede, even through other prudent men, to the individual faithful subject to him, the permission to read and to retain prohibited books and magazines, with due precautions... when they need to refute them or to fulfill properly their own office or lawfully to pursue a course of studies."²⁶ Hence there is nothing now to prevent a bishop from commissioning the confessors or pastors of his diocese to concede this permission.

Much has been said also of the need to revise the entire process law of the Church so as to hasten the settlement of marriage cases and to speed up the entire system of justice. The same as even truer of the Fifth Book of the Code on Crimes and Penalties. This complex and almost unmanageable system of intricacies, after all its labored construction, is then almost entirely nullified by one canon: 2254. It is a section of the law which places a burden on the time, memory and conscience of the professor, seminary student and con-

²⁵ McManus, *op. cit.*, p. 281 ff.

²⁶ Cf. A.A.S. LVI (1964), 5-12; English translation in *The Jurist* XXIV (1964), 104.

fessor in the box. That it achieves its purpose is very much open to question.²⁷ Two further problems merit a longer comment; they concern the diaconate and the laity.

THE RESTORATION OF THE TERMINAL DIACONATE

Prior to the convocation of the Ecumenical Council now in session, from many quarters of the Church a repeated petition was heard for the renewal of the ancient order of the diaconate as a terminal office in the Church. Many thought that this desire was in the main confined to the missionary areas of the Church; but such was not always the case. A few statistics reported by Cardinal Pizzardo and published in the *Osservatore Romano* in 1961 may illustrate the problem. Europe has a population of almost 300 million people of whom 183,000,000 are Catholics. In 1960 the total number of priests was 231,264 of whom, 62,000 were religious priests. Taking as an ideal norm the proportion of 1 priest for every 1000 people, Europe in the next 40 years would need some 180,000 priests if we consider only the Catholic population. In this case it would require about 4,500 priests per year; but in the year preceding 1960, there were only 3,440 priests ordained throughout all Europe. Excluding entirely the missionary areas under Propaganda Fidei, there is a deficiency of 190,000 priests in relation to the Catholic population. To supply this need, there should be at least 10,000 priests ordained per annum, but in the year 1959 (just before this compilation), only 5,475 priests were ordained.²⁸ Proportionate figures in themselves do not help a great deal for it is not a question of proportion but distribution. Many Catholics are deprived of the regular ministry of a priest simply because of vast territory or because they are living in a district which is largely non-Catholic. This is true of parts of Europe and North America still. It is glaringly acute in Latin America and the Philippines. And this does not even take into consideration the newer missionary churches. In such a small

²⁷ One of the changes most unanimously requested; cf. Conway, *loc. cit.*; McManus, *op. cit.*, p. 281; Abbo, *op. cit.*, p. 394; and Orsy, *loc. cit.*

²⁸ Cf. *Review for Religious* 5 (1961), 376-7.

and relatively well-organized country as England, many Catholics are so isolated that only with the greatest difficulty are they able to go to Mass and to receive the sacraments. This is the perennial problem which suggested as a partial solution, at least, the revival of the married diaconate as a terminal office in the modern Church. All doubts as to whether the Church would adopt this solution are now set at rest. On the 28th of September, 1964, by a resounding majority of 1903 to 242, the Council Fathers decreed to restore the diaconate as a permanent order. The following day in a series of ballotings they further voted that it was to be left to the episcopal conferences to decide, with the approval of the Pope, if it is useful to restore the diaconate; that the supreme ecclesiastical authority can decide that the diaconate will be conferred on men of mature age, even though they be married. But the final proposal to allow the diaconate to be conferred on young men without the obligation of celibacy was defeated.²⁹

How will these deacons be chosen? Schamoni, whose book first brought this proposed solution to the attention of Pope Pius XII, replies as follows: "The deacon should be taken from the best members of the congregation. He would be a well-known and respected figure, one who has proven himself as efficient in his occupation or profession. Diaconal ordination would increase his prestige. Many a seminarian and novice later become disappointments. A man who is a good husband and father and efficient and successful in his occupation has proven himself; he will fulfill the hopes set on him."³⁰ That this was the solution adopted by the Fathers of the Council is evident in their voting.

What would be the function of a married deacon in a priestless community? He could conduct Sunday services; preach; catechize. Where the Blessed Sacrament is reserved, he could be allowed to distribute holy communion. He could

²⁹ Cf. *Osservatore Romano* (French edition), 9 October 1964, p. 4

³⁰ Cf. Wilhelm Schamoni, "Married Men as Ordained Deacons", trans. by Otto Eisner, (London: Burns & Oates), 1955; also V. Paul Brassel, "A Married Diaconate" in *Heythrop Journal*, pp. 377-388; this is an extended review of Schamoni's important work and of several other articles on this subject.

officiate at a service somewhat similar to the Mass of the pre-sanctified of Good Friday, and could give Benediction, as well as baptize solemnly and keep the parish records. He could organize the Catholic social life in a scattered community, run discussion groups on religious and moral matters, and be a stimulating source of unity in Catholic community life. This could well be a full-time job. It could be done after the proper training, by a well-educated retired business man, by a convert clergyman, or by a man who stopped at the threshold of the priesthood but who still wishes to forward the work of God in souls. The solution given by the voting of the conciliar Fathers has established a principle. It is obvious that the further working out of this new development will take time and will in practice fall to the domain of canon law. The entire question of the training, choice, and support of this new body, its relations with the bishop and the priest, all pose some thorny problems for everyone concerned. But it is to the credit of the Council and an indication of the presence of the Spirit of God that its answer has been given in terms which are clear and definite. The married diaconate can be considered as restored. The law must now be re-fashioned to clothe this fact in suitable legal habiliments.

THE LAITY IN THE CHURCH

In the famous medieval compilation of law called Gratian's Decree, St. Jerome is quoted as writing in the following terms of the laity: "These are permitted to take wives, to till the soil, to judge between man and man, to plead causes, to place offerings upon the altar, to pay tithes; and in this way they can be saved, if indeed they avoid evil and do good."³¹ In one respect, it has been said, the Reformation was a protest of lay people against the exclusiveness of the clergy in the Church. When it reacted to protect the hierarchical constitution of the Church, the Council of Trent tended rather to reinforce than to correct this attitude and it would seem that much of the same spirit has passed into

³¹ Decretum Gratiani, C. 12, q. 1, c. 7, quoted by John Reed in "The Laity in Church Law", *Theological Studies* 24 (1963), 605.

the Code of Canon Law.³² In the entire Code of 2,414 canons, the laity as such have but two dedicated explicitly to them. One of these declares that the laity have the right to receive from the clergy the spiritual helps necessary to salvation, while the other forbids them to wear the clerical garb.³³ As a result the intelligent and well-educated layman of today sees quite clearly that the Church is simply not organized in such a way as to make the fullest possible use of his talents and zeal. Moreover a gulf exists between him and the hierarchy and clergy. His complaint is that they do not know his real desires and are often so inaccessible as to make it impossible for the layman to make his views known. It is his opinion, rightly or wrongly, that the teaching authority of the Church is much more intent on preserving clerical rights and privileges than in defining the rights and status of the layman.

A very severe application of the *privilegium fori* is imposed on the laity without any alternative manner of obtaining justice or relief if his personal rights are abused by a physical or moral ecclesiastical person. It is simply understood that as a good Christian he will not resort to the civil courts if he suffers from arbitrary decisions at the hands of a cleric, if he is injured in his property rights, or deprived of his position by a Catholic institution, or if he is the object of defamation by a cleric. Though theoretically well-contrived to meet such contingencies, in practice the weakness of canon law in this area is evident to anyone who is even remotely acquainted with a sense of elementary justice.

The Roman Synod took a step in the right direction when it devoted 14 articles of law to the laity and many more to apostolate of the laity, their Catholic and social action and works of mercy, and even an entire chapter of 27 articles on the means of relaxation and recreation.

In an article on the laity in the Code of Canon Law, Fr. John Reed, S.J. of Woodstock College criticised the definition of the laymen as proposed in the Roman Synod. In its place

³² Reed, *loc. cit.*

³³ Canons 682, 683 of the Code of Canon Law.

he proposed this definition: "The laity are those members of Christ's faithful whose part it is to win over to Christ the material universe and the temporal order by living the fulness of the Christian life in the midst of the world."³⁴ The complete definition of the layman's function in the Church remains to be developed. But alert members of the episcopate have recognized the new potential that is at hand in the well-educated and trained layman, and have not hesitated to fit him into the living apostolate of the Church. Thus in the Baltimore Archdiocese two laymen, rotated periodically, are now part of the civil corporation of each parish. They will help review the financial situation of the parish at an annual meeting and assist in the preparation of the parish report. In Atlanta, Georgia, thirty-six laymen have been appointed to various standing diocesan committees; in St. Louis, Missouri, the ten-member board of the college department of the seminary includes three laymen, one of whom acts as chairman. In a Michigan diocese, the parish board includes a group of laymen.

The University of San Francisco Institute of Lay Theology is training laymen to engage in convert work as parish inquiry-forum directors. The University of Santa Clara, Canisius College and Fordham University have laymen as professors in the theology department. Bridgeport, Conn. has witnessed the opening of a new Catholic university entirely staffed by laymen, while in a diocesan-owned college in Haute-ribe, Quebec, the bishop has removed all the clergy from academic, administrative and disciplinary functions and has turned them over to the laity. These are but some of the more recent practical developments in lay activity in the Church.

It is further suggested that advisory bodies of lay people be established at all levels of the Church—in the parish, diocese, and the Holy See; that trained members of the laity become members of diocesan tribunals so that they may speed

³⁴ Reed, *op. cit.*, p. 607, quoting from an article by Papali. See also Daniel Callahan, *The Mind of the Catholic Layman* (New York: Charles Scribners and Sons), p. 116.

up their work.³⁵ Many members of the hierarchy have asked that a distinct congregation of the Holy See or at least a special commission be established to coordinate and further stimulate the lay apostolate. The scope of such a body would be to supervise the entire life of the faithful in what concerns the over-all juridical regulation of lay associations in their pastoral aspects. At the same time the other extreme of too much organization and excessive episcopal control should be avoided.³⁶ There is sound hope that the present ecumenical Council will clarify this issue as it has done in the case of the diaconate. At the beginning of the Third Session, members of the laity, both men and women, were invited to take their place as collaborators in the work of the Council. Thus, on the highest level of the Church, definite steps have been taken to make the ideal of an active, responsible laity move from the realm of theory to the concrete pavement of reality.

³⁵ On this point see the following articles: Jordan Bishop, O.P., "The Advocate in Ecclesiastical Courts", *The Jurist* XXIII (1963), 337; Albert Bauman, O.S.B., "Bottleneck in Marriage Cases", *The Catholic Lawyer* 10 (1964), 194-5; Marion J. Reinhardt, "Lay Attorneys in Canonical Marriage Cases", in the same issue, p. 196 ff.

³⁶ Cf. the interposition before the ecumenical Council of Archbishop Eugene D'Souza, of Bhopal, India, who, speaking of the initiative to be left to the laity, criticized the Schema text apropos the words: "Nihil sine episcopo" (Nothing without the bishop), and said: "What manifold and great abuses have already been made of these words, as if they signified: nothing unless it comes from the initiative of the bishop and is according to his ideas, nothing unless it is explicitly commanded or approved by the bishop." While agreeing that nothing should be done against the explicit wishes of the bishop, the archbishop strongly denounced clericalism and made it clear that in his opinion bishops should not desire to have everything under their direct supervision, nor consider as suspect what is not under their direct control. (*Divine Word News Service*, 37-E-1964, Rome, Oct. 8, 1964).

CONCLUSION

This summary has by no means mentioned all the aspects of canon law wherein reform may be both possible and desirable. What is offered has been largely culled from the suggestions of other authors. It is hoped that their thoughts may act as a stimulus to reflect upon these matters which should of their nature involve all Christians, for they are concerned with a love for the Church and her mission. Neither should one hesitate, if a suggestion comes to mind, to propose it in the proper quarter. In this way, all can have a share in the updating of the Church's law, a law which is not to be found in the dead letter of a book, but in the living spirituality of a vital Christian people, the *laos* in its widest and truest sense—the people of God.