

THE PRESENT STATUS OF CANON LAW

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To understand the present Code of Canon Law, which, for the most part, restates the law in force previous to its effective date, May 19, 1918, it is necessary to know the history of Canon Law. Many canons of the present Code are simply restatements of the old law, to be understood according to the previously accepted interpretations. Other canons are partly restatements of the old law, to be interpreted according to the previous rule, partly new law, to be interpreted according to the meaning of the words taken in text and context. When there is doubt whether a particular canon restates old law or states new law, it is to be understood according to the old interpretation.¹ Any survey, then, of the present law needs to be preceded by consideration of its past.

A. History of Canon Law

1. *Apostolic Times to Gratian (1140 AD)*

Very little of the rules in force prior to 300 AD has come down to us because of the burning of the books which Emperor Diocletian was induced to order in March, 303 AD against the Christians, as Eusebius (c. 265-339/340 AD) tells us in his *Ecclesiastical History*. That the books were known to the imperial authorities is obvious from the decision, similar to that in *Watson v. Jones*,² by Emperor Aurelian (270-275 AD) that Paul of Samosata, who had been adjudged a heretic in 268 AD and replaced by a certain Domnus, should give up the bishop's residence in Antioch and that it should be awarded to those to whom the Italian bishops of the Christian religion and the Roman bishop would write letters. Some proof had surely been offered to the Emperor as to who was entitled to the buildings and on what grounds.

Characteristic of the canonical collections which have come down to us from this first period is the predominance of canons, statutory materials, over decretals, decisions. People were, no doubt, more accustomed to see the law presented in this way, for the imperial codifications likewise present more constitutions, edicts, and legislative rescripts than judicial rescripts.

The canons in these collections are taken from councils both ecumenical and particular, *i.e.* held to consider the needs of some locality or region. The ecumenical councils are those held from 325 AD (Nicea) to 1139 AD (Lateran II). Of these ten councils the first

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¹ See CODEX IURIS CANONICI *Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (1917 AD), Canon 6.

² 80 U.S. 679 (13 Wall.) (1871).

eight were held in the eastern part of the Roman Empire to which the center of gravity shifted, by reason both of population and of commerce, after Caracalla's edict (212 AD) extended citizenship to all within its boundaries.

The local councils would not, of themselves, have had any authority beyond the limits of the region whence came the bishops who participated therein; but when their canons were adopted by others, either formally or by acceptance of some collection in which these canons also appeared, they came to have in practice a wider influence. Thus it was that the councils of Ancyra (Ankara, Turkey, 314 AD), Sardica (Sofia, Bulgaria, 343 AD), Arles (France, 314 AD), Elvira (Spain, 305/306 AD), and several of Carthage (Tunisia) came to have an influence in the universal Church.

In manuscripts of the fourth century there are also to be found some collections of rules of Christian life purporting to have been given by the Apostles themselves, and, frequently, to have been published by Pope Clement (88-97 AD), their disciple. Five collections of this type, composed in the East and mostly dependent one upon the other, seem to have circulated in the second and third centuries, prior to the first ecumenical council of Nicea (Iznik, Turkey, 325 AD). Though they are apocryphal, reflecting a later stage of development, and were not everywhere accepted in their entirety, these works, especially the one called "Canons of the Apostles," came to have some influence as they were included, at least in part, in later collections.

The later collections have in common a nucleus, known as the *Vetus Ecclesiae Universae Codex*, which is formed of canons of the first ecumenical council, Nicea, and of those of some local councils in the East, i.e. Ancyra, Neocaesarea (Niksar, Turkey, bet. 314/325 AD), Gangra (Cankiri, Turkey, c. 340 AD), Antioch in Pisidia (Yalvac, Turkey, 341 AD). The 104 canons of these councils and of that of Constantinople I (381 AD, second ecumenical) composed the *Vetus Codex* as it was used by the fourth ecumenical council, Chalcedon (Kadikoy, Turkey, 451 AD), which referred to it as the Code of Canons.

In the half century which followed this council several additions were made to this collection. One such enlarged edition, which added canons from the council of Chalcedon, became, in western translation, the Old Latin Version otherwise known as the *Itala* (fifth cent.). From a second enlarged edition, which added canons from the council of Laodicea in Phrygia (Eskisehir, Turkey, bet. 343/381 AD) in place of those of Chalcedon, was made the famous translation of Dionysius Exiguus (c. 500 AD). A third enlarged edition, which added canons of Laodicea and of Chalcedon, was the basis for the *Versio Hispana* (fifth cent.).

As the migrating nations consolidated their domination of the

western portion of the empire, in the first half of the sixth century in the comparative peace and tranquillity of the East still other additions to this nucleus were made, so that by the time of John Scholasticus (d. 577 AD) the collection contained eighty-five Canons of the Apostles, mentioned previously, and canons from Nicea, Ancyra, Neocaesarea, Sardica, Gangra, Antioch, Laodicea, Constantinople I, Ephesus (Ayasuluk, Turkey, 431 AD, third ecumenical), and Chalcedon.

The second Trullan Synod (691 AD) gave a list of sources of canons to be observed. On this basis was formed the *Trullan Collection*, which was in force in the East until the second council of Nicea (797 AD, seventh ecumenical). It omitted the canons of Sardica providing for appeals to the Roman Pontiff by bishops dissatisfied with the sentence of a local council. Included, on the other hand, which illustrates how legislation originally local became general by adoption even as Roman Law was "adopted" in Germany or the western commercial codes in Japan, were 133 canons from the seventeenth council of Carthage (419 AD) in one of which such appeals "beyond the sea," *i.e.* to Rome, by priests, deacons and lesser clerics were prohibited, under pain of excommunication, much as they would be later in the Constitutions of Clarendon (1164 AD) by Henry II, though the number of decisions in the *Decretals of Gregory IX* of cases coming in the early twelve hundreds on appeal from England would seem to indicate that the prohibition was not much heeded.

Included, too, were 102 canons of the *Trullan Synod* itself. New was the inclusion of statements of some twelve Fathers of the Church. For the first time a canonical collection became "mixed," in the sense that it included materials other than legal. In this way, to some extent at least, there was granted to these Fathers, all from the East, an authority similar to that of the juriconsults quoted in the *Digest of Justinian* (535 AD).

To this *Trullan Collection* the Nicene added twenty-two canons of its own, and it changed the order a bit, but basically the collection remained the same.

In addition to these chronological collections systematic ones, *i.e.* by topics, appear with the work of John Scholasticus, divided into fifty titles in imitation of the *Digest*.

Interesting, too, among the Eastern collections are the *Nomocanons*, *i.e.* collections of ecclesiastical law taken from civil sources as well as canonical. Theodosius II in his Code (438 AD) and Justinian in his (534 AD) had published several constitutions which had direct bearing on church matters. A typical example of such a collection is the *Nomocanon in Fourteen Titles*³ composed at the time of Heraclius II

³To illustrate how such *Nomocanons* were arranged here are the titles: Tit. I—On Theology and the Orthodox Faith, canons, ordinations, Patriarchs, Metropolitans, Bishops, Priests, Deacons, Deaconesses; Tit. II—On places and

(610-640 AD), by the time of whose death Syria and Palestine had passed under Moslem control and Christian life was rigidly restricted.

How rigidly it was restricted is indicated by the few collections which have come down to us from these areas. The Nestorian Church in Mesopotamia, which came under Moslem control in the seventh century has, in addition to a translation of the *Vetus Codex*, an official collection of canons from synods of the Patriarchs of Seleucia (Suveydiye, Turkey), composed at the end of the eighth century. The Maronite Church, in Syria and Palestine, likewise under the Moslems since the seventh century, has the *Nomocanon of Metropolitan David* (c. 1060 AD) originally written in Syriac, later translated into Arabic. The Monophysite Church, also in Syria, has a *Nomocanon of Gregory* (d. 1286 AD), originally in Syriac, later translated into Arabic. In Egypt, where the Coptic Church came under Moslem domination in 641 AD, Nomocanons were compiled for its use in the ninth and in the twelfth century. The Ethiopian Coptic Church has a "Synod" containing the Canons of the Apostles in Ethiopic and the "Abtelis," another collection of canons attributed to the Apostles, composed prior to the fourteenth century, as well as a Nomocanon.

The final great collection of what remained of the eastern church, after Asia Minor was taken by the Moslems in the seventh century, is that of Photius (820-897 AD), composed of the chronological collection of the Trullan Synod, with the addition of twenty-two canons from Nicea II and twenty more from synods held by Photius himself, and of the *Nomocanon in Fourteen Titles*, likewise with some additions. The schism which became serious at this time between the eastern and western portions of the Church prevented this collection from being influential in the West.

About this time, too, Cyril (827-868 AD) and Methodius (826-885 AD) were founding the Slav Church. A Nomocanon was published at Kiev in 1620 AD and a *Kormczaia Kniga* by the Patriarch of Moscow in 1650 AD. In addition, the Russian Church has Ecclesiastical Statutes, e.g. those of Peter the Great (1721 AD), as have most of the eastern churches.

In the West the Nomocanons were never widely used, for by the latter part of the fifth century the authority of the Emperor had practically disappeared there. Of much greater practical importance

sacred furnishings; Tit. III—On liturgical gatherings, communion, and ministers serving; Tit. IV—On Christian initiation and catechumens and neophytes; Tit. V—On behavior in liturgical gatherings; Tit. VI—On offerings; Tit. VII—On sacred times; Tit. VIII—On travels of bishops, the duty of hospitality, on relations between churches; Tit. IX—On the manner of proceeding against bishops and priests, on penal law as to ecclesiastics; Tit. X—On the administration of ecclesiastical goods; Tit. XI—On monks and monasteries; Tit. XII—On heretics, Jews, and infidels; Tit. XIII—On the laity, their crimes; Tit. XIV—On common duties, especially moral.

was the legislation of the invader kings, Ostrogothic, Lombard, Burgundian, Frankish and Visigothic. Since so many of these were at first Arian or pagan they did not bother to legislate in church matters for their conquered "Roman" subjects. The Church was left to "live by the Roman Law," as the saying went, *i.e.* such law as it had been accustomed to use, which was that of the translations of the *Vetus Codex*, the *Itala*, the *Hispana*, and that of Dionysius.

In addition to these more general collections we find also local ones of a "mixed" type, containing canons of local western councils and decretals, decisions of cases by Roman Pontiffs. The decretals were given universal application, but the canons adopted locally were not always so accepted. The development of local rules had become necessary because of the difficulties which prevented easy communication between the Christians under one barbarian king and those under another.

Of the several collections made in North Africa prior to the fall of Carthage to the Vandals the most noteworthy was that of the seventeenth council (419 AD) which was used in the *Trullan Collection*. The Moslem invasion, however, in the late seventh century practically wiped out this portion of the Church.

In Spain the most famous and most widely used collection was the *Hispana*, for a time attributed to St. Isidore of Seville (d. 636 AD), but actually translated earlier in Italy. After the Moslem conquest in 711 AD, however, this portion of the church was severely restricted and we find in the Mozarabic Church only a Nomocanon of the priest Vincent (c. 1049 AD).

In Italy various collections circulated. Of these the most famous was that of Dionysius Exiguus which for many centuries was in public use at Rome, throughout Italy, and in France, Spain, North Africa, England, Ireland and in the East. It exercised great influence on other western collections. Also called *Corpus Canonum* or *Corpus Codicis Canonum*, it was in two parts, the first containing canons, the second decretals. With the passage of time various additions were made to keep it up-to-date.

It was this collection, with some changes and additions, which Pope Hadrian I (771-795 AD) gave to Charlemagne in 774 AD. The Emperor promulgated it in the Diet of Aachen in 802 AD where the bishops of his empire received it, speaking of it as the "Old Code of Canons of the Roman Church." This collection filled the gap left by the disappearance of the collections which had circulated in France prior to the fifth century, and met the changed conditions there resulting from the Frankish invasion in the northern part and the Moslem in the southern (718-732 AD).

With the extension of Charlemagne's kingdom throughout Western Europe (768-814 AD) it became easier for the various parts of the church to reestablish communication, and we find in this period legis-

lation of a more universal nature. The collections are still of the chronological type rather than of the systematic. The latter require more scholarship and skill than the former, qualities which were lacking in the greater part of the West until Charlemagne and his son gave a new impetus to schools and studies.

In England and Ireland prior to the coming of the collection of Dionysius in the sixth century—probably with Augustine (d. 604 AD)—only the canons of the council of Nicea and those of local councils were in use. Systematic collections appear at the end of the seventh and during the eighth century. Among these are: the *Collection of Theodore*, Archbishop of Canterbury (673 AD), apparently an adaptation of the *Dionysian*; the *Collection of Egbert*, Archbishop of York (c. 750 AD); the *Irish Collection* (c. 750 AD), which influenced later collections on the Continent because of its use in France and Italy by the Irish monks.

An interesting special type of collection circulating in this period is the "Penitential," containing rules laid down for penitents by councils and individual bishops imposing various public penances according to the various faults or crimes. In the East and at Rome penance consisted mostly in exclusion from Holy Communion and from attendance at Mass. In England and Ireland, however, various penances are prescribed, some of which are: pilgrimages, fasting, prayers, to be repeated for a certain number of days or even years. Famous are the *Penitentials of Theodore of Canterbury* and of *Egbert of York*.

Brought to the Continent the Penitentials were finally ordered burned by some bishops because of abuses which had crept in, such as the almost mechanical application of the penance to the act done without inquiry as to moral culpability, a thing not surprising in a rude age when so low was the level of legal training, that trial by ordeal seemed to offer the surest way of settling a case, and a lord was allowed to satisfy his obligation to fast forty days by having forty of his serfs each fast one day.

In form the Penitentials look much like the *Laws of Aethelberht* (c. 600 AD), of *Ine* (c. 690 AD), of *Wihtried* (c. 695 AD), and of *Alfred* (c. 890 AD).

Other special types of collections are the liturgical collections, determining the ritual of the sacred functions, and the "Formularies." In this period, when legal training consisted mostly in learning how to copy a document fairly accurately, a collection like the *Formulary of Marculph* (c. 660 AD) was probably invaluable. It contained thirty-seven formulae for royal documents and fifty-two for private business.

Also of considerable importance in the West are the ecclesiastical "Capitularies." Following the example of the bishops who had already begun to publish their legislation in short chapters, *capitula*, Charlemagne and other emperors, kings and princes took to issuing collections of

capitula, with the approval of the nobles and bishops present in their diets, on both civil and ecclesiastical matters. Collections of such laws were made by Ansegius, Benedict the Levite and Angilramn.

In this same period appeared the collection of Pseudo-Isidore. Really but a falsification, in certain parts, of the *Hispana*, it mingled its fictitious decretals so cleverly with authentic fragments of documents that for centuries scholars found it difficult to prove just where the falsification lay, though it was suspect because it was not mentioned by any council prior to the middle of the ninth century, nor was it listed among the works of St. Isidore. Further, it contained quotations of Scripture according to the Vulgate edition and some editions by Alcuin, who lived in France under Charlemagne after 781 AD. It also contained excerpts from Fathers, councils and collections of a later time than that of its supposed composition, in addition to having a uniformity of style which would not be likely in several different Roman Pontiffs. Finally, it used a barbarous Latin which reflected rather the ninth century Frankish church, and contained several historical errors and anachronisms.

The falsifier was successful because of the common opinion that a Papal decision had universal and unchangeable force even if it had been unknown for several centuries and because there were gaps in the law which other compilers, too, though none so cleverly, had sought to fill, a thing not needed nor possible after Gratian's *Decretum* and Gregory's *Decretals*.

The purpose of the writer seems to have been reformation of ecclesiastical discipline, a thing much needed at the time in France, and vindication of the rights of the Church against lay usurpers, and of the bishops against the chor-bishops. He also defends the bishops against the archbishops, saying a sentence can not be passed against a bishop except in a provincial council of bishops, and that the final sentence must be given by the Pope himself, as had already been enacted at Sardica, for that matter.

During the tenth and eleventh centuries several more collections appear, the most famous of which are those of Burkhard of Worms (1000-1025 AD), and of Yves of Chartres (c. 1040-1116 AD). Systematic rather than chronological, these form the basis for much of what is to be found in the great collection of Gratian.

2. Gratian to the Council of Trent (1545 AD)

The Camaldolese monk, Gratian, a teacher of Theology, in which school at that time Canon Law was taught, composed his work at Bologna, in his monastery, between 1139 and 1159 AD. He was moved to do this because the existing collections were incomplete in that they did not contain the newer decretals of the Roman Pontiffs and the newer canons of various councils, not only local but even ecumenical, *i.e.* Lateran I (1123 AD, ninth ecumenical) and Lateran II (1139 AD, tenth ecumenical). A further need was to arrange the canons in

better order, for even the systematic collections were unwieldy. Finally, at times the canons contained in the other collections were in conflict, so a judge did not always know which to follow. Hence Gratian, according to Rufinus, his famous commentator, called his work "Concordance of Discordant Canons."

Collecting some 3,458, or 3,945, depending upon the way of dividing them, canons or *capitula*, Gratian in the first and third parts presents a question or a point of law and gives a canon to resolve the question or prove the point, first indicating the source of the canon and a summary of its content. In the second part of his work he presents a case on which he raises specific questions and then quotes a canon to resolve them.

The first part concerns general principles of law, divine and human, consequently, too, ecclesiastics and ecclesiastical offices. The second part has to do with trials, criminal and civil, and in question three of Cause Thirty-three, with penitents and confessors. The third part deals with some sacraments, like Baptism, Confirmation, Penance, and Sacramentals, including Consecration of Churches.

The sources from which Gratian took his materials are: Sacred Scripture; the "Canons of the Apostles" as they appear in the *Dionysian Collection*; the canons of many councils, ecumenical and local, Greek and Latin, taken from the *Dionysian* and *Hispana* collections; decretals of the Roman Pontiffs; works of the Fathers, *e.g.* Jerome, Augustine, Ambrose; works of ecclesiastical writers, *e.g.* Venerable Bede; the *Ordo Romanus* and *Liber Diurnus* and some Penitentials; the *Book of Sentences* of Peter Lombard; the *Institutes, Digest, Code* and *Novels of Justinian*, the *Code of Theodosius*, the *Code of Alaric*, the capitularies of Frankish and German kings.

These materials Gratian obtained not from original sources, but from collections existing prior to his time, especially those of Burkhard, Yves, Anselm of Lucca, Cardinal Deusdedit, Fulgence Ferrand, the *Polycarpus*, and the collection dedicated to Anselm.

The method of teaching the law contained in the *Decretum*, as the work came to be called, was first to give a summary of the matter to be explained in the text. Then the text was read slowly so that the students could copy it, for there were as yet no printing presses. The individual words were then explained and the students made notes in the margins which they had left for this purpose. From the canons general principles of law were deduced, called *Brocarda* because Burkhard (Brocardus) had included such short statements in his collection. Reference then was made to similar places in the *Decretum* either for confirmation of the principle or to explain away the apparent discordance or, finally, to select the canon which seemed best, if the discordance could not be resolved. Lastly, to fix the general principle, a case, sometimes fictitious, more often taken from Sacred History, was presented.

The great Glossators, John the Teuton (d.c. 1246 AD) and Bartholomew of Brescia (d. 1258 AD) collected into one continuous explanation the brief interlinear or marginal notes made on the words or sentences of the *Decretum*. They also noted cross references not only to other parts of the *Decretum* but also to the *Corpus Iuris Civilis* and vice versa. These Glossators were the first to develop a real science of Law. In this they were doing a work which paralleled that of the Glossators of the Roman Law, from Irnerius to Accursius, who spread Roman Law to all of Europe, whence the uniformity still to be observed in European law.

As time went on, however, the *Glossa* developed the same faults as did the other sciences. It became frequently verbose, empty and defective as to historical and even philosophical ideas. Furthermore, the *Glossa* tended to become the text, while the text itself was neglected. Toward the end of the thirteenth and during the fourteenth century the *Glossa* became more and more a commentary.

The Summists, e.g. Paucapalea (c. 1150 AD), Roland Bandinelli, who later became Pope Alexander III (1159-1181 AD), Huguccio (d. 1210 AD), and others, put into a compendium the explanations which were given before proceeding to the analysis of the text. It thus became a treatise on law. The Summists showed, too, a tendency to consider the practical aspects of the law and produced works on criminal practice and judicial practice, among others. Faults, however, developed in the *Summa*, too. In time it became a mere list of opinions, the greater number for a particular side of a question being considered the "common opinion," which was practically the law, as far as the judge was concerned. Some Summists, like Bartolus a Saxoferrato (1314-1357 AD), the famous writer on Roman Law, came to be considered infallible, so that an opinion by them outweighed any other opinion, no matter by how many it was supported, as did the opinion of Aristotle in philosophy in this period.

Though the *Decretum* was not an authentic, i.e. official, collection and the materials therein had simply the value which they had in themselves, because of its widespread use it had great influence on the development of Canon Law in the entire western church, for students, sometimes as many as 10,000, came from every European nation to Bologna to study under the Masters who used it as a text.

As people became aware that the courts were being staffed with more trained officials and justice could be more surely and speedily obtained, more and more cases were being filed and, naturally, more and more were being appealed to the Roman Pontiffs, who, like Alexander III and Innocent III (1198-1216 AD) were frequently former professors at Bologna. Innocent III gathered around himself in his Chancery a group of experts that was made up of professors of Canon Law who were called "Masters". Their task at first was to hear and

report to him on appeals cases but later was to decide the cases themselves. This group is the forerunner of today's Sacred Roman Rota, the highest appeals court in the Canon Law field.

Reports of these decisions were as eagerly awaited as were, later, the *Yearbooks* which run from 1 Edw. I (1272 AD) to 27 Hen. VIII (1536 AD). Some five compilations of decretals, the second by John of Wales (bet. 1210/1215 AD), were made before that of Gregory IX (1227-1241 AD). Further, the councils, Lateran III (1179 AD, eleventh ecumenical) and Lateran IV (1215 AD, twelfth ecumenical) had added several new canons to the existing law.

The mass of materials thus accumulated caused Gregory IX to commission St. Raymond of Pennafort, O.P. (c. 1175-1275 AD), a former professor at Bologna, to collect them. He arranged 2154 *capita* in 185 titles, divided into five books. The first of these deals with those who hold ecclesiastical offices. The second contains the materials regarding judicial procedure. In the third book are the rules regarding the clergy and church property. The fourth book deals with the laws pertaining to marriage. The fifth is a penal code. This arrangement is the same as that which Bernard of Pavia (d. 1213 AD) had used in the first of the five compilations and which he summed up in the mnemonic verse: *Judex, judicium, clerus, connubia, crimen*.

The materials in this collection are partly to be found in the previous collections and partly new. Following the example of Alan the Englishman (c. 1208 AD), also a professor at Bologna, Raymond did not simply report the decision with a sort of "key number" system for ready reference to the various points of law treated therein, but divided the text, putting the material pertaining to the individual points of law under the respective topic headings. Excess verbiage was deleted and, as Tribonian had done in making *Justinian's Digest*, old statutes were changed by correction or interpolation for a clearer statement of the current law.

The method of teaching the law contained in this collection was patterned on that developed for the teaching of the law in the *Decretum*. The Decretalists, as the specialists in this phase of the law were called, therefore, give us *Glossae* and *Summae* and correlate this part of the *Corpus Iuris Canonici* with the *Decretum* and with the Roman Law and vice versa. Some of the famous authors are: Sinibaldus Fliscus (de' Fieschi), who was later Pope Innocent IV (1243-1254 AD), Bernardus de Botone (d. 1266 AD), the author of the *Glossa Ordinaria*, and Cardinal Hostiensis (Henry of Susa, d. 1271 AD).

The collection was promulgated in 1234 AD by sending it, according to the custom of the times, to the universities of Bologna and Paris to be used as an authentic collection.

To keep up with the rapid developments of this judicial legislation and to resolve the conflicts which sometimes appeared in the decisions as

well as to include the newer canons of Lyons I (France, 1245 AD, thirteenth ecumenical) and Lyons II (1274 AD, fourteenth ecumenical), at which the Greek church had been represented, Boniface VIII (1294-1303 AD) transmitted to Bologna in 1298 AD a new authentic collection.

This collection, called the *Liber Sextus* out of respect for the five books of the Gregorian collection, was itself divided into five books which were subdivided into seventy-four titles under which were included 359 *capita*, 229 of which were from decisions and laws of Boniface VIII himself. Included, too, were eighty-eight Rules of Law, *i.e.* legal maxims.

John d'Andrea (c. 1270-1348 AD), a layman, professor at Bologna, wrote the *Glossa Ordinaria* to this collection as well as to the Clementine collection.

This latter collection was ordered after the council of Vienne (1311 AD, fifteenth ecumenical) by Clement V (1305-1314 AD) and finally promulgated in 1317 AD by his successor, John XXII (1316-1334 AD), at Avignon.

The Clementine collection contains 106 *capita*, arranged under fifty-two titles, divided into five books.

To this collection were added between 1317 and 1325 AD twenty other decretals of John XXII, and later seventy more of various Pontiffs from the time of Boniface VIII to that of Sixtus IV (1471-1484 AD).

It is this whole mass of materials which is meant by the words used by Gregory XIII in 1580 AD to describe it, *Corpus Iuris Canonici*, *i.e.* Gratian's *Decretum*, the *Decretals* of Gregory IX, the *Liber Sextus* of Boniface VIII, the *Clementine* collection, the *Extravagantes* of John XXII, *i.e.* decretals outside the previous collections, and the *Extravagantes communes*, the seventy decretals of various Pontiffs from Boniface VIII to Sixtus IV.

The rules of the Apostolic Chancery, published like the Pretorian Edict at the beginning of each new pontificate, are also a source from which certain rules in the present Code are drawn. Primarily intended for the direction of the officers of the Chancery these rules covered such matters as the forms for official communications, the manner of handling appeals of cases, and the reservation of ecclesiastical benefices.

3. Council of Trent to the Code

The long residence of the Popes at Avignon (1309-1375 AD) and the Great Western Schism (1378-1417 AD) with Popes and anti-Popes contending and many arguments about the Constitution of the Church had prevented a needed reform of Christian life and restatement of Christian principles to meet the needs of the Renaissance. What could not be accomplished at Constance (1414-1418 AD, sixteenth ecumenical), nor at Basle-Ferrara-Florence (1431, 1438-1445 AD, seventeenth ecumenical), attended by the Eastern bishops, Constantinople

not yet having fallen, nor in the fifth council of the Lateran (1512-1517 AD), was finally enacted in the council of Trent (1545-1563 AD), the Canons and Decrees of which, divided according to its twenty-five sessions, arranged in chronological order, were approved solemnly by Pius IV on January 26, 1564 AD.

By that time, however, the Diet of Speyer (1526 AD) had adopted the slogan "*cuius regio, eius et religio*," i.e. each prince shall determine what shall be the religion in his territory, and communication between Christians in the various parts of Western Europe was again interrupted as it had been before the time of Charlemagne.

The Canons and Decrees, therefore, of the council of Trent were not everywhere given application. Nevertheless, to secure as far as possible the observance of what had been enacted at Trent, Pius IV on August 2, 1564 established a Congregation of Cardinals, to which Sixtus V (1585-1590 AD) gave the function, in 1587 AD, of interpreting the Decrees, after consultation with the Pontiff.

Well aware of the faults which had appeared in the *Glossa* and in the *Summa*, Pius IV had forbidden such interpretations of the Canons and Decrees of the council of Trent. He was determined that these enactments should be explained not by professors debating their meaning but by trained administrators applying them to concrete cases. A similar shift in the direction of Administrative Law was likewise taking place in the individual dioceses where by decree of Trent the arch-deacon's administrative functions were given to an officer called the "Vicar General," while his judicial functions were given to an officer called "The Official," i.e., the official judge of the diocese. The arch-deacon's court was at the same time consolidated with that of the bishop so that appeal no longer lay from the former to the latter.

During the ensuing 350 years the body of administrative rulings given by the Congregation of the Council grew immensely, as did the collections of the rulings of the other Congregations, i.e. administrative agencies of the Holy See. At the same time the decisions of the Sacred Roman Rota were filling volume after volume. To this mass of materials were added the various constitutions, i.e. laws, of the Popes which were collected by various editors in *Bullaria*, or "Acts," as they were sometimes called, even as the official gazette of the Holy See is today called *The Acts of the Apostolic See* (1908-).

The result was that canonists found it more and more difficult to state with certainty what was the law on a given point, whether the law was still in force, and what it would be held to mean by a court or an administrative agency. It became necessary to check a dozen collections in addition to the old *Decretum of Gratian*. Only a few could possibly have the time and the library to do such research, contrary to the wish of the Church, so often expressed, that all the clergy should be well versed in the sacred canons.

The matter was further complicated by the fact that the arrangement was not the same in all the collections. Furthermore, some of the materials were useless, mere repetitions, or not really laws. In addition, some sources gave the law of the particular case, from which the general rule still had to be deduced. There were, moreover, lacunae which made it necessary to have recourse to Roman Law as a supplementary source, or to the jurisprudence, *i.e.* the usual way of administering the law, or to custom, or, finally, to the opinions of the classical authors, like Reiffenstuel, Schmalzgrueber, Lega, or Wernz.

Many laws still on the books had been abrogated by contrary custom or by subsequent laws, *e.g.* certain rules of judicial procedure, or those as to the election of bishops by the canons, *i.e.* members, of a chapter. Many laws, too, had been abrogated or superseded by Concordats with various countries.

In addition, some laws, good when made, had become too difficult to observe or no longer served the good of souls because of changed times and circumstances. Changes of this type have been made again and again in the course of the history of Canon Law, *e.g.*, as recently as 1953 AD the laws on fasting before receiving Holy Communion were changed because of the difficulty of observing the old laws under modern conditions.

These difficulties had caused many bishops answering the call to the Vatican council, issued in 1865 AD, to suggest that it take up the matter of codification of the Canon Law, after the example of the Napoleonic and other European codes. What the council, interrupted by the Franco-Prussian War (1870-1871 AD), was unable to accomplish Pius X (1904-1914 AD) finally ordered upon his accession to the papal throne.

Thirteen years later the work of digesting, organizing, deleting useless material, filling in lacunae, was done. The present Code, containing 2414 canons, appeared, divided into the usual five books, which deal with General Norms; Persons, including church officers and corporations; Things, *i.e.* Sacraments, sacred places and times, divine worship, preaching, seminaries, schools, benefices and property; Procedure, judicial and administrative; and Crimes and Punishments. Each book is further divided, like the old collections of decretals, into titles under which are grouped the canons. Citation is by the number of the canon, or by that number together with that of the paragraph if it is so subdivided.

In the forty years since this present Code went into effect questions as to its interpretation have been resolved by the Commission of Cardinals established for this purpose. There have also been new decrees from the various Congregations and new papal laws. Published officially in *The Acts of the Apostolic See* these are also available in various unofficial collections published in the different languages of the world, like Bouscaren's *Canon Law Digest*, in English, now in four volumes.

In the meantime work has been going forward on the project of codifying the law of the Eastern Rite churches, and some portions of this Code have already been published.

Thus, through a long and sometimes stormy history has the Canon Law come to its present Status.

B. Survey of Canon Law

Having considered how Canon Law has developed to its present status, as it appears in the Code and in the interpretations thereof, and in the subsequent legislation, we can now proceed to consider the theory of Canon Law and its relation to natural law as well as its relation to civil law. Finally, we can look briefly at some examples of particular canons of importance today.

1. *Theory of Canon Law and its relation to natural law*

The Glossators and Summists began their work on the Canon Law, as we have seen, by analyzing the words and phrases of the various *capitula* and correlating each part with every other part of the collection of laws. At the same time they were pursuing this analytical method they were likewise interested in deducing from the enactments before them the general principles reflected therein.

Since the first part of Gratian's *Decretum* contained materials pertaining to general principles of law as such, whether divine or human, these scholars came early to the development of a real Philosophy of Law. This was the easier for them since Canon Law had previously been taught, at least summarily, to prospective clerics as part of their course in Theology, as it still is.

This philosophical orientation of the Canon Law is further strengthened by the fact that the judges in the courts of Canon Law are trained in Scholastic Philosophy and Theology before they undertake the study of Canon Law. Similarly, the lawyers who practice before those courts are trained at least in Scholastic Philosophy, if they are laymen, and in both Philosophy and Theology if they are priests, before they go on to study the Canon Law.

Though respect for tradition and custom was great, a movement like that of the Historical School never developed among the canonists. In part this may have been due to the fact that in the original collections materials from diverse periods and places, canons from ecumenical and local councils, Roman and Germanic laws, and decretals, all covering a span of several hundred years were juxtaposed. While they might reflect the reaction of the Church to the times and places of origin their discordance was the thing to be explained, not why they were discordant. The materials were all taken as current law and their historical development was not of much concern until after Savigny's influence began to be felt among legal scholars.

Still more important as a reason why the historical approach was

not followed was the basic concept of God as the lawgiver of the Old Law and the New Law. According to this view all just laws ultimately come from a personal God—the Stoics had said from universal reason—either directly, having been established by Him, or indirectly, having been made by those to whom He has given authority to make laws within a certain sphere. As St. Thomas Aquinas explains it in his famous *Summa Theologica*, written between 1267 and 1273 AD, all things are controlled by an eternal law which exists in the mind of God as His plan for the government of His entire creation.

This law, however, is too deep and too universal for the mind of mere man to grasp. What man does perceive of this law by observing the workings of visible creation, in himself, in other men, and in the world in general around him, is “natural” law, *i.e.* written in nature, and to the extent that man knows it he is participating in the knowledge of the eternal law of God, whence he can distinguish between good and evil. Since, however, men do not always observe correctly the workings of nature, as witness the various divergent explanations of the causes of natural phenomena as well as of the workings of the human mind, it is not easy for every man to come to a detailed knowledge of the rules of this natural law. All men can, indeed, agree on the general principle that one should do what is good and should avoid what is evil; and men can agree on the more obvious applications of the rule, *e.g.* do not commit murder. When, however, they come to apply the rule to a more involved set of circumstances they frequently differ greatly in their assessment of what, concretely, is good or evil under those circumstances, or are not satisfied that they have really made the right choice every time.

For this reason, then, God, to enable man to know more readily, more surely, and with less chance of error, what is to be done, has deigned to reveal certain rules of conduct in both the Old and the New Testament. These revealed rules constitute what is called “Divine Positive Law.”

It is clear that this explanation of natural law and its limitations is quite different from that given by the later philosophers of the Law of Nature School, like Grotius (1583-1645 AD), Pufendorf (1632-1694 AD), Thomasiaus (1655-1728 AD), and Wolff (1679-1754 AD), who, to avoid the theological controversies of the age, omitted discussion of the eternal law and the divine positive law and endeavored to make the discussion of the Law of Nature supply the needed “higher norm,” even though they were thus forced to deduce much more detailed rules than their basic principle would really support. The reaction was a dislike, still existing in some quarters, for anything called “natural law,” or “law of nature,” and a turning from reason to unconscious custom by the Historical School.

According to St. Thomas’ explanation even the Divine Positive

Law does not go into as much detail as is required for human social living. God, instead, has chosen to endow two agencies with power to make more particular rules of human conduct. For matters pertaining to the aims and needs of civil, temporal, society to which He has willed that man in this world belong, since he cannot live adequately provided for without association with his fellow human beings, He has willed that there be civil laws, made by the authority which, by the very nature of things, is necessary to control relationships within such society.

Harking back to the argument of all the early Christian writers that the law of Nero (54-68 AD) should be abrogated because it was unjust and unreasonable to forbid people to be Christians, he goes on to say that what is reasonable is just, so every just law ultimately derives from the natural law, which is itself a rational participation in the most reasonable of all laws, the eternal. From this he concludes that every just law, civil or canonical, binds in conscience, as St. Paul had already written in his letter to the Romans.⁴

Recognizing the limitations of human laws, he notes that they cannot prohibit all wrongdoing, nor can they command all virtuous actions. Still, they do bind in conscience because they are ultimately derived from the eternal law. Ideally, the effect of good laws is to make men better both as citizens and as individuals.

For matters pertaining to the society which God has established to look after man's spiritual needs there is also an agency empowered to make laws. It is this authority which makes the Canon Law, as it has made it in the past and as it appears in the collections.

Custom, then, which is a human thing, cannot prevail against laws of a higher rank, the divine positive, the natural, and the eternal law. Within its own sphere, however, it can induce an obligation, or abrogate it, provided it obtain the consent of the supreme authority in the society within which it arises. Like any other law, however, it must be reasonable, and that one may be certain that the people really want the new law or want the old one abrogated it must be continued for a certain length of time, which is specified as forty years in the present Code.⁵

Custom also is a valuable aid to the law, for once the habit of obedience to a particular law or set of laws is acquired man finds it much easier to obey them. Hence, St. Thomas points out change merely for the sake of change is not a good thing, for it breaks up these habits of obedience, as Aristotle had likewise observed. Change may be necessary, because man lives in a changing world, but the advantages of the change should be weighed carefully against the disadvantages involved in breaking up a custom, or habit, of obedience.

The Code introduced some changes into the Canon Law, but, in line with the thinking just outlined, those changes were not introduced

⁴ See *Romans* 13:1-5.

⁵ See Canon 27, § 1.

until the need for them was sufficiently widely felt. In the meantime, however, the necessary flexibility in the law was provided by the institute of "dispensation," *i.e.* the relaxation of the law in a particular case in which such action is reasonable, lest a law established for the general welfare become harmful in an individual case. This is but another application of equity.

Natural law is a source of Canon Law in some cases, *e.g.* as to the rule that impotence prevents a valid marriage.⁶ In a less strict sense natural law is the source of Canon Law in that some commands of the natural law are common to all and are found in all laws, *e.g.* agreements are to be kept; an accused has a right to defend himself. Further, natural law is always the basis and norm of Canon Law in the sense that the lawgiver cannot legislate contrary to the natural law. Finally, if a lacuna should appear, despite the best efforts to fill them all, natural law provides a supplementary norm, *i.e.* what is reasonable and just under the circumstances.

2. Relation of Canon Law to civil law

The relation of Canon Law to civil law can be considered as it appears in the eyes of the Church, with a consideration of the theory of the "indirect power," and as it appears in the eyes of civil government.

a. In the eyes of the Church

Given the theory that all just human laws have power from the natural law and ultimately from the eternal law to bind men in conscience, it is easy to understand the formation of the *Nomocanons* in the East and the *Capitularies* of various princes in the West, as well as the inclusion in Gratian's *Decretum* of various provisions from the Roman and Germanic law. In the present Code, too, Canon 1529 states that what the civil law in the territory provides concerning contracts, both in general and in particular, and concerning discharge thereof, is to be observed by virtue of Canon Law in ecclesiastical matters with the same effects, unless the provisions of the civil law are contrary to divine law or there is some other specific provision on the matter in Canon Law. The "other specific provision" there referred to has to do with specifying what authority must approve alienations of "precious" objects, or other objects the value of which exceeds a certain sum, disposition of the funds obtained from such alienation, gifts from or to the Church, mortgages, sales, length of leases, loans of goods and interest charges on such loans.

Such "canonization" of the civil law was long ago approved by Gregory I (the Great, 590-604 AD), who said that the imperial laws are of great help to the canons, and Nicholas I (the Great, 858-867 AD), who considered the Roman laws "venerable," *i.e.* something almost sacred. Innocent IV ordered the study of both Roman and

⁶ See Canon 1068, § 1.

Canon Law in the school in the Lateran Palace. Boniface VIII ordered the study of Civil Law in the Roman University. Gregory IX included in his decretal collection the statement of Lucius III (1181-1185 AD) that as the laws do not disdain to imitate the sacred canons, so also the statutes of the sacred canons are aided by the constitutions of the princes.

Roman Law was of particular interest to the canonists, for it was a more developed system of law than the Germanic and afforded a much better concept of public law, *e.g.* as to offices, than that developed in feudal times. It remained a suppletory norm for the Canon Law, in fact, until the present Code went into effect, and even now one of the qualifications for a judge of the Sacred Roman Rota is a degree of Doctor of Both Laws (J.U.D.), *i.e.* Canon and Civil.

Roman Law particularly underlies the rules regarding the judicial process, especially the civil as distinguished from the criminal. Indeed, from Roman Law come such terms as "definitive sentence," "interlocutory sentence," "res judicata," "appeal," words which through Canon Law passed readily into Equity procedure in England, since the Chancellors were ecclesiastics until the time of Thomas More (1478-1535 AD).

Huguccio, the famous commentator, remarked in the early thirteenth century that all are bound to live according to the Roman laws, at least those which the Church approves. This does not mean, however, that the Church was loath to "canonize" Germanic institutes. Indeed, it accepted the Germanic version of the benefice, and the idea of the right of patronage, for a time, though it later led to the conflict over "investitures," for a vassal could not be independent.

On the other hand, the Christian church refused to recognize the Roman Emperor as supreme pontiff and refused, even at the cost of life itself, to obey his laws ordering sacrifice to the gods of Rome. This was a practical application of the distinction between just and unjust laws. The former were to be obeyed in conscience, the latter were to be disobeyed because of conscience.

The problem of how the Church should get along with the State prior to the Edict of Milan (313 AD) was simply that of how to live through a period of persecution. When, however, the Church became the official religious body of the Roman Empire the question of Church-State relations had to be resolved. To Ambrose (c. 340-397 AD), bishop of Milan, but previously Roman Governor of Liguria and Emilia provinces, belongs the honor of having worked out the basic principles.

He held, first, that the Church is, in its domain, independent of the State. This was important in his day because of the prevalent concept that public law, *jus publicum*, covered all matters included *in sacris, in sacerdotibus, in magistratibus*, *i.e.* in sacred, religious, things, in priests, in government officers, as Ulpian (d.c. 228 AD) expressed it. Hence the emperors after Constantine considered that as heads of the State,

and consequently of the law, both public and private, they were also heads of the Church.

It was against this Caesaro-papism that Ambrose asserted the independence of the Christian church. According to Ambrose, then, the Church is, in its own sphere, subject to its own law, the *jus ecclesiasticum*, e.g. bishops are to be judged only by other bishops, and as to matters of faith the emperors themselves are subject to the Canon Law. Churches, religious edifices, are not subject to the authority of the emperors and they cannot dispose of them at their pleasure, as they can of public buildings belonging to the State. Thus, when Empress Justine wanted to take a church from Ambrose and give it to the Arians whom she favored he filled the church with a congregation which he kept alert all night singing hymns, which he composed on the spot, so that the troops could not take it without a massacre.

Second, Ambrose held that the Church has a right to protection from the State. This did not mean for Ambrose that violence should be countenanced against a heretic or that blood should be shed in a religious controversy. Rather, to convert the Arians who were opposing him he counted on the moral and intellectual action of his faithful.

It was Augustine (354-430 AD), annoyed repeatedly by the violences of the Donatists, who finally swung away from the position of Ambrose, his teacher, to urge repressive measures by the State against these disturbers of the peace. It was this opinion of Augustine which had great weight throughout the Middle Ages and which serves to explain much of what went on during the religious controversies of that period.

Third, Ambrose held that the Church is the guardian of morals, and even princes are subject to her in this. After the slaughter of several thousands which Theodosius had ordered at Thessalonica in reprisal for the murder of some imperial functionaries during a riot there, Ambrose refused the emperor Communion until such time as he had done public penance for the atrocity.

This action of Ambrose raises the question of the "indirect power" of the Church over the State. Similar to his action is that of Innocent III taken when Philip Augustus, King of France (1180-1223 AD), refused to appear before the Roman Pontiff, contending that in the matter of the fief regarding which, in breach of his oath, he was contending with John Lackland, King of England (1199-1216 AD), he was independent. The Pope in his decretal said:

Let no one think that we intend to disturb or diminish the jurisdiction of the illustrious king of the French, when he neither wishes to nor should impede our jurisdiction. . . . For we do not intend to judge concerning the fief, the judgment as to which belongs to him, unless perchance by common law through special privilege or contrary custom something

has been derogated, but to decide about the sin, as to which without doubt the censure pertains to us, which we can and must exercise over every person.

Therefore, he declares that he can be appealed to in that temporal controversy between princes because of the spiritual care which he should exercise also with regard to princes.

Commenting on this text Sinibaldus Fliscus, whose work was composed after he became Innocent IV, says, regarding the words, "For we do not intend to judge concerning the fief . . .," "Directly, indirectly is a different thing, because one cannot do penance unless one makes restitution."

The power which Innocent was asserting had nothing to do with that direct power of the Pope over civil society which some writers of the Guelph party, like Egidius Colonna (1247-1316 AD), were proposing to counterbalance the claim of the Ghibellines that all of Christendom should be united under the Holy Roman Emperor.

The Guelph and the Ghibelline writers, too, like Dante Alighieri (1265-1321 AD) who wrote his treatise *On the Monarchy* c. 1312 AD, made much use of scholastic arguments, allegories, symbols, and very subtle discussions on points which would not seem to need refutation, but such was the taste of the times. A favorite symbol used by both sides in this debate was that of the "two swords," representing the Papacy and the Empire.

How the symbol was used appears in the Bull of Boniface VIII, *Unam Sanctam*. Boniface wrote:

It is necessary that one sword be under another, and the temporal authority be subjected to the spiritual power. For as the Apostle says: 'There is no power but from God, and those that are, are ordered by God'; but they would not be ordered, unless one sword were under the other, and as an inferior were led by the other to the highest things. For according to Blessed Dionysius it is a law of the divinity, that the lowest by the intermediate be led to the highest. It is not, therefore, according to the order of the universe that all things be brought into order equally and immediately, but the lowest by the intermediate and the lower by the higher. Now, that the spiritual power must precede any terrene power in dignity and nobility we must the more clearly confess the more the spiritual things excel the temporal.

This precedence in dignity and nobility, indicated by the position in which the church flag is flown by the Navy during ship's services, shows the primacy of the spiritual, which requires that the temporal shall not be a hindrance to the spiritual, but rather a help. The indirect power, therefore, of the Church in temporal matters is not a political or temporal power, which was never granted to it, but a spiritual one.

It is based on its spiritual mission, exercised in virtue of its spiritual rule of souls, and directed toward the supernatural good of the faithful, as in the case of the excommunication announced by Pius XII (1949 AD) of those who become militant Communists, or the prohibition issued in 1959 AD by John XXIII against voting for those who, though not Communists themselves, support Communist programs. This indirect power certainly has nothing to do with the juridical perfection of the State which is completely independent in its sphere, as Innocent III stated. Simple in theory it is difficult to apply in practice, as History shows.

b. In the eyes of civil government

The communication between systems of Law is not a one-way street. As the Canon Law has taken institutes from Roman and Germanic law so other laws have borrowed institutes from the Canon Law. In addition to the procedure of Equity, mentioned previously, there are other examples of institutes which show the influence of Canon Law upon their development.

Thus, the feoffment to uses, out of which grew our modern law of Trusts, shows this influence. Partly because of the statutes of mortmain, like the Great Charter of Henry III, c. 43 (1217 AD) and the Statute *de religiosis*, 7 Edw. I (1279 AD), and partly because of the interpretation of the vow of poverty by some religious orders to mean that while they might have the use of property they could not have title thereto even as a corporation, the custom of feoffments *ad usum*, *i.e.* to the use of the corporation arose. While at first the cestui's claim against the feoffee to uses was enforced only by the indirect power, *i.e.* the power to refuse to admit the feoffee to penance until such time as he was willing to respect the feoffor's wishes and allow the cestui to use the property according to the terms of the feoffment, a large body of rules covering the relationship had grown up by the time the Chancellor, the keeper of the king's conscience, took over the task of enforcing what until then had been a duty of the individual's conscience.

This enforcement of uses, frequently after the feoffor had died, was another aspect of the enforcement of wills in general. While the feudal rules regarding inheritance were in force there was not much a man might leave. His few chattels he directed some friend, not infrequently the priest who attended him in his last illness, to distribute to certain persons or for certain purposes. These wills, frequently nuncupative, of such unimportant items as personal property were not a matter of concern to the courts which were wrestling with the more complicated problem of restraints on alienation of realty. The most effective way, then, to secure the performance of his duty by the executor, or to persuade the next of kin to allow him to do it, was to threaten refusal of admission to penance. The discussion of the circumstances under which this was to be done and what, on the other hand, was to be

considered sufficient performance gave rise to a considerable body of rules by the time of the Statute of Wills (1540 AD).

By a similar use of this indirect power the mortgage was changed from the original *mortuum vadium* according to which the mortgagee got not only title to the property but also the right to all the rents and profits thereof until the loan was repaid, on law-day. Since the title was transferred merely for the purpose of giving the lender security the property seemed more rightfully that of the borrower to whom should, in conscience, go the rents and profits as if he had never mortgaged it. The mortgagee who insisted upon taking the rents and profits for himself instead of letting them go to the mortgagor or applying them to reduce the debt seemed indistinguishable from the usurers who, according to the second council of the Lateran (1139 AD) could not be admitted to penance unless they made full restitution. Thus was the concept of the mort-gage shifted to that of the *vivum vadium* whereby rents and profits went to the mortgagor or in payment of the debt.

A considerable body of marriage law likewise has come from the Canon Law, particularly from the Fourth Book of the *Decretals*. From the Fifth Book, too, has come an interesting body of rules concerning the distinction between accidental and voluntary homicide, particularly after the fourth council of the Lateran (1215 AD) forbade the clergy to have any more part in trials by ordeal.

The State's attitude toward the Canon Law has varied from that of Diocletian that it should be burned to that of Justinian that he, as Emperor, should make it. Fundamentally, both Diocletian and Justinian were applying with totalitarian thoroughness the Roman concept of public law whereby religious bodies, of which according to the *Twelve Tables* there could be but one, and religious matters, and clergy are as much a part of the public law of the State as are public officers and are to be regulated in the same way. Whether the regulation was oppressive or oppressively paternal depended upon the attitude of the sovereign toward the particular religious body.

In the East the oppressive attitude was shown in the areas which came under Moslem control. In the West the areas which came under the control of the migrating nations experienced the oppressive attitude for a time, then the paternal one evidenced in the Capitularies came to the fore. The independence of the Church, so strongly asserted by Ambrose, was compromised even when the paternalism was disguised as a "right of supervision," or a "right of protection," which meant, *e.g.*, that to make sure Church revenues were protected the protector, called "*advocatus*," collected them and disbursed them himself, for a fee, naturally. So bad did this practice become that it gave rise to the medieval jingle: St. Yves was a Breton, an *advocatus*, but not a robber, a thing of wonderment to the people!

The attitude of paternalism continued after the Diet of Speyer in countries which applied literally the slogan "*cuius regio, eius et religio.*" The result was that in place of Canon Law, Church Law, as it was called, enacted, authorized, or approved by the State came to predominate. In so far as the Canon Law existed at all it was considered as the Law Merchant had been for a long time, *i.e.* a body of rules governing the relationships of a particular group of people by which they could settle their differences between themselves but which did not concern the courts of the State unless some member of the group saw fit to appeal to those courts.

Since the upheavals of the nineteenth century in Europe this attitude of paternalism toward a particular religious group and of oppression toward others has given way to one of neutrality toward all groups, so that the laws of all groups are in the status of the old Law Merchant prior to its adoption into the municipal law systems of the various countries.

3. *Examples of particular canons of importance today*

To choose from among the 2414 Canons of the Code, which are themselves the distillation of centuries of experience, certain ones which are of importance today in comparison to the rest is not an easy task.

One might, however, point to Canon 1520 which provides that each bishop, for the proper administration of church property, shall have in his episcopal city a "Council of Administration," composed of two or more suitable men, as far as possible expert also in civil law, chosen by himself with the advice of his Board of Consultors to advise him on matters of administration.

In some cases of alienation, according to Canon 1532, the bishop must get the advice of this Council of Administration, in other cases he must get its consent, or the alienation is invalid and the Church has a right to proceed against him or his estate to recover what was received from the alienation or the value of the property, whichever is higher.

Further, the maximum amount beyond which consent of the Holy See is required for the alienation to be valid has been amended as of 1952 AD so that the amount stated in Canon 1532 is no longer to be followed. The amount specified in the amendment is 5,000 U.S. dollars for North America, unless special powers are given, *e.g.* to the Apostolic Delegate, to authorize alienations over that amount.

In view of the announcement of a forthcoming ecumenical council, which will be the twenty-first, Canons 222-229 might also be considered important. They provide for the convocation, agenda, membership, attendance and departure of members, and binding force of decrees of such a council, as well as for its interruption in the event of the death of the Pope while it is in session.

Also of current interest is the provision in Canon 429 for the

government of a diocese by the Vicar General should the bishop be imprisoned or in exile and unable to communicate with his people even by letter. He can even appoint several priests to take over the government one after another, should the situation warrant it. Should this not be possible, *e.g.* if he is captured too quickly, the Board of Consultors is empowered to elect a Vicar to carry on. All of these men are required to notify the Holy See as soon as possible of what has happened.

The Sacred Congregation for the Propagation of the Faith when asked whether these same provisions apply to dioceses in mission territories stated in 1954 AD that they do.

Cyprian, Bishop of Carthage (249-258 AD), was able, during the persecution of Decius, to continue to govern his diocese by letters from his place of exile. Not all bishops, however, have always been so fortunate, hence the provision of Canon 429.

Thus, in Canon Law, is the old ever new, and the new, as was stated in the beginning of this article, frequently joined with the old.