

EDWARD N. PETERS

ECCLESIASTICAL OFFICE AS PUNISHMENT
FOR CRIME: TOWARD THE ABROGATION
OF CANON 1336 § 1, 4°

SUMMARY: 1. Introduction. 2. Ecclesiastical office in general. 3. Penal transfer: a novel and neglected sanction. 4. Problems associated with applying Canon 1336 § 1, 4°. 5. The limited good served by Canon 1336 § 1, 4° is satisfied by other norms. 6. Conclusion.

1. INTRODUCTION

THIS article proposes the abrogation of the expiatory penalty known as “penal transfer to another office” (currently authorized by Canon 1336 § 1, 4° of the Johanno-Pauline Code¹) on two grounds: first, that conferring ecclesiastical office on a delinquent member of the faithful as punishment for his or her crimes is an affront to the dignity with which office in the Church should be conferred and accepted; second, that the legitimate values which the institute of penal *transfer to an office* might seek to serve are adequately protected by other canons on penal *deprivation of an office*. We will begin by outlining the importance of ecclesiastical office in general and by distinguishing mere penal deprivation of office from penal transfer to another office. Next, after demonstrating that the abrogation of penal transfer would disturb no venerable canonical principles (the penalty, it turns out, has very shallow roots in canonistics), we will examine some of the difficulties likely to be encountered if one were to attempt to confer ecclesiastical office on an individual guilty of a penal offense, and then

¹ Text and translations of the Johanno-Pauline Code [1983 CIC] will be from *Codex Iuris Canonici, auctoritate Ioannis Pauli PP. II promulgatus*, published in *Acta Apostolicae Sedis* 75/2 (1983) 1-320, as corrected and amended; English translations from Canon Law Society of America, *Code of Canon Law, Latin-English Edition, New English Translation* (Canon Law Society of America, 1999). That the 1983 Code should, from time to time, be subject to necessary emendation is doubted by no one. For a recent papal reaffirmation of the need “to abrogate norms that prove antiquated; to modify those in need of correction; to interpret — in light of the Church’s living Magisterium — those that are doubtful, and lastly, to fill possible *lacunae legis*”, see Benedict XVI, “Address to a Study Congress Marking the 25th Anniversary of the Promulgation of the Revised Code of Canon Law” (25 January 2008), in *L’Osservatore Romano*, English weekly edition, 6 February 2008, p. 4.

show that the limited good that can be achieved by penal transfer can be achieved less controversially.

2. ECCLESIASTICAL OFFICE IN GENERAL

Canon 145 of the Johanno-Pauline Code defines ecclesiastical office as “any function constituted in a stable manner by divine or ecclesiastical ordinance to be exercised for spiritual purpose.” This juridic definition of ecclesiastical office, however, belies a deeper theological reality, namely, that all ecclesiastical offices “entail doing something *on behalf of the Church and of Christ*. An office is not for one’s own sake, but is to be exercised for the sake of other people”.² It is not possible, nor is it necessary for the purposes of this article, to present fully the mystery at work when human beings are entrusted with an ecclesiastical office and assist the Church in her ultimate spiritual purpose, namely, the salvation of souls (1983 CIC 1752).³ But what is possible, and what is indeed necessary to appreciate the proposal made in this article, is firmly to recognize that conferral of ecclesiastical office is no mundane matter akin to sorting through job applicants and finding someone adequate to the task and willing to work for the wages offered. Ecclesiastical office is a cherished participation in the very salvific mission of the Church.

A number of canons attest to the care with which the selection of ecclesiastical office-holders is to be conducted. Canon 157, for example, reserves conferral of most ecclesiastical offices at the diocesan level to that figure most directly responsible for the welfare of the local Church, the diocesan bishop (1983 CIC 381); Canon 149 requires that potential officer-holders be in communion with the Church as well as endowed with those qualities required for the office in question; and Canons 158-183 closely regulate several procedures for selecting some office-holders from among the faithful

² James Provost, commentary on Canon 145, in J. Beal, *et al.*, eds., *New Commentary on the Code of Canon Law*, (Paulist Press, 2000) [herein *CLSA New Comm*] at 196, emphasis added. See also Benito Gangoi, commentary on Canon 145, in A. Benlloch Poveda, ed., *Código de Derecho Canónico Edición bilingüe, fuentes y comentarios de todos los cánones* [1993], (Edicep, 1994) at 95, wherein: “Podemos afirmar, aplicando la teoría al terreno eclesial, que las instituciones u oficios eclesiales tienen un doble fin: el inmediato o esencial y el último. El oficio eclesiástico tiene dos características: 1) Se trata de una realidad objetiva estable de derecho divino o de derecho eclesiástico.... 2) Con finalidad espiritual sea inmediata o mediate.” For a broader recent discussion of the concepts of office, power, and authority in the Church, including their fundamental orientation to the Church’s primary mission to souls, see, e.g., Juan Ignacio Arrieta, *Governance Structures within the Catholic Church* (Wilson & LaFleur, 2000), *passim*.

³ On the ultimate orientation of “spiritual purpose” under Canon 145 to the “salvation of souls” under Canon 1752, see, e.g., Provost, *CLSA New Comm* at 198, and Pio Pinto, commentary on Canon 145, in P. Pinto, ed., *Commento al Codice di Diritto Canonico* (Urbaniana, 1985) at 86.

themselves.⁴ Scores of other canons set out in more or less detail the rights and responsibilities attached to dozens of ecclesiastical offices, and many of these canons are in turn supplemented by the specific terms of appointment to a given ecclesiastical office (1983 CIC 145 § 2) or by office policies and procedures developed by the competent authority (1983 CIC 148).

Of course, a wide variety of circumstances might, and almost certainly will, suggest from time to time the opportuneness of removing a given individual from an ecclesiastical office. Such removals might occur with or without an anticipated assignment to another office. The great majority of removal situations imply nothing negative about the officer-holder (1983 CIC 184 § 1), and the possibility (we may safely say, the probability) of a routine loss of ecclesiastical office is anticipated in the law (1983 CIC 184-191).⁵

At times, however, the removal of an individual from ecclesiastical office might indeed take place because of wrong-doing by the office-holder (1983 CIC 192-193, 195). Strictly speaking, even these circumstances need not have been *criminal* in nature,⁶ but certainly, some instances wherein one might incur the loss of ecclesiastical office will be a consequence of one's verified commission of a delict, this, either narrowly under Canon 194 § 1, n. 2 (public defection from the faith or communion) or n. 3 (a cleric attempting even civil marriage), or more broadly, when one suffers "privation" of ecclesiastical office in punishment for a canonical crime (1983 CIC 196), that is, in response to gravely imputable delictual behavior (1983 CIC 1321 § 1).

The 1983 Code directly authorizes privation of ecclesiastical office as a possible punishment for three offenses: abuse of ecclesiastical power or func-

⁴ Still other examples of the care with which candidates for certain offices are to be identified are available, including Canons 377-378 on the selection of bishops, Canon 512 on designation of members of the diocesan pastoral council, Canons 521 and 524 on the appointment of pastors, and so on.

⁵ Some appointments to ecclesiastical office (e.g., episcopal vicars under Canon 477 § 1, or chancellors and notaries under Canon 485) are made "*ad nutum episcopi*" meaning that a bishop may remove such individuals from office without any implication of poor performance on their part. Several other office-holders (e.g., procurators and advocates under Canon 1436 § 2) can be removed for "just cause", which just cause need not, of course, reflect negatively on the performance of the officer-holder in question. See, e.g., William Woestman, *Ecclesiastical Sanctions and the Penal Process* (St. Paul University, 2000) at 58, Alphonse Borras, *Les Sanctions dans L'Église* (Tardy, 1990) [herein Borras, *Sanctions*] at 93, or Antonio Calabrese, *Diritto Penale Canonico* (Edizioni Paoline, 1990) [herein Calabrese, *Penale*] at 129. The complex of canons governing the removal of pastors from office (1983 CIC 1740-1752) opens with an express recognition of the fact that the removal process may be initiated even without an intimation of negligence on the part of the pastor. See also *Communicationes* 16 (1984) 43.

⁶ For example, Canon 193 § 1 only calls for "grave cause", and *not* the certainty of criminal behavior, to justify removal, while Canon 194 § 1, 1^o merely refers to a situation in which one has lost the clerical state, which loss might or might not have been occasioned by a cleric's delictual behavior.

tion (1983 CIC 1389 § 1), violation of the law of residence attached to an office (1983 CIC 1396), or violation of a number of responsibilities in the judicial arena (1983 CIC 1457).⁷ In addition, privation of office is effectively authorized against procurators or advocates guilty of malfeasance in the performance of their offices (1983 CIC 1488).

The broadest assertion of the competent authority's ability to deprive offenders of ecclesiastical office, however, is found in Canon 1336 § 1, 2° which states: "In addition to other penalties which the law may have established, the following are expiatory penalties which can affect an offender either perpetually, for a prescribed time, or for an indeterminate time...; 2° privation of a power, office, function, right, privilege, faculty, favor, title, or insignia, even merely honorary...." There seems no doubt but that privation of office can be invoked as the unspecified "just penalty" authorized for a large number of offenses,⁸ making Canon 1336 § 1, 2° that norm by which penal loss of office is most likely to be encountered in ecclesiastical practice. While the requirements of justice in a particular case might militate against a penalty as harsh as deprivation of office for a minor offense, that one's delictual behavior *could* result in one's deprivation of office, even if the offense were not committed in the context of the office, seems indisputable.⁹

But Canon 1336 § 1, 4° presents a very different scenario from that envisioned under Canon 1336 § 1, 2°. While the *loss* of ecclesiastical office as a consequence of canonically criminal behavior is hardly controversial, the possibility that one's misconduct could result in the *conferral* of ecclesiastical office on an offender should strike observers as incongruous, if not startling. By its plain language, however, Canon 1336 § 1, 4° does precisely this

⁷ One might question whether privation of office under Canon 1457 is strictly speaking a "penalty", given that Canon 1457 is not found among the penal canons of Book VI, but is instead located in Book VII on procedures. But consider: Canon 1457 "deprive[s] a member of the Christian faithful of some spiritual or temporal good" (1983 CIC 1312 § 2), operates as a consequence of "the external violation of a law" (1983 CIC 1321 § 1, 1399), uses plainly penal language (*congruis poenis...puniri possunt*), and appears to be but a specification of a certainly penal canon forbidding abuse of ecclesiastical power or function (1983 CIC 1389 § 1) upon pain of *loss of office* (emphasis added). The penal character of Canon 1457 is plain.

⁸ Some 22 canons authorize the imposition of a "just penalty" in response to delictual behavior, with four such norms (1983 CIC 1364 § 1, 1387, 1394 § 1, and 1397) expressly referring to Canon 1336. See Thomas Green, Tables 5 and 8, in J. Coriden, *et al.*, eds., *The Code of Canon Law: A Text and Commentary* (Paulist Press, 1985) at 934-935.

⁹ For example, one's participation in prohibited sacred rites (in violation of 1983 CIC 1365) might result in expulsion from the diocesan pastoral council, even though one's service on the council has been exemplary; or, a sacristan who joins a neo-Nazi association (in violation of 1983 CIC 1374) might be dismissed from his or her office despite otherwise competent service therein. Note, too, that numerous civil public offices can be forfeited upon the office-holder's conviction of a serious crime. Few find such secular consequences for criminal behavior to be unjust.

when it authorizes, as *punishment for a crime*, an offender's "penal transfer to another office" (emphasis added). How guilt for an ecclesiastical offense should occasion one's appointment to ecclesiastical office defies easy explanation, but before outlining some of the difficulties likely to be encountered by those trying to act under Canon 1336 § 1, 4^o, the relative ease with which such a penalty can be eliminated from canon law should be made clear.

3. PENAL TRANSFER: A NOVEL AND NEGLECTED SANCTION

The abrogation of the penalty of penal transfer from canon law would require no pain-staking research into an institute with ancient roots lest a value hidden to modern eyes be jettisoned unwittingly. Penal transfer appears to be a recent invention of western law,¹⁰ an invention which, so far at least, seems to have attracted no following under Pio-Benedictine or Johanno-Pauline jurisprudence.

Canons 2286-2305 of the Pio-Benedictine Code are cited as sources for Canon 1336 § 1 of the Johanno-Pauline Code, but only 1917 CIC 2298, which authorized a cleric's "penal transfer from an obtained office or benefice to an inferior [one]", is a predecessor for the modern institution of penal transfer.¹¹ But it is very difficult to find indications of penal transfer being recognized as a punishment for ecclesiastical crimes prior to the first codification of canon law. The evidence for this claim is perforce largely by way of absence.

Pietro Cdl. Gasparri (1852-1934), architect of the Pio-Benedictine Code, cited no decretist or decretalist sources for the penalty of penal transfer.¹² Petrus Vidal, who adapted Franciscus Wernz's monumental *Ius Decretalium* (publ. 1905-1913) to codified law, termed penal transfer "a new penalty about whose application there is not sufficient jurisprudence",¹³ and no canonical

¹⁰ Penal transfer of criminous office-holders is not authorized in Eastern canon law.

¹¹ Text and translations of the Pio-Benedictine Code [1917 CIC] are from *Codex Iuris Canonici, Pii X Pontificis Maximi, iussu digestus, Benedicti Papae XV, auctoritate promulgatus*, published in *Acta Apostolicae Sedis* 9/2 (1917) 11-521, as corrected and amended; English translations from Edward Peters, *The 1917 or Pio-Benedictine Code of Canon Law in English Translation with Extensive Scholarly Apparatus* (Ignatius Press, 2001).

¹² In fact, examination of the sole source cited by Gasparri for the twelve clerical "vindictive penalties" set out in 1917 CIC 2298, namely, the title *Ordo suspensionis, reconciliationis, etc.*, of the Roman Pontifical, yields no evidence that it even knew of penal transfer to another office as punishment for a crime. See, e.g., *Pontificale Romanum Summorum Pontificum*, in 3 vols., (Mechliniae: Dessain, 1867) III: 103-110.

¹³ Francisco Wernz and Petrus Vidal, *Ius Canonicum* [being a posthumous revision by Petrus Vidal of Wernz's *Ius Decretalium* according the Pio-Benedictine Code of Canon Law], in 7 volumes, (Gregorianum, various editions from 1923-1938), VII: 368, wherein: "Cum sit poena nova, quoad applicationem nondum adest sufficiens iurisprudentia".

commentary I located demonstrates that penal transfer pre-dated the codification of canon law.¹⁴

Considering that so little use seems to have been made of penal transfer under the 1917 Code, it was surprising that, from the first drafts of what would eventually be Book VI of the 1983 Code, penal transfer was retained as a penalty,¹⁵ with the only modification being that penal transfer could henceforth be imposed on any member of the faithful instead of only on clerics.¹⁶ In any case, since promulgation of the 1983 Code, there seems little evidence that penal transfer is actually being imposed. That penal transfer, however, seems to be a dormant canonical institute does not obviate the af-

¹⁴ Vidal, while asserting that penal transfer enjoys but little illuminative jurisprudence, was able to send readers to but a single case decided forty years prior to the codification of canon law by the Sacred Congregation of the Council, in which case a pastor was assigned, for a time, to a "lesser" benefice than the one he previously held. See "Premislien.", *Acta Sanctae Sedis* 20 (1887) 126-142. As an example of penal transfer, however, this case is wanting. The narration does not establish that the bishop's action against the pastor was taken in response to crime (as opposed to it being done in response to the pastor's perhaps abrasive manner), nor that the transfer was intended as a punishment (as opposed to it being a way, under the former benefice system, to keep the pastor out of poverty while his case was adjudicated). The Congregation even suggests, quite plausibly, that priests of limited talent might be better off assigned as pastors to smaller, if poorer, parishes where they would have perhaps a better chance at pastoral effectiveness than if they were assigned to larger and wealthier parishes.

¹⁵ See Edward Peters, *Incrementa in Progressu 1983 Codicis Iuris Canonici* (Wilson & Lafleur, 2005) 1158. A very odd discussion on penal transfer as a penalty occurred within the *Coetus de Iure Poenali*. The first draft of what would eventually be Canon 1336 § 1, 4° authorized penal transfer only to a lower (*inferius*) office, suggesting, it seems, that assignment to *higher* office would not be authorized by the canon. Arguing, however, that such a restriction was a "hardship" (*crudelitatem*), one consultor succeeded in having the word *inferius* removed, making the norm amenable to penal transfer to *any* level office. See *Communicationes* 9 (1977) 156. I find this outcome inexplicable. Perhaps Giuseppe Di Mattia finds it strange too, for, in commenting on Canon 1336, he calls the coetus discussion of the original draft "clever", but concludes nevertheless that the final version of Canon 1336 § 1, 4° effectively prohibits penal transfer to a higher office. See Giuseppe Di Mattia, commenting on Canon 1336, in A. Marzola, et al., eds., *Exegetical Commentary on the Code of Canon Law*, in 5 vols. bound as 8, (Wilson & Lafleur, 2004), IV/1 at 346. Much as I, too, find it unconscionable that delictual behavior would result in one's assignment to *higher* office, I do not see how Di Mattia reaches his conclusion about what the canon actually says. Nothing in Canon 1336 § 1, 4° restricts penal transfer only to "lower" offices, and an attempt to so restrict the operation of this sanction was deliberately removed. Better, I think is Borrás' simple assertion that it should be "obvious" (*il va de soi que*) that penal transfer should not be to higher office. Borrás, *Sanctions* at 93. See also Calabrese, *Penale* at 129.

¹⁶ As several commentators on the 1983 Code have observed, this extension of the possibility of penal transfer from clerics to lay persons was made in recognition of that fact that, under the Johanno-Pauline Code, lay persons could hold certain ecclesiastical offices. See, e.g., Thomas Green, commentary on Canon 1336, in J. Coriden, et al., eds., *The Code of Canon Law: A Text and Commentary* (Paulist Press, 1985) at 909.

front that the mere presence of such a norm in the Code poses to the much larger institution of ecclesiastical office.

4. PROBLEMS ASSOCIATED WITH APPLYING CANON 1336 § 1, 4^o

Beyond the fundamental dissonance occasioned by conferring something as estimable as office in the Church on someone as a punishment for crime, a number of practical problems would seem to confront those who, in accord with Canon 1336 § 1, 4^o, would try to confer ecclesiastical office on a malefactor.

First, while obviously one's status as a criminal could in no way be considered as a *qualification* for ecclesiastical office in accord with Canon 149, little about the administrative or judicial penal process (1983 CIC 1342 § 1) by which penalties are imposed or declared would seem to afford a superior or judge with the kind of information needed to assess an individual's qualification for office; indeed judges, *qua* judges, seem incompetent to confer office on anyone, let alone on criminals.¹⁷ Moreover, once an offender is assigned to an office, nothing prevents him or her from promptly resigning the office in accord with Canons 187-189. An expiatory that can be avoided by the otherwise licit act of declining the penalty seems no sanction at all! But the anomalies of imposing ecclesiastical office as punishment for a crime go beyond the administrative complications such an action would inevitably occasion.

Regarding certain ecclesiastical offices as "superior" to some offices and as "inferior" to others is not inherently misguided, and there is no doubt that in hierarchy organized society, various offices will reflect that hierarchic structure. But the notion that assignment to another office, even if an "inferior" one, could be used as a punishment for crime tacitly admits the kind of ecclesiastical careerism that is so inimical to understanding power in the Church as a part of service in the Church; for that matter, using an ecclesiastical office as a post of punishment diminishes the dignity of those who hold, and indeed serve with honor in, a variety "inferior" offices.

For example, the office of judge (1983 CIC 1419-1422) is reckoned "superior" to that of, say, auditor (1983 CIC 1428) or defender of the bond (1983 CIC 1432-1436). But, if a judge were convicted of an abuse of his or her office (say

¹⁷ Green, one of the few commentators to notice this problem, suggests that judges "consult with the pertinent ordinary regarding the penalized individual's eligibility to assume the new office." See Thomas Green, commentary on Canon 1336, in J. Coriden, *et al.*, eds., *The Code of Canon Law: A Text and Commentary* (Paulist Press, 1985) at 1554, in fn. 87. The possibility that a local ordinary (typically, the diocesan bishop) might only be "consulted" about the assignment of someone (let alone an offender) to office in his local Church is but another manifestation of the incongruity of using ecclesiastical office as a punishment for crime in the first place.

under 1983 CIC 1386 or 1389), and the facts of the case did not immediately make moot the possibility of assignment, could the competent superior *seriously* consider assigning that criminal judge to penal service henceforth as an auditor or a defender of the bond, ordering him or her to take up duties with the other men and women who have been entrusted with the serious responsibilities of that same office and who are proud to serve therein, not in expiation of their crimes, but in service to the People of God?

5. THE LIMITED GOOD SERVED BY CANON 1336 § 1, 4^o IS SATISFIED
BY OTHER NORMS

The limited good that Canon 1336 § 1, 4^o can achieve, namely, the removal of an offender from ecclesiastical office, can obviously be supplied by Canon 1336 § 1, 2^o, which norm authorizes the simple removal of an offender from office without complicating matters by immediately conferring another office on the malefactor. In other words, Canon 1336 § 1, 4^o serves no good purpose that is not satisfied by Canon 1336 § 1, 2^o, while the utilization of Canon 1336 § 1, 4^o raises serious questions about the propriety of conferring ecclesiastical office on an offender precisely in the context of his or her punishment for crime.

6. CONCLUSION

At no point have I argued that persons found guilty of ecclesiastical offenses are forever, or even immediately, necessarily ineligible for any office in the Church. It might be that one's specific misconduct, while justifying privation of an office currently held, is not destructive of one's eligibility for another office or that, over time, one's conduct in other contexts suggests the suitability of future assignment to office.¹⁸ But the values served by *privation* of ecclesiastical office are wholly distinct from the issues to be considered in *conferring* office in the Church. Using ecclesiastical office as a vehicle for the punishment of canonical offenders shocks the consciences of those concerned with seeing power in the Church called back to its roots in service within the Church.

Canon 1336 § 1, 4^o should be abrogated.

¹⁸ Naturally, great care should be exercised in reaching this conclusion in a specific case. Given the relative infrequency with which penal canon law is applied today, it seems more than probable that any conduct meriting penal privation of office in the first place would also militate against one's concomitant eligibility for another office, at least for some time. Indeed, the fact that one held ecclesiastical office at the time of the commission of a delict might actually serve as grounds for augmenting a sanction in accord with 1983 CIC 1326 § 1, 2^o.