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THE CAPUCHIN LAY BROTHER: A JURIDICAL-HISTORICAL STUDY

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(Second of Two Special Issues)



The Capuchin Lay Brother: A Juridical-Historical Study (Part II)

Justin J. Der, Capuchin

THE NEW ROUND TABLE is a publication of the Province of St. Joseph of the Capuchin Order, facilitating critical research into Franciscan history and resources, for the purposes of making applications to contemporary Capuchin life.

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The lay friar Justin of Panigaleo served the Capuchin Order as commissary provincial of the Umbrian province. He died in 1547. The above etching of this Capuchin friar is an etching from the *Flores Seraphici*, by Charles of Arembergh, published in Munich in 1640.



Chapter IV The Capuchin Reform and Its Legislation

Lodovico da Fossombrone was among the first three friars grouped together in what would become the Capuchin Order. He became vicar-general in 1529 when Matteo da Bascio resigned the office only a few days after election. In 1535, Lodovico bitterly left the order after a chapter of the order did not reelect him. Like Brother Elias after the death of Francis, Lodovico proved to be the organizational genius needed to keep the new order on its feet. With time he came to believe that his leadership was indispensable to the order, an attitude that contributed to his fall. The above depiction of Lodovico was created by Michael Gaffney, Capuchin.

The Beginning of the Capuchins

The history of the Order of Capuchin Friars Minor, its origin, later development, and its impact on the religious world, especially during the Counter-Reformation, are well known. The Capuchin reform of the Franciscan family began in 1525 when Matteo da Bascio, a priest of the Observant Province of the Marches, received from Clement VII verbal authorization to observe the *Later Rule* (1223) of St. Francis *to the letter*, to wear a habit different from that of the Observants, and to lead the life of an itinerant preacher. Toward the end of the same year two brothers, Lodovico and Raffaele da Fossombrone, were denied permission by their superiors to leave the friary and lead an heremital life. They consequently fled the friary and took up residence, first with the Conventual friars, and then with the Camaldolese monks, before joining up with Matteo da Bascio. For three years they strove in vain to be recognized and during this time were protected through the good graces of Caterina Cibo, Duchess of Camerino, the niece of Clement VII.¹

Through the mediation of Caterina Cibo, Clement VII on July 3, 1528, issued the bull *Religionis zelus*, which sanctioned the program of these pioneers of reform, and gave canonical recognition to their existence. The bull envisioned a genuine and radical return to the original Franciscan ideals. It placed these first friars of the Capuchin reform under the nominal jurisdiction of the Conventual superiors, gave them permission to wear a beard (after the manner of the Camaldolese), and to adopt a habit with a long pointed hood which was thought to represent the type of habit worn by Francis.²

¹Cuthbert (Hess) of Brighton, *The Capuchins: A Contribution to the History of the Counter-Reformation* (New York: Longmans, 1929), I, pp. 17-49.

²*Religionis zelus*, in *Bullarium Ordinis Cappucinatorum*, I, pp. 3-4; An English translation by Victor Valentovic is found in *Round Table of Franciscan Research* 7 (1941-42), pp. 339-342, reprinted edition (1949), pp. 110-112.

The life of the first Capuchins was outlined in *The Statutes of Albacina*, which were written in 1529 when the first twelve friars gathered at the friary in Albacina in the Marches.³ *The Statutes of Albacina* were drawn up after the first superiors of the Capuchins had been elected, and were written in Italian, the *lingua franca* of the new community. The thrust of the new statutes was not to institute a new rule or to even totally change the way of life that had hitherto been led by the friars; but to return to the origins of the Franciscan way of life.⁴

During the early years of the Capuchin reform the legislation followed closely that of the Observant friars regarding the reception, formation, and the life style of the lay friar. There was a definite tone, or intention, to return to the early days of the Franciscan life as lived by Francis and his first followers.⁵ The early *Statutes of Albacina* carry over with them from the practice of the Observants and the other Franciscan families the distinctions between cleric friars and lay friars. In number 32 of the statutes it is observed that no one shall be received into the order until he has passed his fifteenth year. During the year of novitiate the cleric friars were to memorize the rule of Francis.

Nothing is said of the lay friars, or of their obligations during this period of formation.⁶ In number 33 of the statutes we read that the young clerics and lay friars are to be under the guidance of a master for four years so that they may learn the perfect way of the spirit of the Lord.⁷

There are internal indications in *The Statutes of Albacina* that the Capuchin reform was clerical from its beginnings. In various places we read that the prelates of the order are to insure that silence is maintained in the friaries.⁸

³While the document written at Albacina is often called the *Constitutions of Albacina*, this title is actually a misnomer. The document does not deal with matters in the form proper to constitutions. Rather, the document was a set of ordinances or statutes that were drawn up to govern the activities of the first Capuchin friars. It is so noted by Catalano and Cargnoni when they argue that the first Capuchin constitutions were those of 1536. See Filippo Catalano and Costanzo Cargnoni, eds., *Le prime costituzioni dei Frati Minori Cappuccini: Roma - S. Eufemia, 1536, L'Itali Franciscana* 57 (1982), 9.

⁴*The Statutes of Albacina* (1529), in *Constitutionum Ordinis Fratrum Minorum S. Francisci Capucinatorum: series completa ab anno 1529 ad annum 1909: collegerit et transcripsit ad usum commissionis capitularis legislationis*, ed. Marie-Antoine de Lauzon (Montreal, 1965-1968), I, p. 1; An English translation of these statutes by Isidore Mausolf can be found under the title *The Constitutions of Albacina* in *Round Table of Franciscan Research*, reprinted edition 8 (1949), 116-126.

⁵Alessandro da Ripabottoni, *I fratelli laici nel primo ordine Franciscano* (Roma: Jus Seraphicum, 1956), p. 225.

⁶*The Statutes of Albacina*, 32 (de Lauzon, p. 7).

⁷*Ibid.*, (de Lauzon, p. 7).

⁸*Ibid.*, 10 (de Lauzon, p. 3); also see c. 110 *The Code of Canon Law of 1917* (hereafter referred to as *CIC*), note.

We might also make reference to numbers 18 and 43 of the statutes, where a distinction is made between major and minor prelates. Clearly, it was the mind of the friars gathered in Albacina that a distinction was existent between those who possessed jurisdiction to rule and govern the community and to posit certain acts which required its exercise, and those who lacked it. We may also argue from the evidence that the friars were aware of this because they used the word *prelate*, and that this word always denoted a cleric. *The Statutes of Albacina* speak of the offices of guardians and vicars, and these are considered minor prelates.⁹

It must be noted, as did the authors of the Latin version of these statutes, which was published in 1881, that the statutes were not the complete legislation of the order. They are, for the most part, new laws which would regulate the lives of the pioneers of the Capuchin reform. The early Capuchins considered the constitutions of the Observant friars to be binding on them, except where they were changed by *The Statutes of Albacina*.¹⁰

Further Constitutions

The legislation of the order was definitively codified in *The Constitutions of 1536*. By this time the Capuchin reform numbered seven hundred friars. In 1535 a general chapter was convoked in the friary of Sant'Eufemia, Rome, with its main purpose being the establishment of regular government and the reconsideration of *The Statutes of Albacina*. These were the first constitutions which followed the outline of the *Later Rule* and which contained twelve chapters.¹¹

In chapter II of these constitutions it is stated that no one is to be received until he has finished his sixteenth year; and no one is to be received as a cleric if he does not have sufficient literary education.¹² Again, the word *prelate* is used to signify the superior.¹³

⁹*Ibid.*, 18 (de Lauzon, p. 5).

¹⁰See note 4 above; Malachy Flaherty, "The Spirit of the First Constitutions," *Round Table of Franciscan Research* 8 (1942-43), p. 5, reprinted edition (1949), p. 3; Malachy Flaherty, "Discussion," *Round Table of Franciscan Research* 7 (1941-42), p. 120, reprinted edition (1949), pp. 42-43.

¹¹"Constitutiones FF. Capuccinorum," in *Lexicon Capuccinum: promptuarium historico-bibliographicum Ordinis Fratrum Minorum Capuccinorum* (Romae: Bibliotheca Collegii Internationalis S. Laurentii Brundusini, 1951), pp. 454-455.

¹²*The Constitutions of 1536*, 12-13 (de Lauzon, p. 5); An English translation by Mark Stier can be found in *Round Table of Franciscan Research* 7 (1941-42), pp. 245-279, reprinted edition (1949), pp. 113-142.

¹³*Ibid.*, 22 (de Lauzon, p. 7).

Chapter III treats the prayer life of the community and once more distinctions are made between the cleric friars and the lay friars. The clerics are to assemble in the friary chapel for the recitation of the Divine Office, while the lay friars are to assemble in some devotional place to recite the *Pater noster* as commanded by the rule.¹⁴

The election of the leaders of the order is discussed in chapter VIII. The opening paragraph of this section gives an indication of the lines the friars accepted for government.

As Christian Prelates, according to the teaching of Christ, our humble Lord, they should not resemble the Princes of the Gentiles, who lord it over their subjects; but on the contrary, the greater the burden they bear on their shoulders, the more they ought to humble themselves and to reflect that, whereas other Friars are bound to obey their Prelates, the Prelates themselves should obey all the brethren.¹⁵

Chapter IX of the constitutions treats the matter and the manner of preaching by the friars. Although there are no overt references to the distinction between cleric friars and lay friars in this chapter, there are, nevertheless, indications that this chapter is primarily addressed to the clerical element within the order. This is not to say that the lay friars did not preach from time to time. Alessandro da Ripabottoni states that the lay friars were not excluded from the mission of preaching, and gives examples from the early histories of the order in which various lay friars are cited as having performed in this apostolate. He and Charles of Arembergh, author of the *Flores Seraphici* (1640), cite numerous examples of lay friars who exercised the office of preacher and superior, even into the seventeenth century.¹⁶

The *Constitutions of 1536* were to stand for years to come as the model on which subsequent editions of the constitutions were fashioned. Various legal points, or points of emphasis on the spirituality of the friars might be changed, but the basic format remained the same. It might be well to point out that as the order evolved and grew it was seen as necessary to provide more particular or specific laws which originated in the general chapters. These were the *Ordinances and Decrees of the General Chapters*, which were

¹⁴Ibid., 37 (de Lauzon, p. 10).

¹⁵Ibid., 101 (de Lauzon, p. 28); English translation by Stier, *Round Table of Franciscan Research* 7 (1941-42), p. 268, reprinted edition (1949), p. 132.

¹⁶da Ripabottoni, pp. 230-231; The *Report of the Committee Formed by the North American Capuchin Conference to Study the Declericalization of the Order of Friars Minor Capuchin* (privately printed, 1970), p. 9 summarizes the evidence found in *Flores Seraphici*: "We know that some lay brothers did become ministers in the early days. For example, *Flores Seraphici* indicates that Justin a Panigaleo (1547) was a commissary."

truly *fontes juris* for the order. Since they lacked any papal approbation they could be changed, increased, or suppressed as a general chapter would determine. There have been three collections of the ordinances of the chapters published since the inception of the order, the last having been published in 1928.¹⁷

The constitutions which followed those of 1536 followed closely the model that was presented, and treated the lay friar, usually, in four specific sections of the legislation: a) the reception and formation of the lay friar; b) his Christian and religious formation; c) the life of the lay friar within the friary; and d) the right to vote, precedence, and other questions. It is our aim to review some of the pertinent legislation on these points, especially in the constitutions and ordinances that were published and enacted prior to the revision of *The Constitutions of 1968*. It is in these areas that we believe that we find the mind of the first friars of the Capuchin reform with regard to their expectations of the role of the lay friar and his place in the community.

Reception of the Lay Friar

Besides the qualities laid down in the canons, apostolic constitutions, and pontifical decrees, i.e., good health of mind and body, freedom of debts, good reputation, the non-need to support parents, etc., the Capuchins demanded that the lay friar have a good attitude toward manual work.¹⁸

In regards to the age at which the lay friar might be received, the constitutions varied according to the times in which they were written. The first *Statutes of Albacina* established fifteen as the minimum age for both cleric and lay friars. The *Constitutions of 1536* and *1552* demanded sixteen for both classes. The *Constitutions of 1575* required that the age for cleric friars be seventeen, and nineteen for the lay friars. They could not be beyond their fortieth year in order to join the order.¹⁹ The last constitutions which were enacted before the promulgation of the code of canon law of 1917 determined that the lay friar was not to be admitted before his twentieth year, and not after his thirty-fifth. A decree of Pius X, *Sacrosancta Dei Ecclesia* (January 1, 1911), permitted the reception in the seventeenth year with the proviso that there be two years of postulancy, and the candidate not be admitted to the novitiate before his twentieth year.²⁰

¹⁷"Ordinationes et decisiones, capitulorum generalium," *Lexicon Capuccinum* (Romae: Bibliotheca Collegi Internationalis S. Laurentii Brundusini, 1951), pp. 1249-1250.

¹⁸The *Constitutions of 1536*, 14 (de Lauzon, p. 5).

¹⁹The *Constitutions of 1536*, 12 (de Lauzon, p. 5); The *Constitutions of 1552*, 11 (de Lauzon, p. 4); The *Constitutions of 1575*, 7 (de Lauzon, p. 4).

²⁰The *Constitutions of 1909*, 10 (de Lauzon, pp. 4-5); *Enchiridion de statibus perfectionis, I, Documenta Ecclesiae sodalibus instituendis* (Roma: 1949), n. 272, p. 310.

Besides the question of age, the constitutions and ordinances also required other gifts or qualities. In the *Ordinances of 1884*, it is stated that in order not to dim the dignity of the order, the lay candidate must have an ordinary attitude toward work, and be gifted with sufficient intelligence. No criteria are set down with which to measure what sufficient intelligence entails, or what constitutes an ordinary attitude toward work. Certainly, literacy was not required.²¹

Christian and Religious Formation

The first constitutions speak of having the novices live in one or more places, chosen by the chapter, which would be suited for the spiritual life.²² In *The Constitutions of 1909* we read that the novices, together with their master, are to reside in a place apart from where the professed live. In *The Constitutions of 1925* it is stated: "A distinct place shall be assigned to the lay friars." This last provision is in accord with canon 564, 2 of the *Code of Canon Law of 1917* which states: "A separate place must be assigned to the lay novices."²³

From the beginning of the order it was generally the case that there was one master for both classes of novices. However, in some provinces there was the practice of having a lay friar serve as master for the lay novices. Charles Arembergh in *Flores Seraphici* (1640) gives the names of two friars who served their provinces as masters of novices. We are also told that St. Felix of Cantalice had a lay friar, Boniface d'Anticoli as his master of novices.²⁴ Lay friars also served as instructors in the novitiate houses in teaching the lay friars the ceremonies of the mass and of the order, and in the customs of the order. At other times they would give the daily conferences to the lay novices, which the master would give to the cleric novices.²⁵

The Life of the Lay Friar Within the Friary

The laws of the order, dating from 1536, speak of the need for the newly professed to maintain the spirit that they have acquired in the novitiate. For this reason, masters were assigned to guide them, and the newly professed

²¹ *Ordinazioni e decisioni del Capitolo Generale LXV* (Roma: Tipografia Editrice-Industriale, 1886), n. 6, p. 10.

²² *The Constitutions of 1536*, 17 (de Lauzon, p. 6).

²³ *The Constitutions of 1909*, 20 (de Lauzon, p. 7); *The Constitutions of 1925*, 15 (This translation is from *Rule and Testament of the Seraphic Father Saint Francis and the Constitutions of the Capuchin Friars Minor of St. Francis* [Detroit: Province of St. Joseph, 1945], p. 28).

²⁴ Bernardinus a Colpetrazzo, *Historia Ordinis Fratrum Minorum Capuccinorum (1525-1593)* (Assisi, 1939), II, p. 307; *NACC Report*, p.9; da Ripabottoni, p. 231.

were to be assigned to houses of regular observance. The guardian of the friary was usually given the title of master of the newly professed and he was to be helped in this task by a lay friar, presumably to help with the direction of the newly professed lay friars.

In some provinces the newly professed lay friars were to be assigned to a specific friary and given over to the care of one of the priests, who was to instruct them in Christian discipline and in regular observance. The ordinances of the chapter of 1884 state that the lay friars (newly professed) are to be under the spiritual direction of an instructor, and dependent on a solemnly professed lay friar for their manual work.²⁶

It is interesting to note that in the job description of the lay friar instructor there is a list of the qualities that he is to possess. He is to have profound devotion; he must be full of reverence and respect for the cleric friars; and he must not act in a sacerdotal manner because the lay friar does not have the care of souls, and so he must not become a director of conscience, impose penances, or hold conferences. His work is solely to demonstrate to the young lay religious a model of humility and religious observance, and to teach them to work faithfully and devotedly.²⁷

Albert of Bolzano in his *Expositio regulae FF. Min. S. Francisci* (1850) says that the order should not generally welcome unlearned men in its ranks, because as religious they should be better instructed than ordinary lay people concerning the tenets of Christian doctrine, and they must know the precepts and the admonitions of the rule they have vowed to observe. They must also have clear ideas of the ascetical principles which lead to perfection.²⁸

The Constitutions of 1925 state:

The local superior shall, at least once a month, or oftener, in accordance with the praiseworthy customs of the Province, give a religious conference to all their subjects. Moreover, they shall arrange that a suitable catechetical instruction be given to the lay brothers and domestics at least once a month.²⁹

²⁵ da Ripabottoni, p. 244.

²⁶ *Ordinationes Capituli Generalis LXV* in *Analecta Ordinis Fratrum Minorum Capuccinorum* 2 (1886), 230.

²⁷ "Commentaria circa ordinationes et decreta novissimi capituli generalis LXV," *Analecta OFM Cap 3* (1887), 84-85.

²⁸ Albertus a Bolzano, *Expositio regulae FF. Minorum S.P. Francisci Ass* (Innsbruck: Rauch, 1850), pp. 30-32.

²⁹ *The Constitutions of 1925*, 221 (Province of St. Joseph, 1945, p. 76).

Among the offices usually entrusted to the lay friars of the order were those of questor, porter, cook, gardener, and sacristan. *The Constitutions of 1909* state that the duty of questor is the ordinary office of his religious life.³⁰ The general chapter of 1884, and the ordinances of 1928, command that ordinarily the office of porter be assigned to solemnly professed lay brothers.³¹

We have briefly touched on some elements of the life of the lay friars within the Capuchin order, especially with regard to their reception, their formation, and their ministry. There is one area, however, that still bears scrutiny and which is of vital interest to our study of the juridic status of the lay friar within the Capuchin order, and that is his juridic standing in regards to the exercise of voting rights, i.e., the right to active and passive voice within the order.

The Right to Vote, Precedence, and Other Questions

One of the matters which seemed of importance in times past, but which seems to make little difference in our day, was the matter of titles and precedence. We read in various ordinances that the lay friar is to be addressed as *Venerable*, or *Beloved Brother*, but never as *Father*. He is not to have a fixed place in the choir (chapel), and under no pretext "shall he presume to enter the choir places of the priests."³² Just as a cleric friar, presumably before ordination, may pass to the status of lay friar, the lay friar may pass to the clerical state after making a new novitiate.³³

In regards to precedence within the order numerous arguments have waged back and forth, and even the decrees of two popes, Paul V and Urban VIII, have been evoked to settle the disputes that arose. According to the most recent ordinances (1928), the precedence for those not ordained as priests was as follows:

After the priests who have completed their studies, follow the students who are priests, and then those who are not yet priests, according to their seniority; after the cleric students, or if there are no students in the family, after the last priest in the family, come the cleric novices according to the order of seniority; then come the lay novices, according to the day of their investiture; at the end come the cleric and lay postulants, according to the day of their admission into the friary.³⁴

³⁰*The Constitutions of 1909*, 88 (de Lauzon, p. 25).

³¹*Ordinationes Capituli Generalis LXV*, p. 230.

³²da Ripabottoni, p. 259, and note 188.

³³CIC, c. 558.

³⁴*Ordinationes capitulorum generalium Ordinis Minorum Capuccinorum in capitulo generali LXX revisae et in codicæ redactæ*. (Roma, 1928), n. 323, p.83.

Alessandro da Ripabottoni makes the statement that the lay friars, even after the *preparatory state* of the order (1525-1535) continued to be elected superiors, guardians, masters of novices, provincial definitors, and even commissary provincials. Unfortunately, he gives no documentation for such a statement. However, Charles of Arembergh, writing in the seventeenth century, does give a list of lay friars who filled important offices within the order and the provinces.³⁵ In his study of Franciscan history, Lazaro Iriarte states that the question of active and passive voice for the lay friars was always a vexing question. At the time of the Council of Trent, a law forbade anyone below the order of subdeacon to participate in ecclesiastical elections. The procurator of the Capuchins, however, received a dispensation from that law from Pius V in 1566 because of an *old and proper custom*. The practice was then incorporated into the constitutions.³⁶ Iriarte states that during the first decades of Capuchin reform many lay friars filled the office of guardian.³⁷

The Constitutions of 1643, in number 113, state: "Clerics, even if they are not subdeacons (and also lay brothers), can have voices in the elections, because of the declaration and concession of Pius V of happy memory, notwithstanding the decree of the sacred Council of Trent."³⁸ It is not stated more clearly whether both active and passive voice is included in this constitutional law. *The Constitutions of 1909* restrict the right of lay brothers only to active voice for the election of delegates to the chapter.³⁹ In *The Constitutions of 1925* it is stated: "In elections, of whatever nature, no one enjoys a passive voice, unless a priest who has obtained his patents for preaching from the Minister General, and has made profession of solemn vows; but never until he has completed seven years from first profession. . . ."⁴⁰

There can be no doubt that during certain periods of the life of the order the lay friars enjoyed both active and passive voting rights. In *The Constitutions of 1536* it is stated that all of the friars have a passive voice for the post of definitor, if they find themselves in the place where the chapter is being held.⁴¹ In time, the rules for votation were changed until the lay friar

³⁵da Ripabottoni, pp. 230-231; See note 16 of this chapter.

³⁶The Council of Trent, sess. XXII, cap. 4; Matthias a Salo', *Historia Capuccina*, vol. II of *Monumenta historica Ordinis Minorum Capuccinorum*, gen. ed., Melchior da Pobladora (Roma, 1946), p. 307, n. 364.

³⁷Lazaro Iriarte, *Franciscan History: The Three Orders of St. Francis of Assisi* (Chicago: Franciscan Herald Press, 1982), p. 249.

³⁸*The Constitutions of 1643*, 113 (de Lauzon, p. 33).

³⁹*The Constitutions of 1909*, 132 (de Lauzon, p. 39).

⁴⁰*The Constitutions of 1925*, 138 (Province of St. Joseph, 1945, p. 59).

⁴¹*The Constitutions of 1536*, 107 (de Lauzon, p. 29).

had only the right to active voice in the election of the delegate to the provincial chapter from his own friary. By 1925 the rule was that "clerics and lay brothers who have made solemn vows, may take part in the election of the discreet (delegate) only after they have spent ten years in the order from their first profession."⁴²

Modern Developments

It can be seen from the legislation that we have discussed so far, that the order was in the main a clerical order, although there are periods in the early days of the reform when it was decidedly more democratic and egalitarian. We must remember the clericalizing tradition that the Capuchins inherited from the other Franciscan families when it achieved its independence. We must also be aware that the evolving church law came to look upon all orders as clerical if the majority of its members were priests, as is seen in c. 488,4 of the code of 1917.

We may say that the conditions of the lay friars and the legislation concerning them was concretized after the promulgation of the *Code of Canon Law (1917)*, and the publication of *the Constitutions of 1925*. It was not until the advent of the Second Vatican Council (1962-65), and the decrees and legislation emanating from it that we have a substantial rethinking of the position of the lay friar within the order, and even outside the ambits of the friary. This was a condition that effected not only the Friars Minor Capuchin, but almost all orders and congregations, monastic, mendicant, and others. It was a process that was especially deepfelt within the Franciscan family as it reexamined the mind of Francis and his first followers, and strove to return to the ideals that propelled them on the way of evangelical perfection.

In 1958, Clement of Milwaukee, the minister general of the Capuchin order, addressed an encyclical letter to the entire order on the subject of the lay friar. He deplored the lack of vocations to lay religious life, and lamented the fact that adequate training was not being provided for the men who came to join the order as lay friars. It must be said that, in this letter, the idea of the lay friar as the coadjutor of the cleric friar is very much in evidence, and is reflective of the time it was written.⁴³

It was during these times preceeding the council that many began to question not the existence or reason-for-being of lay friars within the order, but their proper role and function. There was also a movement to restore the Franciscan heritage to its original ideals, based on the life of Francis and the early friars. In short, there was growing support for more democratization

⁴²*The Constitutions of 1925*, 140 (Province of St. Joseph, 1945, p. 59).

⁴³Clement Neubauer (of Milwaukee), *Letter Concerning the Lay Brothers of our Order (November 29, 1959)*, (Pittsburgh: The Province of St. Augustine, 1960).

and decision sharing within the order, based on the Franciscan charism. It is interesting to note that the relator for the decree *Perfectae caritatis* of the Second Vatican Council made mention of the fact that there was an incomprehension present in the minds of many as to the proper role of the lay religious.⁴⁴

Among the causes alleged for the incomprehension of the vocation of the lay religious, two were identified. The first was that many of the activities of the lay religious, e.g. house work, receptionists (porters), manual laborers, etc., were seen as tied to an outdated form of Christianity; the second, was the growing clericalization of the religious life so that a vocation to the lay religious life was seen as a negative option, a means to become a religious for those who could not, or would not, aspire to the priesthood.⁴⁵

Second Vatican Council

It was to these concerns and attitudes that the council addressed itself in the decree *Perfectae caritatis*. After numerous interventions, *modi*, and emanations, the decree, promulgated on October 28, 1965, stated:

Lay religious life, for men and for women, is a state for the profession of the evangelical counsels which is complete in itself. The holy synod holds it in high esteem, for it is so useful to the Church in the exercise of its pastoral duty. . . .⁴⁶

100 Although it seems that this particular paragraph of the decree is addressed to institutes that are totally lay in character, it can still be seen that what is valid for them is also valid for the member of an order in which there is a mixture of clerical and lay members. Paragraph 8 of *Perfectae caritatis* addresses this aspect when it says:

In the church there are very many institutes, clerical and lay, engaged in different kinds of apostolic work and endowed with gifts which vary according to grace that is given to them. . . . Consequently these institutes should adjust their observances and customs to the needs of their particular apostolates. Since however the active religious life takes many forms, this diversity should be taken into account when its up-to-date renewal is being undertaken, and in the various institutes the members' life in the service of Christ should be sustained by means which are proper and suitable to each institute.⁴⁷

Addressing the orders and congregations made up of different classes (clerical and lay, choir and lay, choir and extern) the decree *Perfectae caritatis* again addresses the notion of equality of members within the order or congregation:

⁴⁴*Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani Secundi*, 27 vols. (Vatican City, 1970-1980), "Relatio congregationis generalis CXIX," vol. 3: *Pars 7: Congregationes 119-122*, pp. 138-142.

⁴⁵*Ibid.* Intervention by Cardinal Raul Silva Henriquez, archbishop of Santiago in Chile, pp. 570-579, and an intervention by Abbot Godfrey Dayez, OSB, pp. 599-603.

⁴⁶*Perfectae caritatis*, 10.

⁴⁷*Ibid.*, 8.

In order to strengthen the bond of brotherhood between the members of the institute, those who are called lay brothers, cooperators, or some such name should be associated more closely with the life and the work of the community. . . Men's monasteries and institutes which are not entirely lay can, of their very nature, admit clerics and laymen, in accordance with the constitutions, on an equal footing and with equal rights and obligations, apart from those arising out of sacred orders.⁴⁸

Paragraph 4 of the same decree states: "Effective renewal and right adaptation cannot be achieved save with the cooperation of all the members of the institute."⁴⁹ In the *motu proprio Ecclesiae sanctae*, which is the implementing law for the decree on the renewal of the religious life, Paul VI wrote:

General chapters and synaxes must study the manner in which religious who are called lay brothers (lay sisters), cooperators, or any similar name, may, gradually, obtain a vote in specified community activities and in elections, and may even become eligible for certain offices. They will thus become more directly involved in the life and the activities of the community and the priests will have greater freedom to perform those ministries which are reserved to them.⁵⁰

In a sweeping statement a recent author has stated that the Second Vatican Council declericalized the church, or better, gave the doctrinal grounds for an opening for a progressive declericalization. Without denying the need for a hierarchical ministry, he says that the council reevaluated the role of the laity within the church. In chapters II, IV, and V of the dogmatic constitution *Lumen gentium*, in the decree *Apostolicam actuositatem*, and in the constitution *Gaudium et spes*, the church has written the swan song of clericalism, but not to the clergy.⁵¹

Franciscan and Capuchin Legislation after the Council

In accordance with the decrees of the council the Order of Friars Minor were among the first to come to grips with the problem of integrating the clerical and lay friars totally within the community. In the general chapter of 1967, they revised their constitutions to bring them into harmony with the

⁴⁸*Ibid.*, 15.

⁴⁹*Ibid.*, 4.

⁵⁰*Ecclesiae sanctae*, 27 (translation from *Vatican Council II: The Conciliar and Post Conciliar Documents*, Austin Flannery [Collegeville: The Liturgical Press, 1975], p. 630).

⁵¹Builherme Barauna, "Il futuro dei fratelli non chierci," *Studi Francescani* 66 (1969), 64.

decrees and the spirit of the council, and sought to return to the original intentions of Francis as called for in *Perfectae caritatis*. This conciliar document stated:

It is for the good of the Church that institutes have their own proper characters and functions. Therefore, the spirit and aims of each founder should be faithfully accepted and retained, as indeed should each institute's sound tradition, for all these constitute the patrimony of the institute.⁵²

In the chapter of the Friars Minor it was decided to abolish all juridical distinctions between the clerical and lay friars. The new legislation established that it was not necessary to embrace the clerical state to be fully integrated within the community, with all the rights and the responsibilities which are inherent to the human and Christian person, and likewise to the Friar Minor religious.⁵³ It was decided at this chapter that there would be absolute equality between the members of the order, including eligibility for all offices and responsibilities within the order. In the early part of 1968 the minister general, Constantine Koser, submitted the recommendations of the general chapter to the Holy See for approval. The Sacred Congregation for Religious and Secular Institutes replied that the proposed modification was one of utmost importance, since it dealt with the very nature of the institute, and that a definitive answer would require careful study at the highest level.⁵⁴

It was against this background that a special general chapter of the Friars Minor Capuchin was held in Rome from August 19 - October 25, 1968. The first impulse for such a chapter was manifested by the general chapter of 1958 when the subject of updating the legislation of the order and reordering the structure of the order was broached. In the general chapter of 1964 there was constituted a legislative commission, composed of thirteen friars, whose task was to rewrite the constitutions of the order to bring them into harmony with the needs of the time, the needs of the church as expressed by the council, and to bring them into conformity with the laws that were to come in the wake of the council.

⁵²*Perfectae caritatis*, 2b.

⁵³Barauna, p. 64.

⁵⁴*Clericalia instituta* (November 27, 1969), in *Acta Apostolicae Sedis* 61 (1969), 739ff. Also found in *Analecta OFM Cap.* 86 (1970), 46-47. An English translation can be found under the title "Government of Clerical Institutes," in *Canonical Documentation on Consecrated Life (1963-1976)* (Ottawa: St. Paul University, 1977), pp. 257-258; Also cf. an undated explanatory note on *Clericalia instituta* authored by the Sacred Congregation for Religious and Secular Institutes under the title "Declaration," in *Canonical Documentation* pp. 259-262.

Before the publication of the motu proprio *Ecclesiae sanctae*, the consultation regarding the new constitutions was limited to the major superiors of the order, and some experts. After the publication of *Ecclesiae sanctae* this consultation took on a wider dimension as all of the friars were invited to give expression to their thoughts regarding the basic law which would govern their lives.

When the chapter gathered to discuss and write the constitutions, one of the first discussions centered on the position of the rule of Francis in the life of the order today. The chapter had no difficulty in accepting, as a base of argument, the need to return to the sources, which was one of the criteria laid down by the Second Vatican Council for the renewal of religious life and law. Thus, the capitulars necessarily turned back to Francis as the inspiration for their work. They were also aware that they had to treat not only of Francis the man, but also of Francis the writer of the rule and the animator of the Franciscan charism. The constitutions to be written were not only to reflect these ideals as applied to the Capuchin life, but were to serve as the authentic interpretation of the rule for the Friars Minor Capuchin.⁵⁵

In the *Schema* prepared by the members of the legislative commission for the capitular body the topic of conferral of offices in the order, and the requisite qualifications, were stated in number 134. In this preliminary text it was stated:

1. Offices of the order are conferred by election or appointment.
2. When they make provision for an office the friars are to proceed with a right intention, simply, and canonically.
3. As a means of better providing for the welfare of the order, a discreet consultation on those to be elected and appointed may be held beforehand.
4. As true minors, the friars should not seek office; if, however, the other friars place their trust in them, and call them to office, they should not stubbornly refuse to serve as superiors or in any other capacity.
5. Only those friars who are solemnly professed priests, who have finished their studies, can be elected as major superiors.
6. For the other offices and positions, except for the afore-mentioned, all of the friars who are solemnly professed and have finished the time of formation are eligible.⁵⁶

⁵⁵Lazaro Iriarte, *I Cappuccini si rinnovano* (Torino: Editrice Francescana, 1969), p. 26.

⁵⁶Commissio Capitularis Legislationis OFM Cap., *Schema constitutionum nostrarum: textus continuus quinquies emendatus* (Roma, 1968), n. 134, p. 96.

During the course of the debate in the chapter on this particular number there was a great contrast of opinion. For a fuller description of the various arguments and points made by the capitular fathers, we refer the reader to the acts of the chapter, where is found a verbatim account of the argumentation on this number of the schema, and the votations that took place over the wording of the various sentences.⁵⁷

A great sector of the capitular body wished to suppress absolutely any form of discrimination between the cleric and the lay friars in regard to the appointment or election to office. Their strongly held belief was based on the origins of the order and the mind of Francis who wished all the friars to live in fraternity without any form of discrimination based on class. To discriminate in these areas would lead to a dissolution of true fraternity.

The Second Vatican Council had given the impulse for an equality of rights in regard to all things which did not necessitate the use of sacred orders. The argumentation, often, was based on the *ius vigens* on the use of jurisdiction. The superiors of the order enjoy such ecclesiastical jurisdiction, and its use is reserved to cleric friars. This was not the only reason adduced for opposition to this proposed new number of the constitutions, but it was a major one. In the end, after considerable debate, the proposal was accepted by the capitulars and became number 101 of the revised *Constitutions of 1968*.⁵⁸

It is also interesting to note that when discussing chapter V, the capitular fathers spent considerable time on the theme of fraternity as essential to the Franciscan charism. Thus, we read in number 72: "We who profess this form of life constitute an order of brothers."⁵⁹ Again, this was seen as essential to the Franciscan charism.

After the work of rewriting the constitutions was finished they were promulgated *ad experimentum*. Several of the articles were submitted to the Sacred Congregation for Religious and Secular Institutes for approval because they were contrary to the common law.

Shortly after the constitutions were completed, the procurator general of the Capuchin order petitioned the Holy See that solemnly professed lay friars be allowed to be elected delegates to the provincial chapters which were upcoming in 1969. In a response given on February 7, 1969, the Sacred

⁵⁷*Acta capituli generalis specialis, OFM Cap.* (Roma, 1969), II, passim.

⁵⁸*The Constitutions of 1968*, 101 (*Acta capituli generalis specialis, OFM Cap.* [Roma, 1968], II, p. 443).

⁵⁹*Ibid.*, 72 (*Acta*, p. 435).

Congregation for Religious and Secular Institutes granted the request with the proviso that the lay friars not exceed one quarter of the elected delegates. In actuality this had the effect of having no more than one-eighth of the chapter membership made up of lay friars, since according to Capuchin legislation the number of delegates elected to the chapter equalled the number of ex officio delegates.⁶⁰

Later that year, the Sacred Congregation for Religious and Secular Institutes gave further responses to questions asked it by the general superiors of the order. In response to the above mentioned rescript, the congregation notes that the restrictive clause of the earlier document limiting the number of solemnly professed lay friars who could be elected as delegates to provincial chapters was no longer effective, due to the decree *Clericalia instituta* (November 27, 1969.). Henceforth, it would be the task of the general chapters to make statutes for the times when the lay friars could possess active and passive voice in the order.⁶¹

Clericalia instituta

The decree *Clericalia instituta* concerned the degree to which lay members could participate in the government of clerical religious institutes. It contained four principles or directives in which is outlined the degree of participation allowed to lay members of clerical institutes, especially with regard to governmental functions:

1. General chapters of clerical religious institutes can decree that lay religious can be allowed to exercise purely administrative offices such as treasurer, bookkeeper, and others of that kind which do not have a direct relation to the ministry which is properly clerical.
2. The said chapters can likewise grant them active and passive voice regarding chapters on any level, elections and the handling of business matters which must be taken up in these chapters, according to the measures and conditions imposed by the very nature of things or as stipulated by the chapter.
3. In addition, they can decree that, within the same limitations, non clerical members can discharge the function of councillor on any level.
4. On the other hand, non clerical members will not be able to assume the office of superior or of vicar, general, provincial or local.⁶²

⁶⁰"Quaestiones de novis constitutionibus", *Analecta OFM Cap.* 85 (1969), 61.

⁶¹"Acta ordinis," *Analecta OFM Cap.* 86 (1970), 44-45.

⁶²*Clericalia instituta*, in *Canonical Documentation*, pp. 257-258.

Under the date of April 17, 1970, the apostolic delegate to the United States of America issued a declaration relative to the decree *Clericalia instituta*. In this declaration there is given the background prompting the decree, i.e., the request of the minister general of the Order of Friars Minor, referred to earlier in this chapter. The declaration then goes on to detail the various phases of study which took place before the decree was issued. During the course of study it was decided to make the ultimate decision applicable not only to the specific case of the Friars Minor, but also "to all lay religious members of clerical institutes of whatever kind. Under this heading were included all those institutes which, by the will of their founder, or in view of their priestly ministry, are regarded as clerical."⁶³

The declaration adds that the Sacred Congregation for Religious and Secular Institutes:

Was not motivated by any considerations of excessive clericalism, nor any supposed principle that no priest member of a religious institute can be subject to a lay religious in what pertains to the religious life; nor was any important role played by canon 118 of the *Code of Canon Law* (1917), which demands clerical status for the exercise of ecclesiastical jurisdiction.⁶⁴

The basic consideration, according to the declaration, was that superiority on any level involves in varying degrees the direction and supervision of priestly ministry. It adds:

It hardly needs to be pointed out that the individual lay religious may be men of outstanding talents, even surpassing those of individual priests. But for the priestly ministry the lay religious has neither the special preparation nor the particular social grace or charism demanded for priestly administrations.⁶⁵

⁶³*Declaration to Major Superiors by the Apostolic Delegate to the United States*, in *Canonical Documentation*, pp. 259-260.

⁶⁴*Ibid.*, p. 261.

⁶⁵*Ibid.*

The apostolic delegate then makes the surprising statement that the decree of the Sacred Congregation can hardly be called discriminatory unless the discussion starts with the supposition that lay and clerical religious are equal in all aspects of their religious life and apostolate, the priestly ministry included.⁶⁶ It is to this point that most members of the Franciscan family would object. It is their view, supported by history, that it was the mind of their founder, Francis, to establish a *fraternitas* (fraternity) in which there would be no class distinctions as were found in earlier orders, and in which all of the members would be equal in all respects, including the right to all offices and positions in the order. This we have studied in detail in the second chapter of this work.

The concluding paragraph of the declaration of the apostolic delegate sheds further light on the rationale for the decree *Clericalia instituta*, and condescendingly appeals to lay members of clerical institutes to use their talents as widely and generously as they can. Thus, according to the declaration, they collaborate with the priests of their institutes in carrying out the special apostolic work of the church.⁶⁷

It seems from the statements of the Sacred Congregation for Religious and Secular Institutes, and from the observations of the apostolic delegate to the United States, that there is a confusion of ideas regarding the primary purpose of religious life, as enunciated in number 2 of the decree *Perfectae caritatis*:

The up-to-date renewal of the religious life comprises both a constant return to the sources of the whole of Christian life and to the primitive inspiration of the institutes, and their adaptation to the changed condition of our time. This renewal, under the impulse of the Holy Spirit and with the guidance of the Church, must be promoted in accordance with the following principles:

- a) Since the final norm of the religious life is the following of Christ as it is put before us in the Gospel, this must be taken by all institutes as the supreme rule.
- b) It is for the good of the Church that institute's have their own proper characters and functions. Therefore, the spirit and aims of each founder should be faithfully accepted and retained, as indeed should each institutes' sound traditions, for all these constitute the patrimony of an institute. . . .⁶⁸

On the one hand the institutes are told that they must return to the spirit and aims of their founders, and that sound traditions must be preserved. On the other, the various institutes which include both priest and lay members are told that notwithstanding these same ends and the spirit of the founder, and notwithstanding the sound traditions, they must be judged differently because of the presence of ordained members. The focus or the reason

⁶⁶Ibid., pp. 261-262

⁶⁷Ibid., p. 262.

⁶⁸*Perfectae caritatis*, 2.

for accepting a vocation from God to live the religious life according to a particular rule or constitutions seems to be misjudged. Priesthood is not essential to the religious life, or to the call to become a religious. Yet, by this decree the separate classes of religious, which most religious and the council accepted as being without merit, are perpetuated.

With the publication of the decree *Perfectae instituta* it was no longer possible for lay members of clerical religious institutes to be elected or appointed to the office of superior on the general, the provincial, or the local level. In the constitutions of the Capuchins, written in 1968, it had been provided that "any solemnly professed friar who has completed his formation program may be promoted to other offices and positions," with the exception of major superior which was reserved to solemnly professed priests.⁶⁹

In October of 1971, during the plenary council of the order held in Quito, Ecuador, it was decided to prepare for the next general chapter by forming a pre-capitular legislative commission. The task of this commission was to correct and up-date the constitutions so that they could be presented to the general chapter, and eventually to the Holy See for definitive approval.⁷⁰

The Sacred Congregation for Religious and Secular Institutes at the same time decided that it was still premature to speak of obtaining definitive approval, and suggested that it was better to make the necessary changes, and to further the time for experimentation. It was the judgment of the general definitory on September 11, 1972, that the object of the next general chapter was to revise the constitutions and review the life of the order before seeking definitive approbation.⁷¹

The General Chapters of 1974 and 1982

The extraordinary general chapter was held in Rome from August 26 - October 1, 1974. According to the acts of the chapter there was no discussion of number 101 of the constitutions during the proceedings. Several changes were made in the constitutions, but none concerning this number except for a note which deleted the phrase: "Any solemnly professed friar who has completed his formation program may be promoted to other offices and positions." The explanatory note stated: "This text, which is contrary to the common law of the Church, has not yet been fully accepted by the Holy See. Therefore, until there is an official agreement or favorable response, we should observe the decree *Clericalia instituta* which is found in the Ana-

⁶⁹*Acta capituli generalis specialis, OFM Cap.*, II, p. 443.

⁷⁰"Exitus laboris commissionis praecapitularis de revisione textus constitutionum," *Analecta OFM Cap.* 90 (1974), 63-64.

⁷¹Ibid., p. 64

lecta O.F.M. Cap. 86, 46-47 (1970).⁷²

In the same year a petition was made to the Holy See by the minister general for a dispensation from number 4 of the decree *Clericalia instituta* so that a lay friar could be appointed local vicar in a house of one of the American provinces of the order. The reasons stated in the request was that the community felt that it was important at that time in the church and the community that witness to the equality of all members of the order be given in this way, i.e., the opening of superior posts to nonclerical brothers. In a private response of November 12, 1974, the Sacred Congregation for Religious and Secular Institutes granted the request with the proviso that it was excluding from the grant whatever power was connected with the clerical state.⁷³ Since this first grant subsequent indults have been granted for lay friars to exercise the office of guardian or vicar in several instances, always with the proviso cited above.

A general chapter of the order was held in Rome from June 1 - July 11, 1982. Following a letter from the Sacred Congregation for Religious and Secular Institutes of November 15, 1979 which indicated that the time for experimentation in constitutions was coming to a close, it was decided that this general chapter would review and re-write certain areas of the constitutions with a view to obtaining the definitive approbation of the Holy See.⁷⁴

During the general chapter, note was taken of the impending promulgation of the new *Code of Canon Law*. The finished work, after having been put into its final form by an editorial committee, was then submitted to the Holy See for its approval. The Sacred Congregation for Religious and Secular Institutes in a letter of November 12, 1982, gave approval for the constitutions to be promulgated and to be the general law of the order, pending definitive approval after the promulgation of the new *Code of Canon Law*. In a letter to the order on December 25, 1982, the minister general, Flavio Carraro, and the general definitory, promulgated the new *Constitutions of 1982* and decreed that they would take effect on March 25, 1983. In the meantime, a juridical commission was established to make any corrections that would be needed as a result of the new *Code of Canon Law*. The Sacred Congregation for Religious and Secular Institutes established that the constitutions would have to be re-submitted to the Holy See before the end of the *vacatio legis* of the *Code of Canon Law*, i.e. before November 27, 1983, for the definitive approval.⁷⁵

⁷²Ibid., pp. 276-336, 341-360; *Rule and Constitutions of the Order of Friars Minor* (Pittsburgh: The Province of St. Augustine, 1970), p. 72.

⁷³Canonical Documentation, p. 442. Cf. appendix II.

⁷⁴*Constitutiones Fratrum Minorum Capuccinorum* (Roma: Curia Generalis OFM Cap., 1982).

⁷⁵Ibid., pp. 18-19.

These most recent constitutions of the Capuchins reaffirm the Capuchin Franciscan view of Francis' call to the first friars to live the evangelical life in fraternity. In number 4 of the constitutions it is stated:

As Capuchin Friars Minor we ought to know the nature and purpose of our fraternity, in order that our life, appropriately adapted to the times, may be inspired by the sound tradition of our brothers. First of all it is right to follow their example by returning to the original inspiration, that is, to the life and Rule of our Father Francis, through interior conversion, so that our Order may be continually renewed.⁷⁶

In chapter VI of the constitutions which is entitled "Our life in fraternity", it is stated in numbers 83 and 84:

Inspired by God, Saint Francis initiated a way of gospel life which he called a fraternity, following the example of Christ and his disciples. Hence we who profess this way of life are truly an Order of brothers. . .

. . . In as much as they have the same vocation, the brothers are equal, for this reason, in accordance with the Rule, the Testament and the earliest custom of the Capuchins, all of us should be called brothers without distinction. The precedence which is necessary for the service of the fraternity comes from functions and offices actually held. All offices and services within the Order, a province and a local fraternity should be open to all the brothers, except when this is contrary to the regulations of ecclesiastical law. All should help one another according to the gifts each one has received, including the performance of daily household duties.⁷⁷

The principle of fraternity and equality of all members of the order is clearly established in these numbers of the constitutions. The capitulars were responding to the call of the council to return to the mind of the founder and the healthy traditions of the order when they provided the order with these particular laws of the order. They were faithful to carry through with these themes in succeeding numbers of the constitutions. In chapter VIII, which treats of the government of the order and the fraternity, it is stated in number 115:

The offices of the Order are conferred either by election or by appointment. In this matter the brothers should act with a right intention, simply and canonically. For the good of the Order a preliminary and prudent consultation regarding those to be elected or appointed may take place.

⁷⁶*The Constitutions of 1982*, 4:1-2 (All English translations of these constitutions are from *Constitutions of the Order of Capuchin Friars Minor revised by the General Chapter of 1982* [Hays, Kansas: North American Capuchin Conference, 1983]).

⁷⁷*The Constitutions of 1982*, 83:5-6; 84:3-6.

The brothers, as true minors, should not be ambitious for office, but if they are called to it by the confidence of their confreres they should not obstinately refuse to serve as superior or in some other office. Since we are an Order of brothers, in accordance with the will of Saint Francis and the genuine Capuchin tradition, all brothers in perpetual vows are eligible for all offices or positions, following n. 84,5; but not before three years after perpetual profession when it is a question of the office of superior.⁷⁸

It can be seen from the above cited numbers of the Capuchin constitutions that the capitulars strove to extend the concept of fraternity and equality through every facet of the order. Even when speaking of the leadership, of superiors, they declare that all of the friars who are solemnly professed have an equality among themselves to hold the various offices of service within the order.

The chapter of 1982 did add two restrictive clauses to number 115. They decreed that no friar was to hold the office of superior until three years had elapsed from his solemn profession. The wisdom of this regulation is clear and evident. The chapter desired that the period of initial formation be completed, and that sufficient time be given for the friar to become acquainted with the customs and traditions of the order before assuming a position of leadership, or of service, as a superior. The other restrictive clause of this number states that all offices are open to all of the friars according to number 84.5 of the constitutions. We have already cited this number, which states that offices and services within the fraternity are open to all of the friars unless the regulations of common law stand against it. It must be remembered that these constitutions were written before the new *Code of Canon Law* was promulgated. It was not known at the time of the writing in which direction the common law would go in regard to the question of the exercise of jurisdiction, or *potestas regiminis*. Hence, the capitulars provided that the constitutions would be in accord with the common law of the church.

In April of 1983 the Vice-Province of Central Canada in the vice-provincial chapter elected a lay friar, Ignatius Feaver, as the new vice-provincial. Immediately the Holy See was petitioned to approve the election even though this election was contrary to number 4 of the decree *Clericalia instituta*. In a response from the Secretary of the Sacred Congregation of Religious and Secular Institutes of May 4, 1983, the petition was granted. The permission was limited, however, by the fact that the new vice-provincial could not exercise any act of jurisdiction which required sacred orders. A priest of the vice-province was delegated who would exercise these func-

⁷⁸The Constitutions of 1982, 115.

tions. Although limited, the approval by the Holy See of a lay friar to be vice-provincial was seen as a historic stride for the order, since it was the first time that a lay friar was elected to such a high position in the order since the sixteenth century.⁷⁹

With the promulgation of the new *Code of Canon Law* by John Paul II on January 25, 1983, with the apostolic constitution *Sacrae disciplinae leges*, the order was faced with the question of how to bring its constitutions into conformity with the new canons, and especially in the area of government. In the next chapter we will examine various canons as they pertain to government of religious institutes, and hopefully, through a commentary on these canons, suggest some possibilities for the future of the order, so that it can remain true to the ideals of its founder and to the healthy traditions of the church.

Conclusions

The early legislation of the Capuchin reform followed closely the constitutions of the Observant friars. There were however, significant changes in the area of government. Lay friars took an active part in the elections and for a time enjoyed passive, as well as active voice at all levels of the order. In the early history of the order various lay friars held the offices of commissary provincial, definitor general, guardian and master of novices.

The order followed other orders and congregations in gradually restricting the right of the lay friars to enjoy passive voice, although they could still exercise active voice well into this century. With the advent of the *Code of Canon Law* (1917) and *The Constitutions of 1925* their right to active voice was further restricted.

The Second Vatican Council gave the impetus to all orders and congregations to renew their legislation and to evaluate how faithful they were to the mind, the spirit, the ideals of their founders, and the traditions of the institutes. The Capuchins, through general chapters held in 1968, 1974, and 1982 strove through the new constitutions to reflect the ideals of Francis, especially in the area of fraternity and the equality of all the men called to the life of the Friars Minor Capuchin.

Legislation by the church, especially the decree *Clericalia instituta*, limited the order from fully implementing its will, as expressed by the general chapters with regard to the possibility of all solemnly professed friars being able to hold elective or appointed offices in the order.

⁷⁹See appendix I for a copy of the rescript granting permission for a brother to hold the office of vice-provincial.

Several indults were granted to the order allowing lay friars to hold the offices of vicar, guardian, and even vice-provincial. However, these grants were always limited in that none of these lay friars were allowed to exercise the *potestas regiminis*, the power of jurisdiction. The present legislation of the order opens all offices to solemnly professed friars unless the common law of the church forbids it.



Chapter V The New Code of Canon Law: A Practical Application

Paul VI called for a revision of the Code of Canon Law shortly after the conclusion of the Second Vatican Council. John Paul II promulgated the new code on January 25, 1983 with *Sacrae disciplinae leges*. This graphic of the two popes who shaped the new code was created by Michael Gaffney, Capuchin.

The New Code and the Religious Life

With the promulgation of the new *Code of Canon Law* on January 25, 1983, by means of the apostolic constitution *Sacrae disciplinae leges* of John Paul II, the church had its first complete revision of its basic law since the promulgation of the first code of canon law in 1917.¹

The code takes into account the decrees of the Second Vatican Council and the subsequent enabling legislation. It was only natural that the section concerning the religious life should be revamped in accord with these acts of the council and later legislation, and that the laws reflect the teaching of the council.

We have attempted in earlier chapters to study and investigate the position of lay brothers in various orders, but especially in the Franciscan order. To do this we have had to investigate the spirit, the aims, and the ideals of Saint Francis of Assisi as he set about founding the Order of Friars Minor. We have looked at the primitive legislation of the order, as embodied in the rule, and in the first constitutions of the order. We have attempted to give a survey of later legislation in so far as they have affected lay friars of the order, and finally, we have surveyed the Capuchin legislation with regard to the same subject matter.

Now it is our task to look at the new *Code of Canon Law* and to investigate the various canons which regulate the religious, or consecrated life in so far as they affect the subject matter that we have already treated, as well as other canons which have a relationship to it. Only after a thorough analysis, and with some interpretations of these canons, will we be able to draw conclusions regarding the present juridic status of lay friars within the Capuchin Order. In doing so, we believe that the analysis will be of some help to

¹The *Code of Canon Law*, promulgated in 1917 will hereafter be referred to as *CIC*; the *Code of Canon Law*, promulgated January 25, 1983, will be referred to as *NCIC*.

other orders and congregations which are dealing with the same sensitive problem. We will look especially at the questions regarding the capability of lay friars to hold offices of authority and service within the order, as envisioned by numbers 84 and 115 of the constitutions.² It is our belief that there are eight canons of the new code which directly treat of this matter, and which bear investigation. We shall limit, therefore, our study primarily to these canons, although comments and references to other canons are not necessarily excluded. The canons to which we will focus our attention are canons 577; 578; 586, 1 & 2; 587, 1; 588, 1 & 2; 596; 662; and 129, 1 & 2. We believe that these canons are of utmost importance for the purpose of our study and for the positions taken earlier in this work. In the case of canon 129, we believe that the very newness of this canon and the possibilities that it opens to the layperson, including lay friars, to cooperate in the power of governance in the church makes it especially important. We believe that it is necessary to have correct concepts of the meaning of this canon, of its parameters, and its intent. It is evident that this canon lies at the heart of the matter of lay involvement in the concept of shared government and will continue to have great importance for all of the church. The canon is so new, and so drastically changed from the draft proposal presented to the Holy Father, that it is bound to stir debate, as well as offer opportunity for interpretation and application to ordinaries, canonists, and even the Holy See itself for many years.

Canon 577

In the church there are many institutes of consecrated life, with gifts that differ according to the graces given them; they more closely follow Christ praying, or Christ proclaiming the kingdom of God, or Christ doing good to people, or Christ in dialogue with the people of this world, but always Christ doing the will of the Father.³

This canon, obviously, is a generic canon which can apply to all institutes of consecrated life. It delineates in general terms the reason for being of the institutes of the consecrated life. The background for this canon can be found in the decree *Perfectae caritatis*, number 8. The last paragraph of this

²The Constitutions of 1982, 84, 115.

³NCIC, c. 577 (English translations are taken from *Code of Canon Law in English Translation* [London: Collins, 1983], here p. 106).

number of the decree states:

... these institutes should adjust their observances and customs to the needs of their particular apostolate. Since, however, the active religious life takes many forms, this diversity should be taken into account when its up-to-date renewal is being undertaken and in the various institutes the members' life in service of Christ should be sustained by means which are proper and suitable to each institute.⁴

In the schema of 1980 and 1982 this canon had an added phrase which was deleted from the text promulgated by the pope. This phrase *variis Spiritus charismatibus ornata* (endowed with various charisms of the Spirit) can be found in canon 506 of the 1980 schema, and in canon 580 of the 1982 schema. The reasons for the deletion of the phrase from the final text are not known.⁵

What is of interest to us in this canon is that it speaks of the different gifts that each religious institute brings to the church. It is normal that in the common effort to recapture the vision of the source of Christian life, the gospels, that the various institutes find themselves with a common ideal which, in turn, fuses with the aspirations of every sincere Christian, i.e., to take seriously the commitment made at one's baptism. From this there arises the question of why there should be such a multiplicity of institutes, and such differences between them? The great founders of religious orders and congregations each had, in common, the desire for a total response to the gospel program. "Thus it is that each group of religious sets in motion particular means of personal sanctification, of witness, of action, and is received by the community of believers as a sign different from the other."⁶

Our main focus in this study is on the charism that led Francis of Assisi to form a band of men who would lead an evangelical life unlike that found in other orders existent in his day, and that from this foundation a great order would develop with several branches, each striving to lead the evangelical life according to the ideals of Francis.

⁴*Perfectae caritatis*, 8.

⁵Pontificia commissio codici iuris canonici recognoscendo, *Schema codicis iuris canonici*, (Vatican City, 1980), p. 124 [hereafter cited as *Schema* (1980)]; Pontificia commissio codici iuris canonici recognoscendo, *Codex iuris canonici: schema novissimum*. (Vatican City, 1982), pp. 108-109 [hereafter cited as *Schema* (1982)]; For a history of the discussions of the canons, and the observations of the consultants of the commission which was entrusted with the redaction of these canons one is referred to *Communicationes CIC* 10 (1978), 160-179; 11 (1979), 23-66, 296-346.

⁶Lazaro Iriarte, *The Franciscan Calling* (Chicago: Franciscan Herald Press, 1974), p. 5.

Franciscanism was born as a movement. Francis is the initiator of a multiple but well defined impulse whose characteristic is Christian sincerity: joyful and free readiness to respond to the dominion of love in order to follow Christ, and through him, to experience the mystery of brotherhood. . . Franciscanism has never stopped affirming itself as a movement. . . Reform belongs in a certain sense to the essence of Franciscan institutions.⁷

It is just this gift bestowed on the order by the Lord, and espoused and propagated by Francis that is the inspiration of the Franciscan families today; to respond to the call of the Second Vatican Council and to acknowledge in their consecrated lives this gift of a Franciscan vocation. In the Capuchin constitutions this is expressed in various numbers. Among them we may cite numbers 1 - 4 as giving the reason for being of this form of life, that is, the following of Christ in an evangelical form of life based on the counsels, and with a strong emphasis on fraternity as a basis for this gospel calling.⁸ The *Later Rule* of the Friars Minor more perfectly expresses the gift of Francis' vision which has inspired his followers for eight centuries.

This is a pattern or form of life that is meant to be lived in the pursuit of the Gospel mission; that is, in the striving to witness and proclaim the mystery of the Incarnate Word of God. At the very heart of this document Saint Francis articulates the dynamism of the fundamental principle of the spiritual life: "the spirit of the Lord and His holy manner of working". Thus he provides for his followers an important tool for understanding the totality of this vision.⁹

Canon 578

The whole patrimony of an institute must be faithfully preserved by all. This patrimony is comprised of the intentions of the founders, of all that the competent authority has approved concerning the nature, purpose, spirit, and character of the institute, and its sound traditions.¹⁰

This canon has for its basis the conciliar document *Perfectae caritatis*, and the norms implementing this document as contained in *Ecclesiae sanctae II*. In *Perfectae caritatis* we find that this canon has its origins in paragraph 2b of the document, and is almost a verbatim rendering. Likewise, *Ecclesiae sanctae II*

⁷Ibid., pp. 10 - 12.

⁸The *Constitutions of 1982*, 1 - 4.

⁹From the editors' introduction to *The Later Rule* in Armstrong and Brady, *Francis and Clare: The Complete Works* (New York: Paulist Press, 1982), pp. 136 - 137.

¹⁰NCIC, c. 578 (*Code of Canon Law in English Translation*, p. 106).

repeats the words of the conciliar document, and these are incorporated into the canon. In paragraph 16:3 of *Ecclesiae sanctae II* the emphasis is perhaps made stronger with the mandate given to the religious institutes to strive to recapture the original charism or gift of the institute in the life of the church. Hence, we read:

For the good of the Church, institutes must seek after a genuine understanding of their original spirit, so that they will preserve it faithfully, when deciding on adaptations, will purify their religious life from alien elements, and will free it from what is obsolete.¹¹

It is clearly seen from these documents, and from the canon, that it is incumbent on religious institutes to seek after the *mens fundatoris* (the mind of the founder), if authentic renewal is to take place in the various institutes. They must return to the original sources to understand the spirit which imbued the founder and which constitutes their very reason for being.

For the Franciscan family, then, it is important that it return to the spirit of Francis, and attempt to discover through his writings, actions, and the early legislation of the order what particular gift he brought to the church. This spirit must be preserved faithfully if the plans of Francis are to be realized in the order in this age.

We have attempted in chapter two of this work to show the mind of Francis when he and his first followers began their fraternal life together. Francis' original plan, which was never modified, was that he and the friars that followed him in a way of life based on the Gospel counsels, would form a fraternity. This fraternity was made up of learned and unlearned, nobles and working class people, clerics and laymen. All were to be called brothers. This flowed from Francis' ideal of *minoritas* (minority) which was to be imbued in all of the brothers. Each was to consider himself a lesser brother called by God to use the talents given him to build up the fraternity, and to serve the church with the gifts particular to the person.

From the evidence presented, we see that this equality of members always remained important in the mind of Francis, and he strove throughout his life that there should be no class distinctions within the fraternity, unless absolutely necessary, as in the case of absolution from sin by priest-friars, or for the celebration of the Eucharist by the same priest-friars. All of the brothers were to exercise their talents through work and prayer. This was essential to the vocation of the true friar minor, and Francis makes references to these points both in the *Earlier Rule* and the *Later Rule*.¹² In whatever work was

¹¹*Perfectae caritatis*, 2; *Ecclesiae sanctae II*, 16:3 (Flannery, p. 627).

¹²Armstrong, pp. 107 - 135, 136 - 145.

assigned, whether apostolic, manual, or the work of government and service, the equality of all members was assumed. Reference has already been made to those exceptional cases where the exercise of orders was necessary by some of the friars, especially for the sacramental life of the fraternity.

Francis' vision was of a *religio* (order) totally unlike existing monastic orders of his time, and his rule was unlike the existing rules of Basil, Benedict, or Augustine. As we pointed out, a significant thrust of Francis' rule, as approved by Innocent III and Honorius III, was that the brothers were to live in fraternity without distinction. It must be noted that, after the death of Francis in 1226, there was internal strife in the order over various interpretations of the *Rule* and the *Testament*, and even over the mind of the founder. The strife and resulting divisions of the friars soon caused the order to be split into various factions. Many of the divisions were caused by personal ambition, but were more often caused by attempts to re-think the mind of Francis, and to justify certain positions or advance certain arguments. Basically, however, it seems clear from the vantage point of history and scientific research, which we have mentioned in chapter two, that the *mens fundatoris* concerning the nature, the end, the spirit, as well as the character of the order (fraternity), is obvious. What later interpreters, commentators, or even legislators, did to change the direction of the order or to modify its spirit does not change this concept.

The call of the Second Vatican Council seems very clear in calling the religious institutes to re-discover the nature, end, spirit, and character of the institute. For the Franciscan family this imperative is a call to a deeper understanding of the mind of Francis and his spirit, which imbued the first friars, so that they may "preserve faithfully" the original character of the order and its sound traditions.

It has been argued, as we have noted in chapter three, that the very character of the order was changed substantially within thirty-five years of the death of Francis. In this span of time the order became more clerical in nature, and this condition has remained substantially the same for the last seven centuries. Whether it is possible to return to the original character of the order, i.e., to that of a fraternity of men, of different social classes, and vocations, is a question that has serious implications and consequences for the entire family of the First Order. The juridic consequences are, especially, important to consider. Without subverting the mind of the founder we must ask if it is possible to retain the *status quo* as found in the order today, or is it possible to make a radical change that would be more in conformity with the ideals of Francis and his concepts of fraternity and minority that serve as bed-rocks of his vision?

In question is the matter of the clerical nature of the order as we find it today. The clerical nature of the order has been sanctioned by history and by ecclesial legislation. We have seen that in the legislation written by Francis, and sanctioned by the pontiffs of that time, fraternal equality was an outstanding characteristic of the young order. All were accepted who were led by the spirit of God to embrace this way of life, and all were eligible for the offices of the order. *The Constitutions of 1982* indirectly refer to this aspect of the Franciscan vocation when they state: "To live together as lesser brothers is a basic part of the Franciscan vocation. Therefore, fraternal life is always and everywhere a fundamental requirement. . ."¹³ We have alluded to recent changes in the basic legislation of the Capuchin order in chapter four of this study, regarding the concept of fraternity in the order, and of means to implement it. It is apparent that this legislation attempts to return to the initial plan of Francis and the concepts regarding the nature, end, spirit, and character of the order that guided him and the first friars.

Canon 586

1. A true autonomy of life, especially of governance, is recognized for each institute. This autonomy means that each institute has its own discipline in the Church and preserves whole and entire the patrimony described in can. 578.
2. Local Ordinaries have the responsibility of preserving and safeguarding this autonomy.¹⁴

In this canon we observe that the church wishes that each religious institute preserve its legitimate traditions, and that it (the institute) be safeguarded from extraneous influence. The basis for this canon can be found in *Ecclesiae sanctae I*, numbers 23, 25, and 26, and in the *Directives for the Mutual Relations between Bishops and Religious in the Church (Mutuae relationes)*, issued by the Sacred Congregation for Bishops and the Sacred Congregation for Religious and Secular Institutes, on May 14, 1978.¹⁵

This canon does not differ from canon 588 of the 1982 schema, nor from canon 514 of the schema of 1980. In the work of the commission that formulated this canon it is noted that one of the primary aims of the canon is to establish a just relationship between the common law of the code and the constitutions of the various institutes.¹⁶

¹³*The Constitutions of 1982*, 23:4.

¹⁴NCIC, c.586 (*Code of Canon Law in English Translation*, pp. 106 - 107).

¹⁵*Ecclesiae sanctae I*, 23, 25, 26 (Flannery pp. 604 - 605); *Directives for the Mutual Relations between Bishops and Religious in the Church (Washington D.C.: Publications Office United States Catholic Conference, 1978)*, p. 41.

¹⁶*Communicationes CIC II (1979)*, 40, 51 - 52.

This canon is not of great moment in the study under question, except for the fact that it does address the question of a "true autonomy of life, especially with regard to government. . ." This phrase guarantees religious institutes that they are responsible for formulating the directive by which they will be governed, and that this right shall not be infringed upon by anyone outside of the institutes, saving the rights of the Holy See. It also reminds the religious institutes that in the government of the institutes they are bound to follow the directives of canon 578, which we have already studied. This last mentioned canon is the *charter* by which the religious institutes are guided in formulating their basic law, and in the manner of regulating their existence through government.

Canon 587

1. To protect more faithfully the vocation and identity of each institute, the fundamental code or constitutions of the institute are to contain, in addition to those elements which are to be preserved in accordance with can. 578, basic norms about the governance of the institute, the discipline of the members, and the proper object of their sacred bonds.
2. This code is approved by competent ecclesiastical authority, and can be changed only with the consent of the same.
3. In the constitutions, the spiritual and juridical elements are to be aptly harmonized. Norms, however, are not to be multiplied without necessity.
4. Other norms which are established by the competent authority of the institute are to be properly collected in other codes, but these can be conveniently reviewed and adapted according to the needs of time and place.¹⁷

The basis for this canon is found in *Perfectae caritatis*, number 2, and in *Ecclesiae sanctae II*, numbers 12 - 14, of which mention has already been made. Along with other canons in this section of the code the importance of the constitutions is stressed, along with the approval of the same by the competent authority of the church.¹⁸

The thrust of this canon is to ensure that each institute protects its character and identity, which is special to it, through legislation. In our treatment of the *mens fundatoris* we have seen that the call of Francis to the religious life, the immediate response of a number of like-minded men, and the early legislation proposed by Francis, gives to the Friars Minor a particular identity within the framework of the institutes of religious life. It was unlike other institutes which pre-dated it, and has retained a particular charism through the centuries.

¹⁷NCIC, c. 587 (*Code of Canon Law in English Translation*, p. 107).

¹⁸*Communications CIC* (1979), 53 - 57.

We must admit that in the question of the identity of the order the lines are somewhat blurred due to differences which arose after the death of the founder, regarding the nature of the order. Was it to be, by nature, a fraternal and classless order in which all of the friars were called to lead an evangelical life without any distinction between them, or was the mind of the founder so indistinct as to cause the order to become clerical through internal legislation, and through the legislation of the Roman pontiffs?

This canon stresses the fact that fundamental norms concerning the government of the institute are to be contained in the constitutions. In chapter two an attempt was made to show the mind of Francis in regard to the government of the young Order of Friars Minor, and its existential nature. One must be aware that canon 578, already studied, calls for a faithful preservation of the nature, the ends, the spirit, and the character of a particular institute.

It seems that the essential character and nature of the Friars Minor was radically changed by legislation emanating from the chapters of 1239 and 1242, the texts of which are non extant, and from the legislation of the Chapter of Narbonne in 1260, which collated and confirmed previous legislation. It is also apparent that a succession of papal bulls and privileges given to mendicant orders by the popes confirmed this change until the Order of Friars Minor became essentially clerical in nature, as well as in fact. Now we must face the question whether in the light of the call of the Second Vatican Council and the *Code of Canon Law* it is possible to reverse the trend, and return to the original ideals of Francis? Further study of the *Code of Canon Law* will indicate that this would be difficult due to the course of history and canonical legislation. There are, however, several interesting possibilities that could be pursued in order that the order might be able to remain faithful to the vocation and identity of the order as envisioned by Francis.

Canon 662

Religious are to find their supreme rule of life in the following of Christ as proposed in the Gospel and as expressed in the constitutions of their own institute.¹⁹

The basis for this canon is found in *Perfectae caritatis*, number 2, and *Ecclesiae sanctae II*, numbers 12 - 14.²⁰

¹⁹NCIC, c. 662 (*Code of Canon Law in English Translation*, p. 120).

²⁰*Perfectae caritatis*, 2; *Ecclesiae sanctae II*, 12 - 14 (Flannery, pp. 626 - 627).

We have already referred to the paragraph from *Perfectae caritatis*, which speaks of the renewal of religious life as both a return to the sources of the whole Christian life, and to the primitive inspiration of the institutes. In *Ecclesiae sanctae II*, nn. 12 - 14, the norms which should guide institutes in the adaptation of the religious life, and in the writing of new constitutions, are outlined. This canon evidently has a close connection with canons 596 and 598. In the former canon the law speaks of the power of superiors and chapters as defined by the universal law and constitutions, to which we will address ourselves later in this chapter. Canon 598 speaks of the need for every religious institute to define in its constitutions the manner in which the evangelical counsels are to be observed.

The wording of canon 662 is the same as that contained in canon 588 of the schema of 1980, and in canon 662 of the schema of 1982.²¹ It is important to note that in this canon the constitutions are presented as flowing directly from the gospel or evangelical following of Christ, as are the norms which govern the institute. Of course, for institutes which possess or follow one of the approved rules, e.g., those of Basil, Benedict, Augustine, or Francis, the constitutions flow from the rules. They are, however, the particular legislation of the institute. The constitutions are normative for every member of the institute, and should reflect the mind of the founder, the spirit of the institute, its nature, and the gift that it brings to the church. These points have been treated earlier, and it is not thought that further discussion is warranted at this point of the treatment of the subject matter.

Canon 588

1. In itself, the state of consecrated life is neither clerical nor lay.
2. A clerical institute is one which, by reason of the end or purpose intended by the founder, or by reason of lawful tradition, is under the guidance of clerics, presupposes the exercise of sacred orders, and is recognized as such by ecclesiastical authority.
3. A lay institute is one which is recognized as such by ecclesiastical authority because, by its nature, character, and purpose, its proper role, defined by its founder or by lawful tradition, does not include the exercise of sacred orders.²²

This canon has its origins in the conciliar documents *Lumen gentium*, number 43, and *Perfectae caritatis*, number 10. Both speak of the importance of religious life in the church's life. *Perfectae caritatis* speaks of the vocation to the lay religious life as a state of profession of the evangelical counsels which is complete in itself.²³ *Lumen gentium* speaks of the religious life as a form of life to which some Christians, clerical or lay, are called so that they may

²¹ *Schema (1980)*, p. 143; *Schema (1982)*, p. 123; Also see *Communicationes CIC* 13 (1981), 177.

²² *NCIC*, c. 588 (*Code of Canon Law in English Translation*, p. 107).

²³ *Perfectae caritatis*, 10.

enjoy a special gift of grace in the church, and may contribute to the saving mission of the church.²⁴ In the *Code of Canon Law* of 1917 there is canon 488,4 which simply states that clerical orders are those in which priests make up the greater part of the membership, while the remaining institutes of the religious life are called lay institutes.²⁵

One should take note, also, of the discussions on this canon of the new code as it was discussed by a study committee of the Code Commission. There is little or no debate about the first paragraph of the canon. There was, however, some discussion concerning the second and third paragraphs, especially the second where it speaks of the governance of clerical institutes by clerics. The secretary of the commission informed the group that the Sacred Congregation for the Doctrine of the Faith, in response to a doubt raised by the Commission, had stated that lay persons could participate in the power of jurisdiction *singulis pro causis auctoritas Ecclesiae suprema ipsis concedit*. This would signify that lay people could be empowered to exercise jurisdiction in singular cases when the power is given them by the supreme authority of the church. It was agreed in the meeting of the commission that this phrase should not be added to the proposed canon, but should be retained in the proposed canons on associations of the faithful.²⁶

What is important to note, however, in treating these canons, is that it is stated that religious institutes are neither clerical nor lay by their very nature. The distinctions that are made can be said to be convenient in that they follow history and the traditional manner of dividing religious societies or institutes of consecrated life. It can also be said that the distinction is not accidental, since clerical and lay orders are two species of the same genus. The institutes can or cannot have elements of both states within its membership. In addition, this canon does not state that an institute designated as clerical or lay must be composed exclusively of clerical or lay members.

It is also interesting to note that the Sacred Congregation for the Doctrine of the Faith stated that it was possible for lay persons in the church to cooperate in the exercise of the power of jurisdiction. In the new code this phrase is changed to *potestas regiminis* (the power of governance). Nevertheless, the concept is the same. The action of the Sacred Congregation opened up several interesting possibilities for lay people to share in this power of governance. It is true that it was limited to singular cases, and had to be granted by the supreme authority of the church. We might reason from this that such a grant would be extremely rare, and that it would have to flow from the

²⁴ *Lumen gentium*, 43.

²⁵ *CIC*, c. 488,4.

²⁶ *Communicationes CIC* 11 (1979), 57 - 61.

Roman pontiff himself, but the very fact that it was stated that lay persons could share, by way of concession, in this power, gave evidence that such power was not intrinsically and inseparably linked with the power of orders as had been the common teaching.

It is also interesting to note that in the new code provision is made for the appointment of lay persons to hold office in the judicial forum, which entail the exercise of the power of governance in judicial matters. We refer especially to canon 1421,2, which allows for lay persons to be appointed judges on collegiate tribunals. Here it is a question of participation in the power. A layperson never exercises that power as a titular of an office, but only in cooperation with those who possess the power by reason of office. This concept flows throughout the code. Here there is no discussion of delegation of the power, or of the use of the power in individual cases, but of appointment to these posts on a continuing basis, as long as the person is qualified to hold the post.²⁷

Given the nature of paragraph 1 of canon 588, the statement of the Congregation for the Doctrine of the Faith, and the possibility of lay persons exercising jurisdiction in judicial cases, one can presume that it would be possible for a lay member of a clerical institute to participate in the power of governance if he were delegated to do so by the Roman pontiff, without destroying the distinctions made in paragraphs two and three of the same canon.

It can also be noted that the Order of Friars Minor, and all three of its branches, have been classified as clerical institutes for centuries. This has been by the will of the church, and also arises from legislation coming from within the order. It seems to us that it was not in the mind of Francis to found either a clerical or lay institute, but a fraternity in which members of both classes would be welcome without distinction. The governance of the order was in the hands of lay friars for some years, and it was not until sixteen years after the death of Francis that the clerical nature of the order became, for all intents and purposes, an accomplished fact.

Canon 596

1. Superiors and Chapters of institutes have that authority over the members which is defined in the universal law and in the constitutions.
2. In clerical religious institutes of pontifical right, Superiors have in addition the ecclesiastical power of governance, for both the external and the internal form.
3. The provision of cann. 131, 133, and 137-144 apply to the authority mentioned in paragraph one.²⁸

²⁷NCIC, cc. 1417,2; 1421,2; 1435.

²⁸NCIC, c. 596 (*Code of Canon Law in English Translation*, p. 108).

The schema of 1980, canon 523, does not contain paragraph three of this canon of the new code, while the schema of 1982, canon 597, does. The code of 1917 in canon 501,1, contains most of the substance of paragraphs one and two of the present canon, except that it uses the word jurisdiction in place of the phrase, "ecclesiastical power of governing".²⁹

In the minutes of the study commission which discussed this canon in the Code Commission, there is an interesting discussion concerning paragraph one and the use of the words "superiors and chapters enjoy that power". One consultant made the observation that the power over the members is a power possessed by all religious institutes, including lay institutes, and that this power is in some way derived from ecclesiastical power. He further stated that in the case of lay institutes, there could be a certain participation in the power of governance. The relator of the study commission noted that this question had been discussed at length in the preparation of the schema. He further stated that it was not in the power of the study commission to make a decision in this regard.³⁰

What interests us in this canon is the second paragraph. Superiors of clerical religious institutes of pontifical right have the ecclesiastical power of governing for both the external forum and the internal forum. Clearly, this canon gives to the superiors of such institutes the *potestas regiminis*. We have seen in an earlier treatment of canon 588 that the governance of such clerical institutes, as defined in this canon, is limited to clerics. Hence, this canon explicitly gives them the power of governing for both forums. As the law stands, there is no provision for sharing this power with lay members of the institute.

In canon 501,1 of the code of 1917 it is stated that superiors and chapters, acting in accord with their constitutions and the common law, have dominative power over their subjects. The same canon states that in clerical exempt religious orders, the superiors enjoy ecclesiastical jurisdiction for both the internal and external forums. What interests us in this distinction is that the new code of 1983 makes no mention of dominative power. Dominative power was defined by Schaefer as the right to rule subjects toward the proper end of the society, whether the society was a natural society or one which arose out of a freely entered contract. It arose, therefore, either from a natural or a contractual relationship. In the religious life dominative power had in its origin a double source; the nature of ecclesiastical society and the obedience that each religious owed to his/her superior by reasons of the profession of the vow of obedience. In the same canon, quoted above, there seems to be a definitive separation of dominative power and ecclesiastical jurisdiction

²⁹Schema (1980), c. 523, p. 127; Schema (1982) c. 597, p. 111; CIC, c. 501,1.

³⁰Communications CIC 11 (1979), 306.

enjoyed by clerical exempt religious institutes. This is not to say that dominative power could not be used in clerical exempt religious institutes, but that jurisdiction could not be employed by superiors of institutes which were not clerical and exempt.³¹ The word *dominative* was dropped from the new code because of its unacceptance in a democratic culture.

It does seem evident that superiors of religious institutes must possess some power in order to govern their respective institutes. However, a particular appellation is not given in the code of 1983. Paragraph 1 of canon 596 says that superiors possess that authority over their members that is defined by the constitutions and the common law. This then would be the power that non-clerical institutes, both of men and women, of pontifical right and all institutes of diocesan right, would employ in the governance of their communities.

The fact that major superiors of clerical exempt religious institutes were listed as ordinaries in the code of 1917 is one argument why lay brothers were not able to exercise the power of jurisdiction, since this was limited to major superiors of the clerical exempt institutes. Since jurisdiction was so intimately tied to the clerical state, even local superiors were possessors of jurisdiction in the clerical exempt institutes.³²

It seems from the new code that superiors of clerical institutes of pontifical right have the ecclesiastical power of government, while other institutes, pontifical and diocesan, lack this power. Although they have the authority to rule their subjects, that authority is not well defined, and in no way may be called *potestas regiminis*, as is evident from canon 129,1 of the new code.

In any discussion as to the reason that lay brothers and others, do not possess the power of governance, or jurisdiction, we must say that the basic reason lies in the fact that they lack the clerical state and thus cannot hold an office which demands the exercise of the power of governance. Whether in times past there was fear of lay people exercising too much power in this regard, or whether it was thought that lay people were not educated sufficiently to wield the power is not within our province to decide. We do believe that in the clerical orders the lay brother was often of the ill-educated class of the populace, and thus was not considered as a likely subject to use or possess this power. Their main purpose was to help the clerics or priests in the exercise of their (the clerics') apostolic work and activity. The argument against lay brothers exercising the power of governance may be said to rest on the arguments of convenience and decency, at least as seen by legislators of times past. It was convenient that this power be used only by the educated clerical members of the church, who could exercise it in both the internal

³¹CIC cc. 198,1; 488,4; 488,8; 615; Timotheus Schaefer, *De religionis ad normam Codicis Juris Canonici*, 4th ed. (Citta del Vaticano: Typis Polyglottis Vaticanis, 1947), p. 198.

³²Schaefer, pp. 196-197, 204-207.

forum, and the external forum. There was also a fear that a peril would arise if the non-clerical superiors would use this power over clerical members of the institute. Although this is not proven with any empirical evidence, it is a supposition that many expressed in the past. The entire problem of domestic power or dominative power versus the power of governance is not entirely settled, and we believe that it still bears much further investigation.

In paragraph 3 of canon 596 reference is made to several canons which treat of the delegation of the power of governing. In a later portion of this chapter some of the principles stated in those canons will be treated in as far as they relate to the possibility of lay persons sharing in the power of governing.

From the canons treated heretofore, which treat in a particular way the governance of religious institutes, we shall now pass to a canon contained in the section of the general norms of the new code, under the title of the power of governing the church. We believe that it is essential that we study this canon, much of which is totally new and somewhat revolutionary in the history of canonical legislation, in order that we may explore the possibilities offered in this study concerning the status of lay friars, and the use of the power of governance by them, within the Capuchin order.

Canon 129

1. Those who are in sacred orders are, in accordance with the provision of law, capable of the power of governance, which belongs to the Church by divine institution. This power is also called the power of jurisdiction.
2. Lay members of Christ's faithful can cooperate in the exercise of this same power in accordance with the law.³³

In the schema of 1980 and in the schema of 1982 this canon was rendered differently, especially in what is now paragraph 2 of the present law. In canon 126 of the schema of 1980 the canon reads:

The power of governance, which exists in the Church by divine institution and is also called the power of jurisdiction, can be possessed by those who have received a sacred order; in the exercise of this same power, the Christian laity, even if a sacred order has not been conferred, can share to the extent that this has been conceded to them for individual instances by the highest authority of the church.³⁴

³³NCIC, c. 129 (*Code of Canon Law in English Translation*, p. 20).

³⁴Schema (1980), c. 126, p. 27.

In the schema of 1982, canon 129 contains all of the substance of canon 126 of the schema of 1980, with the exception of the phrase, "even if a sacred order has not been conferred."³⁵

The new code now calls the power to rule the church the power of governance, and adds that it may also be called the power of jurisdiction. In the *Praenotanda* of the Code Commission, written in 1977, it is explained that this change in terminology is more in accord with historical usage, and is more in agreement with conciliar documents, especially *Lumen gentium*, which speaks of the teaching power, the sanctifying power, and the governing power of the church. *Jurisdiction* is a word that has been in common usage in civil law, and is usually reserved to the exercise of judicial power in civil law. Hence, the phrase *power of governance* was substituted to express more clearly the role of the church in this regard.³⁶

According to paragraph one of this canon, the power of governance is possessed and exercised by those who have received a sacred order, and who are acting in accord with the prescription of the law of the church. *Habiles sunt* (are capable), from the Latin text, refers to those who have received a sacred order. According to the legislation of the church the sacred orders are those of bishop, priest, and deacon. It would seem that for the ordinary use of the power of governance the reception of one of the sacred orders is an absolute necessity. It would be in virtue of the order received that a person is able to possess and to exercise the power of governance in the church.

What makes the provisions of canon 129 of the code of 1983 most significant and important though, is the extension of the power by cooperation to the Christian faithful, the non-ordained members of the church, as provided for in paragraph two. The Christian faithful can participate in the exercise of this power *ad normam juris* (in accordance with the law). The exercise of this power, in principle, must be employed by a cleric, and the lay member of the church can only cooperate with the person who possesses this power as the titular of an office. It might be asked what the words *cooperari possunt* (can cooperate) signify, and what, if any, restrictions are put on the cooperation envisaged by this grant. From the text itself we see that there is no further delineation and, therefore, we believe that we can rightly conclude that there are no restrictions on the cooperation of the power, and that it can be exercised in the widest sense.

³⁵Schema (1982), c. 129, p. 21.

³⁶Communicationes CIC 9 (1977), 234.

It is important to note that by the use of the words *habiles sunt* in paragraph one, the legislator signifies the possibility of the ordinary use of the power of governance. By the use of the words *cooperari possunt* it would seem that some manner of delegated power is envisioned. According to paragraph two there is some form of cooperation in the power of governance. The Christian laity, men and women, cannot be titulars of the power of governance since this is restricted by paragraph one to those in sacred orders. Thus, the non-ordained Christian faithful would not hold ordinary power. It would also seem doubtful that they could hold this power vicariously, since such power flows from the ordinary power and is joined to a certain office by the law itself, as is explained in canon 131 of the code of 1983.

For the exercise of this power, then, it would seem that a layperson, man or woman, would have to be delegated to use the power of governance. Paragraph two of canon 129 is an exception to the general law of paragraph one, and the terminology (*cooperari possunt*) necessarily leads us to the conclusion that delegation would be the only possible way for lay men and women to cooperate in the exercise of the power of governance.

It seems that, according to this particular canon, there exists a wide range of possible applications, and not limited solely to that of judge of a collegiate tribunal, as provided for by the legislator in canon 1421,2. Reference may also be made to the provisions of canon 766 which admits that lay persons may be admitted to preach, if necessary and useful, according to the prescriptions of episcopal conferences, and always excluding the homily, as is stated in canon 767,1. This last example is analogous to that of the cooperation allowed by canon 129,2.

It must be noted that in clerical religious institutes of pontifical right the position of superior is an office which by its very nature joins the power of governance and the domestic power to rule the institute. This extends from the general to the local level. Historically, lay brothers of clerical exempt religious orders or congregations have been excluded from exercising power of governance (jurisdiction), and also the domestic power arising from the constitutions of the various institutes.

It is true that in recent years several indults have been given for lay friars to act as local superiors, local vicars, and in one case as vice-provincial. The competent ecclesiastical authority, the Holy See, has granted these indults (dispensations from the law) always with the proviso that for any act requiring the use of the power of governance recourse must be had to a priest of the institute. The lay friar, thus, becomes an instrument in the flow of governance within the community. He can cooperate with the priest in the exercise of governance. It may be said that he becomes an instrument because of the constitutions of his particular institute, and because he is given the power to cooperate with one who is *habilis* (capable) according to the meaning of paragraphs one and two of canon 129.

One who does not possess sacred orders is incapable, according to the law, of exercising the power of governance *ad normam juris*. It can be said that the church is seeking to find its way through this thorny issue. It has extended the concept of who may cooperate in the power of governance, and has defined it in the case of a lay judge on an ecclesiastical tribunal. All other forms of cooperation must be granted by the legislator. The forms of cooperation, through rescripts and indults, may widen the forms of cooperation hitherto known. Always, however, this will be cooperation, one person acting as an instrument of another. This is envisioned in canons 759 and 766 where the possibilities to preach are extended to laypersons when called to do so through the commission granted by proper authority.

From what has been said in the preceding paragraphs we believe that we may come to some preliminary conclusions regarding the use of the power of governance by those who are not in sacred orders. The law is vague on the meaning of the extent of the cooperation that is envisioned. There is no line drawn on how far this cooperation extends, to what cases, instances, or even offices in the strictest sense. Theoretically, all forms of cooperation are possible which are permitted in the *potestas regiminis*. It must, therefore, be left to the legislator to give an authentic interpretation, according to canon 16,1 of the code of 1983. Some might ask whether such an interpretation is needed or desired, or should we rely on practical applications as developed in the *praxis* of the orders and congregations?

It is possible for an interpretation of this canon, coming from the supreme authority of the church, acting in his capacity as legislator, to determine which forms of cooperation could be admitted to the Christian laity, or be denied to them. It is certain that the Christian laity who have not received any of the sacred orders cannot exercise ordinary power of governance, as is evident from the words *cooperari possunt*. Canon 131 states that ordinary power of governance is that which is joined to a certain office by the law itself; delegated power is that which is granted to a person, but not by means of an office. It has been shown that there are instances in the code of 1983 where Christian laity may hold an ecclesiastical office, such as judge of a collegiate tribunal (can. 1421,2.). These are exceptions to the statement that the laity may not exercise ordinary power of governance.

It is also interesting to point out that the Code Commission, while drafting these canons, did not distinguish the power of governance of the external forum and the power of the internal forum, of conscience, as was the case in canon 196 of the code of 1917. In the *Praenotanda*, which we have already

cited, it is stated:

...the power of the external forum and the power of the internal forum, according to present doctrine, and the unanimous opinion of all of the consultors, is the same power of governing, although the effects of its exercise can be different. Of itself, or commonly, the exercise of this power produces effects for the internal forum (in reference to the person involved) and for the external forum (as far as all others are concerned). It can happen however that it produces effects for the internal forum alone, i.e., only in reference to the persons involved, namely, it can happen that the effects of the exercise are limited to those persons involved and that those effects are not extended to other persons or are not known by other persons. In this case, this power is limited only for the internal forum. For the rest, this power which is exercised for the external forum alone cannot be called one of the forum of conscience. Therefore, the power of governing by which jurisdiction for confessions is conceded, now is called, and more rightly named, the faculty to hear confessions.³⁷

Application

During the course of this study an attempt has been made to demonstrate the juridic state of lay brothers and *conversi* before the time of Francis. Then, we have tried to show what was the mind of the founder of the Friars Minor in regard to the nature of his foundation, and how it was totally unlike all other pre-existing orders or foundations in that it was built solidly on the following of the Gospel in fraternity. This was a unique concept of that period, which was a very structured society, both civilly and religiously. Francis attempted to draw men from all ranks of society. The community of the Friars Minor was not simply a pious society of Christians, not a mere chance association of religious minded men; rather, it was regarded, from its very foundation, as a true religious order, and received first the oral approval of the reigning pontiff, and then the written approval of the rule by his successor.

The members of this order came from all classes of Christendom, and no real importance was attached to conditions of origins, birth, or wealth. One should not, as Esser points out, regard the order as a reaction of a political or social nature, whereby the lower social strata sought to gain for themselves status in the church or in society. From the start, the new order was neither consciously a lay movement, nor a predominantly clerical community. Rather, clerics and lay (Christian faithful) were so united in one Christian fraternity that all of the members, cleric and lay, were brothers in a fraternity based on gospel values.³⁸

³⁷Ibid., pp. 234-235.

³⁸Esser, *Origins of the Franciscan Order*, pp. 41-2.

The call of the Second Vatican Council for all religious institutes to return to the mind of the founder (*mens fundatoris*) concerning the nature, the spirit, the end of the institute, and its particular gift to the church found a response in all the Orders of the Friars Minor, and especially in the Friars Minor Capuchin, as we have seen in chapter four of this work. They have sought in the years following the council to identify more precisely the nature of the order, and to return to the mind of the founder through research of his writings, of the early Franciscans, and of the early legislation of the order. It has become clearer with the passage of time that the mind of Francis, his spirit, his ideals, and his aims for the order became somewhat clouded after his death, and that the original ideal of *fraternitas*, which admitted of no class distinctions, unless absolutely necessary (as in the case of absolution by a priest from sin or censure, as contained in chapter VII of the *Later Rule*), was lost. The order became *de facto* a clerical order, after the manner of so many other orders.

This situation perdured through the centuries, and the Capuchin reform was classified as a clerical order, along with other branches of the Friars Minor. As such, and through legislation, lay friars were effectively barred from holding offices within the order. The order saw in the general chapter of 1968 that to return to Francis' ideal of *fraternitas*, a greater effort had to be made to incorporate the lay friars more completely into the life of the order, especially in the area of governance. Until such was accomplished there would always remain classes in the order, based on the reception, or the non-reception of sacred orders; for only those in sacred orders were enabled to exercise the offices by which the order was governed.

It does not seem possible, as some have suggested, that the order declare itself a non-clerical institute. Such a move, if accepted, might accomplish a unity within the order. It could also leave wounds which would need a lengthy time to heal. There is no guarantee that with such a move equality would automatically be guaranteed. It seems that when some propose this solution they lose sight of the provision of canon 588 of the code of 1983, which states that the designation of an institute as clerical or non-clerical does not come from the simple will or wish of the institute and its membership, but from the recognition of the institute by the Apostolic See.

An attempt has been made in this study to indicate those canons which directly apply to the governance of an institute, and which define the competency of the institute to regulate the form of government by which it shall be ruled. We have also singled out those canons which specifically apply to clerical institutes, as defined by the code, and which impose on the institute governance by clerics.

Lastly, we have looked at one canon, canon 129 of the code of 1983, and see that it is possible for the Christian laity to share or cooperate in the power of governance of the church. It has not yet been defined what limitations, if any, would be imposed in the exercise of such power. Neither has it been determined who, apart from the Roman pontiff, can delegate the use or the exercise of such power to the Christian laity. As the canon stands all forms of cooperation in the power of governance are possible which are permitted or contained in the concept of *potestas regiminis*. In this interpretation we are guided by the text of canon 17 of the code of 1983 which states:

Ecclesiastical laws are to be understood according to the proper meaning of the words considered in their text and context. If the meaning remains doubtful or obscure, there must be recourse to parallel places, if there be any, to the purpose and circumstances of the law, and to the mind of the legislator.³⁹

According to this passage we must seek an interpretation of the law from the words of the law itself, from parallel passages, from the purposes and the circumstances of the law, or from the mind of the legislator. We believe, however, that the very newness of the second paragraph of canon 129 fits none of these categories, and so an authentic interpretation must be sought from the legislator, as provided for in canon 16 of the code of 1983.

1. Laws are authentically interpreted by the legislator or by that person to whom the legislator entrusts the power of authentic interpretation.⁴⁰

In previous redactions of the schema, provision was made for the sharing of the power of governance by the Christian laity, but always "to the extent that this has been conceded to them for individual instances by the highest authority of the church."⁴¹ These words are missing from the code of 1983. Nowhere are there words limiting the cooperation in the exercise of the power of governance for individual instances, or of the concession being granted by the highest authority in the church. The second paragraph is a straightforward statement that the Christian laity may cooperate in the exercise of the *potestas regiminis*. Nothing else is delineated or defined. As the canon stands there are no restrictions on the cooperation in the exercise of the power *ad normam juris* once it has been granted by one capable of commissioning, unless he places restrictions.

³⁹NCIC, c. 17 (*Code of Canon Law in English Translation*, p. 4).

⁴⁰NCIC, c. 16 (*Code of Canon Law in English Translation*, p. 4).

⁴¹*Schema (1980)*, c. 126, p. 21; *Schema (1982)*, c. 129, p. 21.

A practical application of this canon could be suggested to all of the branches of the Order of Friars Minor, who desire to make provision in their constitutions for a full and complete participation of all the friars in the internal life of the order, especially in its governance. Given the possibility for the Christian laity to cooperate in the exercise of the power of governing, as provided for in canon 129,2, it seems possible for the Friars Minor, Friars Minor Conventual, and the Friars Minor Capuchin to petition the Holy See to use this canon in favor of the lay friars of the order so that they might cooperate in exercise of the power of governance. Provision has already been made by the Capuchin order for such an eventuality in numbers 84.5 and 115.5 of their *Constitutions of 1982*.

Such a petition to the highest authority of the church, which has the right to approve constitutions, and to interpret the universal law of the church, would necessarily be limited to the order that petitioned, and would be in accord with particular legislation. It also might carry with it the possibility that an authentic interpretation of the law would be given in order to more clearly define the parameters of canon 129,2 of the code of 1983. We would then be in a position to determine from such a declaration the mind of the legislator and the many forms of cooperation in the power of governance that would or would not be permitted to the lay friars of the order.

It would be well to keep in mind that if such a petition was addressed to the Holy See, both for further participation of lay friars to cooperate in the power of governance and for a further elucidation of this canon, that certain other canons would prevail, whatever the outcome. We refer, especially, to the canons mentioned in canon 596 (cc. 131, 133, 137-144), which we have already studied. They treat of the delegation of the power of governance and the executive power of governance. It is also our duty to point out that in our discussion of the possibility for the delegation of the power of governance, we envision that it would be a grant of the executive power of governance, as is indicated in canon 135,4. The delegation of the power of governance for a religious institute would not be legislative, as this is the prerogative of the chapter of the institute. The delegation would entail judicial governance if a lay friar were called upon to serve as a member of an ecclesiastical tribunal within the order by a particular grant of authority, or by qualification.

Such an extension of canon 129,2 to cover the lay friars of the Order of Friars Minor would necessarily be directed only to that branch of the order which requested the grant and the interpretation of the law from the supreme authority of the church, as is envisioned in canon 16. It would in no way affect other institutes of religious, or substantially change the general law by which religious institutes are governed. There would be a particular application of this canon to respond to a particular situation, or request. The basic law would remain unchanged. At the same time, such a grant would allow a particular order, or a branch thereof, to return more faithfully to the

mind and the ideals of the founder of the order, and the order would thus be able to preserve its patrimony, which is unique in the annals of religious life.

Conclusions

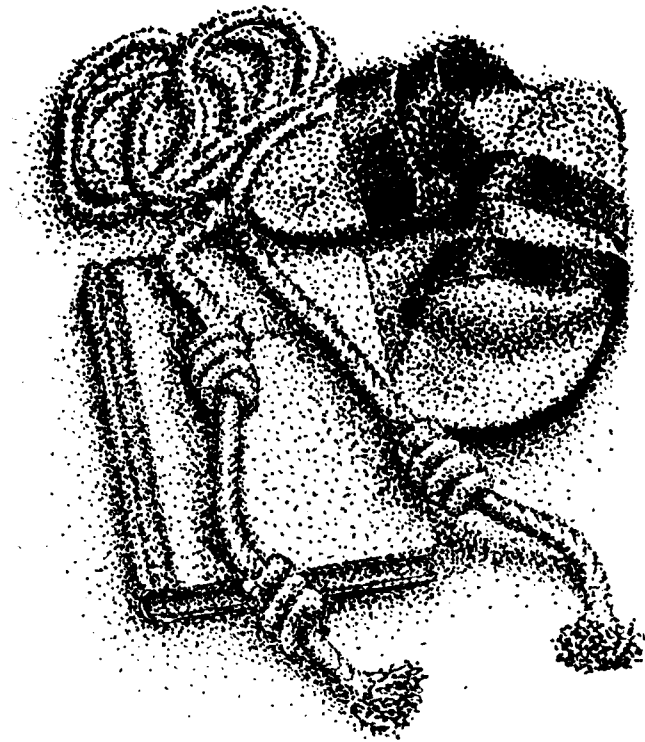
The new code of 1983 reflects very clearly the teaching of the Second Vatican Council regarding the nature and the ends of the religious life, and its place and value within the church. Many of the canons are literal readings of the documents of the council.

Most of the canons call the religious institutes to renew themselves through a series of practices which entail that the institute seek out the original mind of the founder, the spirits, goals, and traditions of the institute. Such a renewal effort should be reflected in the constitutions or the basic law of each institute.

A series of canons define the institutes' form of governance on whether the particular institute is one that is clerical or one that is lay, as determined by the intention of the founder, the traditions of the institute, or by ecclesiastical authority.

Clerical institutes, among which are all the branches of the Order of Friars Minor, are considered clerical, as we indicated in previous chapters. As such they must be governed by clerics by law. There is, however, provision in the code of 1983 for certain members of the Christian laity to exercise this power of governance for specified posts. There is also canon 129,2 which leaves open the question of the Christian laity participating or cooperating more in the power of governance, if so delegated.

Since the meaning of the words of canon 129,2 is so unclear, and the canon is so new, we believe that before the Christian laity can participate or cooperate in the power of governance an authentic interpretation of this canon should be sought from the highest authority of the church, the supreme pontiff, in order to determine the limits of their cooperation. Depending on the interpretation we believe that it would then be possible to determine the limits by which the lay friars of the Order of Friars Minor could participate in the power of governance within the order. Provision has already been made by the Friars Minor Capuchin in the constitutions to accommodate such an interpretation or delegation of the *potestas regiminis* to all of the solemnly professed members of the order.



Conclusion

The above depiction of the cord, sandals and rule--symbols of the Franciscan family--was created by Michael Gaffney, Capuchin.

During the course of this study an attempt has been made to show the status of the lay brother, especially in the history of the Friars Minor, with special reference to the Capuchin Franciscan Order. The history of the institute of the lay brother has been treated from both a historical and a juridical point of view, with an attempt being made to indicate a manner in which the lay brother may be more fully incorporated in the internal life and governance of the order.

From this study certain conclusions have been made at the end of each chapter, as the thesis developed, and it would be redundant to repeat all of these at this point. Sufficient to point out would be certain general conclusions which we believe are essential to an understanding of the problem that exists regarding the present state of lay brothers within the Capuchin Order, and the possibilities for an eventual modification of ecclesiastical law which would permit them to hold office(s) which entails the *potestas regiminis* (the power of governance) within the order.

1. St. Francis did not intend to found a clerically oriented order. Quite the contrary is shown from the earliest writings of Francis, and his actions. All of the men who joined the fraternity established by Francis were embraced by him as brothers, without regard for class, clerical status, or the lack of it. All friars were, in the beginning of the order, eligible for all offices within the order.

2. Various forces contributed to a growing clericalization of the order. There are some who posit the theory that Francis was aware of this tendency in the years before his death, but this cannot be adequately proved. One source that led to the clericalization was internal to the order; the other external. The internal force was the continuing rivalry between the educated clerics of the order who were disturbed by the abuses they perceived as occurring under the leadership of the immediate successors of Francis, especially Brother Elias of Cortona. There was also the feeling that the order should join the mainstream of the Church, along with other religious orders, all governed by clerics.

3. An external force which contributed to the clericalization of the order, and to the decline of the concept of total equality for all the members of the order, was the insistence of the Holy See that the order take the lead, along with the Order of Preachers, in the preaching apostolate and in other apostolates which demanded priestly service, including the foreign missions.

4. Legislation was enacted during the generalate of Haymo of Faversham (1240-1244) which firmly established the order as clerical, and which effectively disenfranchised lay brothers from the right to hold elected or appointive offices within the order. This legislation was later codified in *The Constitutions of Narbonne*, under the leadership of St. Bonaventure, and was to remain the guide for centuries to come.

5. The Capuchin reform, while somewhat more democratic than the other Franciscan families, and attempting to return to the original spirit that guided Francis, was not exempt from the clerical mentality. It did allow lay brothers more active participation in the chapters of the order, and there were instances in which the lay brothers acted as commissary provincial, local guardian, local vicar, and discreet. Up until the beginning of this century the lay brother in the Capuchin order was allowed passive voice for election to the provincial chapter. New laws, however, disallowed this right.

6. The *Code of Canon Law* of 1917 declared that all clerical exempt religious orders had to be governed by law, by religious of the order who were solemnly professed priests. The reason for such a prescription was the thought that the use of the power of jurisdiction was inexorably tied to that of the Sacrament of Orders, and could not be exercised by any other than a cleric of the order.

7. The Second Vatican Council issued a call to all religious institutes to renew themselves by returning to the original sources and ideals of their lives. Paramount was the call to seek the *mens fundatoris* (the mind of the founder) as a precious patrimony that each institute was to cherish and preserve.

8. The new *Code of Canon Law* (1983) states in canon 588 that the religious life is, by its very *nature*, neither clerical nor lay, but then makes the provision that clerical institutes, i.e., institutes which by reason or end or purpose intended by the founder, or by lawful tradition, are under the governance of clerics, presupposes the exercise of sacred orders, and is recognized as such by ecclesiastical authority. We do not believe that this canon adequately covers those institutes, such as the entire Order of Friars Minor, which is called to return to the mind of Francis, or to preserve the ideals and sound traditions that he has bequeathed to his family.

9. The new *Code of Canon Law* does provide for laymen to exercise the power of government, especially in the judicial arena, as judges of a collegiate tribunal. This demonstrates to the author that the power of orders and the power of government are not inexorably linked. It demonstrates that lay people

within the church are capable of exercising this power when delegated to do so by the competent authority.

10. We believe that in canon 129,2 there exists the possibility that lay people could be granted further participation in the power of governance of the church, and of religious institutes. The canon is not clear in itself, and we believe that it needs an authentic interpretation by the highest authority in the church to make the meaning of the words clear, and to possibly extend the power of governance to qualified lay people in other areas of church governance. We believe that this could also apply to the possibility of lay brothers being capable of holding elected or appointed office within the Capuchin Order, as provided for in the Capuchin *Constitutions of 1982*, nn. 84.5 and 115.5.

Appendix I



SACRA CONGREGATIO
PRO RELIGIOSIS
ET INSTITUTIS SAECULARIBUS

Beatissime Pater,

N. 6088/74

Minister Generalis Ordinis Fratrum Minorum Capuccinorum a Sanctitate Tua implorat admissionem fratris laici Caroli MUELLER ad munus Vicarii localis conventus S. Bonaventurae Detroitensis, non obstante vetito decreti "Clericalia Instituta", sub numero 4° a Sacra Congregatione pro Religiosis et Institutis saecularibus, die 27 novembris 1969 promulgati.

Et Deus, etc.....

Sacra Congregatio pro Religiosis et Institutis saecularibus, attentis rationibus omnino singularibus in casu occurrentibus et habito voto Ministri Generalis dicti Ordinis, annuit pro gratia iuxta preces, ita ut frater Carolus MUELLER munere Vicarii localis conventus S. Bonaventurae Detroitensis fungi valeat, exclusa qualibet potestate cum statu clericali connexa, servatis ceteris servandis.

Contrariis quibuslibet non obstantibus.

Datum Romae, die 12 novembris 1974.

Basilius Heiser, Ofm. Conv.
Subsecretarius

L. Abbinkla P.O.

Appendix II



SACRA CONGREGATIO
PRO RELIGIOSIS
ET INSTITUTIS SAECULARIBUS

N. 9196/83

Beatissime Pater,

Capitulares Viceprovinciae Canadensis Centralis Ordinis Fratrum Minorum Capuccinorum, a Sanctitate Tua postulant admissionem postulationis fratris non clerici "Ignatius Feaver" ad munus Viceprovincialis, non obstante vetito decreti "Clericalia Instituta" diei 27 novembris 1969 sub n. 4n ob causas allatas.

Et Deus, etc.....

Sacra Congregatio pro Religiosis et Institutis saecularibus, consideratis rationibus per Ministrum generalem O.F.M.Cap. submissis, annuit pro gratia, iuxta preces, ea tamen lege ut ad perficiendos actus iurisdictionis qui ordinem sacrum requirunt, sacerdos nominatim designetur; servatis ceteris servandis.

Contrariis quibuslibet non obstantibus.

Datum Romae, die 4 mensis maii 1983.

+ *A. Kayer*
Sec.

Basil Heiser, ofm.
Subsecr.

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