Memorandum of Canon Law

On whether *custom* has derogated from Canon 277 such that married clerics in the Roman Church are no longer bound to observe perfect and perpetual continence

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Note: This memorandum does not make the formal case that all clerics in the Roman Church are bound by Canon 277 to observe perfect and perpetual continence. That argument is made in detail elsewhere (e.g., in the resources gathered here: http://www.canonlaw.info/a_deacons.htm). Rather, this memorandum discusses whether widespread inadvertence to the obligation of continence by married clergy might derogate from that obligation—put another way, whether "custom" is (or might be by late January 2013) applicable against the obligation of continence set out in Canon 277.

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Introduction

1. Clerics in the Roman (or Latin, or Western) Church are bound to perfect and perpetual continence. 1983 CIC 277 § 1; Peters, "Considerations", *passim*. Notwithstanding occasionally differing degrees of advertence to and enforcement of this obligation over the centuries, the clerical obligation of perfect and perpetual continence is of ancient and unbroken lineage in the West. Pius XI, enc. *Ad catholici sacerdotii* [nn. 43-44]; McGovern, PRIESTLY CELIBACY at 32-69 and 224-233; Cochini, APOSTOLIC ORIGINS, *passim*; Stickler, CELIBACY, *passim*; Heid, 90, 122, 148, 244, 317; and generally the historical sources cited in Peters, "Considerations", fn. 2 at 148.

2. Upon ordination to the diaconate, men, regardless of their matrimonial status, become "clerics" in the Church. 1983 CIC 266 § 1. Several express exemptions from various clerical obligations are made

in favor of married men in holy Orders, but the clerical obligation of *continence* (as distinguished from *celibacy*) is not among them. 1983 CIC 288, *pace* cc. 1031 § 2, 1042, 1°, 1050, 3°, and Coccopalmerio, "Letter of 17 dec 2011", replied to by Peters, "Memorandum of 16 feb 2012". An express exemption from (what would eventually become) Canon 277 was proposed for married *deacons*, but the exemption was eliminated by Pope John Paul II just before promulgation of the revised Code. Peters, "Considerations" at 169-171. All clergy in the West, therefore, even those married, have long been, and remain, bound by the obligation of perfect and perpetual continence. Peters, "Considerations", *passim*, and the numerous sources cited in Peters, "Considerations", fn. 2 at 148.

3. Virtually no married man ordained under the Johanno-Pauline Code, as he approached holy Orders, was aware of a clerical obligation to perfect and perpetual continence, nor was he formed to embrace it, nor, along with his wife (*pace* cc. 1031 § 2 and 1050, 3°), was he asked to consent to it. These factors raise serious questions about whether such men, ordained in personal and uxorial ignorance of this clerical obligation, are bound by it. Peters, "Considerations", at 177-179. The situation of these clerics and their wives, however, is not the immediate subject of this Memorandum (but see no. 33, below).

4. Rather, this Memorandum explores two related but distinct questions: first, at some length, whether, by "custom"—specifically, a custom *contra legem et quidem antiquam*—the positive clerical obligation of continence has been derogated for married clerics in the West; and second, more briefly, what the effects of this custom *contra legem*, if it has occurred, might have on the future of the obligation of clerical continence binding all men in Western holy Orders. Before turning to that analysis, two preliminary points regarding custom as a canonical institute must be made.

(a) The complexity of the canon law on custom

5. The canon law on custom is very complex. Otaduy, in EXEGETICAL COMM. I: 383, 386, and 389 (citing the illustrious Van Hove's observation that canonical custom is a subject "*intricatissima*"). A popular understanding of the word "custom" cannot casually be applied to *canonical* custom, for the latter institute operates according to requirements "very specific to canon law". Mendonça, in GB & I COMM. n. 69 at 21. Therefore, even if "custom" against Canon 277 is too-lightly alleged by those unaware of its *canonical* characteristics, ecclesiastical authority must proceed with due deliberation in assessing a claim of "custom" as specifically *canonical*, particularly where such a claim is raised, as here, *contra legem et quidem antiquam.*

(b) The burden of proof when alleging custom

6. Law needs no proof. Otaduy, in EXEGETICAL COMM. I: 390. But, even though, as will be discussed below, custom is a way of establishing a norm *of law*, assertions as to the *existence* of a given custom are regarded as assertions *of fact*. Otaduy, in EXEGETICAL COMM. I: 390-391; Mendonça, in GB & I COMM. nn. 69-70 at 21-22. As a question *of fact*, then, the burden of proof regarding the existence of an alleged custom falls on those making the assertion. Cicognani, CANON LAW at 647; 1983 CIC 1526 § 1. The Johanno-Pauline Code largely follows the Pio-Benedictine Code in taking a restrictive view of custom. Cicognani, CANON LAW at 647; Örsy, in CLSA COMM. at 38-39; Otaduy, in EXEGETICAL COMM. I: 387. Customs that impact the Sacrament of Orders warrant greater scrutiny. Otaduy, in EXEGETICAL COMM. I: 405. Universal customs *contra legem universalem* are more unusual yet, indeed, they are rare. Cicognani, CANON LAW at 654; Huels, in CLSA NEW COMM. at 93. It is especially important, therefore, that those asserting custom against universal law appreciate the cumulative and

heavy burden of proof they are assuming in alleging, not simply a "custom", but a custom *contra legem et quidem antiquam*.

PART ONE: The elements of custom under canon law

7. Notwithstanding the central role of its legislator, canon law recognizes the possibility that, under certain strictly defined conditions, behavior within a community can become normative within that community without the overt intervention of ecclesiastical authority. Cicognani, CANON LAW at 645-646; Mendonça, in GB & I COMM. n. 69 at 21; Huels, in CLSA NEW COMM. at 87-88. The Johanno-Pauline Code sets out five factors that, when taken together (and notwithstanding some degree of overlap among them), can result in custom with juridic force, namely, when (1) a community capable of receiving a law, (2) reasonably acts, (3) in a way not contrary to divine law, (4) with the intention of establishing a law, (5) for thirty continuous years. 1983 CIC 23-28; see a slight variation on these five requirements offered by Huels, in CLSA NEW COMM. at 88, 94. We will examine each of these five factors to see whether custom has derogated from Canon 277 in regard to the obligation of perfect and perpetual continence for married clerics in the West. Recall that the burden of establishing *each* of these five elements of custom must be shouldered by those asserting its existence. Otaduy, in EXEGETICAL COMM. I: 391.

(1) A community capable of receiving a law

8. Some commentators questioned whether any group of persons organized below the level of the particular church can constitute a "community capable of receiving a law". Dom Augustine, COMMENTARY I: 109; Abbo-Hannan, SACRED CANONS I: 54. Nevertheless, given the ramifications that conduct within certain sub-groupings of the faithful can have for the wider ecclesiastical community, I think the better case is made by those who believe that, among such sub-groupings, diocesan clergy *can* constitute a community capable of receiving a law. Cicognani, CANON LAW at 648; Cook, ECCLESIASTICAL COMMUNITIES at 98; Jone, COMMENTARIUM I: 47; Otaduy, in EXEGETICAL COMM. I: 410. The question in this case, however, is narrower still: namely, whether "*married* clergy", that is, those clerics for whom the use of marriage is alledgedly countenanced, constitute a community capable of receiving a law.

9. Arguments for recognizing "married clerics" as a community capable of receiving a law include the fact that other admittedly small groups of clergy are recognized by some commentators as capable of constituting a community capable of receiving a law. Cook, ECCLESIASTICAL COMMUNITIES at 98 (mentioning pastors, parochial vicars, and/or vicars forane). Against Cook, however, I would observe that "pastor", "parochial vicar" and "vicar forane" are *offices* in the Church, offices which any priest could hold; but *married* deacon, on the other hand, or *married* priest, marks only the *status* of certain clerics as individuals, and personal status is a questionable basis upon which to establish custom. Otaduy, in EXEGETICAL COMM. I: 409-410. Huels regards "the permanent deacons of a diocese" as a community capable of receiving a law, but he does not address specifically the question of *married* deacons. Huels, in CLSA NEW COMM. at 90. There are several objections to be made against simply equating *married* and *permanent* deacons, and there are yet wider problems associated with continually bifurcating *the* diaconate according to the matrimonial status of certain members thereof. Peters, "Categories", *passim*, and immediately below.

10. Arguments against recognizing "married clerics" as a community capable of receiving a law include the fact that neither the West nor the East recognize two types *of diaconate* nor two types *of*

presbyterate, but rather, both recognize a single diaconate and a single presbyterate, with two types *of men* in each, namely, celibate and married, the latter ordained only in virtue of a canonical exception having been in their favor (whether by way of concessions in positive law for deacons or by way of dispensation for priests). Peters, "Categories", at 111-112. Multiplying exceptions to ecclesiastical discipline for *married* men in holy Orders, as would be the effect of exempting married clerics from the obligation of perfect and perpetual continence, then, multiplies the wounds on the law that exceptions inflict by their very nature, and suggests that the Church is moving toward recognizing a fundamental bifurcation in the sacrament of Orders (specifically, a split based on *matrimonial* status) that could be doctrinally dubious.

11. Finally, while both deacons and presbyters are "clerics" under law, canon law and sacramental theology recognize major differences between these two levels of holy Orders. CCC 1587-1588 and 1595-1596; 1983 CIC 1009, 1029; Benedict XVI, m.p. *Omnium in mentem*. Thus, it is possible that, while custom might fail to relieve *either* married deacons or married priests of their obligation to continence, or might work to relieve *both* married deacons and married priests thereto, custom might also relieve married *deacons* of the obligation of continence, but not married *priests*. Peters, "Considerations", 179. Therefore, any allegation of custom against the positive obligation of *clerical* continence as set out in Canon 277 would need to be assessed separately for its applicability to married *deacons* and to married *priests*.

12. In sum, it is not clear whether "married clergy", whether they be deacons or priests, constitute a community capable of receiving a law under Western canonistics and, if so, whether they would constitute one community or two.

(2) Reasonable acts

13. In order for an action contrary to law to induce a custom recognizable by the legislator, the action must be "reasonable". 1983 CIC 24 § 2.

14. There is no express reprobation of sexual intercourse between (lay) married persons in the Johanno-Pauline Code, and acts not expressly reprobated in canon law cannot be considered unreasonable as a matter *of law*. 1983 CIC 24 § 2; Örsy, in CLSA COMM. at 39; Huels, in CLSA NEW COMM. at 89. Indeed, sexual intercourse between married couples is an important aspect of the marital union to which both parties to the marriage enjoy an equal right. CCC 2360-2363; 1983 CIC 1055 § 1 and 1135. Thus, the exercise of conjugal rights between married persons can hardly be regarded as *un*-reasonable as a matter *of fact*. But if marital relations are performed against a provision of law, could the illegality of that action render the action *unreasonable*?

15. Assessing the "reasonableness" or "unreasonableness" of an action *contra legem* requires not simply looking at its status as "illegal" (else, custom *contra legem* could never arise), but, in addition, requires examining the action in its proper context. Cicognani, CANON LAW at 649; Huels, in CLSA NEW COMM. at 89; Mendonça, in GB & I COMM. n. 73 at 22, and n. 74(b) at 23. The proper context in which to assess conjugal relations undertaken by men in holy Orders is *two-fold*, one in regard to Matrimony, of course, *and one in regard to holy Orders*.

16. If an action *contra legem* is such as to "disrupt the nerve of ecclesiastical discipline", it can be held to be "unreasonable". Jone, COMMENTARIUM I: 47; Abbo-Hannan, SACRED CANONS I: 55; Huels, in CLSA NEW COMM. at 89; Otaduy, in EXEGETICAL COMM. I: 405. The question for ecclesiastical authority, then, is whether the very recent and widespread inadvertence to the ancient and unbroken

tradition of perfect and perpetual continence for all Western clergy is such as to "disrupt the nerve of ecclesiastical discipline". Cochini, APOSTOLIC ORIGINS at 398 (citing Pope Sergius' rejection of Trullan canons, discussed below in n. 23, because they were "against the order of the Church"); Stickler, CELIBACY at 44-45, 49 (especially concerning earlier questions *de statu ecclesiae*). In short, whether the exercise of conjugal rights by married clergy disrupts Western ecclesiastical discipline cannot be answered simply by consulting the approved authors, and so remains an open question.

(3) Not contrary to divine law

17. To provide the basis for custom, actions must not be contrary to divine law. 1983 CIC 24 § 1. Custom "has no power to contravene the laws of God … even if it has been repeated by the whole community for a long period of time." Abbo-Hannan, SACRED CANONS I: 55; Mendonça, in GB & I COMM. n. 71 at 22. Indeed, custom has no force against divine law, "not even against its least part, in any way." Cicognani, CANON LAW at 650. Arguments that conjugal relations by married clerics after ordination are prohibited by divine law are available, as follows.

18. Sacrilege is a violation of the First Commandment of the Decalogue and by that very fact is forbidden by divine law. CCC 2118, 2120, 2139; P. Palazzini, s.v. "Sacrilegium", in DMC IV, esp. at 171-172; Davis, MORAL AND PASTORAL THEO. II: esp. at 31-35.

19. The Pio-Benedictine Code expressly castigated as "sacrilegious" clerics acting against the "chastity" required of those in the clerical state. 1917 CIC 132 § 1; Pius XI, enc. *Ad catholici sacerdotii* [n. 40]. The *unanimous* opinion of Pio-Benedictine commentators on this norm, moreover, was that this castigation of "sacrilege" applied to clergy who "used marriage" (i.e., had sexual intercourse with their wives) after ordination. Peters, "Considerations" at 158-160 (citing Vermeersch-Creusen, Bouscaren-Ellis, Wernz-Vidal, Alonso Lobo, and Ayrinhac); Davis, MORAL AND PASTORAL THEO. II: 33, 35. Indeed, the Pio-Benedictine Code withheld "legitimacy" from the children of fathers who, though they were married, were prohibited from conjugal relations "because of … the taking up of sacred Orders". 1917 CIC 1114. Commentators on this norm identified children born of such unions as "sacrilegious". Peters, "Considerations", 159-160, 166-167 (citing Regatillo, Alonso Lobo). The otherwise welcome elimination of the legal consequences *for children* under the former Canon 1114 from the revised law does *not* serve to rehabilitate the use of marriage *by their fathers* in holy Orders. Peters, "Considerations", 166.

20. In the wide sense, every sin of a Christian is a "sacrilege" against the temple of the Holy Spirit (I Cor. 6, 19) but, lest the peculiar malice of *sacrilege* be left unrecognized, the "species of profanation found in some sins and not found in others" yields the more accurate concept of sacrilege as "the violation of a person, place, or thing publicly dedicated to God in a particular manner for particular purpose." Davis, MORAL AND PASTORAL THEO. II: 33, and at 35. There was no evidence under Pio-Benedictine law that even fornication among lay persons was legally regarded as "sacrilegious", let alone was the use of conjugal rights by those in marriage, so the *only* factor that provoked the awful designation of "sacrilege" in regard to conjugal relations by those in holy Orders seems to have been their status as clerics in the Church. Moreover, while caution should always be observed in finding *for* a divine law obligation (Örsy, in CLSA COMM. at 39), or for that matter, in finding against one, the recent publications by Stickler, Cochini, Cholij, and Heid demonstrating the probable apostolic origins of clerical continence tend *toward* finding some divine law basis for questioning whether married clerics may continue conjugal relations after ordination.

21. It might be objected that, long-standing Roman acquiescence to the Eastern observance of only temporary continence among married clerics (related to their celebration of the Liturgy) would militate against a finding that divine law prohibited all use of marriage after ordination. This is a plausible argument (Pius XI, enc. *Ad catholici sacerdotii* [nn. 44, 47]) and one perhaps not fully resolvable under the kind of purely canonical analysis offered here, but it is subject to at least three legal qualifications.

22. First, Eastern law has countenanced conjugal relations by married clerics only since the Second Council of Trullo (Quinisext, 691-692). To justify conjugal relations among married deacons and priests, the Trullan Fathers, who had adopted an expressly anti-Roman attitude in their Canon 13, manipulated texts of the Council of Carthage (390) to support their novel legislation; moreover, the Council of Trullo has never been approved by Rome and was, in fact, the first major Eastern council not to receive Roman approbation. Stickler, CELIBACY at 70, 73-77; Cochini, APOSTOLIC ORIGINS at 396-410; McGovern, PRIESTLY CELIBACY at 59, 61-65, 227-229. This combination of historical and legal factors counsels restraint in concluding that the use of marriage by clerics after ordination enjoys the peaceful approbation of divine law.

23. Second, the traditional Eastern expectation is for *some* exercise of continence among married clergy in relation to their celebration of the Liturgy. Roman acquiescence, then, whatever may be said of its effect, to conjugal relations by Eastern clerics assumes *at least* this practice of temporary continence. At present, however, Western married clergy exercise in fact *no form of continence within marriage whatsoever*, a situation that Rome simply cannot be said *ever* to have approved even with regard to Eastern Catholic clergy, leaving open, again, the possibility that the current failure of Western married clergy to commit to any degree of continence might be contrary to divine law.

24. Third, "tacit approval" of a custom (itself a complex and controverted option, see Otaduy, in EXEGETICAL COMM. I: 397-400) might come about when it is certain that the legislator is aware of the practice and does nothing to eliminate it. Huels, in CLSA NEW COMM. at 88. But where ecclesiastical authority is unable, without grave inconvenience, to remove or reprove a practice *contra legem*, its silence cannot be construed as consent to the practice. Dom Augustine, COMMENTARY I: 107; Cicognani, CANON LAW at 645; Abbo-Hannan, SACRED CANONS I: 53. The difficulties of Rome's calling Eastern Christianity to perfect and perpetual continence among its married clerics, if that is what it felt necessary to do, are neither new nor difficult to identify. Stickler, CELIBACY at 68, 80-81; McGovern, PRIESTLY CELIBACY at 69.

(4) Requisite knowledge and intention

25. The degree of *knowledge* and *intentionality* required among a community seeking to assert a custom, particularly a custom *contra legem et quidem antiquam*, was the object of much controversy under Pio-Benedictine law and remains controverted today. Örsy, in CLSA COMM. at 39; Otaduy, in EXEGETICAL COMM. I: 411-416. Moreover, custom *contra legem* must rest on actions undertaken by a community "*with the intention* of freeing themselves" from a legal obligation. Cicognani, CANON LAW at 648 (emphasis added). But special difficulties arise when the *obligation* from which one seeks freedom is actually a *prohibition* (and the obligation of continence is best construed as a prohibition against otherwise licit conjugal relations). Otaduy, in EXEGETICAL COMM. I: 420-421 (acknowledging the special difficulties faced when confronting alleged customs *contra legem*). Plainly, freeing oneself "from an obligation" is not the same thing as freeing oneself "from a prohibition", for one freed of an obligation need not *do* anything to exercise such freedom, while one freed from a prohibition, on the other hand, must usually *act contrary* to the prohibition to exercise such freedom. The inherent

complexity of this area of the law on custom inevitably increases the burden on those trying to prove the existence of custom *contra legem prohibentem*. Furthermore, in this particular case, additional "subjective" factors complicate the discernment of intentionality, as follows.

26. "Custom arises *only* from the frequent repetition of the act … with full knowledge of its implications and *with the express intention* on the part of the persons performing the act of obliging themselves [to it] or of freeing themselves from an obligation." Abbo-Hannan, SACRED CANONS I: 54 (emphasis added). As noted above, however, no married clerics ordained under the Johanno-Pauline Code were informed that canon law expected them and their wives to surrender the exercise of conjugal rights upon ordination, nor were they informed of the theological rationales for such obligation or alerted to its ancient lineage. As married couples, then, these clerics and their wives continued to exercise their rights in marriage without any inkling that their conduct might be forbidden and contrary to important sign values of holy Orders. When, therefore, some of them learn in piecemeal manner and without systematic education that Western canon law expects, and always has expected, perfect and perpetual continence of married clerics, current married clergy and their wives can hardly react with anything less than bewilderment, shock, and perhaps anger (directed either against ecclesiastical leadership for not having informed them of this obligation, or against those who venture to point out the obligation). Either way, sensing that Canon 277 somehow gravely threatens their conjugal rights and/or their continuation in ordained ministry (neither of which conclusion is necessarily accurate), but learning that a canonical theory known as "custom" might work to relieve them of the obligation of continence without impinging on their clerical ministry if, among other things, they can demonstrate certain 'intentionalities' in their exercise of conjugal relations, the temptation to frame their consternation and disbelief concerning the continence obligation as expressing an intention *contra legem* is obvious. In short, I question whether retrospective characterizations as to what kind of intention married clergy and their wives *would* have had, if they had known that they needed an "intention" in regard to their use of marriage, can be relied upon at this time. Such reliance as might be attempted would be all the more strained as it attempts to discern "intentions" allegedly formed by men and women who have not been adequately educated in the history, law, or theology of holy Orders in this area.

27. Beyond this perhaps insurmountable "subjective" obstacle to proving what kind of intention *contra legem*, if any, married clergy (whether deacons or, *a fortiori*, priests) and their wives would have had since the promulgation of the Johanno-Pauline Code, some other points on intentionality should be made.

28. For the intention *of the community* to be shown, it is generally required that the majority of the community commit to the action. Cicognani, CANON LAW at 648; Jone, COMMENTARIUM I: 47; Huels, in CLSA NEW COMM. at 91. There is little doubt but that, currently, the overwhelming majority of married deacons and priests in, say, the US and Germany, continue to make unfettered use of their marriage rights after ordination and do so with no intention of making a legal point. But, what percentage of married clerics and their wives, in those nations and around the world, after being properly instructed in the law and tradition of the Western Church, would want to insist on the continued exercise of their rights in marriage, cannot be known at this time.

29. *Deliberate* disregard of a law could result in custom. Dom Augustine, COMMENTARY I: 108; Huels, in CLSA NEW COMM. at 86, 89. This applies even if the first persons in the community wherein custom is alleged knowingly acted in violation of the law. Mendonça, in GB & I COMM. n. 74(b) at 23. But when action is taken based *on error or ignorance*, it usually vitiates such intention. "Generally speaking, authors concede that antecedent error invalidates the intention. This is true when antecedent

error which is the cause of the behavior occurs precisely because it is wrongly thought that there is no law, or that the law is already abrogated." Otaduy, in EXEGETICAL COMM. I: 416; Cicognani, CANON LAW at 648; Abbo-Hannan, SACRED CANONS I: 54. It seems indisputable that married men in the West ordained over the last few decades "wrongly thought that there is no law" concerning continence. If this fact does not, standing alone, defeat the argument for sufficient intentionality *contra legem* among married clerics in regard to the "use of marriage", it renders unprovable any claim of sufficient intention specifically among married clergy who, almost without exception, were unaware that canon law and Western tradition obligated all clerics, even those married, to perfect and perpetual continence.

(5) Thirty continuous years

30. Each of the four elements of custom outlined above must have been duly observed *simultaneously* for thirty continuous years to result in custom under canon law. 1983 CIC 26. Even if married clergy were a community capable of receiving a law, and a sufficient number of married clergy had begun acting with sufficient intention to form a custom *contra legem*, and that the action was reasonable and not contrary to divine law, the demarcation of thirty continuous years of observance would be still difficult to determine given how widely spread around the world are married clergy and how various are the degrees of formation and information they might have as to this issue.

31. The continuity of the thirty years could be interrupted, moreover, if the proposed custom is "expressly disapproved by legitimate ecclesiastical authority." Otaduy, in EXEGETICAL COMM. I: 419, 424; Abbo-Hannan, SACRED CANONS I: 55 and Huels, in CLSA NEW COMM. at 92 (both outlining several ways this disapproval could be expressed). Such interruption would require the recommencing of the thirty-year period for custom to arise. Cicognani, CANON LAW at 652; Abbo-Hannan, SACRED CANONS I: 56; Huels, in CLSA NEW COMM. at 94. No such interruption would be required, of course, for effectiveness if the actions in question did not qualify as formative of custom in the first place.

PART TWO: The effect of a custom *contra legem* regarding clerical continence

32. There are no penalties or other consequences in the external forum currently threatened against married clerics who violate the law of perfect and perpetual continence, so a custom *contra legem*, if one existed, would not need to be invoked as protection against non-existent consequences.

33. It is, however, undoubtedly within the scope of ecclesiastical authority to reiterate the clerical obligation of perfect and perpetual continence that is currently the object of widespread inadvertence in the West, and to enforce that obligation with consequences in the external forum. 1983 CIC 331; Stickler, CELIBACY at 23, 30-31, 34, 41. If such reassertions are forthcoming, then the *specific* situation of men ordained (and their wives) without awareness of, formation for, and consent to clerical continence would need to be addressed directly and fairly. I have suggested four basic approaches here: http://www.canonlaw.info/a_deacons4.htm. Against three of these four approaches, custom *contra legem* could theoretically be raised. Said custom, however, even if established, would prove no permanent barrier to the reinvigoration of the long-standing expectation of perfect and perpetual continence among clerics in the West, as follows.

34. Custom itself could be revoked by contrary custom or by law. 1983 CIC 28. Examples of customs being overturned by contrary customs are few. Otaduy, in EXEGETICAL COMM. I: 431. It is more likely that a custom, if it had been established, would be revoked by contrary positive law. Otaduy, in EXEGETICAL COMM. I: 432, 435. Because Canon 277 is a universal norm, and because fundamental

clerical discipline is of universal concern, only the Supreme Pontiff could expressly approve or reject alleged customs *contra legem* in this area, or could enact universal legislation revoking customs contrary to it. 1983 CIC 331; Jone, COMMENTARIUM I: 46; Abbo-Hannan, SACRED CANONS I: 53; Mendonça, in GB & I COMM. n. 70 at 22; Huels, in CLSA NEW COMM. at 87.

Conclusions

35. Notwithstanding its principle of legislative supremacy, canon law allows "custom", carefully defined, to establish some norms for behavior in the Church and to free the faithful of certain obligations set out in positive law. Against the positive and deeply-rooted obligation of perfect and perpetual continence for all clerics in the West (c. 277), some might allege "custom" *contra legem* to free married clerics from this obligation. The burden of proving all five of the elements of custom *contra legem et quidem antiquam* rests on those alleging the custom.

36. Regarding none of the five elements of custom can proponents of custom *contra legem canonis 277* offer solid evidence of satisfaction: (1) it is not clear whether "married clergy" constitute a community capable of receiving a law, and if so, whether they constitute one community or two; (2) it is not demonstrable that a complete disregard of the ancient and unbroken tradition of continence among married clerics in the West poses no threat to ecclesiastical discipline and therefore remains "reasonable"; (3) it is not clear that the exercise of conjugal rights by married clerics enjoys approbation under divine law; (4) it is implausible to assert that married clergy have been exercising conjugal rights with the intentionality necessary to free themselves of the positive obligation of continence as always understood in the West; and (5) it cannot be shown that thirty continuous years have passed since the other four necessary elements of canonical custom (might) have come to be.

37. Important readings not otherwise cited above would include:

- Filippo Liotta, LA CONTINENZA DEI CHERICI NEL PENSIERO CANONISTICO CLASSICO: DA GRAZIANO A GREGORIO IX (Quaderni de Studi Senesi, 1971) 401 pp.
- J. Coppens, ed., SACERDOCE ET CÉLIBAT: ÉTUDES HISTORIQUES ET THÉOLOGIQUES (Gembloux / Peeters, 1971) 752 pp., English edition, PRIESTHOOD AND CELIBACY (Ancora, 1972) 1023 pp.
- Roman Cholij, CLERICAL CELIBACY IN EAST AND WEST (Gracewing, 1989) 226 pp., partially on-line here, and Roman Cholij, "Priestly celibacy in patristics and in the history of the Church" (undated), on-line here.
- Stefan Heid, CELIBACY IN THE EARLY CHURCH: THE BEGINNINGS OF A DISCIPLINE OF OBLIGATORY CONTINENCE FOR CLERICS IN EAST AND WEST, trans. M. Miller (Ignatius Press, 2000) 376 pp., from Heid's *Zölibat in der frühen Kirche: Die Anfänge einer Enthaltsamkeitsplicht für Kleriker in Ost und West* (1997).
- Donald Keefe (American Jesuit, b. 1924), "Clerical continence and the restored permanent diaconate", (October, 1998, on-line here.

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