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**INVALIDATING AND INCAPACITATING LAWS
IN THE *CODE OF CANON LAW***

by
James E. CONNELL

A dissertation submitted to the Faculty of Canon
Law, Saint Paul University, Ottawa, Canada, in partial
fulfillment of the requirements for the degree of
Doctor of Canon Law

Ottawa, Canada
Saint Paul University
1994



James E. Connell, Ottawa, Canada, 1994



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INTRODUCTION

A wise and prudent person always protects whatever concerns the ultimate goal.¹ In fact, by exemplifying this proverb, invalidating and incapacitating laws stand among the most important canons in the *Code of Canon Law*. Indeed such laws provide the outer limits of the legal parameters within which the Roman Catholic Church conducts its salvific mission. Also, since they place the boundaries beyond which actions in the Church lack juridic effect, these laws must always respond in a most contemporary manner to the normative requirements of the Church. Hence, prudence dictates that the Church use invalidating and incapacitating laws as vehicles that pertain to the most important aspects of Church life.

Moreover, since gifts of the Holy Spirit, manifested in the teachings of the Second Vatican Council, continuously stimulate the people of God to a renewed and inspired dedication to the salvific mission of the Church, the laws of the Church also must reflect and protect this same dedication. In reality, the 1983 *Code of Canon Law* dwells in the Church as a product of the Second Vatican Council. Therefore, the renewed *Code of Canon Law*, including its laws of invalidity and incapacity, takes its rightful place in service to the people of God.

¹ Perhaps this proverb reflects the thought of Saint Thomas Aquinas, when writing, "[...] prudentia est bene consiliativa de his quae pertinent ad totam vitam hominis, et ad ultimum finem vitae humanae." See *Summa Theologiae*, Ia-IIae, q. 57, art. 4.

At the same time, however, an essential question bursts forth: exactly how has the Second Vatican Council affected both the definition and the identification of invalidating and incapacitating laws in the 1983 *Code of Canon Law*? To address this question, the text of the dissertation is divided into four chapters, followed by a concluding remark.

Since the inclusion of such laws in the 1983 *Code of Canon Law* continues a legislative approach also present in the 1917 *Code of Canon Law*, Chapter One first reviews the evolution of the concept of invalidating and incapacitating laws in the Church's legal system up to and in the 1917 *Code of Canon Law*. Actually the first part of the review of this canonical tradition comprises three moments: the understanding of invalidating and incapacitating laws prior to Pope Innocent III; the contribution of Innocent III; and the further development orchestrated by the canonists from the time of Innocent III up to 1917. Then Chapter One documents the definition of invalidating and incapacitating laws in the 1917 *Code of Canon Law*.

Next, with this historical framework in place, Chapter Two presents the definition of such laws in the 1983 *Code of Canon Law*. While generally based on the definition of invalidating and incapacitating laws in the 1917 *Code of Canon Law*, these laws in the 1983 *Code of Canon Law* also incorporate the teachings of the Second Vatican Council. Hence, Chapter Two clearly notes the effect of the Second Vatican Council on

this very important aspect of the Church's legal system.

Of course, the actual application of the definition of the invalidating and incapacitating laws highlights both the weight of the definition developed in Chapter Two, as well as the legislator's conviction concerning the use of such laws. As a result, Chapter Three demonstrates the process necessary to identify the laws of invalidity and incapacity in the 1983 *Code of Canon Law*. In addition, although Chapter Three concentrates on Book One of the 1983 *Code of Canon Law*, the Appendix that accompanies this dissertation indicates the presence of such laws throughout the remaining books of the Code. Furthermore, since Chapter Three demonstrates the technique to identify these laws in the 1983 *Code of Canon Law*, the appreciation for both their purpose and their role also surfaces. Thus, Chapter Three illustrates the legislator's use of invalidating and incapacitating laws in light of the Second Vatican Council.

Moreover, to evaluate the actual use of invalidating and incapacitating laws in the 1983 *Code of Canon Law*, Chapter Four critiques both the definition and the use of these laws in the present Code. Indeed, although the 1983 *Code of Canon Law* presents an improvement in the articulation of invalidating and incapacitating laws over the articulation in the 1917 *Code of Canon Law*, opportunities for further enhancement also exist. Hence, Chapter Four delineates the accomplishments of the revision of invalidating and

incapacitating laws in the 1983 *Code of Canon Law*, while also noting weaknesses in this effort.

Finally, a brief presentation of concluding remarks answers the thesis question by reiterating the essence of the dissertation, while also closing the text of the dissertation.

CHAPTER ONE

INVALIDATING AND INCAPACITATING LAWS IN THE 1917 CODE OF CANON LAW

May 27, 1917, Pentecost Sunday, saw Pope Benedict XV promulgate of the 1917 Code of Canon Law¹ in the Apostolic Constitution, *Providentissima Mater Ecclesia*,² thus culminating more than 13 years of work to codify the laws of the Church. Even though bishops from various parts of the world had sought a new or revised Code, before, during, and after the First Vatican Council,³ the effort was not begun officially until Pope Pius X, on April 14, 1904, issued his *motu proprio*, *Arduum sane munus*,⁴ in which he called for a thorough and systematic codification of all existing Church laws, with all other laws either being eliminated or brought into conformity with modern conditions.⁵ Thus the Latin Church witnessed the inauguration of a new and systematic approach to its legal system.

¹ In this dissertation, "1917 Code" will signify *Codex iuris canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus*, Romae, Typis Polyglottis Vaticanis, 1917, xlvii, 1200 p.

² BENEDICT XV, Apostolic Constitution, *Providentissima Mater Ecclesia*, in *Acta Apostolicae Sedis* (=AAS), 9, Pars II (1917), pp. 5-8.

³ See S. KUTTNER, "The Code of Canon Law in Historical Perspective," in *The Jurist*, 28 (1968), pp. 129-131. The First Vatican Council (=Vatican I) took place from 1869-1870.

⁴ PIUS X, *Motu proprio, Arduum sane munus*, in *Acta Sanctae Sedis*, 36 (1903-1904), pp. 549-551.

⁵ See T. BOUSCAREN, A. ELLIS, and F. KORTH, *Canon Law, A Text and Commentary*, 4th rev. ed., Milwaukee, The Bruce Publishing Company, 1966, pp. 4-5.

The request for and development of a codified legal system advanced at approximately the same time in the Church's history that the last of the Papal States were absorbed in the kingdom of Italy. Even though some persons might have considered the Church to be less than a true society in the world because of the loss of the Papal States, the Church clearly saw itself differently. In fact, in the opening sentence of *Providentissima Mater Ecclesia*, Benedict XV describes the Church as a "perfect society."⁶ Clearly the codification of law provided an instrument for the Holy See to exercise power over the Catholic world in matters both civil and ecclesial.⁷

Since many bishops who attended Vatican I expressed a desire to reinforce the unity of the Church, especially in regard to disciplinary questions,⁸ improved clarity and uniformity of the laws were seen as vital instruments to

⁶ See BENEDICT XV, Apostolic Constitution, *Providentissima Mater Ecclesia*, p. 5. Indeed, the application of the term perfect society to the Church asserts that the Church is itself complete, and has within itself the sufficient means to attain its end. See C. TARQUINI, *Iuris ecclesiastici publici institutiones*, editio XVII, Romae, Typographia polyglotta, 1898, p. 30.

⁷ See A. MOTILLA, "La idea de la codificación en el proceso de formación del Codex de 1917," in *Ius canonicum*, 28 (1988), p. 695.

⁸ Actually the consultors who worked to develop the 1917 Code considered disciplinary matters primary, with matters of faith and morals being incidental. See "The Code of Canon Law. 1918-1943," in *The Jurist*, 3 (1943), p. 180.

provide the requested reinforcement.* Invalidating and incapacitating laws contributed to this improvement. In addition, although the conceptual basis for the definition of invalidating and incapacitating laws was well established prior to 1917, the practical application of these laws prior to 1917 lacked clarity and uniformity. Therefore, the work of codification incorporated the chore of refining the definition of invalidating and incapacitating laws so as to facilitate identification of these laws in the 1917 Code.

Thus, Chapter One comprises the following four sections:

- I. Objective of Chapter One,
- II. Invalidating and incapacitating laws before
the 1917 Code,
- III. Invalidating and incapacitating laws in the
1917 Code,
- IV. Conclusion.

I. OBJECTIVE OF CHAPTER ONE

Laws that determine the invalidity of an action or the incapacity of a person to act validly in a certain way were no innovation on the part of the Church. Indeed, since these laws help to protect a society's interests, invalidating and incapacitating laws have been recognized by many societies as a necessary component of their legal system. Accordingly, the

* MOTILLA, "La idea de la codificación en el proceso de formación del Codex de 1917," pp. 695-696.

objective of Chapter One is to document the evolving definition of invalidating and incapacitating laws in the Church's legal system up to and in the 1917 Code.

II. INVALIDATING AND INCAPACITATING LAWS BEFORE THE 1917 CODE

The definition of invalidating and incapacitating laws in the Church evolved in stages. Moreover, throughout this evolution, a consistency of thought materialized which guided the definition of invalidating and incapacitating laws found in the 1917 Code. Thus a review of the evolving definition of invalidating and incapacitating laws in the history of the Church's legal system will facilitate understanding the purpose of these laws in the 1917 Code.

Invalidating and incapacitating laws before 1917 will be examined in three moments: the situation prior to Innocent III; the contribution of Innocent III; and the contribution of the classical canonists¹⁰ after Innocent III.

A. The situation prior to Innocent III

Documents from the first three centuries of the Church indicate no real distinction between invalid and illicit acts.¹¹ Indeed, an illicit act was also invalid. Yet, although most forms of incapacity rendered a person completely

¹⁰ In this dissertation, the term classical canonists refers to those canonists who wrote during the period from the Council of Trent until the promulgation of the 1917 Code.

¹¹ See G. D'ERCOLE, "Invalidità degli atti e incapacità delle persone nella disciplina delle origini cristiane," in *Apollinaris*, 32 (1959), p. 398.

incompetent to act in a certain way, some differentiations were made regarding the capacity of some persons. For example, while a neophyte was prohibited from certain actions, a specific clause of incapacity or nullity was necessary to establish incapacity based solely on the fact that the person was a neophyte.¹³ The Church, therefore, was willing to establish regulations that would accommodate its mission as a community of faith.

In addition, the attitude in the civil law during those years throws light upon the Church regulations. For example, at one time Roman Law distinguished between laws binding under pain of nullity from those laws that allowed contrary acts to be valid yet punishable.¹³ Theodosius II (401-450), however, decreed that if a legislator simply forbade an act, even without expressly establishing invalidity as a consequence of the violation, performance against the law was void and held to be as useless as if the act had never taken place.¹⁴ Furthermore, Justinian (483-565), confirming Theodosius II, held that an illicit act was also an invalid act.¹⁵ As a

¹³ Ibid., pp. 396-400.

¹³ See B. DEUTSCH, "Ancient Roman Law and Modern Canon Law," in *The Jurist*, 27 (1967), p. 303.

¹⁴ Ibid., p. 303.

¹⁵ For example Justinian writes, "Non dubium est in legem committere eum qui verba legis amplexus contra legis nititur voluntatem [...] ut ea (lex) quae (actiones) lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur [...]" (c.I,14,5), in E.

result, an action in violation of a law was held to be completely without effect or consequence.

Moreover, Pope Gregory I (590-604) held the same norm as the law of Justinian. Indeed, Gregory I taught that what is contrary to a law is invalid.¹⁶ Thus Gregory I formalized, in a way that would last for many years, the Church's law concerning invalidity and incapacity.

B. The contribution of Innocent III

However, by the time of Pope Innocent III (1198-1216), the Church's attitude toward the invalidity of acts done in violation of prohibiting laws had changed. For example, in a letter to the Archbishop of Pisa, Innocent III writes that many prohibited things, if they were done, would obtain the assurance of validity.¹⁷ As another example, when discussing

ROELKER, *Invalidating Laws*, Paterson, St. Anthony Guild Press, 1955, p. 80. This work by Roelker, a priest of the Archdiocese of Cincinnati who taught at the Catholic University of America for more than a quarter of a century, is a comprehensive study of invalidating and incapacitating laws in the 1917 Code that has provided both valuable research and direction for Chapter One of this dissertation.

Canonist Barbosa (1590-1649) demonstrates the understanding that canonists had of Justinian's teaching when Barbosa explains that Justinian's phrase, "non solum inutilia," means that an action "non solum nullus est et inutilis, sed etiam habetur pro non facto et sic ipso iure nullus est," in ROELKER, *Invalidating Laws*, p. 82.

¹⁶ Gregory I writes, "imperiali constitutione sancitum est aperte, ut ea, quae contra leges fiunt, non solum inutilia, sed etiam pro infectis habenda sint" (c.13, C. XXV, q. 2.). See *Corpus iuris canonici*, A. Friedberg (ed.), Lipsiae, Ex officina B. Tauchnitz, 1928, vol. I, col. 1015.

¹⁷ In fact Innocent III writes, "[...] multa fieri prohibentur, quae, si facta fuerint, obtinent roboris firmitatem [...]" (c. 16, X, III, 31). See *Corpus iuris canonici*, Friedberg, vol. II, col. 575. Although the

the right of an archdeacon to take possession of his office, Innocent III says that any denial or refusal by an authority must be expressly denied.¹⁸ In a final example, concerning rescripts, Innocent III writes that an error in good faith can result in a valid rescript, while fraud invalidates a rescript.¹⁹ Clearly Innocent III recognized situations when a violation of a law did not necessarily mean the invalidity of an act.

Furthermore, Saint Thomas Aquinas (1225-1274) confirms the change in attitude toward invalid actions in the Church. When writing on the question of whether schismatics had any power, Thomas acknowledges the reality of a valid yet illicit act in that a baptism by a schismatic would be valid although illicitly administered.²⁰ Hence the norm of the Church

1917 Code shows no sources for c. 11, the canon concerning invalidating and incapacitating laws, this passage from Innocent III is cited as a source for c. 11 in the 1916 *schema*. See *Codex iuris canonici cum notis Petri Card. Gasparri*, Romae, Typis Polyglottis Vaticanis, 1916, p. 4. In addition, c. 10 in the 1912 *schema*, the canon concerning invalidating and incapacitating laws in the 1912 *schema*, also includes this citation. See *Codex iuris canonici cum notis Petri Card. Gasparri*, Romae, Typis Polyglottis Vaticanis, 1912, p. 4.

¹⁸ Innocent III writes, "[...] si negaret expresse [...]" (c. 6, X, III, 7). See *Corpus iuris canonici*, Friedberg, vol. II, col. 485.

¹⁹ Innocent III says, "Qui [...] falsitatem expriment vel supprimunt veritatem, in suae perversitatis poenam nullum ex illis literis commodum consequantur" (c. 20, X, I, 3). See *Corpus iuris canonici*, Friedberg, vol. II, col. 25.

²⁰ Indeed Thomas Aquinas writes, "[...] est quod tales usum potestatis amittunt, ita scilicet quod non liceat eis sua potestate uti. Si tamen usi fuerit, eorum potestas effectum habet in sacramentalibus [...]." See *Summa Theologiae*, IIa-IIae, q. 39, art. 3. Yet this

concerning invalidity and incapacity truly had changed.

However, even though a tradition had developed that recognized the concept of valid yet illicit, *Regula Iuris* (RJ) 64 of Boniface VIII (1294-1303) seems to restate the position of Justinian and Gregory I. Indeed RJ 64 says, "those acts which are done against a law have to be considered as undone."²¹ Yet, while this statement of Boniface VIII might appear to be a change in direction for the Church,²² the Council of Trent understood differently.

The Council of Trent (1545-1563) saw itself having the power to establish invalidating and incapacitating laws as something beyond prohibiting laws, thus clearly acknowledging

theological teaching of Thomas Aquinas was well established before the time of Thomas. In fact, Pope Anastasius II (496-498) held the same position. See H. DENZINGER and A. SCHÖNMETZER, *Enchiridion symbolorum, definitionum et declarationum de rebus fides et morum*, editio XXXVI, Barcione, Herder, 1976, p. 125, no. 356.

²¹ RJ 64: "quae contra ius fiunt debent utique pro infectis haberi" (RJ 64, in VI^o). See *Corpus iuris canonici*, Friedberg, vol. II, col. 1124. For a commentary on RJ 64, see V. BARTOCETTI, *De regulis iuris canonici*, Roma, A. Belardetti, 1955, p. 215. Also, for a summary of the opinions of various canonists concerning the meaning and function of RJ 64, see ROELKER, *Invalidating Laws*, p. 85-98.

²² In fact, even though Boniface VIII teaches RJ 64, he also expresses an opinion similar to that of Innocent III. For example, when writing about the execution of an apostolic mandate or decree, Boniface VIII clearly states that he holds the discretion to establish invalidity. Actually he writes, "Si [...] licet, si contra faciat, [...] nisi nos in gratia tibi facta decrevissemus irritum et inane quod neret contra ipsam [...]" (c. 6, III, 7, in VI^o). See *Corpus iuris canonici*, Friedberg, vol. II, col. 1040. Moreover, similar to the comment in footnote no. 17, this passage from Boniface VIII is cited in both the 1912 and the 1916 *schemata* as a source for the canon on invalidating and incapacitating laws. See *Codex iuris canonici cum notis Petri Card. Gasparri*, 1912, p. 4; and also see *Codex iuris canonici cum notis Petri Card. Gasparri*, 1916, p. 4.

the distinction between invalid and illicit. For example, the Council both established canonical formalities for a valid marriage;²³ it also declared that a profession of religious vows before age 16 is invalid.²⁴ Truly the Church had established a legal reality that not all illicit acts were invalid, only some. The stage was now set for the classical canonists to clarify and to amplify this position.

C. The contribution of the classical canonists after
Innocent III

In 1612, Franciscus Suárez (1548-1617), a Spanish Jesuit theologian, produced a synthesis of Christian juridical thought entitled *Tractus de legibus ac Deo legislatore*.²⁵ Suárez held that the human legislator, whether secular or ecclesiastical, received the power to govern the state, insofar as it is a *societas perfecta*, directly from God.²⁶ Furthermore, Suárez dedicated a sizeable portion of *De legibus*

²³ These are found in session 24, chapter 1 of the Council of Trent. See H. SCHROEDER, *Canons and Decrees of the Council of Trent, Original Text with English Translation*, St. Louis, B. Herder Book Co., 1941, pp. 183-185.

²⁴ This occurs in session 25, chapter 15 of the Council of Trent. See *Ibid.*, p. 226.

²⁵ See F. SUÁREZ, *Opera Omnia*, edito a Carlo Berton, Parisiis, Apud L. Vivès, 1856-1878, 28 vols. Vols. V and VI are *De legibus ac Deo legislatore* (= *De legibus*). In this dissertation, citations from *De legibus* indicate the volume, book, chapter, and paragraph.

²⁶ See E. CORECCO, *The Theology of Canon Law: A Methodological Question*, F. Turvasi (trans.), Pittsburgh, Duquesne University Press, 1992, p. 52.

to the topic of invalidating and incapacitating laws in the Church.²⁷ Consequently, *De legibus* serves as one of the principal sources for identifying the contribution of the classical canonists to the subject of invalidating and incapacitating laws.

Our review of the contribution of the classical canonists²⁸ concerning invalidating and incapacitating laws encompasses eight categories: 1) definition, nature, and purpose; 2) scope; 3) legislative power to enact; 4) words of the law; 5) effects; 6) excuse from the effects, 7) summary of the contribution of the classical canonists, and 8) confusion with the identification of invalidating and incapacitating laws.

1. Definition, nature, and purpose of invalidating and
incapacitating laws

²⁷ In fact, Chapters 19-34 of Book V, in Vol. V, sixty pages of text, concern invalidating and incapacitating laws. No other classical canonist wrote more on this topic.

²⁸ In addition to F. Suárez (1548-1617), A. Reiffenstuel, O.F.M., (1642-1703), a German theologian and canonist who taught for many years at the University of Freising, Cardinal G. D'Annibale (1815-1892), an Italian moral theologian who served in many Church positions including that of Prefect of the Congregation of Indulgences from 1889 until his death in 1892, and F. Wernz, S.J., (1842-1914), a German canonist who taught at the Pontifical Gregorian University for 24 years and who served as a consultant to the commission for the codification of Canon Law, are the classical canonists most frequently cited by the 1917 canonists (in this dissertation, the term 1917 canonists refers to canonists who wrote about the 1917 Code) regarding invalidating and incapacitating laws. Therefore, these four classical canonists provide the principal data for this section of Chapter One. The works of additional classical canonists who also wrote concerning laws of invalidity and incapacity are cited in the bibliography attached to this dissertation.

Since the classical canonists take for granted the existence of invalidating and incapacitating laws,²⁹ these canonists proceed to define the concept of invalidating and incapacitating laws by describing the nature and purpose of these laws. First, invalidating and incapacitating laws³⁰ concern the very important matters of the Church³¹ and are for the common good,³² which is understood to mean eternal happiness.³³ Reiffenstuel and Wernz continue this teaching

²⁹ Consider, for example, that *De legibus*, V, 19, the opening chapter of Suárez's discussion of invalidating and incapacitating laws, is entitled, "utrum leges humanae irritantes contractum poenales vel onerosae sint." In this context, to ask *utrum...sint* implies *sunt*. Thus, to Suárez, the role of canonists was to explain the nature and function of these laws, rather than to prove their existence. For more on this point see ROELKER, *Invalidating Laws*, p. 8.

³⁰ At times authors use the term invalidating laws when, from the context of the comment, it is clear that the reference is to both invalidating and incapacitating laws.

³¹ For example Suárez writes, "[...] irrationes ecclesiasticae sunt de rebus gavioribus et majoris momenti [...]." See *De legibus*, V, 5, 33, 2.

³² For instance Suárez writes, "[...] lex etiam ut irritans est directiva, et per se necessaria ad commune bonum [...]." See *De legibus*, V, 5, 27, 4. Suárez also says, "[...] per se intendit irrationem propter bonum commune." See *De legibus*, V, 5, 22, 7.

³³ Suárez teaches, "[...] ad felicitatem aeternam, quae secundum se commune bonum est [...]." See *De legibus*, V, 1, 7, 3. Furthermore, Suárez understands the common good to be the reason for a society, and the basic premise upon which laws for social order are based. See I. GOMEZ ROBLEDO, *El origen del poder político según Francisco Suárez*, Mexico, Editorial Jus, 1948, pp. 66-71.

In addition, the writings of Saint Thomas Aquinas support the position of Suárez, that the common good refers to eternal happiness. Saint Thomas Aquinas writes, "[...] ultimum finem, qui est bonum commune [...]," and "[...] est autem ultimus finis humanae vitae felicitas vel beatitudo [...]." See *Summa Theologiae*, Ia-IIae, q. 90, a. 2.

of Suárez.³⁴ Then these laws concerned the capability of a person,³⁵ or required substantial formalities of an act.³⁶

³⁴ For example Reiffenstuel writes, "Certum est, quod legislator lege a se condita, pro bono communitalis, possit quosdam contractus, aliosque actus humanos ita irritare, ut nullius sint roboris ac momenti." See A. REIFFENSTUEL, *Jus canonicum universum, tractum de regulis iuris*, Parisiis, Apud Ludovicum Vives, 1864, vol. I, nos. 239. Reiffenstuel also writes, "Dicitur tandem in definitione juris canonici, ad recte vivendum, aeternamque salutem consequendam, etc. Quibus verbis indicatur finis primarius, et principaliter intentus ipsius [...] simulque finis ultimus, videlicet salus aeterna hominis, per observantiam mandatorum Dei et Ecclesiae, post hanc vitam in coelis consequenda." See REIFFENSTUEL, *Jus canonicum universum*, vol. I, nos. 41.

Wernz says, "Lex in genere, cum sit ordinatio rationis ad bonum commune ab eo [...]." See F. WERNZ, *Ius decretalium, tomus I, introductio in ius decretalium*, Prati, Giachetti, 1913, p. 104.

³⁵ For instance Suárez writes, "Alius modus directe irritandi actum est negativus seu prohibitivus actus cum verbis sufficientibus ad irritandum illum; talis est lex prohibens matrimonium inter consanguineos vel affines intra quartum gradum, et irritans matrimonium clerici in sacris, aut religiosi, et similes," which demonstrates that Suárez used the *irritans* to include the incapacity of persons. See *De legibus*, V, 5, 19, 4.

Later canonists also support this position of Suárez. For example D'Annibale writes, "[...] inhabilitantes dicuntur quae quasdam personas incapaces efficiunt vel quibusdam actibus perficiendis, vel ex eis quidvis capiendi." See G. D'ANNIBALE, *Summula theologiae moralis, Pars I, Prolegomena*, Mediolani, S. Josephi, 1881, no. 212. Further, Wernz writes, "[...] modis irritandi [...] vi cuius directe persona inhabilitatur [...]," in WERNZ, *Ius decretalium*, I, p. 133. Also see A. REIFFENSTUEL, *Jus canonicum universum, tractum de regulis iuris*, Parisiis, Apud Ludovicum Vives, 1870, vol. V, no. 19 where Reiffenstuel discusses the capability of a person to contract a marriage.

Therefore, these classical canonists consider the action of an incapable person as invalid, without juridic effect.

³⁶ In fact Suárez writes, "[...] ita videre licet in lege dante formam actui, et per consecutionem irritante actum factum sine tali forma." See *De legibus*, V, 5, 19, 4, where Suárez cites the example of the canonical form of marriage. This teaching of Suárez continues in the teaching of later canonists. For example Wernz writes, "[...] lex irritans Ecclesiae directe aliquid constituere vel praecipere potest, quod ad substantiam actus omnino requiritur v.g. forma substantialis sponsalium vel contractus matrimonialis [...]." See WERNZ, *Ius decretalium*, I, p. 133. Reiffenstuel and D'Annibale cite the same example. See A. REIFFENSTUEL, *Jus canonicum universum, tractum de regulis iuris*, Parisiis,

Thus the classical canonists understand invalidating and incapacitating laws to be a truly important component of the Church's legal system.

2. Scope of invalidating and incapacitating laws

Although Suárez says that the natural law does, at times, invalidate,²⁷ he primarily regards laws of invalidity and incapacity as human legislation, established for the common good.²⁸ In other words, the natural law, as such, apparently

Apud Ludovicum Vives, 1870, vol. VII, Regula LXIV, no. 6; and D'ANNIBALE, *Summula theologiae moralis*, no. 213.

²⁷ For example see *De legibus*, V, 2, 12, 3, where Suárez says, "Nihilominus certum est actus factos contra jus naturale, aliquando non solum malos, sed etiam irritos esse." Suárez then cites, as examples, the attempted marriage of a person who is already in a valid marriage, or a contract effected under the influence of fear, violence, or fraud. For similar explanations by later canonists, Reiffenstuel says, "[...] ipso jure naturali fuit irritus [...]." See REIFFENSTUEL, *Jus canonicum universum*, vol. I, no. 253. Then Wernz, when discussing impediments to marriage that are contained in natural law, teaches that some impediments are contained in natural law. See WERNZ, *Ius decretalium*, I, p. 97.

Furthermore Suárez, noting the necessity to assign some rules for determining when an action prohibited by the natural law is valid and when it is invalid, suggests two rules (*De legibus*, V, 2, 12, 3).

First, when an act is forbidden by the natural law because of some defect of power or because of the incapacity of the subject matter, then the act is null and void by its very nature. An example would be an attempted marriage by a person who is already validly married (*De legibus*, V, 2, 12, 4).

Second, when an act is forbidden on account of some unseemliness or depravity discerned in its subject matter, then it is also invalid when that same condition exists in the effect of the act itself. An example would be a marriage of blood relations in the first degree. Such a marriage is invalid because of the nature of the subject matter (*De legibus*, V, 2, 12, 5).

²⁸ Actually Suárez writes, "Unus ex effectibus legis humanae est irritare contractus [...] ratio autem cur hoc possit facere lex humana, est quia non repugnat legi naturali, et alioqui expedit ad commune bonum [...]." See *De legibus*, V, 5, 19, 1.

has power to give commands but not to do anything." Yet, since a law of invalidity itself renders an action ineffective and a law of incapacity itself renders a person ineffective, it would seem to follow that an effort is required so as to generate the ineffectiveness of invalidity or incapacity. Therefore, although the natural law may prohibit an act, usually it would not render null the effect of that act.⁴⁰ Thus there exists the role of human legislation to establish laws of invalidity and incapacity.

Furthermore, the textual context of the writings by classical canonists concerning invalidating and incapacitating laws helps to understand their view of the scope of these laws. For example, Suárez limits his comments concerning invalidity and incapacity established by natural law to a few paragraphs in *De legibus*, V, 2, 12, 1 - 6.⁴¹ On the other hand, Suárez's comments concerning the establishment of invalidating and incapacitating laws by human legislation embrace 16 chapters of *De legibus*, V, 5, 19-34. Reiffenstuel,

³⁹ Suárez says, "[...] irritare non est praecipere, sed facere; jus autem naturale, ut sic, solum videtur habere vim praecipiendo [...]." See *De legibus*, V, 2, 12, 2.

⁴⁰ See *De legibus*, V, 2, 12, 6, where Suárez says, "Extra hos autem casus, quamvis jus naturae prohibeat actum, non irritabit effectum ejus [...]." Suárez then cites, as an example, the sale of property for an unjust price: while restitution is required, the sale remains valid.

⁴¹ While elsewhere in his writings Suárez refers to invalidity and incapacity established in natural law, Suárez seems to have limited to this location comments contrasting the development of invalidating and incapacitating laws in natural law to those established in human law.

D'Annibale, and Wernz have similar positions.⁴² In short, to the classical canonists, laws of invalidity or incapacity refer to human legislation that renders an action not valid or a person not capable of validly placing a certain act. Indeed, a human effort is needed to render invalid or incapable that which otherwise would be valid or capable. Thus, while the classical canonists do not deny that certain

⁴² The contextual location of comments provides an insight concerning the understanding of invalidating and incapacitating laws in the mind of these classical canonists, as the following summary demonstrates.

Suárez: 1) Natural law invalidity is limited to a few paragraphs in *Tomus V (De legibus)*, *Liber II (De lege aeterna, naturali, et jure gentium)*, *Cap. XII (Utum lex naturalis non solum prohibeat aliquos actus, sed etiam irritet contrarios)*.

2) Human law invalidity, however, is a major presentation in *Tomus V (De legibus)*, *Liber V (De varietate legum humanarum, et praesertim de poenalibus et odiosis)*, *Caps. XIX-XXXIV*. These 16 chapters are completely dedicated to invalidating law within ecclesiastical law.

Reiffenstuel: 1) Natural law invalidity is presented as a short comment within one sentence in *Liber I, Titulus II (De constitutionibus)*, § XI (*De lege irritante, ejusque obligatione, ac effectu*), n. 253.

2) Human law invalidity, however, is presented at length in *Liber I, Titulus II (De constitutionibus)*, § XI (*De lege irritante, ejusque obligatione, ac effectu*), nn. 239-262. Undoubtedly, to Reiffenstuel, invalidating law concerns ecclesiastical law.

D'Annibale: 1) Natural law invalidity is implied in his discussion of natural law in Chapter II (*de legibus in specie*) in *Tractatus II (De actibus humanis)*.

2) Human law invalidity is discussed in an Appendix to Chapter II (*de legibus in specie*), which is part of *Tractatus II (De actibus humanis)*. D'Annibale clearly states that invalidating law concerns acts that are valid according to natural law.

Wernz: 1) Natural law invalidity is limited to a few paragraphs in *Tomus I (Introductio in ius decretalium)*, *Titulus III (De Deo legislatore et legibus Divinis)*.

2) Human law invalidity, however, is presented in detail as one of the potential effects of ecclesiastical law in *Tomus I (Introductio in ius decretalium)*, *Titulus IV (De legibus Ecclesiae Catholicae)*.

conditions of human life are invalid according to natural law, they exclude these situations from the scope of invalidating or incapacitating laws.⁴³

3. Legislative power to enact invalidating and
incapacitating laws

To the classical canonists the Church, which has a proper power to build and govern,⁴⁴ exercises this governance of the community through laws.⁴⁵ Indeed, just as Peter was given this power from Christ, so the supreme pontiff accepts from Christ legislative power for the universal Church.⁴⁶

⁴³ Perhaps the point can be described as follows. Picture a circle that represents the universe of invalidity and incapacity. Then picture the circle divided into two portions: part A represents invalidity and incapacity contained in divine law, while part B represents invalidity and incapacity established by human legislation. While the classical canonists are not denying the existence of the part A, they consider invalidating and incapacitating laws to concern part B.

⁴⁴ For instance Suárez writes, "[...] est [...] esse in Ecclesia peculiarem potestatem ad regendam et gubernandam illam [...]." See *De legibus*, V, 4, 1, 3. Continuing this teaching of Suárez, Wernz says, "Potesta legislativa Ecclesiae sese extendit ad omnia obiecta, quae ad finem Ecclesiae convenienter prosequendum necessaria sunt." See WERNZ, *Ius decretalium*, I, p. 115.

⁴⁵ Furthermore Suárez says, "[...] potestas haec vere et proprie legislativa est [...]. Item gubernatio perfecta talis communis debet fieri per leges [...] sed haec est potestas gubernativa perfecta [...]." See *De legibus*, V, 4, 1, 6. Teaching in a similar way, Wernz says, "Hinc Ecclesiae, cui Christus pro sua sapientia sane sufficienter providit, potestas legislativa fini et mediis proportionata est concessa. [...] At divinus salvator non tantum fuit doctor, sed verus legislator; ergo etiam cum Apostolis potestatem legislativam communicavit." See WERNZ, *Ius decretalium*, I, p. 106.

⁴⁶ As when Suárez writes, "[...] summus pontifex immediate accipit ab ipso Christo, et ex vi institutionis ejus potestatem legislativam in universam Ecclesiam." See *De legibus*, V, 4, 3, 10. Reiffenstuel and Wernz provide the same observation. Reiffenstuel says, "Papa suam

Furthermore bishops have some legislative power in their diocese," as do religious communities have for their proper law." Hence legislative power was certainly well distributed to serve the needs of the society.

Yet, even though only true law establishes invalidity or incapacity," perhaps not all persons with legislative power within the Church are empowered to enact invalidating or incapacitating laws. For example, while the pope certainly

potestatem immediate habet a Deo." See, REIFFENSTUEL, *Jus canonicum universum*, vol. I, no. 54. Then Wernz writes, "Legislatores singulares, qui ius universale constituunt in Ecclesia sunt S. Petrus eiusque in Sede Romana legitimi successores [...]." See WERNZ, *Ius decretalium*, I, p. 107.

⁴⁷ For example Suárez says, "[...] censeo Episcopos habere potestatem legislativam in suis diocesibus jure ordinario humano fundato aliquo modo in divino [...]." See *De legibus*, V, 4, 4, 2. Continuing this teaching of Suárez, Wernz says, "Episcopi servatis conditionibus a iure communi requisitis pro suis dioecesibus veras leges ecclesiasticas ferre valent." See WERNZ, *Ius decretalium*, I, p. 111.

⁴⁸ In fact Suárez writes, "[...] has communitates inferiores ecclesiasticas non posse ordinarie ac regulariter proprias leges ferre, sed solum ubi constiterit, eas habere propriam jurisdictionem spiritualem: tunc enim juxta modum jurisdictionis poterunt legem statuere, et non amplius." See *De legibus*, V, 4, 6, 19. Wernz concurs when writing, "Capitula saltem generalia ordinum religiosorum virorum, qui ab Ecclesia tamquam verae religiones exemptae clericorum approbatae sunt, iurisdictionem spiritualem vel potestatem legiferam habent ad condenda decreta vel statuta, quibus vis atque natura verarum legum ecclesiasticarum propria est." See WERNZ, *Ius decretalium*, I, p. 114.

⁴⁹ Indeed Suárez teaches, "[...] legem irritantem non annullare actum donec solemniter promulgata sit [...] quia ante talem promulgationem non est lex." See *De legibus*, V, 5, 33, 1. Suárez also writes, "Unus ex effectibus legis humanae est irritare [...]." See *De legibus*, V, 5, 19, 1. This very important principle continues in the doctrine of other classical canonists, as when Wernz writes, "Potestas legislativa Ecclesiae [...] extendere potest [...] legis inhabilitantis vel legis irritantis [...]." See WERNZ, *Ius decretalium*, I, p. 116.

possessed this power,²⁰ the diocesan bishops apparently might hold the power on a limited basis, if at all.²¹ Also the classical canonists make no specific mention concerning any authority for religious communities to establish invalidating and incapacitating laws within their proper law. Thus the authority to enact such laws is not clearly documented in the writings of the classical canonists.

4. Words of the law required for invalidating and
incapacitating laws

The classical canonists certainly believe that invalidity and incapacity come from the words of the law,²² understood

²⁰ For example Reiffenstuel writes, "Ita communis doctorum [...] ipsamet potestate legislativa supremis principibus competente, qua non solum habent facultatem obligandi subditos [...] sed etiam annullandi eorum actus quando istud bono communi expedire judicaverint." See REIFFENSTUEL, *Jus canonicum universum*, vol. I, no. 251. "Supremis principibus" is in the plural because this statement applies to the supreme sovereign of all legitimate societies, not merely the Church.

²¹ In fact Wernz says the bishop does not have this power, yet Wernz notes that Suárez and others do not express this point. Wernz writes, "Episcopos non posse condere leges irritantes: at nec Suárez nec Scherer alique hac de re expressum et generalem quemdam canonem afferunt [...]." See WERNZ, *Ius decretalium*, I, pp. 111-112.

²² For example Suárez writes, "[...] irritatio est [...] juxta verba legis." See *De legibus*, V, 5, 24, 7. Reiffenstuel, D'Annibale, and Wernz continue this very important teaching of Suárez. Reiffenstuel writes, "[...] irritatio explicita dicitur, quae fit verbis clavis et expressis; [...] irritatio implicita est, quae fit per verba aequivalentia [...]." See REIFFENSTUEL, *Jus canonicum universum*, vol. I, no. 243. Then D'Annibale says, "Nonnunquam actus [...] lege seu civili seu canonica irriti infectique ipso iure esse jubentur [...]." See D'ANNIBALE, *Summula theologiae moralis*, no. 211. Finally Wernz teaches, "[...] irritatio actus [...] ex verbis legis est eruendum." See WERNZ, *Ius decretalium*, I, pp. 132-133.

according to their common usage,⁵³ with the result that the words of the law produce its effect.⁵⁴ Also the declaration of invalidity or incapacity in a law has to be presented formally or equivalently.⁵⁵ Thus, while a law of absolute prohibition establishes invalidity, a law of nonabsolute prohibition is not equal to an invalidating law,⁵⁶ unless by some other means or by the intention of the legislator the invalidating action of the law is stated sufficiently.⁵⁷

⁵³ Suárez says, "[...] ex communi usu illius verbi [...]." See *De legibus* V, 5, 25, 23. Teaching the same principle, Wernz writes, "Ut singulae scientiae sua habent artis vocabula, ita etiam in iure ecclesiastico reperiuntur formae loquendi et scribendi a communi usu alienae solisque iuris peritis cognitae." See WERNZ, *Ius decretalium*, I, p. 154.

⁵⁴ Suárez writes, "[...] irritare non est praecipere, sed facere." See *De legibus*, V, 2, 12, 2.

⁵⁵ Suárez says, "[...] explicatur sufficienter ipso facto, vel ipso iure, formaliter, aut aequivalenter, ut: non valeat, careat robore firmitatis [...]." See *De legibus*, V, 5, 26, 2. Then Wernz writes, "At actus, qui directe per legem canonicam absolute et simpliciter prohibentur [...] sunt ipso iure nulli atque invalidi, si speciatim et expresse vel aequivalenter de effectu irritationis in illa prohibente lege canonica directe caveatur." See WERNZ, *Ius decretalium*, I, p. 133.

⁵⁶ For example Suárez writes, "[...] si prohibitio absoluta sufficit ad irritandum, quod prohibitio vel causa ejus sit temporalis non sufficit ut lex non censeatur irritare." See *De legibus*, V, 5, 25, 8. Suárez also writes, "[...] prohibere actum et irritare illum sunt effectus valde diversi; ergo ut per legem fiant, debent per ejus verba sufficienter explicari; sed per solum verbum prohibendi non explicatur effectus irritandi [...] prohibere solum est praecipere et obligare ut actus non fiat; irritare autem non est praecipere, sed facere [...]." See *De legibus*, V, 5, 25, 22.

⁵⁷ Suárez says, "[...] ex sola rei natura legem pure prohibentem non irritare actum, nisi alio modo talis effectus, seu intentio legislatoris sufficienter declaretur." See *De legibus*, V, 5, 25, 22. Reiffenstuel and D'Annibale also teach this very important principle. For example, Reiffenstuel writes, "Quando lex prohibet quidem contractum, aut aliam

Furthermore, in the face of doubt concerning validity or capacity, the presumption always favors the validity of the act or the capacity of the person.³⁸ Also invalidity and incapacity can be based on a broad sense of the law, such as the reason or the context, provided that they are based on truth and not presumption.³⁹ Thus invalidity and incapacity require both truth and certain declaration.

5. Effects of invalidating and incapacitating laws

Invalidating and incapacitating laws, as with any

dispositionem, sed ipsum non infirmat, [...] valet quidem contractus [...]; dicitur esse validus, sed non licitus." See REIFFENSTUEL, *Jus canonicum universum*, vol. I, no. 244. Then D'Annibale teaches, "Irriti [...] ergo huc non pertinent [...] leges quae actum aliquem prohibent tantum [...]." See D'ANNIBALE, *Summula theologiae moralis*, no. 211.

³⁸ Suárez clearly states, "[...] in dubio semper praesumitur pro actus validitate." See *De legibus*, V, 5, 27, 8. Reiffenstuel stresses this same critical point when he says, "[...] si ex facta contra obscure proferentem interpretatione, tota dispositio irrita, et omni carens effectu evaderet. Ratio est, quia universaliter interpretatio sic facienda est, ut verba aliquid operentur, et dispositio potius valeat, quam pereat." See REIFFENSTUEL, *Jus canonicum universum*, Regula LVII, no. 8.

³⁹ Suárez says, "[...] has leges [...] non fundari in praesumptione, sed in solida veritate [...]. Item ille actus non irritatur nisi in virtute legis latae, in juxta rationem ejus: illa autem non fuit lata ex praesumptione, sed ex justa causa certa, quae causa etiam in hoc actu particulari invenitur [...]." See *De legibus*, V, 5, 24, 5. Furthermore Suárez writes, "[...] necessarium esse ut vel per expressa verba, vel per effectus, vel per ipsam rationem legis, sufficienter declaretur." See *De legibus*, V, 5, 26, 4. Also Suárez declares, "[...] leges canonicae prohibentes actum directe et in substantia ejus, non irritant illum ipso facto, nisi ex aliis verbis vel aliis particularibus signis constet de tali effectu." See *De legibus*, V, 5, 29, 1.

ecclesiastical law, are considered to oblige in conscience.⁴⁰ Moreover the effect of invalidity or incapacity comes about either *de facto* or from a judicial sentence.⁴¹ Indeed, while an invalidating or incapacitating law that takes effect *ipso*

⁴⁰ Suárez writes, "[...] lex canonica, seu ecclesiastica obligare potest, et ex se obligat in conscientia." See *De legibus*, V, 4, 14, 7. Reiffenstuel and Wernz teach the same principle. Reiffenstuel says, "Leges humanae, non solum ecclesiasticae sed etiam civiles, possunt obligare in conscientia [...]." See REIFFENSTUEL, *Jus canonicum universum*, vol. I, no. 153. Then Wernz teaches, "Nam omnis lex etiam ecclesiastica est vinculum quoddam ordinis moralis, quod sine ulla obligatione vera in conscientia existere nequit." See WERNZ, *Ius decretalium*, I, p. 132.

⁴¹ Actually Suárez writes, "Duobus [sic] modis potest actus fieri irritus per legem: uno modo, mediante sententia iudicis, vel condemnatoria, vel saltem declaratoria criminis; alio modo immediate per ipsammet [sic] legem statim ac fit seu intentatur actus." See *De legibus*, V, 5, 21, 1. Reiffenstuel, D'Annibale, and Wernz teach the same principle. Reiffenstuel says, when citing as an example of *de facto* invalidity a diriment impediment of marriage established by ecclesiastical law, "Et quidem jure censetur irritare contractum, aiiumve actum, quando lex per seipsam, et non exspectata sententia iudicis, ipsum irritat, cassat, et annullat: uti accidit in impedimentis jure ecclesiastico dirimentibus matrimonium [...]." See REIFFENSTUEL, *Jus canonicum universum*, vol. I, nos. 240 and 241. Then D'Annibale says, "Sententia utraque gravis; quocirca alii possessori favendum putant, quoad iudex fori exterioris sententiam dixerit: et jure prorsus." See D'ANNIBALE, *Summula theologiae moralis*, no. 214. Finally Wernz writes, "Leges ecclesiasticae sive ipso facto sive per sententiam iudicis ecclesiastici condemnatoriam vel declaratoriam actus irritare possunt." See WERNZ, *Ius decretalium*, I, p. 132.

Also note that Suárez does not see these laws as a penalty. Suárez writes, "[...] leges irritantes non esse poenales, sed morales, seu per se directivas communitatis." See *De legibus*, V, 5, 19, 3. Suárez also writes, "[...] lex prohibens actum et irritans illum intuitu boni communis vel privatorum, non est poenalis." See *De legibus*, V, 5, 19, 6. Yet, D'Annibale and Wernz speak somewhat differently. D'Annibale writes, "Utrarumque duplex genus est; nam vel introductae sunt in odium patrati alicujus criminis, vel secus: illae poenales sunt, de quibus propediem; hae non item, de quibus hic." See D'ANNIBALE, *Summula theologiae moralis*, no. 211. Then Wernz says, "Lex irritans etiam in foro ecclesiastico non est essentialiter poenalis [...]." See WERNZ, *Ius decretalium*, I, pp. 133-134.

facto obliges in conscience immediately,⁴² a law that does not invalidate or incapacitate immediately but by means of a decree does not oblige in conscience until the decree is issued.⁴³ Thus the timing of the moral obligation depends on the timing of the effect of the invalidating or incapacitating law.

6. Excuse from the effects of invalidating and
incapacitating laws

Neither ignorance⁴⁴ nor fear⁴⁵ can impede the effect of an invalidating or incapacitating law. In addition, *epieikeia* also cannot impede a law that has established invalidity or incapacity.⁴⁶ Hence, since invalidating and incapacitating

⁴² Suárez writes, "[...] si lex declarat irrationem ipso facto, non est quid amplius spectetur." See *De legibus*, V, 5, 26, 4.

⁴³ Suárez says, "[...] quando lex non irritat actum ipso facto, sed praecipit irrationem ejus, tunc ad irrationem non obligat, nisi fortasse judicem." See *De legibus*, V, 5, 20, 13. Reiffenstuel concurs, writing, "Quando lex contractum non ipso jure irritat, sed a judice dumtaxat infirmandum decernit; certum insuper est eum valiturum, donec per sententiam judicis rescindatur." See REIFFENSTUEL, *Jus canonicum universum, tractum de regulis iuris*, vol. I, no. 245.

⁴⁴ Suárez writes, "[...] ignorantia solum potest excusare a culpa; haec autem irritatio non pendet a culpa, quia non est poena [...] sed per se propter commune bonum: ergo ignorantia [...] non potest abstinere huic effectui." See *De legibus*, V, 5, 22, 7. D'Annibale agrees, saying, "Principio igitur non prodest in his legibus ignorantia seu facti, quia nihil mutat ignorantia facietis [...]." See D'ANNIBALE, *Summula theologiae moralis*, no. 216.

⁴⁵ Suárez also says, "[...] ergo nec metus impedit." See *De legibus*, V, 5, 22, 10.

⁴⁶ In fact Suárez writes, "[...] actum irritum per legem simpliciter et absolute, non posse unquam valide fieri contra verba legis, per solam *epiikiam*." See *De legibus*, V, 5, 23, 2. Furthermore Suárez teaches,

laws mean what they declare, personal subjective factors cannot affect these laws.

On the other hand a dispensation, a relaxation of an ecclesiastical law⁶⁷ in a particular case by competent authority for a special and sufficient reason,⁶⁸ would excuse the effect of the invalidating or incapacitating law in that particular case. Since invalidating and incapacitating laws were most probably enacted exclusively by the supreme authority of the Church, this power of dispensation rested with the pope,⁶⁹ unless he delegated otherwise.⁷⁰ Hence

"[...] inhabilitas per legem inducta non potest restitui per modum epiikiae [...]." See *De legibus*, V, 5, 23, 3. D'Annibale and Wernz continue this teaching. D'Annibale writes, "Deinde nullam epichejam recipiunt." See D'ANNIBALE, *Summula theologiae moralis*, no. 216. Then Wernz says, "Epikēa quoque in legibus irritantibus Ecclesiae saltem ordinarie non potest adhiberi." See WERNZ, *Ius decretalium*, I, p. 134.

⁶⁷ Wernz writes, "Romanus Pontifex in legibus divinis sive naturalibus sive positivis absolute latis vere valideque dispensare non potest." See WERNZ, *Ius decretalium*, I, p. 144.

⁶⁸ Wernz teaches, "Dispensatio [...] definiri potest: relaxio legis ecclesiasticae in casibus particularibus a competente superior ecclesiastico ex causa speciali et sufficienti facta." See WERNZ, *Ius decretalium*, I, p. 142.

⁶⁹ Suárez writes, "[...] de potestate Papae [...] omnem materiam necessariam tantum ex lege humana, a quocumque puro homine vel hominum congregatione lata sit, esse materiam dispensabilem per potestatem hominibus datam." See *De legibus*, VI, 6, 12, 5. Wernz concurs, saying, "Verumtamen R. Pontifex in omni lege mere ecclesiastica [...] dispensare potest." See WERNZ, *Ius decretalium*, I, p. 145.

⁷⁰ Wernz says, "(Episcopi) verum in legibus universalibus Ecclesiae dispensare nequeunt, nisi in casibus expresse vel tacite iure ordinario permissis aut speciali delegatione concessis." See WERNZ, *Ius decretalium*, I, pp. 145-146. Suárez speaks in a similar way. See Suárez, *De legibus*, VI, 6, 15, 8-10.

invalidating and incapacitating laws can be the object of a dispensation.

7. Summary of the contribution of the classical canonists
after Innocent III

The classical canonists skillfully articulated the definition of invalidating and incapacitating laws in the Church's legal system, as the following descriptors summarize.

- a. Invalidating and incapacitating laws refer to human legislation that either incapacitates a person from acting validly in a particular way, or invalidates an action for lack of some required substantial formality.
- b. Invalidating and incapacitating laws concern the very important matters of the Church and are for the common good, which is understood to mean eternal happiness.
- c. Invalidating and incapacitating laws are constituted by true legislative power in the Church.
- d. Invalidating and incapacitating laws hold power to invalidate or to incapacitate from the words of the law itself, understood according to their common usage. In the face of doubt concerning invalidity or incapacity, the presumption is for validity of the act and for the capacity of the person.
- e. Invalidating and incapacitating laws establish their

effect either *de facto* or from a judicial sentence.

- f. Invalidating and incapacitating laws deny that ignorance, fear, or *epieikeia* act as an impediment to the effect of the laws. However, invalidating and incapacitating laws certainly can be the object of a dispensation, to the extent that the legislator provides this power.

The writings of these classical canonists illustrate the definition of invalidating and incapacitating laws that served the Church society, at least from the time of the Council of Trent until the promulgation of the 1917 Code.

8. Confusion with identification of invalidating and incapacitating laws

Although the articulation of the definition of invalidating and incapacitating laws received rather clear expression, the application of the definition so as to identify laws of invalidity and incapacity proved complicated and difficult.⁷² Actually canonists would sometimes disagree because of differing convictions as to whether the meaning of a particular law fit the definition of an invalidating or incapacitating law. Thus the need was present for improved

⁷² In fact D'Annibale writes, "Materia implexa, difficilis, salebrosa [...]." See D'ANNIBALE, *Summula theologiae moralis*, no. 211. Cicognani acknowledges D'Annibale's comment regarding the many questions raised by canonists concerning the force and application of invalidating and incapacitating laws. See A. CICOGNANI, *Canon Law*, 2nd ed., authorized English version by J. O'Hara and F. Brennam, Philadelphia, Dolphin Press, 1935, p. 557.

clarity in the meaning of laws.

D. Conclusion to the Discussion of Invalidating and
Incapacitating Laws Before 1917

The legal system of the Church before 1917 experienced an evolution in definition and practice regarding the validity of acts and the capacity of persons. Indeed the Church moved from a position that virtually all illicit activities were also invalid to a position that presumed validity of actions and capacity of persons, unless the invalidity or incapacity was indisputably established. Thus, as a result of the Church's defining activity that would be considered without legal consequence, the Church provided the basis for defining invalidating and incapacitating laws in the 1917 Code.

III. INVALIDATING AND INCAPACITATING LAWS IN THE 1917 CODE

Within a few weeks after Pius X issued his *motu proprio*, *Arduum sane munus*, the multi-year effort of codification was begun by a commission of cardinals, assisted by consultors, all working under the direction of Cardinal Pietro Gasparri.⁷² Then in 1912, eight years after the work began, the bishops of the Catholic Church were incorporated into a consultation process that eventually produced the final *schema* in 1916.⁷³ Finally, although it would not be effective until

⁷² See KUTTNER, "The Code of Canon Law in Historical Perspective," pp. 133-137.

⁷³ Ibid., p. 137.

Pentecost Sunday, 1918, the Code was promulgated on Pentecost Sunday, 1917.⁷⁴

The 1917 Code contained a definition of invalidating and incapacitating laws. In fact this definition affected many canons in the 1917 Code because it constituted those canons as invalidating and incapacitating laws. Hence, to understand this definition, its meaning and function in the Code are reviewed in three intervals:⁷⁵ first the definition of invalidating and incapacitating laws in the Code is presented; then their identification in the 1917 Code is discussed, and finally a critique of such laws is offered.

A. The definition of invalidating and incapacitating laws
in the 1917 Code

The well-developed definition of invalidating and incapacitating laws articulated by the classical canonists provided a strong foundation to define these laws in the 1917 Code. In fact Title I, "Ecclesiastical Laws," of Book One, "General Norms," of the 1917 Code contained three canons⁷⁶

⁷⁴ *Providentissima Mater Ecclesia* reads, in part, "[...] vim obligandi habere non incipiant nisi a die Pentecostes anni proxime venturi, idest a die decima nona mensis Maii anni millesimi nongentesimi duodevicesimi [...]. Datum Romae apud S. Petrum die festo Pentecostes anno millesimo nongentesimo decimo septimo [...]." See AAS, 9, Pars II, p. 8.

⁷⁵ This dissertation only concerns invalidating and incapacitating laws in the *Code of Canon Law* of the Latin Church.

⁷⁶ These canons, cc. 11, 15, and 16, § 1, constitute the canonical statement of meaning that describes the action of invalidating and incapacitating laws in the 1917 Code. In this paper, the term definition,

which assisted the Church to identify activities that were beyond the bounds of the legally effective. Accordingly we review the definition of invalidating and incapacitating laws in the 1917 Code in nine steps: 1) canonical statement of meaning, 2) purpose, 3) scope, 4) legislative power, 5) words of the law, 6) effects, 7) excuse from the effects, 8) summary of the definition, and 9) conclusion.

1. Canonical statement of meaning of invalidating and
incapacitating laws in the 1917 Code

A brief review of a development within the 1912 and 1916 schemata sets the stage for the discussion of the canonical statement of meaning of invalidating and incapacitating laws in the 1917 Code.

The first schema of the canons of the 1917 Code, sent to the bishops by Cardinal Gasparri on March 20, 1912, included a canon that defined invalidating and incapacitating laws. Actually canon 10, situated under Title I, "Ecclesiastical Laws," says that only those laws are to be considered invalidating or incapacitating in which is established expressly that an act is null or that a person is incapable." By this, the pontifical commission writing the

when referring to these laws, refers not only to the canonical statement of meaning but also to any other factor that defines invalidating and incapacitating laws, such as their purpose, scope, and effects.

" Canon 10 of the 1912 schema: "irritantes et inhabilitantes eae tantum leges habendae sunt, quibus aut actum esse nullum aut inhabilem personam expresse statuitur." See *Codex iuris canonici cum notis Petri*

canon laws into one code⁷⁸ captured the essence of establishing invalidating and incapacitating laws as the classical canonists had taught: the words of the law establish the invalidity or incapacity.

Yet canon 10 of the 1912 schema used the word "expressly" without defining this term. Thus it could be questioned, did "expressly" signify clearly, explicitly, unmistakably, unambiguously, distinctly, or unequivocally? Furthermore, could an effect of invalidity or incapacity be stated implicitly or even tacitly and still be considered "expressly" stated? So, for the sake of clarity, did the law need to say something additional?

Wernz, writing in 1913 regarding prohibiting laws, although not indicating that he was writing about the 1912 schema,⁷⁹ reiterates a focus of the classical canonists that offered clarity to the meaning of "expressly." In fact Wernz writes that prohibiting laws invalidate only if the effect of invalidity is directly provided for in a particular and

Card. Gasparri, 1912, p. 4.

⁷⁸ The exact name of the commission as shown on the letter Cardinal Gasparri sent to the bishops was *Commissio Pontificia legibus canonicis in unum redigendis*.

⁷⁹ Wernz's series, *Ius decretalium*, was published between 1908 and 1915.

expressly or equivalently way."⁶⁰ Accordingly this classical canonist teaches that, since "expressly" includes whatever is equivalent to that which is "express," then "expressly" is a broad concept that goes beyond the immediate words of the canon to identify the meaning of the law.

Then the 1916 schema, following the sense of the classical canonists, used the words "expressly or equivalently."⁶¹ Indeed the legal tradition in the Church prior to 1917 provided the basis for the 1917 Code. Thus, since c. 11 of the 1917 Code was essentially identical to c. 11⁶² of the 1916 schema,⁶³ the tradition of the classical

⁶⁰ In fact Wernz writes, "[...] sunt ipso iure nulli atque invalidi, si speciatim et expresse vel aequivalenter de effectu irrationis in illa prohibente lege canonica directe caveatur." See WERNZ, *Ius decretalium*, I, p. 133.

⁶¹ Canon 11 of the 1916 schema: "Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus aut actum esse nullum aut inhabilem personam expresse vel aequivalenter statuitur." The footnote citations by Gasparri for both c. 10 of the 1912 schema and c. 11 of the 1916 schema were identical: c. 16, X, *de regularib.*, III, 31; c. 6, *de concessione praeb.*, III, 7, in VI. See *Codex iuris canonici cum notis Petri Card. Gasparri*, 1912, p. 4; also see *Codex iuris canonici cum notis Petri Card. Gasparri*, 1916, p. 4. As a result, since Gasparri provides no new source for the addition of "vel aequivalenter," it would seem that this term existed in the general canonical understanding of the day, with Gasparri adding it to c. 11. Writing in agreement Urrutia says, "Un termine (aequivalenter) introdotto dal Gasparri [...]." See F. URRUTIA, "Il libro I: le norme generali," in *La Scuola cattolica*, 112 (1984), p. 151.

⁶² The introductory canons of the 1916 schema were more in number and different in content from the introductory canons of the 1912 schema, with the result that the content of canon 10 in the 1912 schema became canon 11 in the 1916 schema.

⁶³ Canon 11 of the 1917 Code restates c. 11 of the 1916 schema altered, however, by the insertion of the word "esse" between the words "inhabilem" and "personam."

canonists regarding laws of invalidity and incapacity continued to be the norm of the Church.

With the promulgation of the 1917 Code, canon 11 became the canonical description of the action of invalidating and incapacitating laws in the Church's legal system. Further canons 15 and 16, § 1 expanded upon c. 11. Therefore, the canonical statement of meaning of laws of invalidity and incapacity in the 1917 Code includes canons 11, 15, and 16, § 1.

Canon 11 describes the specific action of invalidating and incapacitating law in the 1917 Code.⁴⁴ Since a sectional analysis of c. 11 provides a good method for displaying the significance of this canon, its four major components are discussed individually:

a) invalidating laws: that an act is null (*Irritantes leges: actum esse nullum*) - the words of an invalidating law provide that, in the event a certain act is attempted, the action would be without juridic effect;⁴⁵

⁴⁴ Canon 11 of the 1917 Code: "Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus aut actum esse nullum aut inhabilem esse personam expresse vel aequivalenter statuitur."

⁴⁵ For example Van Hove writes, "Lex irritans ea est quae denegat actui efficaciam iuridicam [...]." See VAN HOVE, *De legibus ecclesiasticis*, Mechliniae, H. Dessain, 1930, p. 163. Also Michiels, when discussing invalidity and incapacity, says, "actus [...] iuridice seu relate ad efficaciam iuridicam ipsi ad normam juris propriam, est ac si non fuisset positus atque ideo infectus, nullus, invalidus, irritus." See MICHIELS, *Normae generales juris canonici, commentarius libri I Codicis juris canonici*, editio altera, Parisiis, Typis Societatis S. Joannis Evangelistae, 1949, vol. I, p. 320. The 1917 canonists stated more

b) incapacitating laws: that a person is incapable (*inhabilitantes leges: inhabilem esse personam*) - the words of an incapacitating law provide that, in the event a certain person attempts to act in a specified manner, the action would be invalid and without juridic effect;⁶⁶

c) those laws are only to be considered (*eae tantum leges habendae sunt quibus*) - only legislation in which the words of the law establish invalidity or incapacity are considered invalidating or incapacitating laws;⁶⁷ and

d) it is established expressly or equivalently (*expresse vel aequivalenter statuitur*) - the reality of invalidity or incapacity must be established expressly or in equivalent

directly than the classical canonists that invalidating laws deny the juridic effect of an act.

⁶⁶ Once again Van Hove writes, "Lex inhabilitans aufert a persona capacitem iuridicam [...]." See VAN HOVE, *De legibus ecclesiasticis*, p. 163. In addition Cappello says, "Lex inhabilitans reddit personam incapacem ponendi actum iuridicum [...]." See F. CAPPELLO, *Summa iuris canonici*, I, Romae, Apud Aedes Universitatis Gregoriana, 1945, p. 57. Furthermore, for similar comments, see MICHIELS, *Normae generales juris canonici, commentarius libri I Codicis juris canonici, editio altera*, pp. 320-321; P. MAROTO, *Institutiones iuris canonici ad normam novi codicis*, Romae, Apud Commentarium pro Religiosis, tomus I, 1921, pp. 233-234; and U. BESTE, *Introductio in Codicem*, Neapoli, M. D'Auria Pontificius editor, 1956, pp. 169-170. Truly the 1917 canonists stated more directly than the classical canonists that incapacitating laws prevent a person from generating a juridic effect as the result of a performing a certain action. Thus, continuing the teaching of Suárez that absolute prohibition is sufficient for invalidity, the action of an incapable person is invalid.

⁶⁷ For instance Maroto writes, "Lex irritans est vera lex [...]." See MAROTO, *Institutiones iuris canonici ad normam novi codicis*, p. 233. Also Van Hove says, "Voluntas legislatoris [...] est attendenda." See VAN HOVE, *De legibus ecclesiasticis*, p. 166. This agrees with the classical canonists.

terms. Since *statuitur* indicates that the invalidating or incapacitating action must occur in the law and must operate through and by the law, an invalidating or incapacitating law itself would invalidate an act or declare a person incapable to act."²⁰ Furthermore, while *expresse* refers to the direct and positive establishment of invalidity or incapacity by the words in the canon," *vel aequivalenter* refers to the indirect and negative establishment of invalidity or incapacity, such as conditions, solemnities, qualities, or circumstances required for validity or capacity."²¹

Yet not all canonists agree on the meaning of *expresse vel aequivalenter*.²² Actually canonists note special

²⁰ For example Roelker writes, "an invalidating law is one which itself will annul an act [...] (an incapacitating law) declares a person incompetent to act. This is the essential point to consider." See ROELKER, *Invalidating Laws*, pp. 45-46.

²¹ For instance Michiels says, "*Expresse* [...] in lege verba, per quae ipsa nullitas aut ipsa inhabilitas directe et positive statuitur." See MICHIELS, *Normae generales juris canonici, commentarius libri I Codicis juris canonici*, editio altera, p. 336.

²² As when Michiels writes, "*Aequivalenter*. [...] tantummodo indirecte et negative, in quantum scilicet verba ista directe et positive exprimunt quatenus conditiones, solemnitates, qualitates aliaeve circumstantiae requirantur ut actus validus aut persona habilis sit [...]." Furthermore Michiels writes, "In utroque casu nullitas actus aut inhabilitas personae non solummodo explicite statui potest, sed et implicite [...]." See MICHIELS, *Normae generales juris canonici, commentarius libri I Codicis juris canonici*, editio altera, pp. 336-337.

²³ For example Van Hove says, "De sensu horum verborum scriptores non conveniunt." See VAN HOVE, *De legibus ecclesiasticis*, p. 167.

confusion in regard to the meaning of *vel aequivalenter*."²² Indeed, although canon 11 describes laws of invalidity and incapacity consistent with the teaching of the classical canonists, the words *vel aequivalenter* caused confusion, not clarity. Hence, since the goal of clear expression resulted in disorder," some 1917 canonists called for a change."

Canon 15 says, in part, that a doubt of law, even an invalidating or incapacitating law, does not bind."²³ Truly, when the existence, meaning, or extent of the obligation of a

²² Some canonists understand "*aequivalenter*" in c. 11 to refer to laws that assign formalities or solemnities to an act in order for it to be valid, while other canonists claimed it means words whose meaning is equivalent to the actual words expressed. Yet other canonists say that "*aequivalenter*" could include any interpretation that fulfills the meaning of the words. For a discussion of the various opinions see ROELKER, *Invalidating Laws*, pp. 98-99. Also see F. URRUTIA, "Adnotationes quaedam ad propositam reformationem libri primi Codicis iuris canonici," in *Periodica*, 64 (1975), pp. 634-638; and MICHIELS, *Normae generales juris canonici, commentarius libri I Codicis juris canonici*, editio altera, pp. 336-337.

²³ For example Michiels says, "Quamvis, ad rem quod attinet, substantialiter convenient auctores, non penitus concordant in determinanda propria significatione verborum expresse et *aequivalenter*, ac proinde in determinando quaenam leges dicendae sint expresse irritantes aut inhabilitantes, quaenam vero *aequivalenter*." See MICHIELS, *Normae generales juris canonici, commentarius libri I Codicis juris canonici*, editio altera, p. 336. Also Bouscaren, Ellis, and Korth, write, "It is not always easy to determine what amounts to an equivalent declaration." See BOUSCAREN, ELLIS, and KORTH, *Canon Law: A Text and Commentary*, p. 27.

²⁴ For example Staffa writes, "Conviene quindi togliere *vel aequivalenter*." See D. STAFFA, "Imperfezioni e lacune del primo libro del Codice de diritto canonico," in *Apollinaris*, 33 (1960), p. 55. For a similar comment see URRUTIA, "Adnotationes quaedam ad propositam reformationem libri primi codicis iuris canonici," pp. 634-638.

²⁵ Canon 15 of the 1917 Code reads, in part, "Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent [...]."

law is doubtful, the law cannot invalidate or incapacitate."⁴⁴ Thus, since validity and capacity are presumed," invalidity and incapacity require clear and certain articulation in the words of law.

Ignorance of an invalidating or an incapacitating law does not excuse from the effects of the law, unless the law explicitly admits ignorance as an excuse."⁴⁵ As a result, no subjective consideration on the part of a person in the Church excuses the objective reality of an invalidating or incapacitating law, unless the law provided otherwise.

The 1917 Code clearly sets forth the norm that only the words of a law invalidate an action or incapacitate a person from acting in a certain way, so that, in the event such an action is attempted, the action would be invalid and without juridic effect."⁴⁶

⁴⁴ See S. WOYWOD, *A Practical Commentary on the Code of Canon Law*, New York, J. F. Wagner, 1932, vol. I, p. 10.

⁴⁵ For example Roelker writes, "In Canon Law, acts contrary to law are presumed valid. Their invalidity must be clearly demonstrated. Doubts are solved in favor of validity not invalidity." See E. ROELKER, "An Introduction to the Rules of Law," in *The Jurist*, 10 (1950), p. 436. This is consistent with the classical canonists.

⁴⁶ Canon 16, § 1 of the 1917 Code reads, "Nulla ignorantia legum irritantium aut inhabilitantium ab eisdem excusat, nisi aliud expresse dicatur." Examples of canons that can halt the effect of an invalidating or incapacitating law are cc. 207, § 2 and 209 in the 1917 Code.

⁴⁷ A juridic effect is a legally based consequence resulting from a juridic act. Robleda defines a juridic act as an external act of the will, directed to produce determined juridic effects. See O. ROBLEDA, *La nulidad del acto jurídico*, Roma, Libreria editrice dell'Università Gregoriana, 1964, p. 7, where he writes, "[...] acto jurídico: es un acto

2. Purpose of invalidating and incapacitating laws

Since all laws in the Church serve the primary mission of the Church, salvation,¹⁰⁰ the invalidating and incapacitating laws in the 1917 Code also work for this purpose. In fact the invalidating and incapacitating laws both provide for the common good of the society¹⁰¹ and set the boundaries beyond which activities in the Church lack juridic effect. Thus the invalidating and incapacitating laws enjoy a central role in the mission of the Church.

de la voluntad, externo, dirigido a producir determinados efectos jurídicos."

Indeed, the 1917 canonists clearly teach that an invalidating or an incapacitating law declares the lack of a juridic effect. For example Van Hove writes, "Lex irritans ea est quae denegat actui efficaciam iuridicam [...]." See VAN HOVE, *De legibus ecclesiasticis*, p. 163. Also Cappello says, "Lex inhabilitans reddit personam incapacem ponendi actum iuridicum [...]." See CAPPELLO, *Summa iuris canonici*, I, p. 57. Then Robleda writes, "Para Suárez inhabilitar es lo mismo que hacer ineficaz - impotente - la voluntad para obtener efectos jurídicos." See ROBLEDA, *La nulidad del acto jurídico*, p. 237.

¹⁰⁰ For example see PIUS XII, Allocution to the Sacred Roman Rota, October 2, 1944, in AAS 36 (1944), pp. 281-290, in which he says that the whole Church exists exclusively for the salvation of souls and that all juridical functions in the Church serve that purpose.

¹⁰¹ For example Cicognani writes, "these [invalidating and incapacitating] laws are made for the common good, for the welfare of society, namely, in order to safeguard society from fraud, danger and injury [...]." See CICOGNANI, *Canon Law*, p. 558. Also Ojetti says, "[...] irritando actum intuitu boni communis vel privatorum [...]." See B. OJETTI, *Commentarium in Codicem iuris canonici, liber primus, normae generales (can. 1-86)*, Romae, Apud Aedes Universitatis Gregorianae, 1927, p. 98.

Urrutia suggests, however, that Church law is for the supernatural spiritual good of individual persons, rather than the common good. See F. URRUTIA, "De natura legis ecclesiasticae," in *Monitor Ecclesiasticus*, 50 (1975), p. 414, where he writes, "Lex ecclesiastica non est primario ordinatio ad bonum commune, sed ad bonum spirituale supernaturale singularum personarum."

3. Scope of invalidating and incapacitating laws

While the 1917 Code does not dispute the presence of invalidity or incapacity in divine law, the presence of canons 11, 15, and 16, § 1 under Title I, "Ecclesiastical Laws," instructs that "invalidating" and "incapacitating" apply to ecclesiastical laws set by human legislation.¹⁰²

4. Legislative power to enact invalidating and
incapacitating laws

While the classical canonists did not write much about specific legislative authority to enact invalidating and incapacitating laws, the 1917 Code is more revealing. For example, canon 542, 1¹⁰³ provides that, in addition to the norms established by law, the religious institute may add

¹⁰² As when Van Hove writes, "[...] non sunt irritantes aut inhabilitantes leges quae declarant nullitatem statutam iure divino naturali vel positivo. Lex irritans enim supponit actum subsistentem ex iure divino [...] ex voluntate legislatoris ecclesiastici denegantur effectus iuridici [...]." See VAN HOVE, *De legibus ecclesiasticis*, p. 194. For further comments in this regard see, BESTE, *Introductio in Codicem*, p. 69; C. BERUTTI, *Institutiones iuris canonici*, vol. I, Taurini, Marietti, 1935, p. 75; and G. Cocchi, *Commentarium in Codicem iuris canonici*, Torino, Marietti, 1931, p. 180.

However, not all 1917 canonists agree with this position, or at least not totally. For example Michiels writes, "[...] leges irritantes aut inhabilitantes in jure canonico non sunt eae solae quae relate ad effectus juridicos ecclesiasticos positive auferunt seu denegant validitatem actum aut habilitatem personarum iis vi juris divini propriam, sed eae quoque quae quolibet ex capite impediunt quominus oriatur seu existentiam capiat actus ad effectus juridicos ecclesiasticos producendos aptus." See G. MICHIELS, *Normae generales juris canonici, commentarius libri I Codicis juris canonici*, editio altera, pp. 321-322.

¹⁰³ Canon 542, 1°, of the 1917 Code reads, in part, "Firmo praescripto can. 539-541, aliisque in propriis cuiusque religionis constitutionibus, 1. invalide ad novitiatum admittuntur [...]."

other conditions for valid admission to a novitiate. This canon is understood to mean that a religious order or congregation could establish regulation more severe than those established by the 1917 Code.¹⁰⁴ Indeed legislative power below that of the supreme authority of the Church includes the power to enact invalidating and incapacitating laws, at least to a certain extent. Consequently, since the 1917 Code does not indicate otherwise, all persons with legislative power in the Church could enact invalidating and incapacitating laws to the extent of that legislative power, within the norms of law.¹⁰⁵

5. Words of the law required for invalidating and
incapacitating laws

The 1917 Code furnishes five canons¹⁰⁶ concerning the proper interpretations of ecclesiastical laws. While each of these canons affects the appropriate interpretation of invalidating and incapacitating laws in the Code, canon 18 is of particular importance because it strongly complements an essential element of the definition of invalidating and

¹⁰⁴ See Woywod, vol I. p. 213.

¹⁰⁵ For example Roelker says, "[...] no restriction can be deduced which would deny a bishop the right to enact invalidating laws [...]. There is nothing in the *Code of Canon Law* which would support such a denial." See ROELKER, *Invalidating Laws*, p. 57.

¹⁰⁶ These are cc. 17-21. For comments concerning these canons see MICHIELS, *Normae generales juris canonici, commentarius libri I Codicis juris canonici, editio altera*, pp. 469-517; and VAN HOVE, *De legibus ecclesiasticis*, pp. 256-264.

incapacitating laws. Actually, since the words of the law establish the action of invalidity or incapacity, canon 18¹⁰⁷ enhances this essential element by declaring that the meaning of the words of law are found in the text and context of the law.¹⁰⁸ Clearly, since the meaning of a law could be found nowhere else, the action of invalidating or incapacitating could be found in the text and context of these laws. Thus the identification of such laws in the 1917 Code requires an accurate comprehension of the meaning of the words in each canon.¹⁰⁹

6. Effects of invalidating and incapacitating laws

¹⁰⁷ Canon 18 of the 1917 Code reads, in part, "*Leges ecclesiasticae intelligendae sunt secundum propriam verborum singificationem in textu et contextu consideratam [...].*"

¹⁰⁸ While text refers to the words of the canon, precisely as written, context refers to the larger setting of the words, as their location in the 1917 Code or the subject area of the legislation. The context also refers to writings external to the 1917 Code that explain the content of the 1917 Code. For example, a review of authentic interpretations of canons of the 1917 Code identifies a large array of papal and Roman curial documents that the Pontifical Commission for the Proper Interpretation of the *Code of Canon Law* used to provide the appropriate context for the correct understanding of the canons. See *Codicis iuris canonici interpretationes authenticae seu responsa a pontificia commissione ad Codicis canones authenticos interpretandos*, annis 1917-1950, Civitate Vaticana, Typis Polyglottis Vaticanis, 1935, vol. I, and 1950, vol. II.

Furthermore, the canonical tradition of the Church prior to 1917 continues to live in the 1917 Code, protected by c. 6 of the 1917 Code.

¹⁰⁹ The 1917 canonists continue to value the words of legislation for the establishment of invalidity or incapacity. For example Michiels says, "[...] neutro casu admitti possit irritatio aut inhabilitatio, nisi termini a legislatore adhibiti certocertius sint hujus irritationis aut inhabilitationis manifestativi [...]." See MICHIELS, *Normae generales juris canonici, commentarius libri I Codicis juris canonici*, p. 337.

If a canon in the 1917 Code is an invalidating or an incapacitating law, the power of the canon effects one of two results:¹¹⁰ 1) the act is nonexistent: a constitutive element is lacking, or the person placing the act lacks the required human capacity; or 2) the act exists, but with no effect: a required condition or solemnity is lacking. Each of these results indicates the absence of a juridic act.

Also, consistent with the teaching of the classical canonists, invalidating and incapacitating laws in the 1917 Code take effect as follows: 1) when the law does not require the intervention of a court, the law in question produces its effect immediately; or 2) if the law requires the intervention of a court, even though the act is presumed valid until it is adjudged invalid, the effect of the judgment by the court would be retroactive to the time of the act.¹¹¹

7. Excuse from the effects of invalidating and
incapacitating laws

In addition to ignorance not being an excuse from the effects of an invalidating and incapacitating law, fear and

¹¹⁰ See ROBLEDA, *La nulidad del acto jurídico*, pp. 211-214.

¹¹¹ For example Roelker writes, "First, an invalidating law which does not require the intervention of a court either for declaration or for condemnation of the act in question produces its effect immediately [...]; secondly, an invalidating law which requires such intervention of the court does not produce its effect [...] until a sentence is produced. In consequence of this second statement, an act contrary to an invalidating law is considered valid until it is adjudged invalid. The effect of this judgment should be retroactive." See ROELKER, *Invalidating Laws*, p. 120.

epieikeia also do not excuse or impede a person from the effect of one of these laws.¹¹² Yet such a law can be the object of a dispensation to the extent that the legislator provides this power. Thus, while individual subjective factors do not excuse a person from the effect of an invalidating or incapacitating law, competent Church authority can dispense a person from such a law for a just cause.

8. Summary of the definition of invalidating and
incapacitating laws in the 1917 Code

The 1917 Code greatly relied upon the classical canonists' definition of invalidating and incapacitating laws for the definition of these laws in the Code, as the following descriptors summarize.

- a. Invalidating and incapacitating laws are forms of human legislation that render certain actions to be without juridic effect and certain persons incapable of acting validly so as to produce a juridic effect.
- b. Invalidating and incapacitating laws are for the good of the Church society by setting boundaries regarding juridic effects in its legal system.
- c. Invalidating and incapacitating laws are established by true legislative power in the Church.
- d. Invalidating and incapacitating laws hold power to invalidate or to incapacitate from the words of the

¹¹² See Ibid., pp. 127-135.

law itself, understood according to its text and context. The declaration of invalidity or incapacity must be stated expressly or in equivalent terms. Moreover, in the face of doubt concerning invalidity or incapacity, the presumption is for the validity of the act and the capacity of the person.

- e. Invalidating and incapacitating laws establish their effect either *de facto* or from a judicial sentence.
- f. Invalidating and incapacitating laws deny that ignorance, fear, or *epieikeia* act as an impediment to the effect of the invalidating or incapacitating laws. However, these laws can be the object of a dispensation, to the extent that the legislator provides this power.

The 1917 Code, therefore, established laws of invalidity and incapacity in clear terms ready for application.

9. Conclusion to the discussion on the definition of
invalidating and incapacitating laws in the 1917
Code

The definition of invalidating and incapacitating laws in the 1917 Code continued the legal tradition articulated by the classical canonists. Moreover the 1917 Code refined that definition to state more clearly the norm of the Church, especially what both invalidating laws and incapacitating laws had in common: they negate juridic effect. Therefore, the

1917 Code presented to the Church a definition of invalidating and incapacitating laws ready to be applied to the legal system of the Church.

**B. The identification of invalidating and incapacitating
laws in the 1917 Code**

Since Church society needed an accurate identification of invalidating and incapacitating laws, the 1917 Code had to be approached with technical skill and legal comprehension. Indeed this art required an approach that relied on the words of the law to establish invalidity or incapacity, without preconceived notions on the part of the reader. Thus the process of identifying invalidating and incapacitating laws in the 1917 Code addressed two issues: the lack of juridic effect and the vocabulary used to communicate this reality.

1. Lack of juridic effect

While cc. 11, 15, and 16 § 1 provide the canonical description of invalidating and incapacitating laws in the 1917 Code, canon 1680, § 1 gives an important instruction for identifying these laws. Actually, according to c. 1680, § 1, an act is invalid only when either something that essentially constitutes the act is deficient, or a solemnity or condition required by the sacred canons under pain of nullity is lacking.¹¹³ In other words, unless one of the situations

¹¹³ Canon 1680, § 1 of the 1917 Code reads, "Nullitas actus tunc tantum habetur, cum in eo deficiunt quae actum ipsum essentialiter constituunt, aut sollemnia conditiones desiderantur a sacris canonibus

described in c. 1680, § 1 is established in a canon, the canon does not constitute an invalidating law. Without exception, only a canon that clearly establishes invalidity is an invalidating law. As a result, when reading the 1917 Code for the purpose of identifying invalidating laws, the question has to be asked of each canon that concerns a juridic act:¹¹⁴ does the canon establish the absence of an element presented in c. 1680, § 1? If yes, the canon acts as an invalidating law.

Although c. 1680, § 1 concerns the invalidity of acts, the question has to be asked, does the same approach apply to the capacity of persons? The answer is yes.¹¹⁵ In other words, if a canon establishes that a person is incapable of acting in a specific manner, any attempt at such an action would be invalid and without juridic effect. Therefore, when reading the 1917 Code to identify incapacitating laws, the question has to be asked of each canon that concerns a juridic

requisitae sub poena nullitatis."

¹¹⁴ Actually, since the identification of invalidating and incapacitating laws asks whether an apparent juridic act produces a juridic effect, the identification process concerns only those canons that regarded a juridic act. In fact Robleda, noting that both c. 11 and c. 1680 provide necessary criteria for nullity in the 1917 Code, writes, "El criterio cognoscitivo general de los actos nulos en el Codex se contiene en los dos cánones 11 y 1680 [...]." See ROBLEDA, *La nulidad del acto jurídico*, p. 203. Also see ROELKER, *Invalidating Laws*, p. 137; and A. BRESSAN, "De inexistencia et nullitate actus iuridici in C.I.C.," in *Periodica*, 59 (1970), pp. 471-483.

¹¹⁵ See ROBLEDA, *La nulidad del acto jurídico*, pp. 223-235, for a discussion on incapacity and expressed nullity.

act: does the canon establish the incapacity of a person to perform validly a certain action? If yes, once again the canon provides an incapacitating law.

2. Vocabulary

Even though the definition of invalidating and incapacitating laws clearly stipulates that only the words of a law establish invalidity or incapacity, identification of these laws was not easy. Moreover, since no signal terms¹¹⁶ would be present to signify invalidity or incapacity, the 1917 canonists consider a large variety of words as potential indicators of invalidity or incapacity. For example, some 1917 canonists¹¹⁷ identify a variety of terms which could¹¹⁸

¹¹⁶ A signal term, if one existed, always would indicate that a canon in which the term is present is an invalidating or incapacitating law.

¹¹⁷ These 1917 canonists are: BERUTTI, *Institutiones iuris canonici*, I, pp. 74-77; BESTE, *Introductio in Codicem*, pp. 68-70; CAPPELLO, *Summa iuris canonici*, I, pp. 57-59; G. GRAF, *Die leges irritantes und inhabilitantes im Codex iuris canonici*, Paderborn, F. Schöningh, 1936, pp. 49-119; MICHIELS, *Normae generales iuris canonici, commentarius libri I Codicis iuris canonici*, editio altera, pp. 335-342; K. MÖRS DORF, *Die Rechtssprache des Codex iuris canonici*, Paderborn, F. Schöningh, 1967, pp. 91-97; ROBLEDA, *La nulidad del acto jurídico*, pp. 236-276; ROELKER, *Invalidating Laws*, pp. 136-157; VAN HOVE, *De legibus ecclesiasticis*, pp. 167-170. Of these authors, Graf, Mörsdorf, Robleda, and Roelker provide the more detailed identifications, yet no two of these authors demonstrate complete agreement.

¹¹⁸ Since no definitive list of terms exists, care has to be taken to comprehend the meaning of the canon, without relying on a signal term to identify invalidity or incapacity. For comments on this see ROELKER, *Invalidating Laws*, p. 136; and ROBLEDA, *La nulidad del acto jurídico*, p. 276; also, on p. 198, Robleda furnishes an example when writing, "Es verdad que las expresiones: effectum non habere, effectum iuridicum non habere no significan muchas veces en el Codex otra cosa que la nulidad del acto, expresándola aequivalenter (c.11) [...]," because to say that they do not signify many times in the Code something else than [...]" ("no

establish invalidating or incapacitating laws:

a. terms noted by five or more of these nine 1917 canonists that can establish invalidity or incapacity:¹¹⁹ *dirimit, effectum non sortitur, inhabilitas, invalidus, irritus, nullus, and ut valeat.*

b. terms noted by four or fewer of these nine 1917 canonists that can establish invalidity or incapacity:¹²⁰ *amittit, caret, eximit, exsultat omnino, una Sedes Apostolica, unus cancellarius, unicus, omnis et solus, solus, incapaces, ut quis capax sit, incompetencia absoluta, nemo potest, nihil, non adiectae, non admittitur, non habent personam standi, non facit fructus suos, non satisfacit, non sustinentur, non valent, nunquam ferri potest, omnino aufert, opus est, perimit, prosus excludit, excluduntur, exclusive, pro infectis habentur, requiritur et sufficit, sub poena, subscriptio, subscribant, tollunt, ut admittatur, ut quis sit patrinus, valide, vim habere, vitio nullitatis laborat, arcentur, debet, dummodo, indiget, necessarius, nequit, nisi, oportet, requiritur, reservata, tantum (tantummodo), exclusus habeatur,*

significan muchas veces en el Codex otra cosa que") implies, since many times does not equal all times, that some times these expressions can mean something other than the nullity of the act. Therefore, the need for careful attention to the meaning of the words of a canon cannot be overstressed.

¹¹⁹ Other forms of these terms are considered encompassed in these terms.

¹²⁰ Other forms of these terms are considered encompassed in these terms.

fructus non facit suos, infames, priventur, suspensi manent, valere, nequit valide, exigi, omni vi caret, nullius roboris est, nihil agit, excludere, repeluntur, non potest valide, non spectare, non pertinere, ius non esse, non competere, sine facultate, sine indulto, sine concessione, sine auctoritate. In addition, *si* and *dummodo* were recognized as words that could establish invalidity because of the action of canon 39, which stipulated that conditions demanded in rescripts are essential for their validity only in those cases where they are expressed by the particles *si* or *dummodo*.

Obviously, according to the 1917 canonists in this survey, many words¹²¹ are able to establish invalidity or incapacity, depending on the meaning of the canon in which the word appears.

3. Conclusion to the identification of invalidating and incapacitating laws in the 1917 Code

None of the nine 1917 canonists in this survey provides a complete list of invalidating and incapacitating laws in the 1917 Code. Furthermore, although many canons of the 1917 Code are identified by more than one of the canonists as invalidating or incapacitating, each canonist identifies at least some canons that no other of these nine canonists has

¹²¹ Notice that only seven terms are identified by five of more of these nine 1917 canonists as a term that can identify an invalidating or incapacitating law, while more than seventy terms are identified by four or fewer of the canonists.

identified as invalidating or incapacitating law. Obviously the fact that a canonist does not identify a particular canon as an invalidating or incapacitating law does not mean that the canonist would not agree that the canon does establish invalidity or incapacity. Really all that can be said is that the canonist chose not to mention that particular canon.

As a result, two conclusions may be drawn from this brief analysis: 1) no canonist chose to submit a complete and exhaustive list of invalidating and incapacitating laws in the 1917 Code; and 2) each of the canonists uses the meaning of the canons, as he understood the meaning of the law within its text and context, to identify those laws that establish invalidity or incapacity.

C. Critique on invalidating and incapacitating laws in the 1917 Code

The definition of invalidating and incapacitating laws in the 1917 Code shows a consistency of legal tradition and thought, at least since the time of Suárez, that served the common good of the ecclesial society. In fact, for the sake of attaining its goal or mission, the Church identified and constituted those activities that, because they exceed the boundaries of what was acceptable behavior, lacked legal effect or consequence. Furthermore, lest there be confusion as to what was or was not beyond the limits of legally effective conduct, the boundaries were established only by

means of true legislation, properly promulgated. As a result, the Church very appropriately held the presumption of validity and capacity, requiring the opposite to be clearly demonstrated. Without a doubt, therefore, the understanding of invalidating and incapacitating laws in the 1917 Code was reasonable and appropriate.

However, the specific articulation of the definition in canon 11 of the 1917 Code left much to be desired. While the words *vel aequivalenter* were written into canon 11 for the purpose of explaining the sense of the word *expresse*, which is also in the canon, *vel aequivalenter* proved to be a source of great confusion, thereby weakening the effectiveness of canon 11. As a result, while the aim of the 1917 Code was to provide clarity and uniformity to the Church's legal system, the history of canon 11 can only be seen as an example where the 1917 Code fell short of its aim.

IV. CONCLUSION

Chapter One documents the evolution of the definition of invalidating and incapacitating laws in the Church's legal system up to and in the 1917 Code, along with the shortcomings of the canonical expression and subsequent application of that definition. While the condition of the invalidating and incapacitating laws in the 1917 Code stands as one example of difficulty in the Church's legal system, the world context in which the Church lived must also be allowed to add perspective

to the frustration felt in the Church. Actually during the sixty-six year reign of the 1917 Code, the world experienced: two world wars; a major economic depression, as well as an unprecedented period of economic growth; outstanding technological innovations that both solved problems and introduced new dilemmas; civil unrest and new found personal freedom; and an increased use of the democratic form of government. Truly the historical circumstances of this period established a world society that differed considerably from the world society that ushered in the 1917 Code. Fortunately the Church is more than a human society of individuals who share a common faith. God lives with the Church.

CHAPTER TWO

THE DEFINITION OF INVALIDATING AND INCAPACITATING LAWS IN THE 1983 CODE OF CANON LAW

January 25, 1959 marks the commencement of a new era in the evolution of canon law. On this day, at the Basilica of Saint Paul outside the Walls, Pope John XXIII announced his intention to convoke an ecumenical council and to establish a pontifical commission to revise the *Code of Canon Law*.¹ John XXIII considered the revision of the Code as a responsibility inseparable from the work of the Second Vatican Council.² In other words, they constituted two moments in one and the same program.³

On March 28, 1963, well after the completion of the first session of Vatican II, John XXIII appointed the first members of the Pontifical Commission for the Revision of the Code of

¹ JOHN XXIII, Allocution to a group of Cardinals after a Solemn Mass, January 25, 1959, in *AAS*, 51 (1959), pp. 65-69. Also see J. ALESANDRO, "General Introduction," in J. CORIDEN, T. GREEN, D. HEINSTSCHEL (eds.), *The Code of Canon Law: Text and Commentary (=American Commentary)*, commissioned by the CANON LAW SOCIETY OF AMERICA, New York, Mahwah, NJ, Paulist Press, 1985, p. 4. In this dissertation, "1983 Code" will signify *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus*, Liberia editrice Vaticana, 1983, xxx, 317 p. English-language citations of canons in the 1983 Code are from the American version of English-language translation: *Code of Canon Law*, Latin-English ed., translation prepared under the auspices of THE CANON LAW SOCIETY OF AMERICA, Washington, D.C., Canon Law Society of America, 1983, xlii, 668 p.

² The Second Vatican Council (=Vatican II) took place from 1962 to 1965.

³ See J. HAMER, "The Code and the Council," in *L'Osservatore Romano* (English Edition), 7 (771), February 14, 1983, p. 9.

Canon Law.⁴ The initial plenary session of the Commission convened on November 12, 1963, when the Commission chose to suspend its activity until the completion of Vatican II. The direction and the teaching of Vatican II would influence the revision of the Code, not the reverse.⁵

Thus, Chapter Two comprises the following six sections:

- I. Objective of Chapter Two,
- II. Vatican II,
- III. Revision of the Code of Canon Law,
- IV. Effect of Vatican II on invalidating and
incapacitating law,
- V. Definition of invalidating and incapacitating
laws in the 1983 Code,
- VI. Conclusion.

I. OBJECTIVE OF CHAPTER TWO

Vatican II produced a new direction to the life of the Church. Moreover, as a result of the Council, the Church strove to reform and to renew its legal system in light of this new direction, even incorporating modifications to the role of invalidating and incapacitating laws. Therefore, Chapter Two endeavors to document the effect of Vatican II on the definition of invalidating and incapacitating laws in the

⁴ See J. ALESANDRO, "The Revision of the Code of Canon Law: A Background Study," in *Studia canonica*, 24 (1990), p. 95.

⁵ Ibid., pp. 95-96, and p. 134.

1983 Code.*

II. VATICAN II

Since the purpose of an ecumenical council is unique to the Church, the contribution of these councils to Church law is also unique and special. Actually the teachings of ecumenical councils frequently have contributed to the Church's legal structure for many years after the ecumenical council. Consequently, understanding the nature and the function of Vatican II promotes understanding the nature and function the 1983 Code.

A. Purpose of an ecumenical council

An ecumenical council manifests in an atypical and extraordinary way the constant presence of the Holy Spirit in the Church. In fact, Vatican II stands as the twenty-first ecumenical council in the history of the Church.⁷ Really the infrequency of these councils indicates their importance. Indeed, they occur solely when the Church needs to deal with a critical situation that affects it and its mission. An ecumenical council gathers the bishops of the Catholic world,*

* Once again, this dissertation only concerns invalidating and incapacitating laws in the *Code of Canon Law* of the Latin Church.

⁷ See J. PROVOST, "The Hierarchical Constitution of the Church [cc 330-572]," in the *American Commentary*, p. 306.

* See P. CORISH, "The Church and the Councils," in *The Irish Ecclesiastical Record*, 98 (1962), p. 209.

inspired by the Holy Spirit,* to act for the protection of the faith or for the preservation of Church unity.¹⁰ As a result, the faithful must honor and observe the doctrines of an ecumenical council. Truly, respect for these teachings exemplifies an important way in which the faithful fulfill their duty to follow the guidance of the sacred pastors, so as to maintain proper relationships in the Church.¹¹

B. Contribution of ecumenical councils to Church law

Ecumenical councils teach many of the values by which the Church lives.¹² Not only do they provide doctrine that stimulates the life of the Church, these councils also contribute positively to the law of the Church in that they augment a canonical tradition in which the heritage of faith

* See Y. CONGAR, "The Conciliar Structure or Regime of the Church," in *Concilium*, Eng. ed., 167-7 (1983), p. 6.

¹⁰ See F. WOLFINGER, "Ecumenical Councils and the Reception of their Decisions," in *Concilium*, Eng. ed., 167-7 (1983), p. 79.

¹¹ For example, see cc. 209, § 1, 212, § 1, and 341 of the 1983 Code. Also see Second Vatican Council, Dogmatic Constitution on the Church, *Lumen gentium*, November 21, 1964, (= *Lumen gentium*) nos. 25 and 37, in AAS, 57 (1965), pp. 6-71 (English translation in A. FLANNERY (ed.), *Vatican Council II: the Conciliar and Post Conciliar Documents* (= Flannery), Collegeville, Liturgical Press, Fifth printing, 1980, no. 25, in Flannery, pp. 379-381, and no. 37 in Flannery, pp. 394-395. Cf. c. 1323 of the 1917 Code.

¹² See D. STEVICK, "A Theological View of the Place of Law in the Church: An Episcopalian Perspective," in *The Jurist*, 42 (1982), p. 2.

and religion fosters a normative discipline within the Church.¹³ Furthermore, the canonical tradition renders a living response to the needs of the Church in such a way that, as the heritage of faith and religion matures, the normative discipline within the Church changes appropriately. Laws, therefore, provide norms of action for the appropriation of values by the community.¹⁴

Just as the Church respected and used its canonical tradition in the 1917 Code, so the Church respects and uses this tradition in the 1983 Code. The 1917 Code called for the interpretation of all the canons that restate a former law, either in whole or in part, according to the accepted interpretation of that former law.¹⁵ Similarly the 1983 Code continues this respect for and use of the canonical tradition

¹³ See *Communicationes*, 23 (1991), pp. 121-123. Also see F. URRUTIA, "Canones praeliminares codicis," in *Periodica*, 81 (1992), pp. 174-176. Indeed, the term canonical tradition refers to the continuing presence of normative doctrine in the legal system of the Church from one period of time to another period of time, such that the normative doctrine of the former period of time influences the meaning or interpretation of the laws in the later period of time. Hence, the American Commentary writes, "Paragraph two provides a general principle of interpretation. Whenever a norm has its roots in earlier tradition, the meaning of the norm should be constructed with the help of that tradition." See the commentary on c. 6, § 2 in the *American Commentary*, p. 28.

Furthermore, the Council of Trent actually had both doctrinal and disciplinary decrees, thus forming a kind of pattern for Vatican II.

¹⁴ See L. ŌRSY, "The Relationship Between Values and Laws," in *The Jurist*, 47 (1987), p. 474.

¹⁵ This is specified in c. 6, 2° and 3° of the 1917 Code.

insofar as the tradition refers to the 1917 Code,¹⁶ and insofar as the tradition conforms with the teachings of Vatican II.¹⁷

In fact, when the revision of the Code began with the formal inauguration of the Commission's work on November 20, 1965,¹⁸ Pope Paul VI asserted that the work of revision "must be accommodated to a new attitude of the mind, proper to the Ecumenical Council Vatican II, from which it is applied to the pastoral care and to the new necessities of the people of

¹⁶ For example, canon 6, § 2 of the 1983 Code stipulates this respect for the canonical tradition. Also, this tradition also includes the canonical tradition existing prior to the 1917 Code and that is not opposed to the 1917 Code. Cf. c. 6, 1° of the 1917 Code. Also see the commentary on c. 6 in E. CAPARROS, M. THÉRIAULT, J. THORN (eds.), *Code of Canon Law Annotated: Latin-English edition of the Code of Canon Law and English-language translation of the 5th Spanish-language edition of the commentary prepared under the responsibility of the Instituto Martín de Azpilcueta (=Navarra/Saint Paul Commentary)*, Wilson & Lafleur Limitée, Montréal, 1993, p. 83; and the commentary on c. 6 in the *American Commentary*, p. 28.

¹⁷ Indeed, no accurate interpretation of the 1983 Code can exist that does not conform with the teachings of Vatican II. See JOHN PAUL II, Apostolic Constitution, *Sacrae disciplinae leges*, in AAS, 75, Pars II (1983), pp. vii-xiv (English translation in the *American Commentary*, pp. xxiv-xxvi), where the legislator notes the complementarity which the Code presents in relation to Vatican II, and that the Code manifests the Spirit of the Council. Also see JOHN PAUL II, Allocution to the Roman Rota, January 26, 1984, in *L'Osservatore Romano* (English edition), February 13, 1984, pp. 9-11; also, "Code and Council," in *The Jurist*, 43 (1983), p. 267, where the legislator says that the Code represents an authoritative guide for the application of Vatican II.

¹⁸ See ALESSANDRO, "The Revision of the Code of Canon Law: A Background Study," p. 134.

God."¹⁹ Furthermore, says John Paul II, "it follows that what constitutes the substantial newness of Vatican II, in line with the legislative tradition of the Church, especially in regard to ecclesiology, constitutes likewise the newness of the new Code."²⁰ . Actually both Paul VI and John Paul II articulate the crux of the situation, Vatican II alters the context of canonical interpretation in such a way that legal meaning is found in the light of Vatican II.²¹

Accordingly, while the teachings of an ecumenical council contribute to the establishment of the canonical tradition, they also provide one means by which the Church may modify or alter existing canonical tradition. Indeed, the teachings of an ecumenical council possess the legislative content and the

¹⁹ "[...] scilicet accommodari debet novo mentis habitui, Concilii Oecumenici Vaticani Secundi proprio, ex quo curae pastorali plurimum tribuitur, et novis necessitatibus populi Dei," in PAUL VI, Allocution to the Cardinals and Consultors of the Pontifical Commission for the Revision of the *Code of Canon Law*, November 20, 1965, in AAS, 57 (1965), p. 988. For a discussion on this very important statement of Paul VI, see E. McDONOUGH, "A *novus habitus mentis* for Sanctions in the Church," in *The Jurist*, 48 (1988), pp. 727-746; F. McMANUS, "Laity in Church Law: New Code, New Focus," in *The Jurist*, 47 (1987), pp. 11-31; L. ÖRSY, "*Novus habitus mentis*: New Attitude of the Mind," in *The Jurist*, 45 (1985), pp. 251-258; and L. ÖRSY, "The Meaning of *novus habitus mentis*: The Search for New Horizons," in *The Jurist*, 48 (1988), pp. 429-447.

²⁰ "Hinc sequitur, ut fundamentalis illa ratio novitatis, quae, a traditione legifera Ecclesiae numquam discendens, reperitur in Concilio Vaticano II, praesertim quod spectat ad eius ecclesilogicam doctrinam, efficiat etiam rationem novitatis in novo Codice," in JOHN PAUL II, Apostolic Constitution, *Sacrae disciplinae leges*, English translation in the *American Commentary*, p. xxvi.

²¹ See J. McINTYRE, "The Acquired Right: A New Context," in *Studia canonica*, 26 (1992), pp. 37-38.

authority to empower and to direct the legislator to amend existing law.²² As a result, the documents of an ecumenical council, which must be approved by the Roman Pontiff to establish an obligatory effect,²³ constitute authentic teaching of the Church that deserves total attention and obedience of the faithful.²⁴

C. Vatican II's call to faith

Vatican II furnishes important wisdom to the revision of the Code because this Council gives a new direction to the life of the Church, as the Council of Trent did in its own way.²⁵ Truly the teachings of Vatican II continue to call each person in the Church to return to the sources of the Church's faith tradition.²⁶ Hence, canon law, by remaining loyal to Vatican II, continues to acknowledge this rich faith

²² An ecumenical council is a legislative body when its laws are enacted by the Roman Pontiff. Actually PAUL VI said that Vatican II "formulated principles, criteria, desires which must be given concrete expression in new laws and instructions [...]." See the Allocution *Christifidelibus coram admissis habita*, in AAS, 58 (1966), p. 800. English translation in F. MORRISEY, "Documents of the Second Vatican Council," in *Papal and Curial Pronouncements: Their Canonical Significance in Light of the 1983 Code of Canon Law*, Ottawa, Faculty of Canon Law, Saint Paul University, 1992, pp. 21-22. (Morrisey distinguishes those papal and curial pronouncements that hold legislative force from those papal and curial pronouncements that do not hold legislative force.)

²³ See c. 341, § 1 of the 1983 Code and c. 227 of the 1917 Code.

²⁴ See *Lumen gentium*, no. 25, in Flannery, pp. 379-381, and no. 37 in Flannery, pp. 394-395.

²⁵ See ŌRSY, "The Relationship Between Values and Laws," p. 481.

²⁶ See *Ibid.*, p. 481.

tradition by continuing to operate on the premise that the context of salvation history provides the purpose of Church law.²⁷

D. Vatican II's ecclesiological insight

Vatican II also provides a new ecclesiological insight for the Church regarding both its mission and its legal structure. As a matter of fact, since each member of the faithful participates in the mission of the Church, the Church is an instrument and a sign of communion with God and of unity among all persons.²⁸ Consequently, this ecclesiological insight provides a basis for many new or revised laws that alter part of the canonical tradition.

A central theme of this new ecclesiological insight springs from the self-understanding²⁹ of the Church which Vatican II modified. Initially Pope Benedict XV expressed this self-understanding of the Church as it existed before the 1983 Code in the Apostolic Constitution *Providentissima Mater Ecclesia*, the document in which he promulgated the 1917 Code. The first sentence of this Constitution describes the Church

²⁷ See D. RYAN, "Law in the Church. The Vision of Scripture," in *Studia canonica*, 17 (1983), p. 24.

²⁸ See *Lumen gentium*, no. 1, in Flannery, p. 350.

²⁹ John Paul II used the term self-understanding in this regard. See JOHN PAUL II, Allocation to the Bishops of the United States, September 16, 1987, in *Communicationes*, 19 (1987), pp. 162-168.

as a "perfect society."³⁰ This epithet signified the efforts of the Church to manage and to direct the behavior of its members in order that all concrete circumstances in the life of the Church would reflect a civil understanding of society.³¹ Although the Church strove to separate itself from the secular society, the Church still retained the secular model for its ecclesiastical legal system.³² Later, however, Vatican II changed the Church's self-understanding in two principal ways: *communio* and *missio*.

1. Communio

Even though Vatican II referred to the Church as a society, the Council chose to omit the word "perfect."³³ Thus, while not denying that the Church is a perfect society, having within itself all that is necessary to attain its end, Vatican II altered the self-understanding of the Church. In fact, the Council describes the Church as the People of God

³⁰ See BENEDICT XV, Apostolic Constitution, *Providentissima Mater Ecclesia*, p. 5. The term perfect society asserts that the Church is itself complete and has within itself the sufficient means to attain its end.

³¹ See J. ALESANDRO, "The Revision of Church Law: Conflict and Reconciliation," in *The Jurist*, 40 (1980), p. 9.

³² See ALESANDRO, "General Introduction," in the *American Commentary*, pp. 8-9.

³³ For example, see *Lumen gentium*, nos. 8 and 9, in Flannery, pp. 357-360. Also see c. 204, § 2, of the 1983 Code which describes the Church: "Haec Ecclesia, in hoc mundo ut societas constituta et ordinata [...]." The deletion of the word "perfect" changes the emphasis to the sense of *communio* presented in Vatican II.

whose unity finds both significance and realization in the eucharistic communion.³⁴ Accordingly, Vatican II gives a precise focus for the Church: *communio*.³⁵ Thus, John Paul II, setting the stage to place the 1983 Code within the context of Vatican II, reiterates the teaching of Vatican II when he says that the genuine image of the Church is presented in

the doctrine in which the Church is seen as a communion and which therefore determines the relations which are to exist between the particular churches and the universal Church, and between collegiality and the primacy; likewise the doctrine according to which all the members of the people of God, in the way suited to each of them, participate in the threefold priestly, prophetic, and kingly office of Christ.³⁶

The focus of the Church, therefore, concerns the relations

³⁴ As in *Lumen gentium*, no. 11, in Flannery, p. 362. Also see c. 204, § 1, of the 1983 Code.

³⁵ For comments on *communio*, see JOHN PAUL II, Allocution to the Bishops of the United States, p. 162. Also see L. ORSY, *From Vision to Legislation: From the Council to a Code of Laws*, Milwaukee, Marquette University Press, 1985, p. 4; J. PROVOST (ed.), *The Church as Communion*, Washington, D.C., Canon Law Society of America, 1984; and W. KASPER, "The Church as Communion," in *Theology and Church*, London, SCM Press, 1989, pp. 148-165. References to additional writings on this subject appear in the bibliography attached to this dissertation.

³⁶ "[...] doctrina praeterea quae Ecclesiam uti communionem ostendit ac proinde mutuas statuit necessitudines quae inter Ecclesiam particularem et universalem, atque inter collegialitatem ac primatum intercedere debent; item doctrina qua omnia membra Populi Dei, modo sibi proprio, triplex Christi munus participant, sacerdotale scilicet propheticum atque regale [...]," in JOHN PAUL II, Apostolic Constitution, *Sacrae disciplinae leges*, English translation in the *American Commentary*, p. xxvi. Also see cc. 204, § 2, 205, and 206, § 1, as expressions of *communio* in the 1983 Code.

between the people of God, rather than the patterns of a perfect society.

Furthermore, since the universal Church brings a people into a unity from the unity of the Father, the Son, and the Holy Spirit," the Holy Spirit and the word of God bind the faithful together³⁸ in bonds of mutual exchange and of interdependence that exist between each member of the Church.³⁹ As a result, *communio* lives as an internal communion of spiritual life that is signified and generated by an external communion of faith, order, and sacramental life.⁴⁰

2. Missio

John Paul II also writes, "at the heart of the Church's self-understanding is the notion of *communio* [...]. It is realized through sacramental union with Christ and through organic participation in all that constitutes the divine and human reality of the Church [...]."⁴¹ *Communio* enjoys a

³⁷ See *Lumen gentium*, no. 4, in Flannery, p. 352. For a discussion regarding the trinitarian dimension of the Church, see F. SULLIVAN, *The Church We Can Believe In: One, Holy, Catholic, and Apostolic*, New York, Paulist Press, pp. 11-19.

³⁸ See HAMER, "The Code and the Council," p. 9.

³⁹ See *Ibid.*, p. 9.

⁴⁰ See *Ibid.*, p. 9.

⁴¹ See JOHN PAUL II, *Allocution to the Bishops of the United States*, p. 163.

purpose or *missio*, a reason for being the focus of the Church. If *communio* shares the sole purpose of the Church - that the Kingdom of God may come and that the salvation of the human race may be accomplished,⁴² *missio* refers to all efforts of the Church to complete its purpose.⁴³ Truly all Christians, whatever their sacramental or canonical status, live as Christians only by their relation to the salvific vocation given by Christ.⁴⁴ Thus, the Church presents the visible sacrament of the saving unity that exists between God and the people of God.⁴⁵

This modification in the self-understanding of the

⁴² For further discussion on the purpose of the Church, see Second Vatican Council, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, December 7, 1965, no. 45, in AAS, 58 (1966), pp. 1025-1120 (English translation in A. Flannery (ed.), *Vatican Council II: the Conciliar and Post Conciliar Documents* (=Flannery), Collegeville, Liturgical Press, Fifth printing, 1980, p. 947). Also see JOHN PAUL II, Apostolic Constitution on the Roman Curia, *Pastor bonus*, no. 12, in AAS, 80 (1988), pp. 841-912, (English translation in the *Navarra/Saint Paul Commentary*, pp. 1193-1195).

⁴³ Examples of the canonical expression of this mission are found in cc. 210 and 211 of the 1983 Code. For further comments in this regard, see J. PROVOST (ed.), *The Church as Mission*, Washington, D.C., Canon Law Society of America, 1984; and B. KLOPPENBURG, *The Ecclesiology of Vatican II*, translated by M. O'CONNELL, Chicago, Franciscan Herald Press, 1974, pp. 97-123.

⁴⁴ See by E. CORECCO, "Theological Justifications of the Codification of the Latin Canon Law," in M. THÉRIAULT and J. THORN (eds.), *The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law, Organized by Saint Paul University and Held at the University of Ottawa, August 19-25, 1984*, Ottawa, Faculty of Canon Law, Saint Paul University, 1986, vol. 1, p. 93.

⁴⁵ See *Lumen gentium*, no. 9, in Flannery, p. 360.

Church, however, does not change the need for a normative pattern within which the Church operates. Certainly the Church requires a legal design because, as a large multicultural and international society, the Church lives with differing perspectives and opinions among its members regarding the ways in which they best meet their Church responsibilities. Hence, Church law provides parameters within which the *communio* of the Church exercises the various ministries proper to its *missio*.⁴⁶

E. Conclusion to the discussion of Vatican II

The faith expressed in Vatican II affects the normative life of the Church in that it justifies the laws that protect and assist the *communio* and the *missio* of the Church, including the invalidating and incapacitating laws of the legal structure. Indeed, invalidating and incapacitating laws comprise those elements of the Church's legal system that establish the boundaries beyond which actions lack juridic effect.⁴⁷ Accordingly the legislator, responding to the

⁴⁶ For a clear articulation of this principle, see JOHN PAUL II, Apostolic Constitution, *Sacrae disciplinae leges*, in the *American Commentary*, p. xxvi, where the legislator promulgates the 1983 Code within the context of *communio* and for the purpose of the Church conducting its functions.

⁴⁷ Invalid means: not valid; void or without legal force; indefensible; deficient in substance or cogency; without force or foundation. Incapable means: not having the necessary ability, qualification, or strength to perform some specific act or function; legally unqualified. See S. FLEXNER (editor in chief), *The Random House Dictionary of the English Language*, 2nd ed., unabridged, New York, Random

teaching of Vatican II, restricts the use of invalidating or incapacitating laws to those situations that adversely affect the *communio* and *missio* of the Church.

The primary gift of the Holy Spirit to the Church lives in the faith of the people working through acts of love.⁴⁸ Furthermore, faith inspires the *communio* of the Church and directs the *missio* of the Church. Faith also governs the hermeneutical and epistemological principles of the law of the Church.⁴⁹ Without a doubt, faith renews the Church.

III. REVISION OF THE CODE OF CANON LAW

John Paul II says that the 1983 Code exists as the last document of Vatican II.⁵⁰ Indeed, the process to revise the Code of Canon Law followed principles based on the theology and philosophy of Vatican II. As a result, just as the Council renewed the ecclesiology of the Church, so the Council renews the law of the Church.

House, 1987, p. 1003 for the word invalid and p. 965 for the word incapable.

Therefore, an invalidating law or an incapacitating law establishes in a clear and certain manner that a given situation lacks the conditions for a juridic act, presented in c. 124, § 1 of the 1983 Code. This understanding of invalidating and incapacitating laws is consistent with the 1917 Code.

⁴⁸ See Galatians 5: 5-6.

⁴⁹ See CORECCO, "Theological Justifications of the Codification of the Latin Canon Law," p. 73.

⁵⁰ See JOHN PAUL II, Allocution to the Roman Rota, January 26, 1984, in *L'Osservatore Romano* (English edition), February 13, 1984, p. 9.

A. Basic philosophy

The primary objective of the Code revision is stated in the opening sentence of the Apostolic Constitution that promulgated the 1983 Code. There John Paul II says, "the Church has been accustomed to reform and renew the laws of canonical discipline so that in constant fidelity to its divine founder, they may be better adapted to the saving mission entrusted to it."⁵¹ Accordingly the law serves the mission of the Church.

B. Principles of revision

In April 1967, a committee of consultors proposed a set of ten principles to guide the revision of the Code.⁵² Actually the teachings of Vatican II provided the foundation for these principles. Also, a Synod of Bishops meeting later that year approved these principles with only minor modifications.⁵³ In fact, two of the 1967 principles of revision directly affect the role of invalidating and incapacitating laws in the 1983 Code.

1. Principle no. 1

⁵¹ "Sacrae disciplinae leges Catholica Ecclesia, procedente tempore, reformare ac renovare consuevit, ut, fidelitate erga Divinum Conditorum semper servata, eadem cum salvifica missione ipsi concredita apte congruerent," in JOHN PAUL II, Apostolic Constitution, *Sacrae disciplinae leges*, English translation in the *American Commentary*, p. xxiv.

⁵² See ALESANDRO, "The Revision of the Code of Canon Law: A Background Study," p. 134.

⁵³ Ibid., p. 134.

Principle no. 1 declares both that the 1983 Code must serve the salvific mission of the Church and also that the Code must protect the rights and obligations of each person in the Church.

This first principle says, in part, "the Christian faithful should be able to find in the canons a means to guide them in their religious life if they wish to be sharers in the goods which the Church offers for the attainment of eternal salvation."⁸⁴ As a matter of fact, John Paul II later declared, "the Code of Canon Law is extremely necessary for the Church [...] in order that the exercise of the functions divinely entrusted to it [...] may be adequately organized."⁸⁵ Clearly this first principle recognizes the primary tenet of Church law, the salvation of souls.⁸⁶

Moreover, this first principle declares, "the Code must

⁸⁴ "[...] Christifidelis in canonibus ipsi propositis, invenire debet qua ratione in vita religiosa ipse se conducere oporteat, si particeps esse vult bonorum quae Ecclesia offert, ut salutem aeternam assequatur [...]," in *Communicationes*, 1 (1969), p. 78-79 (English translation in R. CUNNINGHAM, "The Principles Guiding the Revision of the Code of Canon Law," in *The Jurist*, 30 (1970), p.448). The text of the 10 principles which appears in *Communicationes* is different from the text of the 10 principles which appears in the Preface to the Latin Edition of the 1983 Code because the text in the Latin Edition of the 1983 Code abbreviates into two pages what takes seven pages in *Communicationes*.

⁸⁵ "Ac revera Codex Iuris Canonici Ecclesiae omnino necessarius est [...] ut exercitium munerum ipsi divinitus creditorum [...] ordinetur [...]," in JOHN PAUL II, Apostolic Constitution, *Sacrae disciplinae leges*, English translation in the *American Commentary*, p. xxvi.

⁸⁶ See c. 1752 of the 1983 Code.

protect the rights and obligations of each person, especially as these rights and obligations pertain to the worship of God and the salvation of souls."³⁷ In fact, the 1983 Code includes new forms of legislation concerning the rights and obligations of the Christian faithful.³⁸ Consequently, canonical expressions of the Church's concern for the rights and obligations of each person, some of which affect invalidating and incapacitating laws,³⁹ represent an advancement in the canonical tradition of the Church.

2. Principle no. 3

Principle no. 3 states, in part, that the new Code,

³⁷ "[...] Canonici quoque iuris obiectum praecipuum et essenziale est iura et obligationes uniuscuiusque hominis erga alios et erga societatem definire atque, tueri, etsi eatenus fieri possit in Ecclesia quatenus ad Dei cultum et animarum salutem pertineant," in *Communicationes*, 1 (1969), p. 79 (English translation in CUNNINGHAM, "The Principles Guiding the Revision of the Code of Canon Law," p. 448).

³⁸ Indeed, canons 208-211, 214, 216, 218, and 222, § 2, each of which concerns The Obligations and Rights of All the Christian Faithful, and also cc. 225, 226, § 2, and 227-233, each of which concerns The Rights and Obligations of the Lay Christian Faithful, exist without a precedent in the 1917 Code, and the teachings of Vatican II provide their basis. See PONTIFICIA COMMISSIO CODICI IURIS CANONICI AUTHENTICE INTERPRETANDO, *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Libreria editrice Vaticana, 1989, pp. 57-59.

³⁹ For example, canon 1317 of the 1983 Code, which stipulates that dismissal from the clerical state cannot be established by particular law, is a matter of validity because of c. 135, § 2. This stipulation of c. 1317, which protects the rights of clerics, is not found in the 1917 Code. Cf. cc. 2214, § 2, 2303, § 3, and 2305, § 2 of the 1917 Code, which are the foundation of c. 1317 of the 1983 Code, according to PONTIFICIA COMMISSIO CODICI IURIS CANONICI AUTHENTICE INTERPRETANDO, *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, p. 361.

"should not legislate a law that invalidates a juridic act or incapacitates a person unless in response to a most serious reason required for the public good and the discipline of the Church."⁴⁰ According to this principle, the use of laws of invalidity or incapacity enjoys a very limited role in Church law. Only a most serious reason can justify such legislation.

However, the public good and the discipline of the Church encompass a large assortment of Church activities extending from the major elements of the faith, such as the validity of sacramental celebration, to the more minor components of community order. Accordingly, invalidating and incapacitating laws concern not only the highly visible elements of the Church's activity, these laws also address the more mundane matters of community life that are necessary for the Church to function in a chaos-free atmosphere. Hence, to say that invalidating and incapacitating laws enjoy a limited role in the Church's legal system means, not that these laws are necessarily few in number, but rather that they are employed only when the public good and discipline of the Church require their presence.

⁴⁰ "[...] neve leges irritantes actus iuridicos vel inhabilitantes personas facile Codex statuatur, nisi earum obiectum magni momenti sit, et bono publico ac disciplinae ecclesiasticae vere necessarium," in *Communicationes*, 1 (1969), pp. 79-80 (English translation in CUNNINGHAM, "The Principles Guiding the Revision of the Code of Canon Law," p. 449). The public good and the discipline of the Church must refer to the establishment of the Kingdom of God on earth and the salvation of souls, for which the *communio* and *missio* of the Church exist.

Furthermore, principle no. 3 demonstrates the Church's willingness to alter existing canonical tradition in that this third principle called for a more specific use of invalidating or incapacitating laws than existed in the 1917 Code. Since, as a result of Vatican II, the Church no longer needs to accent the "perfect" society, it now accents the communal relationships that are necessary for it to perform its mission more effectively. Truly laws of invalidity and incapacity assist in this effort.

Since the principles of revision of the Code guided the legislator in determining the need to establish invalidating and incapacitating laws, the teachings of Vatican II assist the Church to protect whatever concerns its ultimate goal.

IV. EFFECT OF VATICAN II ON INVALIDATING AND INCAPACITATING LAWS

Actually, although not few in number, the legislator uses laws of invalidity and incapacity in a relatively restricted way, presumably only in serious matters concerning the public good or the discipline of the Church. Therefore, these laws seem to protect very meaningful elements of the *communio* and *missio* of the Church.

A survey of the 1983 Code illustrates the legislator's use of invalidating and incapacitating laws. In fact, each invalidating and incapacitating law in the 1983 Code concerns one of the following four purposes of the public good or

Church discipline:⁴¹

1. to reserve certain actions to the Holy See, the College of Bishops, the Conferences of Bishops, or the College of Cardinals;⁴²
2. to reserve certain actions to the diocesan bishop as the chief shepherd of his particular church.⁴³

⁴¹ The canons cited are examples to depict the legislator's use of invalidating and incapacitating laws in matters that concern the public good and the discipline of the *communio* and the *missio* of the Church. See Chapter Three of this dissertation for a more complete identification of invalidating and incapacitating laws in the 1983 Code.

⁴² For example, see cc. 291 (dispensation from the obligation of celibacy); 320, § 1 (the suppression of associations erected by the Holy See); 338, § 1 (the right to convoke an ecumenical council); 373 (the right to erect particular churches); 431, § 3 (the right to establish, suppress, or change ecclesiastical provinces); 582 (mergers and unions of institutes of consecrated life); 605 (approving new forms of consecrated life); 709 (erection of conferences of major superiors); 816, § 1 (establish ecclesiastical universities and faculties); 841 (approve or define those things which are required for the validity of the sacraments); 1078, § 2 (dispensation from certain diriment impediments); 1167, § 1 (establish new sacramentals); 1244, § 1 (establish, transfer, or abolish feast days or days of penance which are common to the universal Church); 1405 (the right to judge in certain cases); and 1698, § 2 (the dispensation of ratified and non-consummated marriages).

⁴³ For example, see cc. 87, § 1 (the power to dispense from both universal and particular disciplinary laws); 267, § 1 (incardinate a cleric already incardinated in another particular church); 312, § 1, 3° (erect a public association in his diocese); 462, § 1 (convoke a diocesan synod); 470 (appoint those who exercise offices within the diocesan curia); 579 (erect institutes of consecrated life in his diocese); 686, § 3 (impose excommunication on a member of an institute of diocesan right); 691, § 2 (grant an indult for a professed member to leave a religious institute of diocesan right); 727, § 2 (grant an indult for a professed member to leave a secular institute of diocesan right); 733, § 1 (grant consent for the erection of a house of a society of apostolic life); 1165, § 2 (grant a radical sanation); 1215, § 1 (grant consent for a church to be built); 1292, § 1 (alienate goods of the diocese in excess of a prescribed maximum limit, with appropriate consent); and 1740 (remove a pastor).

3. to secure the integrity of the faith life of the Church;⁴⁴ and
4. to establish and to safeguard the rights of persons:
all the Christian faithful;⁴⁵ clerics;⁴⁶ and
members of institutes of consecrated life and

⁴⁴ For example, see cc. 842, § 1 (only baptized person can be validly admitted to other sacraments); 849 (validly conferred baptism requires washing with true water together with the required form of words); 864 (only unbaptized persons are capable of being baptized); 966, § 1 (a valid absolution of sin requires both the power of sacred ordination and the faculty to exercise that power); 1003, § 1 (only a priest can validly administer the anointing of the sick); 1024 (only a baptized male validly receives sacred ordination); 1055, § 2 (matrimonial consent cannot validly exist between baptized persons unless it is also a sacrament by that fact); 1073 (a diriment impediment renders a person incapable to contract a valid marriage); 1108, § 1 (canonical form for a valid celebration of marriage); 1191, § 3 (a vow made through grave and unjust fear or fraud is null by the law itself); and 1199, § 2 (an oath which the canons demand or admit cannot be taken validly through a proxy).

⁴⁵ For example, see cc. 312, § 1 (only by competent authority can a public association be erected); 322, § 2 (no private association can acquire juridic personality unless its statutes have been approved by competent ecclesiastical authority); 521, § 1 (to assume the office of pastor validly one must be in the sacred order of the presbyterate); 1291 (permission of competent authority is required for the valid alienation of goods, under certain circumstances); 1347, § 1 (a censure cannot be imposed validly unless the accused has been warned at least once in advance); 1420, § 5 (when the see is vacant, the judicial vicar and the adjutant judicial vicars do not cease from office and they cannot be removed by the diocesan administrator); 1478, § 1 (minors and those who lack the use of reason can stand trial only through their parents or guardians or curators); 1481, § 2 (the accused in a penal trial must always have an advocate); 1598 § 1 (after the proofs have been collected the judge must, under pain of nullity, permit the parties and their advocates to inspect the acts which are not yet known to them); and 1620, 1° (a sentence is vitiated by irremediable nullity if it was rendered by a judge who is absolutely incompetent).

⁴⁶ For example, see cc. 267, § 1 (conditions for valid incardination); 538, § 1 (valid resignation of a pastor); 1317 (dismissal from the clerical state cannot be established by particular law); and 1742, § 1 and 1745 (valid removal of a pastor).

societies of apostolic life.⁴⁷ Also, certain persons in the Church have a right and a responsibility to participate in some decisions in the Church.⁴⁸

Indeed, each invalidating or incapacitating law facilitates one of these four areas of public good or Church discipline.

⁴⁷ For example, see cc. 623 (valid appointment or election to the office of a superior requires a reasonable time after perpetual or definitive profession); 638, § 2 (superiors and those designated for the purpose can validly incur expenses and perform juridic acts of ordinary administration within the limits of their office); 643, § 1 (valid admission to the novitiate); 656 (valid temporary profession); 668, § 5 (acquisition or possession of goods in violation of the nature of the institute); 684, § 1 (valid transfer to another institute or living outside the institute); 688, § 2 (indult to leave a religious institute during temporary profession); 696, § 1 (valid dismissal of a member); and 721, § 1 (valid admission to the initial probation); 726, § 2 (indult to leave a secular institute during temporary incorporation); 746 (dismissal of a definitively incorporated member from a society of apostolic life).

⁴⁸ This is based in c. 127. For example, see cc. 272 (consent of the college of consultors for a diocesan administrator to incardinate or excardinate a cleric); 318, § 2 (counsel of the moderator and the major officials of a public association required for the removal of the moderator); 461, § 1 (counsel of the presbyteral council is required for a diocesan bishop to decide to convoke a diocesan synod); 485 (consent of the college of consultors is required for the diocesan administrator to remove the chancellor); 494, § 2 (counsel of the college of consultors and of the finance council are required for a diocesan bishop to remove the finance officer); 515, § 2 (counsel of the presbyteral council is required for a diocesan bishop to erect, suppress, or notably alter a parish); 638, § 3 (consent of the council is required for a superiors of a religious institute to conduct certain business transactions); 665, § 1 (consent of the council is required for the superior of a religious to allow the religious to live outside a house of the institute); 697 (counsel of the council is required for a major superior to begin the process of dismissal of a member); 1018, § 1, 2° (consent of the college of consultors is required for a diocesan administrator to issue a dimissorial letter); and 1277 (consent of the finance council and of the college of consultors are required for the diocesan bishop to conduct certain business transactions).

Communio and *missio* organize and activate the Church to live the gift of faith which the Church treasures. In this effort, the invalidating and incapacitating laws protect the legal parameters within which the Church exists and functions as a community of faith. Clearly these laws seem to respond to the ecclesiology of Vatican II and to the 1967 principles of revision of the Code of Canon Law.

V. DEFINITION OF INVALIDATING AND INCAPACITATING LAWS IN THE 1983 CODE

Title I, "Ecclesiastical Laws," of Book I, "General Norms," of the 1983 Code contains the three canons that focus the discussion of invalidating and incapacitating laws in the 1983 Code. These three canons," which concern the canonical statement of meaning of such laws in the 1983 Code, require thorough comprehension lest a misunderstanding result that could injure either the rights of persons or the proper functioning of Church activity. Therefore, we review the definition of invalidating and incapacitating laws in the 1983 Code in nine steps: 1) canonical statement of meaning, 2) purpose, 3) scope, 4), legislative power, 5) words of the law, 6) effects, 7) excuse from the effect, 8) summary of the

" These canons, cc. 10, 14, and 15, § 1 constitute the canonical statement of meaning that describes the action of invalidating and incapacitating laws in the 1983 Code. In this paper, the term definition, when referring to these laws, refers not only to the canonical statement of meaning but also to any other factor that defines invalidating and incapacitating laws, such as their purpose, scope, and effects.

definition, and 9) conclusion.

A. Canonical statement of meaning

Canons 10, 14, and 15, § 1 provide the canonical statement of meaning of invalidating and incapacitating laws in the 1983 Code. While canon 10 specifically describes these laws, canons 14 and 15, § 1 elaborate on canon 10. In addition to these three canons, canon 124, § 1 presents the criteria for placing a valid juridic act and, as a result, is central to identifying invalidating and incapacitating laws.⁷⁰ Even though canons 10, 14, and 15, § 1 are discussed in this Chapter Two, canon 124, § 1 is presented in Chapter Three, the chapter concerning the identification of these laws.

1. Canon 10

The specific description of invalidating and incapacitating laws contained in c. 10 is analyzed in two steps. First, canon 10 of the 1983 Code is compared to canon 11 of the 1917 Code, the corresponding canon in the prior Code. Then an examination of certain key words or phrases centers the analysis of c. 10: *irritantes* and *inhabilitantes*, *leges [...] quibus, statuitur*, and *expresse*.

⁷⁰ Indeed, canon 124, § 1 stipulates that for the validity of a juridic act it is required that the act be placed by a person capable both naturally and legally, that the act include those elements which essentially constitute the act, and that all the formalities and requisites imposed by law be fulfilled.

a. Comparison of canon 10 of the 1983 Code to canon 11 of the 1917 Code

Although the text of c. 10 of the 1983 Code resembles the text of c. 11 of the 1917 Code,⁷¹ two differences do exist. First, c. 11 of the 1917 Code contains the word *aut* between the words *quibus* and *actum* in the phrase *quibus aut actum esse nullum aut inhabilem esse personam*. This creates an *aut* [...] *aut* construction, which in this canon means that either an act is null or a person is incapable. Canon 10 of the 1983 Code, however, omits the *aut* between *quibus* and *actum*. With this deletion, the English translation says that an act is null or that a person is incapable.⁷² Yet the deletion of the word *aut* does not really alter the meaning of the phrase from its meaning in the 1917 Code because both methods of expression provide same reality: an act is null or a person is incapable of acting in a certain way. Therefore, this change does not revise the definition of invalidating and incapacitating laws as they are used in the 1983 Code.

⁷¹ Canon 11 of the 1917 Code: "Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus aut actum esse nullum aut inhabilem esse personam expresse vel aequivalenter statuitur."

Canon 10 of the 1983 Code: "Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus actum esse nullum aut inhabilem esse personam expresse statuitur." Note how close this text is to the 1912 schema, see footnote no. 77 in Chapter One.

Also, since the subject matter of c. 7 in the 1917 Code has been placed in c. 361 of the 1983 Code, the subject matter of c. 11 in the 1917 Code becomes the subject matter of c. 10 in the 1983 Code.

⁷² See c. 10 in the *American Commentary*.

Second, c. 11 of the 1917 Code contains the phrase *expresse vel aequivalenter statuitur*. Canon 10 of the 1983 Code presents the phrase simply as *expresse statuitur*, thus omitting the words *vel aequivalenter*. According to the 1917 Code, law alone establishes invalidity or incapacity, doing so *expresse vel aequivalenter*. Yet problems existed with this formula.⁷³ Since the well-intentioned effort of the legislator of the 1917 Code fell short of its objective, a change was necessary.

The first schema of c. 10 of the 1983 Code⁷⁴ does not contain the words *vel aequivalenter*. This rapid deletion of these words, while not altering the definition of invalidating and incapacitating laws, dealt with the problem of clarity in the identification of such laws.⁷⁵ Actually the legislators of both the 1917 Code and the 1983 Code held in common the objective of clear and certain identity of invalidating and incapacitating laws. Thus, the inclusion of *vel aequivalenter* in the 1917 Code and the exclusion of these words from the 1983 Code represent two approaches to the same goal, to establish these laws in clear and certain words. Yet, while this objective complies with the canonical tradition of the

⁷³ The inclusion of *vel aequivalenter* in the 1917 Code produced a lack of clarity. Its exclusion from the 1983 Code is appropriate.

⁷⁴ See *Communicationes*, 16 (1984), p. 146.

⁷⁵ See URRUTIA, "Il Libro I: le norme generali," pp. 151-152.

Church, at least since the time of Suárez, other features of c. 10 must be considered.

b. Irritantes and inhabilitantes

Canon 10 says that only those laws which expressly state that an act is null or that a person is incapable of acting constitute invalidating or incapacitating laws. The word *irritantes* in c. 10 refers to an invalid act⁷⁶ and the word *inhabilitantes*⁷⁷ refers to a person who is unable to act validly in a certain manner.⁷⁸ Each in their respective way

⁷⁶ For example, the Salamanca Commentary says, "La ley invalidante establece nulo [...] un acto, puesto por quienquiera que sea, por razón del acto mismo canónicamente considerado." See L. DE ECHEVERRÍA (dir.), the commentary on canon 10, in *Código de derecho canónico* (= *Salamanca Commentary*), ed. bilingüe comentada por los profesores de la Facultad de derecho canónico de la Universidad pontificia de Salamanca, Madrid, Biblioteca de autores cristianos, 1985, p. 20. Also the Urbaniana Commentary says, "[...] la legge irritante riguarda l'atto particolare che è dichiarato nullo." See the commentary on canon 10 in P. PINTO, *Commento al Codice di diritto canonico* (= *Urbaniana Commentary*), Roma, Urbaniana University Press, 1985, p. 10.

⁷⁷ *Inhabilitantes* signifies a broad sense of incapacity. *Inhabilitantes* includes all elements that establish incapacity, not only characteristics of a person but also any legally defined requirements. *Incapientes* refers solely to a reality within a person that renders that person incapable. Canon 171, § 1 of the 1983 Code provides an excellent example of the distinction. This canon begins, "Inhabiles sunt [...]," and goes on to identify four situations in which a person is incapable. The situation in c. 171, § 1, 1^o reads, "[...] incapax actus humani [...]." This "incapax" situation is one of the four "inhabiles sunt" situations, thus demonstrating that *inhabiles* signifies the broader sense of incapacity than does *incapax*. Indeed, the subject of c. 10 includes the broader understanding of incapacity.

⁷⁸ For example, the Salamanca Commentary says, "La ley inhabilitante establece la nulidad canónica de un acto, pero por razón de que la persona actuante no reúne las condiciones que la ley requiere." See the commentary on c. 10 in the *Salamanca Commentary*, p. 21. Also, the Urbaniana Commentary says, "La legge inhabilitante invece riguarda

dictates the same result: lack of juridic effect."⁷⁹

The text of c. 10 also reads, in part, *quibus actum esse nullum aut inhabilem esse personam*. Here resides the effect of invalidating or incapacitating laws, that an act is to be null or that a person is to be incapable to act validly.⁸⁰ The legislator renders invalid an act which otherwise appears valid, and incapable a person who otherwise appears capable.

c. leges [...] quibus

Canon 10 of the 1983 Code reads, in part, *leges [...]* *quibus*. These words mean, "laws [...] in which". "Laws" constitutes a very restrictive phrase, central to the purpose

direttamente la persona e solo indirettamente l'atto de essa posto. [...] Ma in ambedue i casi si vede, la conclusione è la stessa: l'atto posto in contravvenzione alla legge è nullo." See the commentary on canon 10 in the *Urbaniana Commentary*, p. 10. Thus, this teaching is consistent with existing the canonical tradition that absolute prohibition invalidates.

⁷⁹ In other words, canon 10 defines two distinct realities: 1) an invalid act; and 2) an incapable person. To illustrate the separateness of these two realities, canon 10 could have been written:

Canon 10, § 1: "Irritantes eae tantum leges habendae sunt, quibus actum esse nullum expresse statuitur."

Canon 10, § 2: "Inhabilitantes eae tantum leges habendae sunt, quibus inhabilem esse personam expresse statuitur."

However, both realities have in common the lack of juridic effect. For example, Chiappetta writes, "La legge irritante rende invalido un determinato atto giuridico. [...] La legge inhabilitante, invece, rende incapace la stessa persona a porre un atto giuridico." See L. CHIAPPETTA, *Il Codice di diritto canonico*, I, Napoli, Edizioni Dehoniane, 1988, the commentary on c. 10, p. 15.

⁸⁰ For example, the Navarra/Saint Paul Commentary writes, "[...] for an act to be declared null, the law must expressly establish this, either by declaring the invalidating force of a defect in the act (invalidating law) or by determining the incompetence of the persons (disqualifying law)." See the commentary on c. 10 in the *Navarra/Saint Paul Commentary*, p. 86.

of c. 10. In reality, nothing other than a law, even if issued by a legislator, invalidates an act or incapacitates a person. Of course, a law is a specific reality in the Church in which the legislator, intending law to exist, enacts legislation which is then properly promulgated.²¹ Next, "in which" clearly sets the location of the invalidating or incapacitating pronouncement, in the law. Only the words of law provide this determination.

Classical canonists and 1917 canonists also held that only a law invalidates or incapacitates. Lest there be any confusion in the proper functioning of Church activity, only true legislation establishes invalidity or incapacity. Hence, this principle represents an essential element in the Church's legal structure.

Furthermore, canon 10 indicates a specific manner in which a law institutes invalidity or incapacity. The manner exists in the words *expresse statuitur*. Thus, identification of invalidating and incapacitating laws depends on an accurate understanding of these words.

d. statuitur

The legislator uses *statuitur* deliberately. Although the 1974 *schema* concerning c. 10 of the 1983 Code originally had

²¹ See cc. 7 and 8 in the 1983 Code.

caveatur,"⁸² statuitur replaced caveatur in 1979.⁸³ Hence, the legislator considers the more positive word, statuitur, the appropriate word for c. 10, as indeed it had been in the 1917 Code.

Furthermore, an invalidating or incapacitating law is a performative utterance, an illocutionary act⁸⁴ in which a consequence results from the saying of the words.⁸⁵ An example will illustrate this concept. If a superior says to a subordinate, "I feel that something must be done," the only effect is the reporting of the superior's feelings; no consequence results. If, however, the superior says to the

⁸² See *Communicationes*, 23 (1991), p. 73. Caveatur, however, is a term known to classical canonists in this context. See footnote no. 80 in Chapter One.

⁸³ Ibid., p. 151.

⁸⁴ Illocutionary is defined as, pertaining to a linguistic act performed by a speaker in producing an utterance. Act is defined as, anything done, being done, or to be done; deed; performance. See FLEXNER, *The Random House Dictionary of the English Language*, p. 954 for the word illocutionary and p. 19 for the word act. As a result of these definitions, an illocutionary act means a performance done within a linguistic utterance. The Random House Dictionary definition of illocutionary gives four examples: suggesting, warning, promising, and requesting. In all four examples a consequence results from the utterance. In the same sense, an invalidating or incapacitating law is an illocutionary act, with the specific consequence of invalidity or incapacity. The 1983 Code contains other illocutionary acts, such as establishing (a diocese as a juridic person, *ipso iure*), punishing (as in a penalty imposed *ipso iure*), empowering (as granting specific functions to a pastor in c. 530), and requiring (as various permissions required of a superior, an ordinary, or the Holy See).

⁸⁵ See J. AUSTIN, *How To Do Things with Words*, J. Urmson, (ed.), Oxford, Clarendon Press, 1963, pp. 79-145.

subordinate, "do this," a consequence immediately occurs: an order is given which requires obedience.

Not all utterances, therefore, generate a consequence but invalidating and incapacitating laws are among the utterances that do produce one. By the enactment of the words of an invalidating or incapacitating law, that which otherwise might have been valid is now invalid, or those who otherwise might have been capable are now incapable.

Consequently, the significance of *statuitur* rests in the meaning of two words of c. 10. Since only laws that contain the illocutionary act of *irritantes* or *inhabilitantes* constitute laws of invalidity or incapacity, *statuitur* must signify the intention within a law for the presence of the illocutionary act of invalidating or incapacitating. Hence, *statuitur* means that every invalidating or incapacitating law must contain within the words of the law, understood in their text and context, the institution of invalidity or incapacity. As a result, canon 10 excludes all other ways of establishing an invalidating or incapacitating law.

e. expresse

Canon 10 qualifies *statuitur* with the word *expresse*. The invalidating or incapacitating laws must declare this reality *expresse*, meaning clearly or distinctly. Such a criterion

excludes anything tacit.⁶⁶ Canon 10 requires a clear and certain understanding from the text and context of a law that the law constitutes an invalidating or incapacitating law. *Expresse* admits either an explicit or an implicit presentation of the invalidity or incapacity.

1) explicit expresse

An explicit presentation of *expresse* occurs when a law contains a word or words that definitively constitute the reality of invalidity or incapacity. *Ad validitatem, invalide* and *irrita est* exemplify words that frequently present invalidity or incapacity in an explicit way.⁶⁷

Proper identification of invalidating and incapacitating laws in the 1983 Code, however, requires distinguishing words of prohibition from words that signify explicitly invalidity or incapacity *expresse statuitur*. Indeed, prohibiting words do not constitute invalidity or incapacity. *Debet, non potest*

⁶⁶ For example Urrutia writes, "[...] *expresse* si oppone a tacite [...]." See URRUTIA, "Il libro I: le norme generali," pp. 151-152. Also see F. URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, Roma, Tipografia Pontificia Universitas Gregoriana, 1983, p. 15. In this situation *tacit* means understood without being openly expressed, silent, unvoiced, or unspoken. See FLEXNER, *The Random House Dictionary of the English Language*, p. 1934.

⁶⁷ The 1983 Code contains many canons that explicitly present invalidity or incapacity. For example, see cc. 40 and 42. Not all canons, however, that contain these words are laws of invalidity or incapacity. See, for example, cc. 506, § 1, 1107, and 67, § 3. Also see Chapter Three of this dissertation for a discussion of canons that explicitly present invalidity or incapacity, and for comments concerning words used for explicit *expresse*.

and *requiruntur* provide examples. Thus, laws containing words of prohibition would need further indications within their text or context to establish invalidity or incapacity."

2) implicit expresse

The identification of invalidity or incapacity implicitly presented calls for careful consideration because a canon might lack an obvious indication of the invalidating or incapacitating condition. The presence of this condition requires detection found in the context of the law. Actually, various canons in the 1983 Code frequently indicate the context that reveals the reality of invalidity or incapacity. At other times, however, the appropriate context rests outside the Code. Some examples will illustrate the point.

Canon 1277 says, in part, that a diocesan bishop needs the consent of the finance council and of the college of consultors in order to perform acts of extraordinary administration besides cases specifically mentioned in universal law or in the charter of a foundation. Yet no word or words of the text of c. 1277 indicate that the consent is a matter of validity. However, canon 127, § 1 says that a

"Valid yet illicit exists as a well established concept in Church law that continues in the canonical tradition of the Church. See J. KOURY, "From Prohibited to Permitted: Transitions in the Code of Canon Law," in *Studia canonica*, 24 (1990), pp. 147-192. Also see M. THERME, "L'obligation canonique dans le Code: diversité de terminologie," in *L'Année canonique*, 28 (1984), pp. 57-65; and P. ERDŐ, "Expressiones obligationis et exhortationis in Codice iuris canonici," in *Periodica*, 76 (1987), pp. 3-27.

superior operates invalidly if he or she does not seek the consent or counsel required of a college or a group. Thus, in light of c. 127, § 1, if the diocesan bishop conducts an act of extraordinary administration without the required consent, the diocesan bishop acts invalidly.**

As an additional example, consider canon 154, which says that a vacant office that is illegitimately held by someone may be conferred upon someone else, provided that it is duly declared that the current possession is illegitimate and that this declaration is mentioned in the document of conferral. Certainly such a declaration, which is integral to the conferral of office because it communicates to the persons concerned that the current office holder is in that position illegitimately, protects the proper functioning of Church activity. Also, the conditions of c. 39⁹⁰ apply to c. 154. Consequently, since c. 154 presents an administrative act that contains an integral condition prefaced by the word *dummodo*, if the condition of c. 154 is not met, the provision of office

** See the commentary on c. 1277 in the *Navarra/Saint Paul Commentary*, p. 791. Also see the commentary on c. 1277 and 1278 in the *American Commentary*, pp. 872-873; and the commentary on c. 1277 in the *Urbaniana Commentary*, pp. 726-727.

⁹⁰ Canon 39 stipulates that conditions attached to an administrative act affect its validity only when expressed by the particles if (*si*), unless (*nisi*), or provided that (*dummodo*).

is invalid."²¹ These two examples demonstrate that the context within the Code can establish a law of invalidity or incapacity beyond the words of the canon itself.

An example of context from outside the Code demonstrates further the understanding of invalidity or incapacity which implicitly *expresse statuitur*.

Canon 478, § 1 states, in part, that a vicar general must be a priest and not less than thirty years of age. The requirement of being a priest concerns holding that office validly while the requirement of age is not a matter of validity. Canon 478, § 1, however, does not clearly identify the requirement of being a priest as a matter of validity. Yet canon 150 states that only a person with the character of priestly ordination may hold validly any office concerning the full care of souls because such an office requires the exercise of the priestly order. The office of vicar general qualifies as an example of an office dealt with in c. 150, although not obviously from the text of the Code. Hence, the context that constitutes the office of vicar general rests

²¹ Other canonists agree. For example, the American Commentary writes, "This declaration and mention of illegitimate possession of the office is necessary for the valid conferral of the office on someone else in accord with canon 39." See the commentary on canon 154 in the *American Commentary*, p. 101. Also, Chiappetta writes, "[...] la sanzione è contenuta implicitamente nella congiunzione dummodo, che, a termini del can. 39, esprime una condizione essenziale, che occorre rispettare sub pena nullitatis." See CHIAPPETTA, the commentary on c. 154 in *Il Codice di diritto canonico*, I, p. 209.

outside the Code.

For example, Pope Paul VI's *motu proprio*, *Pastorale munus*,²² issued on November 30, 1963, illustrates the Church's understanding of the office of vicar general. In this document, Paul VI granted forty faculties to the residential bishops which the bishop could not delegate to others, except to coadjutor and auxiliary bishops and the vicar general. The bishop could not delegate these faculties to a pastor or to another priest. The vicar general was considered in the group of very close collaborators with the residential bishop, while pastors and other priests were excluded from this group. In addition, one of these faculties, Faculty 27, indicates that a vicar general is a priest where it says, in part, "[...] the vicar general or another priest [...]." Clearly Pope Paul VI saw the vicar general as a priest who played an integral part in the bishop's responsibility for the full care of souls. Such a person, according to Canon 154 of the 1917 Code, must be a priest as a matter of validity.

Then Vatican II reaffirms the importance of the office of vicar general by declaring the preeminence of this office in

²² See AAS, 61 (1964), pp. 5-12, English translation by F. McMANUS, "Decrees and Decisions," in *The Jurist*, 24 (1964), pp. 99-109. Also see A. BOTTOMS, "A Commentary on the Faculties of *Pastorale Munus*," in *The Jurist*, 24 (1964), pp. 423-440.

the diocesan curia."³³ In fact, the Commission for the Revision of the Code of Canon Law also reaffirms the tradition of the priestly character of a vicar general when the Commission quickly discarded the suggestion that a deacon could hold this office."³⁴ Thus, the canonical tradition of priestly ordination as a requirement for validly holding the office of vicar general continues."³⁵

3) Conclusion to the discussion of *expresse*

Clearly the expression *expresse statuitur* exists in c. 10 as an essential element for describing invalidating and incapacitating laws in the 1983 Code. At times the invalidating or incapacitating factor finds explicit articulation in the canon. At other times, however, this essential factor rests in an implicit articulation that requires careful analysis by means of interpretation of the canon. The proper context might reside within the 1983 Code, or it might dwell outside the Code in some aspect of the canonical tradition.

³³ See *Christus Dominus*, no. 27, in Flannery, p. 579.

³⁴ See *Communicationes*, 19 (1987), pp. 126-128.

³⁵ Other canonists agree. For example, the American Commentary writes, "For the validity of the appointment the candidate must be a validly ordained priest or bishop." See the commentary on c. 478 in the *American Commentary*, p. 389. Also, Chiappetta says, "Il presbiterato è richiesto ad validitatem, a norma del can. 150." See the commentary on c. 478 § 1 in CHIAPPETTA, *Il Codice di diritto canonico*, I, p. 562. For more on this topic, see R. PAGE, *Les Églises particulières*, Tome I, Montréal, Éditions Paulines & Médiaspaul, 1985, pp. 83-86.

f. Conclusion to the discussion of canon 10

Invalidating and incapacitating laws establish the boundaries beyond which certain actions lack juridic effect. In reality, laws of such magnitude and importance require precision in their expression. Hence, canon 10 exists as one of the most important canons in the 1983 Code. Besides c. 10, two other canons in Title I, "Ecclesiastical Laws," of Book I concern invalidating and incapacitating laws in the 1983 Code, canons 14 and 15, § 1.

2. Canon 14

Canon 14 says, in part, that a doubt of law, even an invalidating law or incapacitating law, does not bind."²⁶ This part of canon 14 equals in text and meaning the parallel canon 15 of the 1917 Code."²⁷ If the text of a law obscures determining the meaning of the law on some substantial point, a doubt of law exists."²⁸

The canonical tradition of c. 14 of the 1983 Code

²⁶ Canon 14, in part: "Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent [...]."

²⁷ Indeed Roelker writes, "In Canon Law, acts contrary to law are presumed valid. Their invalidity must be clearly demonstrated. Doubts are solved in favor of validity not invalidity." See ROELKER, "An Introduction to the Rules of Law," p. 436.

²⁸ For more information on this point, see the commentary on c. 14 in the *American Commentary*, p. 34. Also see the commentary on c. 14, in the *Salamanca Commentary*, p. 25; and the *Urbaniana Commentary*, p. 15. For a comparison to c. 15 of the 1917 Code see WOYWOD, *A Practical Commentary on the Code of Canon Law*, I, pp. 10-11.

includes the doctrine of the classical canonists and the 1917 canonists that, in doubt, the presumption is for validity."¹⁰⁰ Just as c. 15 of the 1917 Code upheld that doctrine, in the same way the teaching continues in c. 14 of the 1983 Code. As a result, since the reason for invalidity or incapacity must be clear and certain, presumption must remain on the side of validity and of capacity.¹⁰⁰

The Church pursues the activities of its mission as deliberately and as aggressively as possible. If, however, in the judgment of the legislator, a situation concerning either an action or the capacity of a person to act in a specific way frustrates the execution of the Church's mission, such that the public good or the discipline of the Church are seriously affected, the legislator establishes that situation as without juridic effect. Thus, the legislator bears the responsibility to communicate in clear and unquestionable words the existence of invalidating and incapacitating laws.¹⁰¹ Any doubt of law means the absence of invalidity or incapacity.

3. Canon 15, § 1

Canon 15, § 1 confirms the efficacy of invalidating or

¹⁰⁰ For example, Suárez writes, "[...] in dubio semper praesumitur pro actus validitate." See *De legibus*, V, 5, 27, 8.

¹⁰⁰ See L. ŌRSY, "The Canons on Ecclesiastical Laws Revisited: Glossae on Canons 8-24," in *The Jurist*, 37 (1977), p. 129.

¹⁰¹ Clearly this position also is in complete agreement with the classical canonists.

incapacitating laws by declaring that ignorance or error concerning these laws do not hinder the efficacy of the laws unless such a barrier is expressly determined otherwise.¹⁰² Actually canon 16, § 1 of the 1917 Code, the parallel canon in the earlier law, differed in that there was no mention of error so that the law presumed knowledge.¹⁰³ However, the new Code clearly states that ignorance does not excuse the action of a law that invalidates or incapacitates. Therefore, with the addition of error in c. 15, § 1 of the 1983 Code, the legislator strengthens the effectiveness of invalidating and incapacitating laws.

An additional distinction between c. 15, § 1 of the 1983 Code and c. 16, § 1 of the 1917 Code also confirms the strength of the present legislation concerning laws of invalidity and incapacity. While the main verb in c. 16, § 1 is *excusat*, the main verb in c. 15, § 1 is *impediunt*. Where the prior law says that ignorance does not excuse, the current law says that ignorance and error do not impede or hinder.¹⁰⁴ Actually the present c. 15, § 1 enhances the relevance of

¹⁰² Canon 15 § 1: "Ignorantia vel error circa leges irritantes vel inhabilitantes earundem effectum non impediunt, nisi aliud expresse statuatur." For examples of canons that can halt the effect of an invalidating or incapacitating law, see cc. 142, § 2 and 144, § 1.

¹⁰³ See WOYWOD, *A Practical Commentary on the Code of Canon Law*, I, p. 12.

¹⁰⁴ Once again, however, at times the Church supplies the necessary executive power of governance.

invalidating and incapacitating laws by establishing that neither ignorance nor error impedes these laws. As a result, since ecclesiastical law provides the parameters within which the Church operates, the subjective understanding of an individual person does not alter the objective reality of the law.

B. Purpose of invalidating and incapacitating laws

The purpose of the Church involves both the establishment of the Kingdom of God, and the salvation of the human race. Truly the attainment of this objective is accomplished by the members of the Church living their faith in the activity of the Church. Hence, the invalidating and incapacitating laws serve the Church's purpose by guarding the public good and the discipline of the Church.

C. Scope of invalidating and incapacitating laws

Invalidating and incapacitating laws refer to human legislation that renders invalid actions which otherwise would be valid, and incapable persons who otherwise would be capable. As a matter of fact, the legislator placed canons 10, 14, and 15, § 1 in Title I, "Ecclesiastical Laws," of Book I, "General Norms," of the 1983 Code so as to instruct that invalidating and incapacitating laws concern ecclesiastical law. Furthermore, the text of c. 10 itself demonstrates that invalidating and incapacitating laws require a deliberate action by the human legislator to establish as invalid or

incapable that which is otherwise valid and capable. Indeed, both irritantes and inhabilitantes are participial forms that signify a present tense or current action, thus establishing invalidity or incapacity at the present or current time. Accordingly, as also reflected in principle no. 3 of the 1967 principles for the revision of the *Code of Canon Law*, laws of invalidity and incapacity refer to laws established by an action of the human legislator.

D. Legislative power to enact invalidating and
incapacitating laws

All persons who possess legislative authority in the Church¹⁰⁵ possess the power to enact invalidating and incapacitating laws to the extent of their competence.¹⁰⁶

¹⁰⁵ Those with legislative power according to the 1983 Code are: the Roman Pontiff (c. 331), the college of bishops (cc. 336, 337, and 341), a diocesan bishop and those equivalent to him in law (cc. 391, 466, 368, and 381, § 1), a conference of bishops (c. 455 - general decree), a particular council (c. 445), and the general chapter of a religious institute (c. 631, § 2) or of a society of apostolic life (c. 732). See CHIAPPETTA, *Il Codice di diritto canonico*, I, the commentary on c. 10, pp. 21-23; and the commentary on c. 135, § 2, pp. 186-187.

¹⁰⁶ See c. 135, § 2. Some examples in which the 1983 Code asserts this legislative power below that of the Pope are: c. 506, § 1 states that a chapter of canons may determine the conditions required for valid and legitimate transactions of the chapter (actually, in this regard the legislator is the diocesan bishop as stipulated in c. 505); c. 627, § 2 states that the proper law of a religious institute may determine cases in which consent or counsel is required in order for superiors and councils to act validly, in compliance of the norms of c. 127; c. 638, § 1 states that the proper law of a religious institute may determine those things which are necessary to place an act of extraordinary administration validly; c. 643, § 2 states that the proper law of a religious institute may establish impediments to admission to a novitiate, even as a matter for validity; and c. 721, § 2 states that the constitution of a secular

E. Words of the law required for invalidating and
incapacitating laws

The assertion of the invalidity or incapacity must follow from the common usage of the words of the law.¹⁰⁷ So the law itself and not some contingent fact establishes the action of invalidity or incapacity. As a result, since the burden of proof is always on the person who denies the validity of an act or the capacity of a person, the adversary must show that the law declares beyond any reasonable doubt invalidity or incapacity.¹⁰⁸

Furthermore, since only the words of a law can establish invalidity or incapacity, the art of interpretation, which

institute may establish impediments to admission to the institute, even as a matter for validity.

An interesting question is, can a customary law establish an invalidating or incapacitating law? Can custom, introduced by the community of the faithful and approved by the legislator, generate the effect that an otherwise valid act is invalid, or that an otherwise capable person is incapable? Yes. Canon 10 says "leges [...] quibus," without distinguishing the source of the law. Consequently, customary law can create an invalidating or incapacitating law as much as any other source of law in the Church. See cc. 7 and 8 of the 1983 Code. However, the 1983 Code also can restrict the power of customary law to establish an invalidating or incapacitating law. For example, canon 1076 says that a custom that introduces a new impediment or which is contrary to existing impediments is reprobated.

¹⁰⁷ According to Church law, an illegal act can generate a juridic effect because a purely prohibiting law does not invalidate an act or incapacitate a person unless this effect is clearly and sufficiently declared, such that the law is truly understood. This position continues the canonical tradition of the 1917 Code.

¹⁰⁸ See ÖRSY, "The Canons on Ecclesiastical Laws Revisited: *Glossae* on Canons 8-24," p. 129. Also, this position continues the canonical tradition of the 1917 Code.

searches for the meaning of the words of a law,¹⁰⁹ provides a very important tool. While it is true that all the canons of interpretation¹¹⁰ address identifying the meaning of a law, canon 17 holds particular relevance in identifying a law of invalidity and incapacity because canon 17 centers the effort to identify such laws. In fact, canon 17 establishes that ecclesiastical laws are to be understood in accord with the proper meaning of the words considered in their text and context.¹¹¹ Accordingly, we must distinguish text from context, and establish how text and context affect identifying invalidating and incapacitating laws.

The actual words of a law compose the text of a law. The text refers to the use of the words in phrase, clause, sentence, and paragraph, as modified by capitalization and punctuation.¹¹²

The meaning of the words, however, is found not only in the text of a law but also in the context in which the words

¹⁰⁹ See J. CORIDEN, "Rules for Interpreters," in *The Art of Interpretation: Selected Studies on the Interpretation of Canon Law*, Washington, D.C., Canon Law Society of America, 1982, p. 21.

¹¹⁰ See cc. 16-19 and c. 27 of the 1983 Code.

¹¹¹ See c. 17 of the 1983 Code, and cf. c. 18 of the 1917 Code.

¹¹² See CORIDEN, "Rules for Interpreters," p. 20.

of the law appear.¹¹³ Context refers to the larger setting of the words, i.e., the article, section or book of the Code, or the subject area of the legislation.¹¹⁴ For example, Book I contains general norms that are part of the context of the 1983 Code and, as a result, some of these norms provide the principles of invalidity or incapacity that are found in canons in the other books of the Code.¹¹⁵

The context also incorporates pertinent data from many other disciplines, such as theology, philosophy, empirical sciences, and history.¹¹⁶ For example, the context for the interpretation of the 1983 Code includes all the documents of Vatican II and the post conciliar documents.¹¹⁷ Actually, the teachings of Vatican II provide the primary context for the 1983 Code.

¹¹³ See R. HILL, "Reflections on Interpretations," in *The Art of Interpretation: Selected Studies on the Interpretation of Canon Law*, Washington, D.C., Canon Law Society of America, 1982, p. 39.

¹¹⁴ See CORIDEN, "Rules for Interpreters," p. 20. Also see the *Salamanca Commentary*, p. 28.

¹¹⁵ For example, see cc. 39; 124, § 1; 127, § 1 and § 2; 134, § 3; and 150.

¹¹⁶ See the commentary on Canon 17, in the *American Commentary*, p. 36. The context also includes the canonical tradition presented in c. 6, § 2, of the 1983 Code. Also see the commentary on c. 6, § 2 of the 1983 Code, in *Salamanca Commentary*, p. 16.

¹¹⁷ Certainly, to the extent that it is relevant, the context of the 1983 Code also includes all the prior canonical tradition protected in c. 6, § 2 of the 1983 Code. Furthermore, cc. 17, 18, 19, and 27 of the 1983 Code concern the interpretation of ecclesiastical law.

F. Effects of invalidating and incapacitating laws

The effect of an invalidating or incapacitating law in the 1983 Code remains consistent with the effect of an invalidating or incapacitating law in the 1917 Code. Both an invalid act and an act placed by a person who is incapable incur one of two possible results: 1) the act is nonexistent: the act lacks a constitutive element or is placed by a person who lacks the required human capacity (*capax*);¹¹⁸ or 2) the act exists, but with no effect, juridic force, or consequence: a formality or requisite imposed by law is missing.¹¹⁹

Also consistent with the 1917 Code, invalidating and incapacitating laws in the 1983 Code take effect as follows: 1) when the law does not require the intervention of a court, the law in question produces its effect at once; or 2) if the law requires the intervention of a court, even though the act is presumed valid until it is adjudged invalid, the effect of the judgment by the court would be retroactive to the time of

¹¹⁸ For example, see c. 849 (washing with true water for baptism), and c. 171, § 1, 1° (person incapable of placing a human act is ineligible to vote).

¹¹⁹ For example, see c. 1108, § 1 (required form for marriage), or c. 119, 1° and 2°, both of which say, in part, "*id vim habet iuris quod*," meaning that the action has the force of law which [...], followed by stipulations required for the action to have juridic effect. Also see c. 38 which says, in part, "*effectu caret*," meaning that the act lacks effect insofar as [...], followed by stipulations for the action to have juridic effect. Thus, invalidity or incapacity is established unless all required elements are present. See CHIAPPETTA, *Il Codice di diritto canonico*, I, the commentary on c. 38, p. 64, and the commentary on c. 119, pp. 147-151.

the act.

G. Excuse from the effects of invalidating and
incapacitating laws

In addition to ignorance and error not being an excuse from the effects of an invalidating and incapacitating law, fear and *epieikeia* also do not excuse or impede a person from the effect of an invalidating or incapacitating law.

Yet, when the spiritual good of the faithful requires, a dispensation, a relaxation of a merely ecclesiastical law in a particular case, seems to pertain to an invalidating and incapacitating law as much as it does to any other merely ecclesiastical law. However, insofar as a canon in the 1983 Code restates a reality of invalidity or incapacity in the divine law, that canon is incapable of a dispensation.¹²⁰

¹²⁰ See cc. 85-93 of the 1983 Code. A very interesting and important question comes to focus: does an invalidating or incapacitating law present a constitutive element which essentially constitutes a juridical institute or juridic act such that, according to c. 86, the law cannot be dispensed? In support of an affirmative response we must note that the Code contains *ipso iure* faculties to grant dispensations for certain diriment impediments (see cc. 1078-1080) and for marriages lacking canonical form (see c. 1127). Indeed, such a deliberate assertion in the Code might indicate that in general these laws are not open to a dispensation, but rather require specific legislation for such a possibility. Yet, to speak a negative response, we must also note the philosophical principle that what is done can be done. Thus, since the Code affirms certain dispensations of invalidating or incapacitating laws, these laws are able to be dispensed. Moreover, no place in the Code, especially not in the canons that define invalidating and incapacitating laws nor in cc. 85-93, are these laws excluded from the general understanding of dispensations. Perhaps the fundamental question is, what power has the legislator provided in the Code concerning the dispensation of invalidating and incapacitating laws?

Truly the laws concerning dispensations are an important tangent to the invalidating and incapacitating laws of the Church.

Consequently, while individual subjective considerations do not excuse a person from the effect of an invalidating or incapacitating law, competent Church authority may dispense a person from these laws for a just cause.

H. Summary

Within the legal structure of the Church, invalidating and incapacitating laws maintain a critical and unique role, as the following descriptors summarize.

1. Invalidating and incapacitating laws render an otherwise valid action invalid, or an otherwise capable person incapable of acting validly in a certain way.
2. Invalidating and incapacitating laws protect the boundaries beyond which an action lacks juridic effect, thus guarding the public good and the discipline of the Church.
3. Invalidating and incapacitating laws are established by true legislative power in the Church.
4. Invalidating and incapacitating laws, which invalidate or incapacitate from the words of the law itself, must expressly establish the invalidity or the incapacity, either explicitly within the text of the

law, or implicitly from the context of the law found within the 1983 Code or within existing canonical tradition. In addition, in the face of doubt concerning invalidity or incapacity, the presumption is for the validity of the act and the capacity of the person.

5. Invalidating and incapacitating laws establish their effects either *de facto* or from a judicial sentence.
6. Invalidating and incapacitating laws deny that error, ignorance, fear, or *epieikeia* act as a modification to or an elimination of laws of invalidity or incapacity. However, these laws can be the object of a dispensation, as much as any other merely ecclesiastical law.

The definition of invalidating and incapacitating law in the 1983 Code is clear and precise, and reflects the teachings of Vatican II. At the same time, this definition continues the tradition articulated by both the classical canonists and the 1917 canonists, adjusted to reflect the teaching of Vatican II. Furthermore, the current definition of invalidating and incapacitating laws responds to the confusion concerning invalidating and incapacitating laws in the 1917 Code. Thus, we are ready to discuss the process to identify invalidating and incapacitating laws in the 1983 Code.

VI. CONCLUSION

Vatican II did not affect the fundamental responsibility of invalidating and incapacitating laws in the 1983 Code. Actually these laws continue the role they have always exercised in the Church, that is, they protect the manner in which the Church labors to bring about the Kingdom of God and the salvation of the human race. Really, the Church continues to protect that which concerns its ultimate goal.

However, while this responsibility remains constant with the traditional purpose of invalidating and incapacitating laws, Vatican II did alter the pragmatic application of these laws by restricting them to matters of public good and Church discipline. In addition, the changes in the language of the defining canons has improved the identification of the laws of invalidity and incapacity. Now, since Vatican II enlightens this practice with *novus habitus mentis*, the faith of Vatican II has renewed the law of the Church.

CHAPTER THREE

IDENTIFICATION OF INVALIDATING AND INCAPACITATING LAWS IN THE 1983 CODE OF CANON LAW

Pope John Paul II instructs us that the 1983 Code is "to create such an order in the ecclesial society that, while assigning the primacy to love, grace and charisms, it at the same time renders their organic development easier in the life of both the ecclesial society and the individual persons who belong to it."¹ Moreover, since the Code is to assist rather than to frustrate the Church in achieving its mission, the fulfillment of this responsibility requires both technical precision to understand the Code and inspirational guidance to apply it. Thus, a sincere intention of heart along with a thorough comprehension of the law prove indispensable in placing the 1983 Code at the service of the Church.

Naturally, then, the identification of invalidating and incapacitating laws in the 1983 Code requires both technical competence concerning the Code and fidelity to the Spirit of God alive in the Church. Indeed, since no person should approach the Code with preconceived notions of what "must be" or what "must not be" invalidating or incapacitating in the law of the Church, we must allow the Code as it is written, the words understood in their text and context, to identify the invalidating and incapacitating laws of the 1983 Code. As a result, the Church will know the boundaries of juridically

¹ See JOHN PAUL II, in *Apostolic Constitution, Sacrae disciplinae leges*, English translation in the *American Commentary*, p. xxv.

effective activity specified in the Code.

Thus, Chapter Three comprises the following five sections:

- I. Objective of Chapter Three,
- II. Words of the 1983 Code,
- III. Invalidating and incapacitating laws in Book I,
- IV. Invalidating and incapacitating laws in Books
II-VII, and
- V. Conclusion.

I. OBJECTIVE OF CHAPTER THREE

The invalidating and incapacitating laws in the 1983 Code comprise those elements of the Church's legal system that establish certain boundaries beyond which actions lack juridic effect. Moreover, since the Church relies on the accurate identification of these laws to assure the proper functioning of its activities, a discussion of the process to identify them is appropriate. Hence, Chapter Three demonstrates the identification of laws of invalidity and incapacity in the 1983 Code by applying the definition presented in Chapter Two.

II. WORDS OF THE 1983 CODE

The canons of the 1983 Code communicate meaning only from the words of the laws, understood within their text and context. Actually, the action of each canon comes from the vocabulary employed, properly understood. Consequently, the identification of invalidating and incapacitating laws relies upon the words of the canons, as stated and interpreted.

A. Actions in the canons

The canons of the 1983 Code contain a variety of actions. For example, as a result of the words used in the Code, some canons explain, while other canons establish; some canons permit, while other canons prohibit; and still, some canons require, while other canons excuse. Indeed, each invalidating and incapacitating law is among the canons in which the words of the canon produce a specific effect: invalidity or incapacity. By legislating the words of an invalidating or incapacitating law, that which otherwise would have been valid is now invalid, or those who otherwise would have been capable are now incapable. As a result, the identification of laws of invalidity and incapacity concerns identifying those canons whose words establish invalidity or incapacity.

B. Vocabulary

While all the words of the canons are important, the process of identifying invalidating and incapacitating laws must pay special attention to three categories of words: those where explicitly *expresse statuitur*, those where implicitly *expresse statuitur*, and those where there is a prohibition.

1. Words where explicitly *expresse statuitur*

Certain terms in the 1983 Code frequently establish explicitly the presence of an invalidating or incapacitating law, for example: *ad validitatem*, *invalida*, *inhabilis*, *irrita est*, *omni vi caret*, *absoluta*, *caret*, *dumtaxat*, *exceptus*, *exclusis*, *incapax*, *nullus*, *omnibus et solis*, *pro infecto*

*habetur, solus, tantum(modus), unus, vim non habet, and reservatur.*²

Yet since, at times, these and similar terms also appear in canons without constituting invalidity or incapacity, the reality of invalidity or incapacity can only be identified from the meaning of the canon, not by means of any signal term.³ Consider, for example, the term *ad validitatem*, which frequently establishes the action of a canon as a matter "for validity." However, as an exception, canon 643, § 2, which concerns admission to a novitiate, says that proper law can establish other impediments to admission, even for validity (*ad validitatem*), or can add other conditions.⁴ Obviously canon 643, § 2 empowers the legislator of proper law to establish invalidating or incapacitating law, rather than itself establishing invalidity or incapacity. Therefore, the need to pay attention to the meaning of the words of the canon cannot be overstressed.

Similarly, additional terms in the 1983 Code, which frequently establish explicitly invalidity or incapacity, also appear in other canons without establishing invalidity or

² Some 1917 canonists also considered these terms, at least at times, to establish invalidity or incapacity.

³ A signal term, if one existed, would always indicate that a canon in which the term is present is an invalidating or incapacitating law.

⁴ Canon 643, § 2 reads, "Ius proprium potest alia impedimenta etiam ad validitatem admissionis constituere vel condiciones apponere."

incapacity. Some examples of these words are:⁵ *(in)habilis*,⁶ *(in)valide*,⁷ *irritus*,⁸ *nullus*.⁹ Thus, since there are no signal terms to identify invalidating or incapacitating laws, there can be no substitute for careful reading of each canon in the Code.

2. Words where implicitly expresse statuitur

Certain words, although they do not explicitly establish a canon to be an invalidating or incapacitating law, do so implicitly because of a meaning found either in other canons in the 1983 Code or in existing canonical tradition outside of the Code. For example, the words *si*, *nisi*, or *dummodo* in a canon could possibly indicate, because of c. 39, an integral condition to an administrative act which the legislator has established as a matter of validity. Hence, since the meaning of words found in one canon can establish invalidity or incapacity in another canon, careful reading of each canon

⁵ The footnotes attached to these words indicate examples of canons that are not invalidating or incapacitating laws.

⁶ For example, see cc. 228, § 1 and § 2; 229, § 3; 241, § 1; 254, § 2; and 412.

⁷ For example, see cc. 90, § 2; 124, § 2; 251; 290, § 1; 506, § 1; 627, § 2; 638, § 1; 643, § 2; 668, § 1 and § 4; 844, § 2; 845, § 2; 850; 869, § 1 - § 3; 1061, § 3; 1066; 1086, § 3; 1107; 1116, § 2; 1281 § 3; 1296; 1378, § 2, 2^o; 1451, § 2; 1670; 1675, § 1; and 1677, § 3.

⁸ For example, see cc. 67, § 3; 290; and 1739.

⁹ For example, see cc. 559; 694, § 2; 749, § 3; 877, § 2; 924, § 2; 945, § 2; 984, § 2; 1013; 1025, § 1; 1040; 1068; 1084; § 2; 1123; 1157; 1239, § 2; 1348; 1457, § 1; 1520; 1686; 1714; and 1731.

provides the technique for identifying invalidating or incapacitating laws in the 1983 Code.

Yet the terms which implicitly *expresse statuitur* are also used in canons that are not such laws. Using the same example, the commonly used particles, *si*, *nisi*, and *dummodo* frequently appear in canons unrelated to invalidity or to incapacity.¹⁰ Accordingly, the words of the canon should be reviewed carefully to determine whether or not invalidity or incapacity is established.¹¹

3. Words of prohibition

Valid yet illicit clearly lives as a well established principle in the law of the Church. Truly, although laws of prohibition deserve obedience and respect, a violation of a prohibiting law does not breach the boundary of effective Church activity. Accordingly, canons that use terms such as, *debet*, *non potest*, *requiruntur*, and *nequit*, do not constitute invalidating or incapacitating laws, unless other evidence is present in the canon to declare invalidity or incapacity.¹²

¹⁰ For example, see cc. 17, 19, and 559.

¹¹ This legal reality, which is not easy to achieve, can result in disagreement concerning the identification of laws that establish invalidity and incapacity because of the subjective limitations and predispositions of the person who is reading the law.

¹² For more on prohibiting laws see KOURY, "From Prohibited to Permitted: Transitions in the *Code of Canon Law*," pp. 147-192. Also see THERME, "L'obligation canonique dans le Code: diversité de terminologie," pp. 57-65; and ERDŐ, "Expressiones obligationis et exhortationis in Codice iuris canonici," pp. 3-27.

C. Interpretation

Two aspects of interpretation¹³ of invalidating and incapacitating laws require special attention. First, principle no. 3 of the 1967 principles for the revision of the *Code of Canon Law*, a recommendation that the legislator restrict the enactment of invalidating and incapacitating laws, instructs the reader of the law to refrain from exaggerating the perceived enactment of these laws beyond situations that concern a most serious reason required for the public good and the discipline of the Church.¹⁴

Second, some invalidating and incapacitating laws require strict interpretation because these laws either establish a penalty,¹⁵ or restrict the free exercise of rights,¹⁶ or

¹³ For laws concerning interpretation, see cc. 16-19, and c. 27 of the 1983 Code.

¹⁴ The application of c. 39 to administrative acts would be an example of a situation where this caution pertains. While it is not always easy to determine what is or is not an integral condition of an administrative act, principle no. 3 informs the Church that the legislator does not intend to frustrate the *communio* and *missio* of the Church by invalidating activities or incapacitating persons when the public good or the discipline of the Church do not require such legislation. Thus, the mere presence of *si*, *nisi*, or *dummodo* in a canon that concerns an administrative act does not necessarily establish invalidity or incapacity.

¹⁵ For example see c. 1331, § 2, 2°, establishes a censure that invalidates because, as a result of an excommunication being imposed or declared, any act of governance that would otherwise only be illicit according to c. 1331, § 1, 3° becomes invalid. Thus, as part of a penalty, that which otherwise would have been valid is now invalid.

¹⁶ For example see c. 1347, § 1, which invalidates any censure imposed without at least one warning having been given to the accused. Thus the person who has the right to impose a censure has that right

contain an exception to a law.¹⁷ Yet, other invalidating or incapacitating laws lack the need for strict interpretations but, rather, call for broad interpretation.¹⁸ As a result, the form of interpretation of an invalidating or incapacitating law depends on the nature of the canon.

Without a doubt, careful and informed reading of the law provides the only technique to identify the invalidating and incapacitating laws in the 1983 Code.

III. INVALIDATING AND INCAPACITATING LAWS IN BOOK I

Book I of the 1983 Code, the book of General Norms, provides general rules or norms for the entire law of the

restricted until appropriate warning is given to the accused.

¹⁷ For example see c. 166, § 1, which holds as valid the notice of convocation for the election of a person to an ecclesiastical office if the notice of convocation is directed to the place of domicile, quasi-domicile, or actual residence. The locations for a valid notice of convocation are very precise in the law so any exception authorized by the person empowered to issue a notice of convocation (such as sending the notice to the residence of a relative, trusting that it will be forwarded to the addressee) must be interpreted strictly, with the effect that if the exception is not followed exactly (meaning that the notice is actually sent to some place other than where stipulated), the notice of convocation would be invalid.

Another example is c. 1117, which stipulates that a person baptized Catholic or received into it and who has left the Church by a formal act is not bound to the canonical form of marriage. This norm is an exception to c. 11, which identifies those bound by merely ecclesiastical laws.

¹⁸ For example, the laws that protect the rights of persons and the essential activities of the Church, such as cc. 166, § 1 - § 3; 169; 172, § 1; 173, § 3; 174, § 2 and § 3; and 177, § 1. Since each of these laws concerns the valid election of a person to an ecclesiastical office, these laws require proper interpretation to protect the rights of the persons concerned: broadly enough so that all who are entitled to vote are allowed to do so, yet strictly enough so that all who are not entitled to vote are prevented from voting.

Latin Church.¹⁹ In fact, codes of law in the Latin Church, both the universal law of the 1983 Code and the forms of particular, proper, or special law found in the Latin Church, observe these general norms.²⁰ Consequently, invalidating and incapacitating laws in the 1983 Code rely on Book I for their foundation.

This section of Chapter Three identifies the foundation of invalidating and incapacitating laws in Book I, and then finishes with a brief conclusion.

A. Identification of the foundation of invalidating and incapacitating laws in Book I

So as to focus the identification of the foundation of invalidating and incapacitating laws in Book I, the canons concerning juridic acts, and physical and juridic person are reviewed first. Next the remaining canons in this Book are addressed in numeric order. As a result, this analysis uses the following organization:

1. Juridic acts (cc. 124-128)

¹⁹ "Omnes normae in Codice, non tantum quae in Libro I habentur, sunt Ecclesiae normae; certumque in Libro I agitur questionibus vere generalibus," in *Communicationes*, 14 (1982), p. 127. Also, John Paul II promulgated the 1983 Code for the whole Latin Church, see *Sacrae disciplinae leges*, English translation in the *American Commentary*, p. xxvi.

²⁰ "Praecipta quaedam praebet quae in singulis eiusdem Codicis canonibus sunt attendenda atque in omnibus Ecclesiae latinae ordinationibus, tum universalibus tum particularibus sunt servanda," in *Communicationes*, 3 (1971), p. 81. Also see, *Communicationes*, 6 (1974), pp. 52-54. In fact, this reality was true in the 1917 Code, see WOYWOD, *A Practical Commentary on the Code, of Canon Law*, I, p. 1.

2. Physical and juridic persons (cc. 96-123)
3. Preliminary canons (cc. 1-6)
4. Legislative power (cc. 7-34)
5. Executive power: individual administrative acts
(cc. 35-93)
6. Statutes and rules of order (cc. 94-95)
7. Power of governance (cc. 129-144)
8. Executive power: ecclesiastical offices (cc. 145-
196)
9. Prescription (cc. 197-199)
10. Computation of time (cc. 200-203).

The use of this structure accents the purpose of invalidating and incapacitating laws, that is, to establish the boundaries of effective actions by appropriate persons.²¹

1. Juridic acts (cc. 124-128)

A juridic act is a social human act, legitimately placed and revealed, to which the law attributes a determined effect which the agent sought and attempted.²² Not only do laws of invalidity and incapacity concern the existence of juridic acts, these laws present two aspects of the same reality: lack

²¹ The following presentation presumes that the reader of this dissertation has at hand a copy of the 1983 Code.

²² For more on this definition, see the *Salamanca Commentary*, p. 100; also see the *American Commentary*, p. 89; and the *Urbaniana Commentary*, p. 74. For the *synthesis laboris* of the Pontifical Commission for the Revision of the *Code of Canon Law* concerning the general norms regarding juridic acts, see *Communicationes*, 6 (1974), pp. 101-103.

of juridic effect. Thus, identification of invalidating and incapacitating laws begins with the canon that defines the essence of a juridic act.

Canon 124, § 1, which defines a juridic act, opens with the words *ad validitatem*, thus establishing the underpinnings for other canons in the 1983 Code to be laws of invalidity or incapacity. In fact, this paragraph situates three elements necessary for the valid placing of a juridic act: that the act be placed by a person capable of placing it, both naturally and legally; that it include those elements which essentially constitute the act; and that the act also include all the formalities and requisites imposed by law²³ for the validity of the act. As a result, all three elements of c. 124, § 1 must be present for the existence of a juridic act.²⁴

The first element of c. 124, § 1, that the subject of the act be a person capable of placing the act,²⁵ indicates that the subject must be capable in a human or natural sense that

²³ Note that the word, "iure", in c. 124, § 1 is not restricted to merely ecclesiastical law but also includes the formalities and requisites imposed by civil law, provided that the Code defers to the civil law as stipulated in c. 22. See, for example, c. 1290.

²⁴ Canon 124, § 1 of the 1983 Code differs from c. 1680, § 1, the corresponding canon in the 1917 Code, in that c. 124, § 1 contains the condition that the act be placed by a person capable of placing it, which was not in c. 1680, § 1 of the 1917 Code.

²⁵ Canon 124, § 1 reads, in part, "requiritur ut a persona habili sit positus." In writing canon 124, § 1, the Commission noted, "habilitas in canone intellegitur sensu lato [...]," in *Communicationes* 14 (1982), p. 145. The understanding of *habilitas* includes more than is understood in *capax*.

is addressed in divine law.²⁶ Furthermore, the subject must also be free from all dictates of incapacity present in merely ecclesiastical law.²⁷ Therefore, a person who is not truly capable in the sense of c. 124, § 1 is incapable of placing a valid juridic act.²⁸

The second element of c. 124, § 1, that the act include those elements which essentially constitute it, concerns the essential components for the nature of the act such that, without one of these components, the act simply does not exist.²⁹

²⁶ A deficiency here would be the sense of *incapax*.

²⁷ This inclusion of elements of merely ecclesiastical law expands the deficiency from *incapax* to *inhabilis*.

²⁸ An act placed by a person incapable for a human or a natural reason would be considered nonexistent, while an act placed by a person incapable because of a dictate of merely ecclesiastical law would be considered without effect. As a result, an act considered nonexistent due to human or natural reasons cannot be remedied as long as the condition persists. An example would be a person incapable of entering a marriage because the person is already in a valid marriage (c. 1085, § 1). On the contrary, an act, considered without effect because of a dictate of a merely ecclesiastical law, can become effective, either from a change in the person's condition so that incapacitating obstacle no longer exists or from a dispensation from competent Church authority. An example would be the marriage of a man before he has completed his sixteenth year of age (c. 1083, § 1).

²⁹ Indeed a constitutive attribute establishes an intrinsic form or essential element of an act itself, such that the entire status of the act finds being in that which establishes its determined nature. In other words, the absence of an element of the nature of the act means the absence of the act itself. In fact Michiels writes, "[...] de lege ecclesiastica sic dicta juris constitutiva, quae scilicet positive determinat formam intrinsecam, seu elementa essentialia ipsum actum, qui ex jure canonico initium et totum statum capit, in suo esse seu determinata natura constituentia." See MICHIELS, *Normae generales juris canonici, commentarius libri I Codicis juris canonici*, editio altera, p.

The third element of c. 124, § 1 says that the act also must include all the formalities and requisites imposed by law for the validity of the act such that, without a required component, the act would lack effect.³⁰

Thus, with this understanding in mind, the identification of invalidating and incapacitating laws in the 1983 Code employs an approach which regards each canon in the Code in the light of c. 124, § 1. First, does the canon concern a juridic act?³¹ Second, if yes, is there something stated in this canon that establishes a boundary beyond which the act would lack juridic effect? In other words, does the canon establish the absence of at least one of the three elements identified in c. 124, § 1 as necessary for a juridic act? If

341. Therefore, an example of a constitutive element called for in c. 124, § 1 would be in the act of establishing a presbyteral council (called for in c. 495, § 1), whereby only presbyters can be members of this council. Obviously once such a council has a member who is not a presbyter, the council is no longer a presbyteral council but, rather, a council of persons, some of whom are presbyters. Thus, while no law prohibits a person who is not a presbyter from serving as a consultor to the presbyteral council, an attempt to appoint such a person to a seat on the presbyteral council would be without juridic effect because the person is incapable of such an appointment.

In fact Chiappetta writes, "Il consiglio presbiterale è formato per sua natura soltanto di sacerdoti. I diaconi non ne fanno parte (*Communicationes*, a. 1981, p. 129, can. 309, fine); meno i laici, neppure come membri associati." See CHIAPPETTA, *Il Codice di diritto canonico*, I, p. 583.

³⁰ For example, a marriage celebrated without required canonical form (c. 1108, § 1) is invalid.

³¹ Obviously not all canons in the Code concern a juridic act. For example, consider c. 1, which informs the reader that the canons of this Code affect only the Latin Church. Indeed, the action of c. 1 is to instruct. Thus, canon 1 does not concern the elements of c. 124, § 1.

the answer to each of these questions is yes, the canon concludes to one of two possible results:

1. the act is nonexistent: the act lacks a constitutive element or is placed by a person who lacks the required human capacity (*capax*);³² or
2. the act exists, but with no effect, juridic force, or consequence: a formality or requisite imposed by law is missing.³³

Each of these results indicates the absence of a juridic act.³⁴ Certainly, systematic use of this approach requires a clear and accurate understanding of the three elements in c. 124, § 1.³⁵

In addition to the significance found in c. 124, § 1,

³² For example, see c. 849 (washing with true water for baptism), and c. 171, § 1, 1° (person incapable of placing a human act is ineligible to vote).

³³ For example, see c. 1108, § 1 (required form for marriage), or c. 119, 1° and 2° (collegial acts), both of which say, in part, "id vim habet iuris quod," meaning that the action has the force of law which [...], followed by stipulations required for the action to have juridic effect. Also, see c. 38 which says, in part, "effectu caret," meaning that the act lacks effect insofar as [...], followed by stipulations for the action to have juridic effect. Thus, invalidity or incapacity is established unless all required elements are present. See CHIAPPETTA, *Il Codice di diritto canonico*, I, the commentary on c. 38, p. 64, and the commentary on c. 119, pp. 147-151.

³⁴ These effects are consistent with the effects of invalidating and incapacitating laws in the 1917 Code.

³⁵ For a more thorough explanation of these elements, see URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, p. 84. Also see the *Navarra/Saint Paul Commentary*, p. 141; CHIAPPETTA, *Il Codice di diritto canonico*, I, pp. 156-159; the *American Commentary*, pp. 89-90; the *Salamanca Commentary*, p. 100; and the *Urbaniana Commentary*, pp. 74-75.

canon 124, § 2 adds that a juridic act correctly placed with respect to its external elements is presumed to be valid.³⁶ Invalidity requires proof.³⁷

Additional canons within Title VII of Book I further develop the meaning of c. 124, § 1. Canon 125, § 1, for example, declares that an act placed by a person acting under irresistible extrinsic force is without juridic effect.³⁸ Furthermore, canon 126 establishes the invalidity of an act placed because of ignorance or error concerning an element which constitutes a condition *sine qua non*.³⁹ Actually, both canon 125, § 1 and canon 126 address the first element of c. 124, § 1, that the subject of the act be a person capable of placing the act in a truly human and natural way.

³⁶ For a summary of comments by Commission members concerning this statement of law see *Communicationes*, 23 (1991), pp. 231-232.

³⁷ This position is consistent with the canonical tradition of the Church.

³⁸ Concerning the wording of c. 125, § 1, a member of the Commission suggested, "*loco verborum pro infecto habetur dicatur clare et aperte invalidus est*," which led to the response, "*expressio Schematis est traditionalis in iure et ideo admittenda non est correcto proposita*." See *Communicationes*, 14 (1982), p. 145. As a result of this dialogue, along with the meaning of the other words in c. 125, § 1, the words *pro infecto habetur* are identified as words that indicate invalidity which explicitly *expresse statuitur*. Canon 1406, § 1 is another canon in the 1983 Code with this construction.

Also note that canon 125, § 2 does not present an invalidating or incapacitating law but rather a law that empowers the possibility of a judicial decision to rescind an act placed because of grave fear. Even though the act was placed because of great fear, the act might not have restricted a right of the subject nor in any other way have adversely affected the *communio* or *missio* of the Church.

³⁹ The words, "*irritus est*," establish the invalidity.

Additionally, canon 127 strongly protects the rights of persons to participate in the decision process as to whether or not a juridic act should be placed. First, canon 127, § 1 declares as invalid an act done by a superior without the required consent or counsel of a college or group of persons.⁴⁰ Then, while canon 127, § 2, 1° prescribes the invalidity of an act done by a superior when the consent of an individual or persons acting as individuals is required, canon 127, §2, 2° invalidates an act done by a superior when the counsel of an individual or persons acting as individuals is required.⁴¹ Without a doubt, canon 127 is very important and frequently applied in the identification of invalidating laws

⁴⁰ The words, "ut [...] valeant," establish the invalidity. Also, the application of c. 166 is a matter of validity because of the words in c. 166. Moreover, a superior is a person who presides over a determined college, institute, or group of persons, and who enjoys the proper and true authoritative power to place a determined juridic act on behalf of that college, institute, or group of persons. See the *Salamanca Commentary*, p. 103. Furthermore, a superior has a relationship with the subjects that is stable and understood by both the superior and the subjects, such as the relationship between a diocesan bishop and the persons of the diocese.

⁴¹ The words, "invalidus est," establish the invalidity in both sections of c. 127, § 2. The obligation for consent or counsel is not only to the superior from the subordinates, as in c. 1277 which states that the diocesan bishop needs the consent of his finance council and of the college of consultors in order to perform certain acts of extraordinary administration, the requirement can also be for the superior needing consent or counsel from a higher superior, such as in c. 612 which states that the superior of a religious house needs the consent of the diocesan bishop to convert the religious house to an apostolic work different from the apostolic work for which the house was established. To grasp this relationship of superior and bishop, note that c. 678, § 1 provides that religious are subject to the authority of bishops in those matters that involve the care of souls, the public exercise of divine worship, and other works of the apostolate.

in the 1983 Code.⁴²

2. Physical and juridic persons (cc. 96-123)

Since the subject of a juridic act is either a physical person or a juridic person, the canons of the general norms concerning physical and juridic persons must be reviewed so as to determine the canonical sense of a person who is capable of executing a juridic act.

a. Physical person

Canon 96 states that by baptism a physical person⁴³ is incorporated into the Church of Christ and is constituted a person in the Church with duties and rights.⁴⁴ Certainly baptism, which is a juridic act, produces the effect of incorporating one into the Church and constituting him or her as a person in the Church with the capability to perform a juridic act, unless the law stipulates otherwise.

Canons 97, § 2 and 99, however, incapacitate certain

⁴² The proper interpretation of c. 127 includes a statement of authentic interpretation issued by the Pontifical Commission for the Authentic Interpretation of the *Code of Canon Law* in which the Commission determined that when the law requires that a superior must have the consent or the counsel of a body of persons in order to act, he or she does not have the right of voting with the others, not even to break the tie, in *AAS* 77 (1985), p. 771; also in the *Navarra/Saint Paul Commentary*, p. 143.

⁴³ For the *synthesis laboris* of the Pontifical Commission for the Revision of the *Code of Canon Law* concerning the general norms regarding physical persons, see *Communicationes*, 6 (1974), pp. 94-98.

⁴⁴ Examples of these duties and rights are the duty to live a holy life (c. 210) and the right to receive assistance from the sacred pastors (c. 213). See cc. 208-231 for more details in this regard.

persons from performing juridic acts, unless the action is enacted through some capable person.⁴⁵ First, canon 97, § 2 says that a person who has not completed seven years of life is held to be incompetent.⁴⁶ Next, canon 99 stipulates that any person who habitually lacks the use of reason also is held to be *non sui compos*. As a result of these two canons, as long as a person truly is *non sui compos*, the person lacks the capacity to place a juridic act.⁴⁷ Certainly such a person lacks the *habilitas* required by c. 124, § 1 for the valid performance of a juridic act.⁴⁸

Finally, because of the term diocesan bishop, canon 98, § 2 incapacitates a vicar general or an episcopal vicar from certain acts concerning the designation of a guardian, unless the diocesan bishop has issued a special mandate granting such

⁴⁵ For example, canons 1478 and 1479 provide for minors and those lacking use of reason to act through their parents, guardians, or curators. See the commentary on cc. 1478 and 1479, in the *American Commentary*, p. 966.

⁴⁶ Canon 97, § 2 reads, in part, "*censetur non sui compos*," which means that the person is considered not in possession of himself or herself, or not having the use of reason. See the commentary on canon 97, § 2, in the *American Commentary*, p. 72.

⁴⁷ For example, Chiappetta writes, "L'uso di ragione è un elemento essenziale della personalità giuridica, e il suo difetto, nelle forme più gravi, compromette irreparabilmente la capacità di agire." See CHIAPPETTA, the commentary on cc. 97, § 2 and 99 in *Il Codice di diritto canonico*, I, p. 119-120.

⁴⁸ *Ibid.*, p. 120. Also the Navarra/Saint Paul Commentary writes, "The presumption of incapacity is *iuris et de iure* (*censetur*) and admits no evidence to the contrary." See the commentary on c. 99 in the *Navarra/Saint Paul Commentary*, p. 125.

authority to a vicar general or an episcopal vicar."⁴⁰

No other canon in the general norms of Book I that concern physical persons, canons 96-112, establishes laws of invalidity or incapacity.

b. Juridic person

The Church has the right and power to establish juridic persons, that is, corporations in canon law that are subjects of rights and obligations which correspond to the nature of the entities.⁴⁰ In fact, canons 113-123⁴¹ provide the general norms that concern juridic persons in a specific way, and two of these canons concern invalidating laws.

First, canon 117 stipulates that no aggregate of persons

⁴⁰ For example, Chiappetta writes, "[...] il Vescovo diocesano (non il semplice Ordinario del luogo) [...]." See CHIAPPETTA, the commentary on c. 98, § 2 in *Il Codice di diritto canonico*, I, p. 119. Also the Salamanca Commentary writes, "[...] nombrados a tenor del [...] Obispo diocesano (c. 134, § 3) [...]." See the commentary on canon 98, § 2 in the *Salamanca Commentary*, p. 80. Furthermore, see H. MÜLLER, "De speciali Episcopi mandato iuxta CIC/1983," in *Periodica*, 74 (1990), p. 229.

Finally, note that according to c. 134, § 3, the term diocesan bishop includes all persons equivalent to him in c. 381, § 2, yet specifically excludes a vicar general and an episcopal vicar.

⁴⁰ See c. 113, § 2. Canon 113, § 1 establishes the Catholic Church and the Apostolic See as moral persons and not juridic persons because the Catholic Church and the Apostolic See are by divine law, while juridic person are creations of the Church through merely ecclesiastical law. This distinction, however, does not exclude the Catholic Church nor the Apostolic See from being subjects of rights and obligations in merely ecclesiastical law. For examples of the Catholic Church and the Apostolic See being subjects of rights and obligations, see cc. 747, § 1; 755, § 1; 838, § 1 and § 2; 840; 1254, § 1; 1255; and 1260. Also see the *Salamanca Commentary*, pp. 87-88.

⁴¹ For the *synthesis laboris* of the Pontifical Commission for the Revision of the *Code of Canon Law* concerning the general norms regarding juridic persons, see *Communicationes*, 6 (1974), pp. 98-101.

or things can obtain juridic personality unless its statutes are approved by competent authority.³² This essential presupposition provides both for the protection of the rights of the persons concerned with the juridic person, and also for a review of the appropriateness of the endeavor of the juridic person.³³ In this way canon 117 protects the mission of the Church.

Then canon 119, which pertains to elections (section 1^o) and other matters that concern a juridic person (section 2^o), also defines invalid actions.³⁴ Truly canon 119 also protects important voting rights in the Church.

No other canon in the general norms of Book I that concern juridic persons, canons 113-123, establishes laws of

³² The words, "nulla [...] valet nisi," establish the invalidity.

³³ See CHIAPPETTA, the commentary on c. 117 in *Il Codice di diritto canonico*, I, p. 145-146. Also see the *Urbaniana Commentary*, p. 70; and the *Navarra/Saint Paul Commentary*, p. 123-124.

³⁴ Canon 119 is established as an invalidating law from the explicit words of the text, "id vim habet iuris, quod." See CHIAPPETTA, the commentary on c. 119, in *Il Codice di diritto canonico*, I, p. 149. Also see the *Salamanca Commentary*, pp. 93-97; and the *Navarra/Saint Paul Commentary*, pp. 122-123. Furthermore Michiels, Mörsdorf, Robleda, and Roelker each considered the expression *vim habere iuris* to indicate invalidity or incapacity in the 1917 Code.

The proper interpretation of c. 119 includes a statement of authentic interpretation issued by the Pontifical Council for the Interpretation of Legislative Texts in which the Council determined that in the case of elections, the absolute majority is required only in the first two ballots. If there is a need for a third ballot because absolute majority has not been reached in the previous ones, this ballot is decisive and only a relative majority is needed, in *AAS* 82 (1990), p. 845; also in the *Navarra/Saint Paul Commentary*, p. 137.

invalidity or incapacity."⁵⁵

3. Preliminary canons (cc. 1-6)

As an introduction to the 1983 Code, the preliminary canons concern the scope of the 1983 Code and the milieu within which the Code functions. Furthermore, the preliminary canons also define the related position of the Code with regard to the former law, both customary and written.⁵⁶ Thus the preliminary canons are not invalidating or incapacitating laws because they do not invalidate an act or incapacitate a person, but rather constitute the prelude to the remaining 1746 canons.

4. Laws in the Church (cc. 7-34)

Canons 7-34 present the means by which the Church creates and communicates laws that serve the *communio* and *missio* of the Church. In fact, three titles of Book I concern the legislation in the Church: Title I, "Ecclesiastical Laws;" Title II, "Custom;" and Title III, "General Decrees and Instructions."

Canons 7-22, Title I, "Ecclesiastical Laws," and canons 23-28, Title II, "Custom," regard the existence, promulgation, effect, and interpretation of both ecclesiastical laws and

⁵⁵ At the same time, however, this section of canons contains many important laws regarding juridic persons. Some of these canons provide for particular law or for the statutes of the juridic person to enact other laws concerning the juridic person, and some of these laws could be invalidating or incapacitating.

⁵⁶ See *Communicationes*, 9 (1977), p. 231.

customary laws. Also these canons concern the relationship between ecclesiastical laws and certain civil laws. However, only one of these canons constitutes a law of invalidity or incapacity. Canon 16, § 3 stipulates, in part, that an interpretation contained in a judicial decision or an administrative act does not have the force of law and binds only the persons and affects only those matters for which it was given. Indeed, such an interpretation is personal to the individual(s) concerned and does not create new law. As a result, even though according to c. 19 the interpretation has value in providing light for understanding other laws, any attempt to apply such an interpretation beyond the specific scope of the interpretation itself would lack legal force.⁵⁷

In addition, other canons of Title I and Title II also can affect the validity of a juridic act. Indeed, in the event that a statement intended to be law is not properly promulgated, the proposed law would lack juridic effect. Therefore, under the specific circumstance of improper promulgation, additional invalidating and incapacitating laws also exist in Title I and Title II.⁵⁸

⁵⁷ The words, "vim legis non habet," establish the invalidity or incapacity. Note that, while c. 16, § 3 concerns the binding application or effect of an interpretation contained in a judicial sentence or an administrative act, canon 16, § 3 does not contradict the general norm of interpretation contained in c. 19.

⁵⁸ Canons 7, 8, 20-26, and 28 concern the existence and promulgation of law. See, for example, the commentary on c. 29 in the *Navarra/Saint Paul Commentary*, p. 97, which says that a general decree will only be

Canons 29-34, Title III, "General Decrees and Instructions," concern: general decrees, which are laws properly speaking; general executory decrees, which address methods to apply a law or urge observance of laws; and instructions, which clarify the prescriptions of law and concern the implementation of laws. Of these six canons, two canons indicate invalidating or incapacitating laws. First, canon 30 incapacitates a person who possesses only executive power from issuing a general decree, unless in a particular case this power has been granted expressly by a competent legislator.³⁹ Then canon 33, § 1 invalidates prescriptions that are contrary to laws.⁴⁰

5. Executive power: individual administrative acts (cc. 35-93)

Title IV of Book I, "Individual Administrative Acts," presents general norms for acts of governance placed by competent authority in the exercise of the authority's

valid if it is enacted in accordance with c. 8; also see the commentary on custom, in the *American Commentary*, p. 38-40; URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, pp. 23-26; and CHIAPPETTA, *Il Codice di diritto canonico*, I, pp. 33-37.

³⁹ The words, "ferre non valet, nisi," establish c. 30 as an incapacitating law.

⁴⁰ The words, "omni vi carent," establish the invalidity. For example, the Navarra/Saint Paul Commentary says, "These decrees [...] cannot derogate from a law, nor have they any force if they are contrary to this law." See the Navarra/Saint Paul Commentary, p. 99. Also see CHIAPPETTA, *Il Codice di diritto canonico*, I, p. 57; and URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, pp. 28.

function and directed at a single person or persons, in a concrete and particular case. Really, the character of particularity distinguishes the individual administrative act from general administrative acts, such as general decrees, general executory decrees, and instructions.⁶¹ The presentation of the canons in Title IV that provide the basis for invalidating and incapacitating laws is organized according to the five chapters that comprise this title in the 1983 Code.

a. Chapter I - Common norms

The first 13 canons of Title IV present common norms for an individual administrative act, and certain of these canons provide the basis for invalidating or incapacitating laws.

Canon 38 protects the rights of persons by saying that an administrative act lacks effect insofar as it injures the acquired rights of another or is contrary to a law or an approved custom, unless the competent authority expressly adds a derogating clause to the administrative act.⁶²

Canon 39 stipulates the required presence of one of three words for a condition in an administrative act to be an

⁶¹ See CHIAPPETTA, *Il Codice di diritto canonico*, I, p. 60.

⁶² The words, "effectu caret [...] nisi," establish the invalidity. Indeed, Chiappetta writes, "Un atto amministrativo singolare può essere privo di efficacia giuridica (effectu caret) per [...]." See CHIAPPETTA, *Il Codice di diritto canonico*, I, p. 64. Also see the commentary on c. 38 in the *Urbaniana Commentary*, p. 34; and the commentary on c. 38 in the *Salamanca Commentary*, pp. 44-45.

invalidating or incapacitating condition."⁴³ The presence of one of these words, however, does not necessarily establish an invalidating or incapacitating condition."⁴⁴ Although a condition pertains to a restricting or modifying factor in the law, not all conditions have equal effect in the law and, therefore, a proper understanding of c. 39 requires a clear delineation of four types of conditions in the 1983 Code:

1. constitutive condition required for the essence of a juridic act - *ad validitatem* (c. 124, § 1),
2. integral condition required for the completeness of an administrative act - *ad validitatem* (c.

⁴³ Canon 39 in the 1983 Code: "Condiciones in actu administrativo tunc tantum ad validitatem censentur adiectae, cum per particulas si, nisi, dummodo exprimuntur."

Canon 39 in the 1917 Code, the corresponding canon in the prior code, was different: "Conditiones in rescriptis tunc tantum essentiales pro eorundum validitate censentur, cum per particulas si, dummodo, vel aliam eiusdem significationis exprimuntur."

The differences are first, c. 39 in the 1983 Code concerns all forms of administrative acts, not simply rescripts; second, the word "nisi" has been added as a specific term to c. 39 in the 1983 Code; and third, the phrase "vel aliam eiusdem significationis" has been deleted from the 1983 Code.

⁴⁴ Canon 39 reads, in part, "tunc tantum ad validitatem." Properly understanding "tunc tantum" is central to understanding the application of c. 39. "Tunc tantum" means, only at that time. Indeed, canon 39 does not say "tunc semper," which would translate, always at that time. As a result, Canon 39 is saying both that only when one of the three critical words is present can a condition of the administrative act even be considered as possibly being invalidating or incapacitating, and also that the presence of one of the three critical words in an administrative act does not necessarily constitute the condition as a matter of validity. Consequently, the application of c. 39 calls for careful attention. For more on this see URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, p. 32.

39),

3. integral condition required for the completeness
of an administrative act - *non ad validitatem*,
and
4. accidental condition required for an
administrative act - *non ad validitatem*.

A brief discussion of each type of condition will facilitate understanding their effect in the 1983 Code.

1. Constitutive condition required for the essence of a
juridic act - *ad validitatem* (c. 124, § 1)

Canon 124, § 1 holds that a condition necessary to constitute the essence of a juridic act must be present in the act for it to have validity. For example, marriage is brought about through the consent of the parties, which is an act of the will.⁶⁵ Certainly true consent constitutes a condition essential for marriage. Thus, a marriage entered into due to force or grave fear inflicted from outside the person, even if inflicted unintentionally, which is of such a type that the person is compelled to choose matrimony in order to be freed from the force or grave fear, distorts the essence of consent required for a valid marriage.⁶⁶

In other words, the sense of "condition" referred to in c. 39 is not the same sense of "condition" presented in c.

⁶⁵ See c. 1057.

⁶⁶ See c. 1103.

124, § 1, but something lesser.

2. Integral condition required for the completeness of an
administrative act - ad validitatem (c. 39)

Completeness refers to a wholeness or an integrity of an administrative act, and yet a deficiency in completeness to an administrative act does not necessarily mean a lack in the essence of the act. In other words, the law can require that certain elements be present in an administrative act that are something lesser than the essence of the administrative act, as stipulated in c. 124, § 1. Certainly this understanding complies with the valid yet illicit concept found in the 1983 Code.⁶⁷

This sense of completeness is at the heart of c. 39. Indeed, the integral condition referred to in c. 39 is a circumstance that is both external to the essence of the

⁶⁷ The distinction between essential or substantial conditions for an act, and non-essential or accidental conditions is long standing in canonical tradition. For example Suárez writes, "Omissio autem formae accidentalis non tollit substantiam actus, et consequenter non annullat illam. Ergo non omnis corruptio formae, seu non omnis formae corruptio annullat actum, sed cum distinctione de forma substantiali vel non substantiali. Atque ita tota difficultas quaestionis eo revocabitur, ut sciamus quando forma lege praescripta sit substantialis vel tantum accidentalis: non enim id distinguere facile semper est [...]." See *De legibus* V,5,31,2. Suárez then devoted 13 paragraphs to the distinction between substantial and accidental conditions for an action.

However, in the discussion of c. 39 in this dissertation, the term integral is used rather than the term substantial because c. 39 allows for the discretion of the legislator to determine when an integral condition is a matter of validity, whereas substantial conditions are always a matter of validity. In addition, the distinction between substantial and accidental applies only to actions, not to the capacity of a person to act. A person is either capable or not capable.

administrative act considered in itself, and yet also part of the administrative act as prescribed in the law and mandated in the concrete. Further, for the integral condition to be an invalidating or incapacitating condition, this condition must be not only required for the completeness of the act but also accompanied by *si*, *nisi*, or *dummodo*. Thus, the integral condition referred to in c. 39, although very important, is not a matter of validity unless the condition is actually expressed by the *si*, *nisi*, or *dummodo*.⁴⁴

In short, the constitutive condition referred to in c. 124, §, 1, which clearly concerns the validity of a juridic act, differs from the integral condition of an administrative act mentioned in c. 39 because the integral condition referred in c. 39 is not something of the essence of the act, but rather something less that does not constitute the essence of the act. Yet, because of the words *si*, *nisi* or *dummodo*, the legislator has rendered the integral condition as an invalidating or incapacitating condition.⁴⁵ Accordingly,

⁴⁴ In fact, Chiappetta writes, "A norma del can. 39, si considerano essenziali per la validità dell'atto amministrativo soltanto quelle condizioni espresse mediante le particelle *si*, *nisi*, *dummodo*." See CHIAPPETTA, the commentary on c. 39 in *Il Codice di diritto canonico*, I, p. 65; also see the commentary on c. 39 in the *Salamanca Commentary*, p. 45.

⁴⁵ For example, canon 579 empowers the diocesan bishop to erect institutes of consecrated life in his own territory, provided that (*dummodo*) the Apostolic See has been consulted. Also see, for example, c. 1196 which concerns the persons who can dispense from a private vow, provided that (*dummodo*) a dispensation does not injure a right acquired by a person. In both examples, the conditions are integral conditions that

without *si*, *nisi*, or *dummodo*, a condition in an administrative act never represents an invalidating or incapacitating condition.

3. Integral condition required for the completeness of an administrative act - *non ad validitatem*

Certain integral conditions required for the completeness of an administrative act are not matters of validity because of the absence of *si*, *nisi*, or *dummodo*.⁷⁰ While compliance with the condition is expected, lack of compliance does not establish invalidity.

4. Accidental condition required for an administrative act - *non ad validitatem*

Finally, the 1983 Code contains accidental conditions that are circumstantial or tangential conditions to the administrative act and are not matters of validity, even if

are required by law for the administrative act and the conditions have been constituted as matters of validity by the presence of *dummodo*. See CHIAPPETTA, the commentary on c. 39 in *Il Codice di diritto canonico*, I, pp. 64-65.

⁷⁰ Consider, for example, c. 682, § 2, which stipulates that religious can be removed from an office either at the discretion of the authority who entrusted the office, after having notified the religious superior, or at the discretion of the religious superior, after having notified the authority; and neither requires the consent of the other. Certainly, at least in certain situations such as the removal of a pastor, the required notification of the religious superior or the authority is an integral part of the "completeness" of the administrative act of removal from office because of the need to protect the rights of the people to receive appropriate pastoral service. Yet the absence of the required notification does not invalidate the act of removal from office because the legislator has not established the integral condition of notification as a matter of validity.

the condition contains *si*, *nisi*, or *dummodo*. This form of condition complies with principle no. 3 of the 1967 principles for the revision of the Code which enjoined that laws of invalidity or incapacity be restricted to serious matters of the public good and the discipline of the Church. Although important, the accidental condition is considered less important for an administrative act than is the integral one.⁷¹ Consequently, when an accidental condition is accompanied by *si*, *nisi* or *dummodo*, the condition is not an invalidating or incapacitating condition.⁷²

Canon 40 renders invalid⁷³ the execution of an administrative act by an executor who at the time of the execution of the act had not received either a letter of authorization or notice of the letter from the authority who

⁷¹ Consider, for example, c. 269 which says that a diocesan bishop is not to allow the incardination of a cleric unless "[...]," and goes on to list three conditions. Indeed, incardination of a cleric is an administrative act and the conditions in c. 269 are preceded by "*nisi*," yet this canon is not considered an invalidating law. Therefore, if a diocesan bishop incardines a cleric while completely ignoring the three conditions of c. 269, the incardination is valid. See the commentary on c. 269, in the *American Commentary*, p. 195, "These requisites are for licitness only since the canon does not stipulate any invalidating force." Also see CHIAPPETTA, the commentary on c. 269 in *Il Codice di diritto canonico*, I, p. 343, where Chiappetta says these three conditions are "*ad liceitatem*." Further, note that in the *Salamanca Commentary*, the *Urbaniana Commentary*, and the *Navarra/Saint Paul Commentary* there is no comment on c. 269.

⁷² Distinguishing a condition that is an integral part of an act from a condition that is accidental to an administrative act is very difficult.

⁷³ The words, "*invalida [...] fungitur*," establish the invalidity. See the commentary on c. 40 in the *Urbaniana Commentary*, p. 35.

issued the act. In fact, this requirement for a notice with authority protects the integrity of the act intended by the authority who issued the administrative act by requiring certain communication,⁷⁴ thereby denying any assumed competence.

Canon 42 renders invalid⁷⁵ the execution of an administrative act in which the essential conditions attached in the letter are not fulfilled or the procedural formalities are not substantially observed.⁷⁶ Certainly the norm of c. 42 embodies the requirement of c. 124, § 1, that a valid juridic act must contain those elements that essentially constitute the act as well as the formalities and requisites imposed by law for the validity of the juridic act.

Canons 43 and 44 speak to the incapacity of any person to substitute for an executor who has been chosen because of personal qualifications, or when substitution is forbidden, or

⁷⁴ For example, Chiappetta writes, "Perché l'esecutore di un atto amministrativo possa adempiere validamente il suo mandato, si richiede anzitutto che sia in possesso del relativo documento e si accerti della sua autenticità [...] e della sua integrità [...]." See CHIAPPETTA, commentary on c. 40 in *Il Codice di diritto canonico*, I, p. 66; also see the commentary on c. 40 in the *Salamanca Commentary*, p. 46.

⁷⁵ The words, "irrita est," establish the invalidity.

⁷⁶ Indeed Chiappetta writes, "In particolare, è tenuto sotto pena d'invalidità." See CHIAPPETTA, the commentary on c. 42 in *Il Codice di diritto canonico*, I, p. 67; also see the commentary on c. 42 in the *Salamanca Commentary*, p. 47.

when the substitute has been predetermined.⁷⁷

Canon 47 concerns the revocation of an administrative act by means of another administrative act. Truly canon 47 does not invalidate an action by a person, but rather it terminates the power of the original administrative act at the moment the new administrative act takes effect.⁷⁸ Certainly, while the original act was in effect it contained its force and power; yet, upon termination, the force of the administrative act ceases. As a result, any subsequent action based upon the original administrative act would lack juridic force.

b. Chapter II - Individual decrees and precepts

Canons 48-58 concern individual decrees and precepts, and only one of these canons constitutes invalidity.

Canon 52 stipulates, in part, that an individual decree has force only⁷⁹ in respect to the matters it decides and only on behalf of the person(s) for whom the decree was given. In other words, an individual decree is personal to the

⁷⁷ Other canonists agree. Indeed Urrutia says regarding c. 43 that in a violation of one of these cases "exsecutor excederet normam mandati." See URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, p. 33. Also the American Commentary writes, "the unauthorized substitution of another for a person chosen because of particular qualities (*electa industria personae*) invalidates the executive act." See the commentary on c. 44, in the *American Commentary*, pp. 51-52.

⁷⁸ The words, "effectum tantummodo obtinet a momento," establish the invalidity. Yet, depending on the circumstances of a situation, cc. 142, § 2 and 144, § 1 might be exceptions to the norm of c. 47 because at times the Church supplies the necessary executive power of governance.

⁷⁹ The words, "vim habet tantum," establish the invalidity. See c. 16, § 3.

individual(s) concerned, and not territorial. Consequently, any attempt to apply an individual decree beyond the specific scope of the decree itself would have no juridic consequence.

c. Chapter III - Rescripts

Canons 59-75 concern rescripts and many of these canons establish invalidating or incapacitating laws. While rescripts in the prior Code were considered a category of private law, in the 1983 Code rescripts are administrative acts.⁸⁰

Canon 63, § 1 and § 2 indicate conditions under which the concealment of the truth or a statement of falsehood would invalidate a rescript.⁸¹

Canon 64 stipulates the invalidity of a favor by one dicastery of the Roman Curia or by another competent authority below the Roman Pontiff when that favor was previously denied by another dicastery of the Roman Curia.⁸²

Canon 65, § 2 and § 3 provide conditions necessary for competent authority to grant validly a favor after it has been

⁸⁰ See the commentary on Canon 59 in the *Navarra/Saint Paul Commentary*, pp. 109-111. Also, the revision of the canons concerning rescripts received much attention, as demonstrated in *Communicationes* 3 (1971), pp. 87-88; 17 (1985), pp. 52-73; 19 (1987), pp. 23-27; 22 (1990), pp. 304-309; and 23 (1991), pp. 81-84 and 189-193.

⁸¹ The words, "validitati [...] obstat," establish the invalidity in both paragraphs.

⁸² The words, "valide [...] concedi nequit," establish the invalidity.

denied by a vicar general or an episcopal vicar."³³

Canon 66 establishes the invalidity of a rescript due to an error in name of a person or of a place, only if the error is based on true doubt in these matters."³⁴

Canon 72 is an incapacitating law as a consequence of c. 134, § 3. In other words, unless a special mandate has been granted by the diocesan bishop, neither a vicar general nor an episcopal vicar is competent to extend the expired rescript originally granted by the Apostolic See."³⁵

d. Chapter IV - Privileges

Canons 76-84 concern privileges and two of these canons are incapacitating laws. Unlike other forms of individual administrative acts which are issued by executive power, a privilege can be granted by the legislator or by a person with

³³ The words, "valide concedi nequit" in § 2, and "invalida est" and "nequit valide" in § 3, establish the invalidity.

³⁴ The words, "non fit irritum [...] dummodo," establish the invalidity. The particle, "dummodo," constitutes the integral condition as a matter of validity, according to c. 39. As when Chiappetta says, "il dummodo nella normativa canonica è particella invalidante (can. 39)." See CHIAPPETTA, the commentary on c. 66 in *Il Codice di diritto canonico*, I, p. 86.

³⁵ Other canonists agree. For example, Chiappetta writes, "La facoltà è di competenza del Vescovo diocesano, non dell'Ordinario (can. 134, § 1), [...]." See the commentary on c. 72, in CHIAPPETTA, *Il Codice di diritto canonico*, I, p. 89. Next, the Salamanca Commentary writes, "[...] puede ser prorrogado por Obispo diocesano (no por el Ordinario: cf. c. 134) [...]." See the commentary on c. 72 in the *Salamanca Commentary*, p. 62. Finally, Müller includes c. 72 among the canons affected by c. 134, § 3. See MÜLLER, "De speciali Episcopii mandato iuxta CIC/1983," p. 229.

executive power to whom the legislator has granted this power."⁶⁶

Canon 80, § 3, in conformity with c. 119, 2° and 3°, incapacitates individual persons from renouncing a privilege granted to a juridic person."⁶⁷

e. Chapter V - Dispensations

Canons 85-93 concern dispensations," many of which establish invalidating or incapacitating laws. Unlike the 1917 Code which restricted the power of dispensation to the legislator and his successors," the 1983 Code grants the power of dispensation to those who enjoy the power of governance, within the limits of their competence, as well as

⁶⁶ See c. 76, § 1.

⁶⁷ In fact Chiappetta writes, "Trattandosi di persone giuridiche collegiali, la rinunzia va effettuata collegialmente, con la procedura stabilita a tal riguardo nel can 119." See CHIAPPETTA, the commentary on c. 80 in *Il Codice di diritto canonico*, I, p. 96. Also see the commentary on c. 80 in the *Salamanca Commentary*, pp. 67-68.

⁶⁸ Canon 85 defines a dispensation as a relaxation of a merely ecclesiastical law in a particular case. This definition complies with the instruction of Paul VI and excludes any power to dispense from divine law, the vicarious power of the pope notwithstanding, "Nomine legis generalis Ecclesiae veniunt leges dumtaxat disciplinares, a Suprema Auctoritate ecclesiastica constitutae, quibus tenentur ubique terrarum omnes pro quibus late sunt, [...] minime vero eae leges divinae, cum naturales tum positivae, a quibus unus Summus Pontifex - ubi potestate vicaria utitur - dispensare valet;" see Paul VI, in *Normae Episcopis impertiuntur ad facultatem dispensandi spectantes*, in AAS, 58 (1966), p. 469.

The Pontifical Commission for the Revision of the *Code of Canon Law* devoted much effort to dispensations, see *Communicationes* 3 (1971), pp. 89-91; 19 (1987), pp. 72-83, 97-101, 104-105, and 191-193; 22 (1990) pp. 270-272; 23 (1991), pp. 44-46, 86-88, 212-216, and 237-238.

⁶⁹ See c. 80 of the 1917 Code.

to those to whom the power of dispensing has been given explicitly or implicitly either by the law itself or by lawful delegation.⁹⁰ As a result of this legislative change, much of which is in a response to a teaching of Vatican II,⁹¹ new laws exist in the Church regarding the valid granting of dispensations.

Canon 86 declares that laws, to the extent that they define what essentially constitutes juridical institutes or acts, are not subject to dispensation. Clearly canon 86 protects the essence of a juridic act, as defined in c. 124, § 1, by saying that an attempt to dispense from a constitutive element would lack all juridic effect.⁹²

Canon 87, § 1 establishes incapacity in two respects.

⁹⁰ See cc. 85-93 of the 1983 Code for the laws concerning the authorizations and limitations for granting dispensations. The 1983 Code is consistent with the 1917 Code concerning the granting of dispensation in that both Codes recognize the legislator as the sole person who can freely create a law and relax a law. The 1983 Code, however, differs from the 1917 Code in that, while the prior Code contained very few instances where the legislator shared this power to relax a law, the new Code has many such instances. While canon 87, § 1 is the most important canon in this regard, cc. 87, § 2; 88; 527, § 2; 595, § 2; 691, § 1; 692; 1047, § 4, 1049, § 1; 1078, § 1; 1079, § 1 - § 4; 1080, § 1; 1127, § 2,; and 1245 also exemplify the legislator granting the power of dispensation, *ipso iure*.

⁹¹ See *Christus Dominus*, no. 8b, in Flannery, p. 567, which says, in part, that individual bishops have the power to dispense from the general law of the Church in particular cases of those over whom they normally exercise authority.

⁹² Canon 86 restates a directive from Paul VI, "*Facultas autem dispensandi exercetur circa leges praecipientes vel prohibentes, non autem circa leges constitutivas*," in *Normae Episcopis impertiuntur ad facultatem dispensandi spectantes*, in AAS, 58 (1966), p. 469.

First, since c. 87, § 1 empowers the diocesan bishop to grant certain dispensations, the term diocesan bishop incapacitates all other persons, except for those who are equivalent to him in c. 381, § 2.²³ Of course, the diocesan bishop has the prerogative to delegate the power to dispense.²⁴ Yet, as a result of c. 134, § 3, without further specific delegation, no other person, not even a vicar general or an episcopal vicar, can grant a dispensation validly.²⁵

Second, the power of the diocesan bishop to grant dispensations excludes as a matter of validity²⁶ any

²³ See c. 134, § 3.

²⁴ See c. 137.

²⁵ Other canonists agree. For example, the Salamanca Commentary writes, "En casos concretos (c. 85), [...] el Obispo diocesano (c. 134, § 3) y sus equipados canónicamente (c. 381, § 2) pueden dispensar [...]." See the commentary on c. 87 in the *Salamanca Commentary*, p. 72. Next, Chiappetta writes, "Il Vescovo diocesano, non l'Ordinario del luogo, [...]." See the commentary on c. 87 in CHIAPPETTA, in *Il Codice di diritto canonico*, I, p. 103. Further, Urrutia says, "Potestas dispensandi respectu universalium (vel particularium ab auctoritate suprema latarum), in ordinariis adiunctis. Eam habet Episcopus diocesanus, non omnes Ordinarii, neque Ordinarii loci (can. 134, §§ 1 et 2) iuxta c. 134, § 3, quam tamen Episcopus delegare valet (c. 137)." See URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, p. 53. Moreover, the American Commentary says that canon 87 is an example of the application of c. 134, § 3. See the commentary on c. 134, in the *American Commentary*, p. 95. Furthermore, the Urbaniana Commentary simply refers to "il Vescovo diocesano" when discussing the power to dispense. See the commentary on c. 87 in the *Urbaniana Commentary*, p. 56. Finally, Müller includes c. 87, § 1 among the canons in the 1983 Code affected by c. 134, § 3. See MÜLLER, "De speciali Episcopi mandato iuxta CIC/1983," p. 229.

²⁶ The construction, "dispensare valet in legibus [...] non tamen in legibus," establishes the incapacity.

dispensation from procedural⁷⁷ or penal⁷⁸ laws, or from those laws whose dispensation is especially reserved to the Apostolic See or to another authority. Consequently, not even the diocesan bishop can dispense validly from one of these laws without explicit authorization from the legislator."

Furthermore, canon 87, § 1 has been the object of two authentic interpretations. First, that there cannot be a dispensation from the canonical form of marriage in the case of two Catholics and, second, that there cannot be a dispensation from the requirement that a homily is reserved to a priest or a deacon.¹⁰⁰ Hence, these authentic interpretations help to establish the scope of the power of

⁷⁷ Paul VI teaches that procedural laws are constituted for the defense of rights, "Leges ad processus spectantes, cum ad iurium defensionem sint constitutae [...] non sunt obiectum facultatis [...]." See Paul VI, in *Normae Episcopis impertiuntur ad facultatem dispensandi spectantes*, p. 469. As a result, all laws that establish a process or procedure may not be the object of a dispensation because these laws have been established to protect the rights of persons. Therefore, in addition to the many processes and procedures in Book VII, other examples of procedural laws would be laws governing elections, laws that require consent or counsel according to c. 127, and laws governing the admission to or the dismissal from an institute of consecrated life or a society of apostolic life.

⁷⁸ Penal laws also exist to protect the rights of persons and, therefore, may not be the object of a dispensation.

⁷⁹ However, this explicit authorization includes any faculty that is granted by the legislator in the 1983 Code, such as c. 1080, § 1, which concerns the granting of a dispensation for a marriage that cannot be deferred without probable danger of serious harm until a dispensation can be obtained from competent authority.

¹⁰⁰ See the *Navarra/Saint Paul Commentary*, p. 88. Also see *Communicationes*, 17 (1985), p. 262; and 19 (1987), p. 261.

the diocesan bishop to grant dispensations.

Moreover, canon 89 is an incapacitating law which expresses in negative terms that pastors, priests, and deacons cannot dispense from a universal or a particular law unless the power has been expressly granted to them.¹⁰¹

In summary, canons 87, 88, and 89 concern both limiting and establishing the power to dispense. To begin, canons 87, § 1 and 89 present invalidating or incapacitating laws regarding dispensations. At the same time, while canon 87, § 2 grants an ordinary the power to dispense under certain extraordinary and urgent situations, canon 88 empowers a local ordinary to grant a dispensation from diocesan laws as well as from laws passed by a plenary or provincial council or by the conference of bishops. Thus, canons 87, 88, and 89 both establish and limit the power to dispense.

Furthermore, canon 90, § 1 establishes that, unless the dispensation has been granted by the legislator or by his superior, a dispensation is invalid if it is granted without a just and reasonable cause, taking into consideration the circumstances of the case and the gravity of the law from which the dispensation is given. Therefore, a dispensation granted for a reason other than the spiritual good of the faithful, such as only for personal convenience or economic

¹⁰¹ The words, "dispensare non valent nisi," establish the incapacity. See CHIAPPETTA, the commentary on c. 89 in *Il Codice di diritto canonico*, I, p. 105.

gain, is an invalid dispensation, unless the dispensation has been granted by the legislator or his successor.¹⁰²

6. Statutes and rules of order (cc. 94-95)

No invalidating or incapacitating law appears in this title.

7. Power of governance (cc. 129-144)

Although the 1983 Code provides no specific definition, the power of governance refers to the public power conferred by Christ to the Church to support and to organize pastorally the people of God, for the attainment of their proper purposes and to achieve their supreme end which is eternal life.¹⁰³ In other words, the power of governance is understood as the subjective juridical situation in which one person is capable of unilaterally producing effects in some other person.¹⁰⁴

¹⁰² The words, "est [...] invalida," establishes the invalidity. The just and reasonable cause must be the spiritual good of the faithful which is the only justification for a diocesan bishop to grant a dispensation according to c. 87, § 1. This restates the teaching of Paul VI who said, "dispensatio ab iis bonum spirituale fidelium directe non respiciat non sunt obiectum facultatis," in *Normae Episcopis impertiuntur ad facultatem dispensandi spectantes*, p. 469. Paul VI's teaching is based on *Christus Dominus*, no. 8b, in Flannery, p. 567. Furthermore, Chiappetta writes, "La mancanza di una causa iusta et rationabilis [...] rende invalida la dispensa, tranne che sia data dallo stesso legislatore o dal suo superiore gerarchico [...]." See CHIAPPETTA, the commentary on c. 90 in *Il Codice di diritto canonico*, I, p. 106; also see URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, p. 56; and the *Navarra/Saint Paul Commentary*, p. 121.

¹⁰³ See CHIAPPETTA, the commentary on c. 129, § 1 in *Il Codice di diritto canonico*, I, p. 172. Also see the *Salamanca Commentary*, p. 104; and the *Urbaniana Commentary*, p. 78.

¹⁰⁴ See the *Navarra/Saint Paul Commentary*, p. 144.

Canon 129 pertains to the subjects of the power of governance.¹⁰⁶ While according to c. 129, § 2, members of the laity can cooperate in the exercise of the power, Canon 129, § 1 says that those who have received sacred orders are capable of the power of governance. Some canonists hold that c. 129, § 1 excludes those who have not received sacred orders from being a subject of the power of governance.¹⁰⁶ Yet other canonists disagree with this position.¹⁰⁷ In fact,

¹⁰⁶ Only physical persons are capable of the power of governance, according to c. 129. A juridic persons is incapable of this power. See URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, p. 90. Yet the Church, a moral person, can supply the power of governance in certain cases, as in c. 144.

¹⁰⁶ Canon 129, § 1 says that those in sacred orders "habiles sunt" of the power of governance, which some canonists understand to exclude those who are not in sacred orders. For example, the commentary on c. 129 in the *American Commentary* says, "only those who have been ordained are capable of possessing the power of governance in the Church [...]." See the commentary on c. 129, in the *American Commentary*, p. 93. Also see the *Salamanca Commentary*, p. 104 where it says, "Hábiles para el ejercicio de esta potestad son los clérigos. Afirmando, el c. excluye a los que no lo son." For others who hold this position see, E. CORECCO, "Nature et structure de la sacra potestas dans la doctrine et dans le nouveau Code de droit canonique," in *Revue de droit canonique*, 34 (1984), pp. 361-389; W. BERTRAMS, "De subiecto supremæ potestatis Ecclesiæ," in *Periodica*, 54 (1965), pp. 173-232, and 490-499; and K. MÖRS DORF, "De sacra potestate," in *Apollinaris*, 40 (1967), pp. 41-57.

An additional canonist who stated this position is URRUTIA, who writes, "inclusio unius est exclusio alterius, videtur affirmari clericos exclusive habiles esse," in *De normis generalibus, adnotationes in Codicem: liber I*, p. 89; however, according to the following footnote, Urrutia had changed his mind by 1985. Additional authors are noted in the bibliography attached to this dissertation.

¹⁰⁷ For example, Chiappetta writes, "Ma queste affermazioni di principio non sono assolute, vale a dire non escludono che, in casi particolari e in piena dipendenza dall'Autorità ecclesiastica, anche i laici siano chiamati dalla Gerarchia a prestare la loro collaborazione in specifiche attività giurisdizionali, ricoprendo uffici e compiti che richiedono l'esercizio della potestà di governo." See CHIAPPETTA, the

both positions find support within the work of the Pontifical Commission for the Revision of the Code. For example, although the 1974 schema of c. 129, § 1 made no mention of the subject of the power,¹⁰⁸ the text of c. 129, § 1 approved in 1979 provides that "in the exercise of this power, since it is not based on sacred orders, the Christian faithful laity are able to have that part which for individual cases the supreme authority of the Church itself concedes."¹⁰⁹

The Pontifical Commission for the Revision of the Code, however, in a plenary session in October 1981 and after much discussion that accented various theological and practical

commentary on c. 129, § 2, in *Il Codice di diritto canonico*, I, p. 174. Urrutia speaks in a similar way, saying, "I understand the term cooperate of c. 129, § 2 as meaning the actual exercise of some power of governance and not just a general kind of assistance to those who hold such a power." See F. URRUTIA, "Delegation of the Executive Power of Governance," in *Studia canonica*, 19 (1985), p. 341. Further in the same article on p. 347 in footnote no. 11, Urrutia writes, "there is no radical inability on the part of the laity to exercise ecclesiastical jurisdiction".

For others speaking in this regard see A. STICKLER, "De potestatis sacrae natura et origine", in *Periodica*, 71 (1982), pp. 65-91; J. BEYER, "De natura potestatis regiminis seu iurisdictionis recte in codice renovato enuntianda", in *Periodica*, 71 (1982), pp. 93-145 [Beyer presents an extensive bibliography on the power of governance in the Church in the beginning of this article]; and G. GHIRLANDA, "De natura, origine et exercitio potestatis regiminis iuxta novum Codicem", in *Periodica*, 74 (1985), pp. 109-164. Additional authors are noted in the bibliography attached to this dissertation.

¹⁰⁸ See "Canon 96 (CIC 196)," in *Communicationes*, 23 (1991), p. 89.

¹⁰⁹ "Potestatis regiminis [...] in exercitio eiusdem potestatis, quatenus eodem ordine sacro non innititur, christifideles laici eam partem habere possunt quam singulis pro causis auctoritas Ecclesiae suprema ipsis concedit," in *Communicationes*, 23 (1991), p. 239. This text is from the *labor recognitionis Schematis canonum Libri I De Normis Generalibus (reservati)*, 1977, Sessio III (26 nov.-1 dec. 1979).

matters, rejected the 1979 text.¹¹⁰ Actually, the issue concerns the theological context of the power of governance, especially in light of Vatican II,¹¹¹ rather than concerning the actual text of c. 129, § 1.¹¹²

¹¹⁰ See *Communicationes*, 14 (1982), pp. 146-149.

¹¹¹ Early in the process to revise the Code, the need for assistance from theological experts was recognized. During a meeting of the Commission from January 28-31, 1969, the question was asked, "utrum laicis conferri possit potestas regiminis?" After much discussion both in favor of and in opposition to the possibility of the power of governance being conferred on the laity, the *praeses* concluded, "proponit igitur ut peritis in scientia theologica et in scientia iuridica munus conferatur votum de hac quaestione conficiendi," in *Communicationes*, 19 (1987), 88-90. Also, "the Preliminary Explanatory Note 2 of *Lumen gentium* associates the *potestas* - i.e., the juridical exercise of the *munera* received by sacrament - with a subsequent canonical determination made by competent authority; consequently, however, it does not make *potestas* depend exclusively on the *munera* received by means of the sacrament of orders," in the *Navarra/Saint Paul Commentary*, p. 144.

¹¹² Canon 129, § 1 "contains the general declaration that those in sacred orders are capable (*habiles*) of obtaining power of governance in the Church. It does not say that laypeople are incapable, with the effects expressed in c. 10 [...]," in the *Navarra/Saint Paul Commentary*, p. 145.

For two reasons canon 129, § 1 cannot be considered an invalidating or incapacitating law by reason of the text of the canon. First, the term, "*habiles sunt*," in and of itself, constitutes a positive statement and is insufficient to establish invalidity or incapacity. Actually, forms of "*habiles sunt*," appear in other canons, none of which is considered an invalidating or incapacitating law. See, for example, c. 228, § 2 (that lay persons are capable of assisting the pastors of the Church as experts or advisors), and c. 229, § 3 (that lay persons are capable of receiving a mandate to teach the sacred sciences).

Second, throughout the 1983 Code, the legislator did not hesitate to use various adjectives, adverbs, or prepositional phrases to establish invalidity or incapacity. Examples are, *dumtaxat*, *exceptus*, *exclusive*, *invalide*, *invalidus*, *nullus*, *solus*, *tantum*, *ut valide*, *valide*, and *ad validitatem*. Yet none of these or any similar word appears in c. 129, § 1, when the use of such words could settle the dispute concerning who is capable of the power of governance. Thus, the term "*habiles sunt*" in c. 129, § 1 does not establish incapacity for that canon.

As a result, if c. 129, § 1 is an invalidating or incapacitating canon, such a reality must be demonstrated from the context of the canon

Certain other canons of general norms regarding the power of governance set the basis for invalidating or incapacitating laws. First, canon 133, § 1 protects the rights of persons from the abuse of a delegate who exceeds the limits of the mandate.¹¹³

Next, canon 134, § 3 provides a measure that strengthens the prerogative of the diocesan bishop concerning the exercise of the power of governance in certain situations. Indeed, by means of c. 134, § 3, the legislator respects the position of the diocesan bishop as the chief shepherd of his diocese.¹¹⁴

because it cannot be demonstrated from the text of the canon.

Further, the documents of Vatican II alone most probably cannot provide the data to resolve the dispute concerning the power of governance because, even though these documents have been well studied and predominate the question concerning c. 129, § 1, the dispute still exists. Thus, theological insight that further develops the Vatican II teachings will most likely be the source of the solution. In agreement, Herranz Casado writes, "Concerning the possibility or impossibility that a chancellor who is a lay person might exercise vi delegationis the faculty to dispense from matrimonial impediments, [...] I personally think that the Bishop should not concede such delegated power to the lay chancellor as long as the underlying doctrinal doubt remains. This doubt, however, does not seem to me to be resolved by appealing to the sense of the expression cooperari possunt of can. 129, § 2, because the word cooperare is too generic and polyvalent. Rather it is necessary to go deeper, from a theological-canonical perspective [...]." See J. HERRANZ CASADO, "The Power of Governance of the Diocesan Bishop," in *Communicationes*, 20 (1988), p. 308, footnote no. 59.

¹¹³ The words, "nihil agit," establish the invalidity explicitly.

¹¹⁴ In fact, Herranz Casado writes, "The legislator, respecting the personal character of the diocesan bishop's power of governance, intended to affirm with these norms (c. 134, § 3) that [...] there are acts of governance of an executive character that, given their particular importance, are reserved to the personal decision and responsibility of the diocesan bishop. These acts are excluded from the ordinary executive power of other local ordinaries in the diocese (vicars general and episcopal vicars)." See HERRANZ CASADO, "The Personal Power of Governance

More directly, even though c. 134, § 3 is not an invalidating or incapacitating law itself, canon 134, § 3 does present a definition that establishes other canons in the 1983 Code as laws which incapacitate both a vicar general or an episcopal vicar.¹¹⁵ In other words, even though the diocesan bishop can delegate his executive power within the norms of law, unless the diocesan bishop does issue a special mandate granting the necessary authority to a vicar general and an episcopal vicar, the term diocesan bishop in a canon in the realm of executive power creates the exclusive competence of the diocesan bishop to conduct the action of the canon.¹¹⁶

of the Diocesan Bishop," p. 306.

¹¹⁵ Canon 134, § 3 reads, "Quae in canonibus nominatim Episcopo diocesano, in ambitu potestatis executivae tribuuntur, intelleguntur competere dumtaxat Episcopo diocesano aliisque ipsi in can. 381, § 2 aequiparatis, exclusis Vicario generali et episcopali, nisi de speciali mandato."

The word "dumtaxat" establishes the certain distinction between the diocesan bishop and other offices of executive power. Indeed, Müller agrees. See H. MÜLLER, "De speciali episcopi mandato iuxta CIC/1983," p. 229. Further, canon 134, § 3 instructs that, in the realm of executive power, the term diocesan bishop pertains only to the person who is the diocesan bishop. Furthermore, the Pontifical Commission for the Revision of the Code recognized this distinction. In fact, during a meeting from October 20-28, 1981, while discussing the relationship between the diocesan bishop and a vicar general, the comment is made, "[...] secundum quam sub nomine Episcopi diocesani non veniunt per se Vicarius generalis nec Vicarius episcopalis. Ita fit adaequata distinctio inter verba Episcopum diocesanum et Ordinarium loci." See, *Communicationes*, 14 (1982), p. 150.

¹¹⁶ Indeed, other canonists agree. For example, Herranz Casado writes, "There are acts of governance [...] reserved to the personal decision and responsibility of the diocesan bishop. [...] For example, the provision of all ecclesiastical offices of the diocese, incardination and excardination of clergy, the approval of the statutes of the seminary, the erection of institutes of consecrated life, etc." See HERRANZ CASADO,

For example, consider c. 267, § 1, which includes the stipulation that for a cleric already incardinated to be incardinated validly into another particular church, he must obtain a letter of excardination from the diocesan bishop of the particular church in which the cleric is currently incardinated. Moreover, because of the term diocesan bishop in c. 267, § 1, unless the diocesan bishop issues a special mandate to a vicar general or an episcopal vicar granting authority to issue the excardination letter, in the event that a vicar general or an episcopal vicar should sign such a letter, the act of excardination would be invalid.¹¹⁷ Hence,

"The Personal Power of Governance of the Diocesan Bishop," p. 306. Next, Chiappetta writes, "Di conseguenza, quanto nei canoni è attribuito nominatamente ai Vescovi diocesani nell'ambito della potestà esecutiva, s'intende di esclusiva competenza dei medesimi e dei Presuli equiparati, e i Vicari generali ed episcopali non hanno alcun potere a tal riguardo [...]." See CHIAPPETTA, *Il Codice di diritto canonico*, I, p. 183. Then Müller writes, "[...] normae ad rem pertinentes non iam sese referunt ad Ordinarium loci, sed nominatim ad Episcopum dioecesanum, cui in illis casibus administrationis dioecesanae potestas executiva exclusive competit." See MÜLLER, "De speciali episcopi mandato iuxta CIC/1983," p. 229. Furthermore, the Salamanca Commentary writes, "Tiene especial importancia el § 3: el deseo de aumentar las competencias del Obispo diocesano que hagan patente su dignidad y ayuden a un más fácil y eficaz ministerio pastoral no tiene igual aplicación en los Ordinarios del lugar. La mención nominal del Obispo diocesano sale con frecuencia en el Código." See the commentary on c. 134, in the *Salamanca Commentary*, p. 108. Finally, Urrutia simply says, "§ 3 clarificat punctum dubium: Vicarii generales et episcopales non iure aequiparantur Episcopis diocesanis [...]." See Urrutia, *De normis generalibus, adnotationes in Codicem: liber I*, p. 92.

¹¹⁷ In fact, other canonists agree. For example, Chiappetta writes, "La concessione delle due lettere di escardinazione e d'incardinazione è di esclusiva competenza del Vescovo diocesano: il Vicario generale o episcopale non hanno alcuna facoltà a tal riguardo, nisi de mandato speciali (can. 134, § 3)." See CHIAPPETTA, *Il Codice di diritto canonico*, I, p. 341. Next, Müller writes, "In Codice casus, qui in ambitu

since canon 134, § 3 protects legislatively the responsibility of the diocesan bishop to foster and safeguard the unity of the faith and to uphold the discipline which is common to the whole Church,¹¹⁸ canon 134, § 3 acknowledges the proper place of the bishop of the diocese in the Church. He is the chief shepherd of his diocese.

Canon 135, § 2 defines two respects in which the use of legislative power would be invalid.¹¹⁹ First, legislative power cannot be delegated validly, unless explicitly provided for in the law.¹²⁰ Second, no lower legislative power can

potestatis executivae nominatim ac proinde exclusive Episcopo diocesano attribuuntur, valde numerosi sunt, uti statim apparet. Sunt imprimis casus sequentes: [...] litteras excardinationis aut incardinationis dare (can. 267, § 1)." See MÜLLER, "De speciali Episcopi mandato iuxta CIC/1983," pp. 229-230. Furthermore, the *Salamanca Commentary* writes, "Sólo el Obispo diocesano [...] puede conceder la excardinación e incardinación, no el Vicario general." See the commentary on c. 267 in the *Salamanca Commentary*, p. 163. Finally, the *American Commentary* writes, "The excardination-incardination of a deacon or priest is of such importance that the decision must rest with the highest authority. The vicar general or the episcopal vicar may not act in this matter without a special mandate." See the commentary on canon 267 in the *American Commentary*, p. 194.

¹¹⁸ See *Lumen gentium*, no. 23, in Flannery, p. 376, where Vatican II teaches that all (diocesan) bishops have the obligation of fostering and safeguarding the unity of the faith and of upholding the discipline which is common to the whole Church. Also see *Christus Dominus*, nos. 11-21, in Flannery, pp. 569-576, where Vatican II presents a large variety of responsibilities of the diocesan bishop.

¹¹⁹ In both situations the word, "valide," establishes the invalidity.

¹²⁰ An example would be, c. 30 of the 1983 Code.

validly enact legislation that is contrary to a higher law.¹²¹ Thus, some legislative power in the Church experiences restrictions and limits.

Further, canon 137, which essentially restates the rules of delegation and subdelegation of the power of governance that were in c. 199 of the 1917 Code, establishes invalidating law in one respect. Indeed, because of c. 39, canon 137, § 2 invalidates in two situations the subdelegation of executive power delegated by the Apostolic See. Truly, the delegation and subdelegation of executive power are important for the mission of the Church.¹²²

An additional point of interest is that the development of c. 137, § 4 reveals a willingness on the part of the

¹²¹ Thus, for example, the stipulation in c. 1317 that dismissal from the clerical state cannot be established by particular law is a matter of validity.

¹²² Apparently, with the exception of § 2, canon 137 shows that the execution of an administrative act for the good of the person(s) concerned is a greater value than is the value of the formality of who holds delegation to execute the act. For the good of the people, the rules of delegation might be violated without harming the people by invalidating the administrative act.

None of the following commentaries identifies c. 137 of the 1983 Code as an invalidating or incapacitating law: the *Navarra/Saint Paul Commentary*, the *American Commentary*, the *Salamanca Commentary*, the *Urbaniana Commentary*, and CHIAPPETTA, *Il Codice di diritto canonico*, I.

Even though c. 137 of the 1983 Code contains conditions prefaced by *si* or *nisi*, words that might indicate conditions that are a matter of validity because of c. 39, these conditions, other than those in § 2 in which *nisi* is normative, are not matters of validity because none is an integral condition required for the completeness of the administrative act, but rather each is an accidental condition. An additional indicator of invalidity in § 2 is the presence of the words, "electa fuerit industria personae."

Commission to consider the creation of a new invalidating law concerning the subdelegation of the power of governance. While canon 199, § 5 of the 1917 Code reads, in part, *nulla [...] potest [...] nisi*,¹²³ which does not constitute an invalidating law, c. 137, § 4 in the 1974 schema reads, in part, *nulla [...] valet, nisi*,¹²⁴ which would constitute an invalidating law. Moreover, the 1977 schema of c. 137, § 4 restates the text from the 1974 schema, and in 1979 the Commission reacted to the 1977 schema with *placet textus*.¹²⁵ However, by the time the 1983 Code was promulgated the text of c. 137, § 4 had been rewritten to say the essence of c. 199, § 5 of the 1917 Code.¹²⁶ Consequently, while the Commission considered setting a new invalidating law concerning the subdelegation of the power of governance, no such legislation was actually enacted, thereby reinforcing the understanding that, for the good of the people, a violation of the rules of delegation would not invalidate an administrative act.

¹²³ Canon 199, § 5 of the 1917 Code: "Nulla subdelegata potestas potest iterum subdelegari, nisi id expresse concessum fuerit."

¹²⁴ This text reads: "Nulla potestas subdelegata iterum subdelegari valet, nisi id expresse a delegante concessum fuerit," in *Communicationes*, 23 (1991), p. 91.

¹²⁵ See *Communicationes*, 23 (1991), p. 229. This text is from the *labor recognitionis Schematis canonum Libri I De Normis Generalibus (reservati)*, 1977, Sessio III (26 nov.-1 dec. 1979).

¹²⁶ Canon 137, § 4 of the 1983 Code reads: "Nulla potestas subdelegata iterum subdelegari potest, nisi id expresse a delegante concessum fuerit."

Finally, canons 142, § 1 and 143, § 1 stipulate when delegated (c. 142) or ordinary (c. 143) executive power of governance ceases. Obviously, once the power ceases, those who held this power become incapable of validly placing acts based on this power.

8. Executive power: ecclesiastical offices (cc. 145-196)

Title IX of Book I, "Ecclesiastical Offices," presents canons that concern the organization of the Church. Given that an ecclesiastical office refers to any function established in a stable manner by divine or ecclesiastical law to be exercised for a spiritual purpose,¹²⁷ ecclesiastical office includes all personal positions within an ecclesial organization.¹²⁸ The canons in Title IX that establish invalidating and incapacitating laws are organized according to the two chapters that comprise this title in the 1983 Code.

a. Chapter I - Provision of ecclesiastical office

Eleven canons of general norms, some of which determine invalidating or incapacitating laws, introduce this chapter. After they are reviewed, as they are presented in the 1983 Code, each of the methods to provide an ecclesiastical office is addressed.

¹²⁷ See c. 145, § 1.

¹²⁸ See the commentary on c. 145 in the *Navarra/Saint Paul Commentary*, p. 155.

Canon 146 clearly states that no ecclesiastical office can be acquired validly without canonical provision, that is, the office must be conferred by competent authority in accordance with canonical norms.¹²⁹

Canon 149, § 2 invalidates¹³⁰ the provision of an ecclesiastical office to a person who lacks a required quality that is expressly required for the validity of the provision. In addition, canon 149, § 3 invalidates a simoniacal provision of an office.¹³¹

Canon 150 invalidates the provision of an office entailing the full care of souls and requiring the exercise of the priestly order upon a person who has not yet received priestly ordination.¹³²

Canon 153, § 1 invalidates the provision of an office which by law is not vacant.¹³³ Further, canon 153, § 3 stipulates that the promise of an office has no juridic

¹²⁹ The words, "valide obtinere nequit," establish the invalidity. Although not stated in the 1983 Code, the meaning of the term canonical provision is found in c. 147, § 2 of the 1917 Code, the corresponding canon in the prior code, "nomine canonicae provisionis venit concessio officii ecclesiastici a competente auctoritate ecclesiastica ad normam sacrorum canonum facta." See the commentary on c. 146, in the *American Commentary*, p. 99; and URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, p. 100.

¹³⁰ The words, "irrita tantum est," establish the invalidity.

¹³¹ The words, "irrita est," establish the invalidity.

¹³² The words, "valide conferri nequit," establish the invalidity.

¹³³ The words, "est [...] irrita," establish the invalidity.

effect.¹³⁴

Canon 154 is an invalidating law because of c. 39. According to c. 154, a vacant office that is illegitimately held by someone may be conferred upon someone else, provided that it is duly declared that the current possession is illegitimate and that this declaration is mentioned in the document of conferral. Certainly such a declaration, which is integral to the conferral of office because it communicates to the persons concerned that the current office holder is in that position illegitimately, protects the organization of the Church. Consequently, since c. 154 presents an administrative act that contains an integral condition prefaced by the word *dummodo*, if the condition of c. 154 is not met, the provision of office is invalid.¹³⁵

Canon 155 incapacitates an authority from exercising

¹³⁴ The words, "nullum [...] effectum," establish the invalidity. In a sense, canon 153, § 3 is not an invalidating law because a promise to provide an office is not equal to the provision of that office and, since no provision exists, there is no provision to declare invalid. At the same time, however, even though the promise is without effect, no law prevents a current promise of a future provision, with the complete freedom to revoke the promise at any time and without any ground for the vindication of a right to the office. See the commentary on canon 153, in the *American Commentary*, p. 101.

¹³⁵ For example, the *American Commentary* writes, "This declaration and mention of illegitimate possession of the office is necessary for the valid conferral of the office on someone else in accord with canon 39." See the commentary on canon 154, in the *American Commentary*, p. 101. Also, Chiappetta writes, "[...] la sanzione è contenuta implicitamente nella congiunzione *dummodo*, che, a termini del can. 39, esprime una condizione essenziale, che occorre rispettare *sub pena nullitatis*." See CHIAPPETTA, the commentary on c. 154 in *Il Codice di diritto canonico*, I, p. 209.

power over a person upon whom the authority validly conferred an office, while the authority was supplying for someone who is negligent or impeded.¹³⁶

Then, even though c. 156 is not an invalidating law, canon 474 presents an important tangent to c. 156. While the norm set in c. 156, that a provision of any office be made in writing, is not a matter of validity, the application of c. 474 would require that the written instrument of provision must be signed by the person providing the office in order for the written instrument to have juridic effect.¹³⁷ Hence, if the written instrument of provision is not signed, the conferral of office would be valid but no written documentation of the provision with juridic value would exist.

1) Art. 1 - Free conferral

Canon 157 incapacitates because of the term diocesan bishop. As a result, only the diocesan bishop may provide for ecclesiastical offices in his particular church by free conferral, unless he has mandated differently.¹³⁸ Truly

¹³⁶ The words, "nullam [...] potestatem acquirit," establish the incapacity.

¹³⁷ In fact, canon 474 reads, in part, "Acta curiae quae effectum iuridicum habere nata sunt, subscribi debent ab Ordinario a quo emanant, et quidem ad validitatem, [...]." See the commentary on canon 474, in the *American Commentary*, pp. 385-387. Also see CHIAPPETTA, the commentary on c. 156 in *Il Codice di diritto canonico*, I, p. 210.

¹³⁸ Other canonists agree. For example, Chiappetta writes, "La facoltà è esclusiva del Vescovo, per cui, a termine del can 134, § 3, il Vicario generale o episcopale non hanno alcuna competenza in merito [...]." See the commentary to c. 157 in CHIAPPETTA, *Il Codice di diritto*

canon 157 establishes the power of the diocesan bishop to confer offices in his diocese.

2) Art. 2 - Presentation

Presentation is a right of a physical or juridic person to designate a candidate for an ecclesiastical office. This right, however, extends only to the designation and does not create a *ius ad rem*,¹³⁹ or a right to the office. Hence, while each of the canons concerning presentation is very important, none constitutes an invalidating or incapacitating law.¹⁴⁰

3) Art. 3 - Election

Election is the collegial process by which a group of persons or the members of a juridic person exercise their right to select a physical person to hold a particular ecclesiastical office.¹⁴¹ Unlike a presentation, an election

canonico, I, p. 212. Next, the American Commentary writes, "By restricting the right of free conferral [...] to the diocesan bishop, the vicar general is excluded [...]." See the commentary on c. 157 in the *American Commentary*, p. 102. Furthermore, Urrutia writes, "[...] limitatur ius Episcoporum [...]. Recole c. 134. § 3 de aequiparatis Episcopo diocesano." See URRUTIA, *de normis generalibus, adnotationes in Codicem: liber I*, p. 105. Finally, Müller includes canon 157 among the canons that are affected by c. 134, § 3. See MÜLLER, "De speciali Episcopi mandato iuxta CIC/1983," p. 229.

¹³⁹ See the commentary on c. 158, in the *Navarra/Saint Paul Commentary*, p. 161.

¹⁴⁰ Indeed, the subject matter of a presentation is not constitutive to the rights of a person to hold a particular office.

¹⁴¹ See CHIAPPETTA, introduction to the commentary on c. 164 in *I Codice di diritto canonico*, I, p. 220.

establishes a right to the office.¹⁴² Consequently, the canons concerning elections provide many laws of invalidity or incapacity.

The Church expects that an election be an expression of the free will of the persons involved. Accordingly, canon 170,¹⁴³ existing to protect the freedom of elections, invalidates an election whose freedom was in fact impaired. Additional canons implement this value.

To begin, a valid election requires the valid convocation of the electorate, and canon 166, § 1 - § 3¹⁴⁴ present invalidating laws that protect the integrity of a convocation.

Then canon 168 incapacitates a person who has the right to vote by more than one title from casting more than one ballot.¹⁴⁵

¹⁴² If the election does not require confirmation, upon acceptance of the election, the elected person immediately obtains the office (see c. 178). If the election requires confirmation, however, the elected person acquires a *ius ad rem*, or a right to the office, until the proper authority confirms the election. See, the commentary on cc. 178 and 179 in the *Navarra/Saint Paul Commentary*, p. 170.

¹⁴³ The words, "invalida est," establish the invalidity.

¹⁴⁴ Each paragraph of c. 166 contains words that establish invalidity explicitly: "valet si" in § 1, "valet attamen" in § 2, and "est [...] nulla" in § 3.

¹⁴⁵ In fact, canon 173, § 3, which reads, "Si numerus suffragiorum superet numerum eligentium, nihil est actum," applies to c. 168. Thus, Urrutia writes, "Nota unicum suffragium (nisi exceptio particularis) esse ad valorem ex c. 173, § 3." See URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, p. 110.

Further, canons 169¹⁴⁶ and 171, § 1 and § 2¹⁴⁷ protect the rights of persons capable of validly casting a vote. In addition, not only must an election be a free process, the actual vote must be truly free. Hence, canons 172, § 1¹⁴⁸ and 173, § 3¹⁴⁹ invalidate a vote that lacks essential freedom.

In addition, compromise can effect an election, according to c. 174, § 1, provided that certain integral conditions, which are prefaced by the word *dummodo*, are met. Thus, if the conditions are not met, the compromise is invalid.¹⁵⁰ Also, canon 174, § 2 and § 3 are invalidating laws concerning compromise.¹⁵¹

Furthermore, for the good of the Church, the person elected must accept the election within a reasonable time.

¹⁴⁶ The words, "ut valida," establish the incapacity,

¹⁴⁷ The words, "inhabiles sunt" in § 1 establishes the incapacity, and "est nullum" in § 2, establishes the invalidity.

¹⁴⁸ The words, "ut validum," establish the invalidity.

¹⁴⁹ The words, "nihil est actum," establish the invalidity. See c. 168.

¹⁵⁰ Indeed, the unanimous consent required in c. 174, § 1 is an example of the stipulation in c. 119, 3°, that is, what touches all as individuals must be approved by all. For example, Urrutia writes, "Ut valeat [...] ex consensu unanimi (c. 119, 3° singuli cedunt ius personale suffragii), quod factum, [...]." See URRUTIA, *De normis generalibus, adnotationes in Codicem: liber I*, p. 114.

¹⁵¹ The words, "est invalida" in § 2, and "ad validitatem" in § 3, establish the invalidity.

Actually canon 177, § 1¹⁵² requires this acceptance within eight days; otherwise the election has no effect.

Finally, at times, elections require confirmation by competent authority before the elected person may obtain the office. Lest the elected person presume confirmation, canon 179, § 4 invalidates all actions before being informed of confirmation.¹⁵³

4) Art. 4 - Postulation

Postulation is a petition from the college of electors, presented to the competent authority, requesting that an ecclesiastical office be granted to a person who is otherwise not eligible, due to the presence of a dispensable canonical impediment.¹⁵⁴

Canon 181, § 1 and § 2 present rules that affect valid voting for postulation.¹⁵⁵ Then, to assure that a postulation is pursued promptly, canon 182, § 2 declares invalid any postulation not sent within the prescribed time.¹⁵⁶

¹⁵² The words, "effectum non habet," establish the invalidity. See the commentary on c. 177, § 1, in the *Navarra/Saint Paul Commentary*, p. 169.

¹⁵³ The words, "nulli sunt," establish the invalidity.

¹⁵⁴ See the commentary on c. 180 in the *Salamanca Commentary*, pp. 124-125.

¹⁵⁵ The words, "ut [...] vim habet" in § 1, and "valet [...] si" in § 2, establish the invalidity.

¹⁵⁶ The words, "nulla est," establish the invalidity.

b. Chapter II - Loss of ecclesiastical office

Both the provision and the loss of an office concern the rights of both the physical person who holds office and the total Church community. Hence, the 1983 Code shows great deliberation in the canons concerning the loss of an ecclesiastical office. Actually an ecclesiastical office is lost by the lapse of a predetermined time, by reaching the age determined by the law, by resignation, by transfer, by removal, and by privation.¹⁵⁷

According to c. 186, the first two reasons for the loss of an office, either the lapse of a predetermined time or reaching the age determined by the law, take effect only from the moment when the fact of loss of office has been communicated in writing by the competent authority. Thus, the rights of the persons of the Church to receive necessary ministerial service are protected, at least insofar as the law arranges for competent authority to be aware of the need to provide for the services lost.¹⁵⁸ The remaining four reasons for the loss of an ecclesiastical office are each addressed in

¹⁵⁷ See c. 184, § 1. Also, canon 416 provides death as a reason for the loss of the office of diocesan bishop.

¹⁵⁸ The words, "effectum habet tantum," establish the invalidity. Consider, for example, a pastor who, in compliance with c. 538, § 3, submits his resignation when he reaches the retirement age set by law. According to c. 186, this pastor would retain all responsibilities and rights regarding the functions entrusted to a pastor in c. 530, including the right to assist validly at marriages in his parish without further delegation, until he receives written communication from competent authority informing him of his loss of office.

separate articles, as they are presented in the 1983 Code.

1) Art. 1 - Resignation

Each of the three canons in the article establishes invalidity or incapacity. While, canon 188 protect the free capacity of a person to resign,¹⁵⁹ canon 189, § 1 and § 3¹⁶⁰ establish the norms for valid resignations.

2) Art. 2 - Transfer

Canon 190, § 1 incapacitates all persons not empowered to execute a transfer.¹⁶¹ Further, canon 190, § 3 requires written communication for a valid transfer, thereby protecting the rights of the people to the service provided by the person

¹⁵⁹ The words, "irrita est," establish the incapacity. See CHIAPPETTA, the commentary on cc. 187-188 in *Il Codice di diritto canonico*, I, p. 245. Also see URRUTIA, commentary on c. 187, in *De normis generalibus, adnotationes in Codicem: liber I*, p. 120-121. Canon 188 demonstrates an exception provided for in c. 125, § 2 that stipulates an act placed because of grave fear, which has been unjustly inflicted, or because of fraud is valid unless the law makes some other provision. Canon 188 provides that a resignation submitted under these conditions is invalid by the law itself.

¹⁶⁰ The words, "ut valeat" in § 1, and "omni vi caret" in § 3, establish the invalidity. See the commentary on c. 189, § 1, in the *Navarra/Saint Paul Commentary*, p. 176. Also see the commentary on c. 189, in the *Salamanca Commentary*, p. 127.

¹⁶¹ See cc. 146, 147, 157, and 186. For example, since c. 157 gives the diocesan bishop (a restricted term, according to c. 134, § 3) the right to provide an ecclesiastical office, a vicar general or an episcopal vicar who has not received a special mandate to effect a transfer is, therefore, incapable of effecting a transfer. In fact, Herranz Casado writes, "There are acts of governance of an executive character that, given their particular importance, are reserved to the personal decision and responsibility of the diocesan bishop. [...] For example, the provision of all ecclesiastical offices of the diocese [...]." See HERRANZ CASADO, "The Personal Power of Governance of the Diocesan Bishop," p. 308.

in office.¹⁶²

3) Art. 3 - Removal

Canon 192 incapacitates all persons not empowered to remove a person from office.¹⁶³ In addition, canon 193, § 4 requires written communication for a valid removal from office, once again protecting the rights of the people to the service provided by the person in office.¹⁶⁴

Canon 194, § 1 and § 2 identify circumstances under which certain persons are removed from an ecclesiastical office by the law itself. As a result, all persons removed from office by c. 194 become incapable of holding that office and of performing a valid juridic act from that office. If the

¹⁶² The words, "ut effectum sortiatur," establish the invalidity. For example, the Navarra/Saint Paul Commentary says, "In order to be legally effective, it must be in writing." See the commentary on c. 190 in the Navarra/Saint Paul Commentary, p. 177. Also see CHIAPPETTA, the commentary on c. 190, § 3, in *Il Codice di diritto canonico*, I, p. 250; the commentary on c. 190 in the Salamanca Commentary, p. 128; and URRUTIA, commentary on c. 190, in *De normis generalibus, adnotationes in Codicem: liber I*, p. 123.

¹⁶³ See cc. 146, 147, 157, and 186. For example, since c. 157 gives the diocesan bishop (a restricted term, according to c. 134, § 3) the right to provide an ecclesiastical office, a vicar general or an episcopal vicar who has not received a special mandate to effect a removal is, therefore, incapable of effecting a removal. In fact, Herranz Casado writes, "There are acts of governance of an executive character that, given their particular importance, are reserved to the personal decision and responsibility of the diocesan bishop. [...] For example, the provision of all ecclesiastical offices of the diocese [...]." See HERRANZ CASADO, "The Personal Power of Governance of the Diocesan Bishop," p. 308.

¹⁶⁴ The words, "ut effectum sortiatur," establish the invalidity. See CHIAPPETTA, commentary on c. 193, § 4, in *Il Codice di diritto canonico*, I, p. 250. Also see the commentary on c. 193 in the Navarra/Saint Paul Commentary, p. 179.

conditions of c. 194, § 1 and § 2¹⁶⁵ are met, the office is vacant.

4) Art. 4 - Privation

Canon 196, § 1 invalidates any privation from office not in accord with the norms of law.¹⁶⁶

9. Prescription (cc. 197-199)

While the Church generally accepts the prescriptions of civil legislation as binding and effective for the Church community,¹⁶⁷ according to c. 198 the Church considers as invalid any prescription based on civil law not grounded in good faith,¹⁶⁸ as well as those specific prescriptions identified in c. 199.¹⁶⁹

10. Computation of time (cc. 200-203)

No invalidating or incapacitating law appears in this title.

B. Conclusion to the discussion on invalidating and
incapacitating laws in Book I

Not only does Book I of the 1983 Code provide the

¹⁶⁵ The words, "ipso iure [...] amovetur" in § 1 and "urgeri tantum potest si" in § 2, establish the incapacity.

¹⁶⁶ The words, "tantummodo fieri potest," establish the invalidity. See c. 87, § 2, which invalidates a dispensation from a procedural law.

¹⁶⁷ See c. 197.

¹⁶⁸ The words, "nulla valet," establish the invalidity.

¹⁶⁹ Each of these prescriptions is beyond the legal parameters within which the Church exists and functions as a community of faith. See c. 124, § 1 and c. 86.

definition of invalidating and incapacitating laws, it also provides the foundation for identifying these laws in the 1983 Code. In fact, while canon 124, § 1, the definition of a juridic act, focuses the process for identifying invalidating and incapacitating laws, other canons in Book I further direct this effort. Therefore, Book I truly centers the discussion of invalidating and incapacitating laws in the 1983 Code.

IV. INVALIDATING AND INCAPACITATING LAWS IN BOOKS II-VII

The identification of invalidating and incapacitating laws in Books II-VII of the 1983 Code relies on the basic principle used to identify these laws in Book I: only the words of each canon, understood in their text and context, can establish a law to be invalidating or incapacitating. Really, the questions to be asked of each canon are: 1) does the canon concern a juridic act, and 2) if yes, is there something stated in the canon that establishes the absence of at least one of the three elements identified in c. 124, § 1 as necessary for a juridic act? If yes, the canon constitutes an invalidating or incapacitating law.

The Appendix to this dissertation provides examples¹⁷⁰ of invalidating and incapacitating laws in Books II-VII of the 1983 Code, along with the laws of invalidity and incapacity of

¹⁷⁰ An important tool for this effort is X. OCHOA, *Index verborum ac locutionum Codicis iuris canonici*, Citta del Vaticano, 1984, xv, 592 p. This work provides an alphabetical listing of frequently used words in the 1983 Code, with the canons in which the word appears listed in numerical order under each word.

Book I.¹⁷¹

V. CONCLUSION

Chapter Three illustrates the identification of laws of invalidity and incapacity in the 1983 Code by applying the definition presented in Chapter Two. The legislator has clarified the language to communicate these laws. In addition, he has established them in matters that he considers important for the public good and Church discipline. Thus, the definition of invalidating and incapacitating laws developed in light of Vatican II has been applied to the revised Code of Canon Law.

¹⁷¹ Since no signal term exists to identify invalidating and incapacitating laws in the 1983 Code, just as none existed for the 1917 Code, care must be taken so as to avoid any prejudicial influence that could adversely affect the interpretation of the law.

CHAPTER FOUR

CRITIQUE OF INVALIDATING AND INCAPACITATING LAWS IN THE 1983 CODE OF CANON LAW

Pope John Paul II, in the opening sentence of the Apostolic Constitution that promulgates the 1983 Code, sets the context for the revision of the Code of Canon Law, "[...] the Catholic Church has been accustomed to reform and renew the laws of canonical discipline so that in constant fidelity to its divine founder, they may be better adapted to the saving mission entrusted to it."¹ Actually the invalidating and incapacitating laws have been reformed and renewed to assist the Church to accomplish its salvific mission. Hence, these laws in the 1983 Code are alive with meaning and purpose.

However, by way of a critical reflection, questions must be asked relative to the invalidating and incapacitating laws in the 1983 Code. For example, are these laws truly in conformity with the doctrine of Vatican II? To what extent, if any, are they different from those in the 1917 Code? Are additional changes necessary? No doubt such a reflection aids the comprehension of both what actually took place in the revision of invalidating and incapacitating laws in the 1983 Code, as well as how this accomplishment might be enhanced in the future. Therefore, a discussion about laws of invalidity and incapacity in the 1983 Code can benefit from a critique.

¹ See JOHN PAUL II, in Apostolic Constitution, *Sacrae disciplinae leges*, English translation in the *American Commentary*, p. xxiv.

Thus, Chapter Four comprises the following seven sections:

- I. Objective of Chapter Four,
- II. Continuation of the canonical tradition,
- III. Newness in the 1983 Code,
- IV. Quantity of invalidating and incapacitating laws in the 1983 Code,
- V. The need of lay persons to understand the 1983 Code,
- VI. Opportunities for enhancement, and
- VII. Conclusion.

I. OBJECTIVE OF CHAPTER FOUR

Vatican II has renewed the laws of the Church. Moreover, the 1983 Code has both updated the definition of invalidating and incapacitating laws and has applied this definition to the canons of the Code, presumably in compliance with the 1967 principles for the revision of the *Code of Canon Law*. Thus, Chapter Four endeavors to assess the definition and the use of invalidating and incapacitating laws in the 1983 Code, as well as to consider potential enhancements to the definition and the identification of such laws in the Church's legal system.

II. CONTINUATION OF THE CANONICAL TRADITION

The Holy Spirit blesses the Church with gifts to strengthen and to empower the people of the Church, gathered in *communio*, to conduct enthusiastically the *missio* of the

Church. Truly the canonical tradition of the Church,² which helps to protect its faith heritage, lives as one of these gifts. In fact, both the 1917 Code and the 1983 Code defend this canonical tradition by stipulating that, insofar as a law refers to a preceding law, the new law is to be assessed in accord with the canonical tradition of the former law.³ Furthermore, the definition of invalidating and incapacitating laws in the 1983 Code includes contributions from the tradition of preceding canonical doctrine.⁴ Hence, the prior canonical tradition continues to live in the Church's legal

² Indeed, the term canonical tradition refers to the continuing presence of normative doctrine in the legal system of the Church from one period of time to another period of time, such that the normative doctrine of the former period of time influences the meaning or interpretation of the laws in the later period of time. Hence, the American Commentary writes, "Paragraph two (of c. 6) provides a general principle of interpretation. Whenever a norm has its roots in earlier tradition, the meaning of the norm should be constructed with the help of that tradition. See the commentary on c. 6, § 2 in the *American Commentary*, p. 28. Also, the Navarra/Saint Paul Commentary writes, "Paragraph 2, [...] seeks to encourage recourse to canonical tradition as a means of understanding the norms prescribed by the old law. [However, one should not forget that § 2 says etiam, thus suggesting that the interpretation of a norm of the CIC/83 identical in its formulation to what is found in the CIC/17 should not be made only according to the previous law and tradition but also in the light of contemporary circumstances and - above all - of Vatican II and the novus habitus mentis desired by Paul VI." See the commentary on c. 6 in the *Navarra/Saint Paul Commentary*, p. 83.

³ See c. 6, 3° of the 1917 Code, and cc. 6, § 2, and 21 of the 1983 Code.

⁴ Indeed, the accuracy of this statement can be seen by comparing the summary descriptors of the definitions of invalidating and incapacitating laws presented by the classical canonists, found on pp. 24-25; by the 1917 Code, found on pp. 41-42; and by the 1983 Code, found on pp. 99-100 of this dissertation.

system with the resulting emphasis that, while guarding the public good and the discipline of the Church, the canonical tradition regarding these laws protects the *communio* and the *missio* of the Church.

Thus, the definition of invalidating and incapacitating laws in the 1983 Code respects and continues the canonical tradition concerning invalidity and incapacity that was present in the legal system of the Church prior to the 1983 Code.

III. NEWNESS IN THE 1983 CODE

While the canonical tradition of the Church regarding invalidating and incapacitating laws continues in the Church's legal system, the 1983 Code also presents some innovations that enhance the employment of these laws in the life of the Church. These innovations are discussed in the following sections: *communio* and *missio*; the diocesan bishop; improved language to establish invalidating or incapacitating laws; translations of the 1983 Code; canon 15, § 1 strengthened; and conclusion.

A. Communio and missio

First and foremost, the modification to the self-understanding of the Church introduced by Vatican II, the sense of *communio* and *missio*, patterns the purpose and role of invalidating and incapacitating laws in the 1983 Code. In fact, the ten principles of revision established in 1967 to

guide the redaction of the 1983 Code clearly incorporate this sense of *communio* and *missio* into the revision process. As a result, the two principles that directly affect such laws in the 1983 Code, principles no. 1 and no. 3, provide the impetus for the laws of invalidity and incapacity in the Code to respond to the self-understanding of the Church.

Two observations concerning principles no. 1 and no. 3 of the 1967 principles for the revision of the Code should be made.

First, principle no. 1, that the 1983 Code must both serve the salvific mission of the Church and also protect the rights and obligations of each person in the Church, presents a new application of a continuing teaching of the Church, rather than introducing a new doctrine concerning invalidating and incapacitating laws. Actually, even though the 1983 Code contains canons in this regard that did not exist in the 1917 Code, the presence of these new canons represents a further application of traditional Church teaching, rather than a change in Church doctrine. Thus, in compliance with principle no. 1, the invalidating and incapacitating laws in the 1983 Code provide some new or enhanced expressions to the nucleus of Church life: its salvific mission and the right of all persons to participate in this mission.

Second, principle no. 3 establishes more precisely the doctrine regarding laws of invalidity and incapacity. Indeed,

principle no. 3, that the Code should not legislate invalidity or incapacity unless in response to a most serious reason required for the public good and the discipline of the Church, presents a precision of purpose that had not previously been stated.⁵ In fact, principle no. 3 speaks to the context necessary for the establishment of such laws: they must reflect the primary and positive pastoral sensitivity of Vatican II. Truly this clear and precise understanding of the required context for the enactment of invalidating and incapacitating laws provides a new and important contribution to the definition of these laws in the 1983 Code. As a result, both the process to identify and the process to apply such laws in the 1983 Code are assisted by principle no. 3.

B. The Diocesan Bishop

Canon 134, § 3 presents an important definition of an exclusive competence in the law of the Church. In fact, canon 134, § 3 strengthens the prerogative of the diocesan bishop in

⁵ However, the newness furnished by principle no. 3 rests in the clear focus of purpose, not in a change to the essence of the principle. Indeed, for principle no. 3 to speak of the public good and of Church discipline is not truly different from Suárez saying that invalidating laws concern very important matter of the Church and are for the common good, meaning salvation, or for Cicognani to write that these laws are made for the common good, for the welfare of society. Yet to say that invalidating and incapacitating laws should be legislated only in response to a most serious reason required for the public good and the discipline of the Church clearly establishes a scope of purpose not previously stated.

the exercise of his responsibilities.⁶ Actually, since Vatican II emphasizes the role of the diocesan bishop in a very large array of Church affairs within the framework of *communio* and *missio*,⁷ the 1983 Code contains this law of specificity as an expression of necessary regimen for the good of the routine life of the Church. Therefore, canon 134, § 3 strengthens the role of the diocesan bishop as the chief shepherd of the diocese.

C. Improved language to establish invalidating or
incapacitating laws

Unmistakably, the legislator has improved the force of communication when establishing invalidating or incapacitating laws in the 1983 Code. In fact, this most critical element to

⁶ Two points concerning c. 134, § 3 merit comment. First, paragraph 3 is new to the Code. Indeed, the American Commentary writes, "The third paragraph is new and finds no specific parallel in the 1917 Code." See the commentary on c. 134 in the *American Commentary*, p. 95. Also, Müller writes, "Immo in can. 134 nova paragraphus introducta est [...]." See MÜLLER, "De speciali Episcopi mandato iuxta CIC/1983," p. 229.

Second, there is a reason for the introduction of this new paragraph: to provide precise terminology about specific ecclesiastical authority. For example, Herranz Casado writes, "[...] there is a greater terminology precision in the new Code about specific ecclesiastical authorities [...]. This task of technical perfection is at the foundation of the norm contained in can. 134, § 3 [...]." Herranz Casado then continues, "There are acts of governance [...] reserved to the personal decision and responsibility of the diocesan bishop. [...] For example, the provision of all ecclesiastical offices of the diocese, incardination and excardination of clergy, the approval of the statutes of the seminary, the erection of institutes of consecrated life, etc." See HERRANZ CASADO, "The Personal Power of Governance of the Diocesan Bishop," pp. 305-306.

⁷ For example, see *Christus Dominus*, nos. 8a and 11-21, in Flannery, pp. 569-576.

establish invalidity or incapacity, which continues one of the earliest elements within the canonical tradition concerning such laws, has attained a new high level of achievement.* As a result, the following three changes facilitate the identification of these laws in the 1983 Code.

1. vel aequivalenter

The words *vel aequivalenter*, present in c. 11 of the 1917 Code have been eliminated from c. 10 of the 1983 Code, thus removing a major source of confusion in identifying laws of invalidity or incapacity under the 1917 Code.

2. Quantity of terms used to establish invalidity or incapacity

While more than 80 terms were considered by some 1917 canonists as words that could establish an invalidating or incapacitating law, the 1983 Code relies on perhaps fewer than 20 terms for the same purpose.

3. Almost explicite statuitur

The legislator has very freely inserted into the 1983 Code terms such as *ad validitatem, invalide, inhabilis, irrita est, omni vi caret, dumtaxat, exceptus, exclusis, incapax, nullus, omnibus et solis, pro infecto habetur, solus, tantum(modus), unus, vim non habet, and reservatur* to establish

* Yet such a statement of praise must not be construed as without reservation, for reasons that are presented later in this chapter.

various canons as invalidating or incapacitating laws.* Indeed, with the use of words of such clear expression, it could almost be suggested that the words *expresse statuitur* in c. 10 of the 1983 Code could be replaced with the words *explicite statuitur*. Yet, for reasons that will be discussed later in this Chapter, such a change would be unwise, at least at the present time.¹⁰

D. Translations of the 1983 Code

While no "approved" translation of the 1917 Code exists, certain 1917 canonists provided a vernacular version of the 1917 Code, publishing their work with an authorized *Imprimatur* and *Nihil obstat*.¹¹ On the contrary, although only the Latin text of the 1983 Code has public force and effectiveness, the Church recognizes the need for "approved" translations of the 1983 Code into vernacular versions, while still reserving to the Holy See all and exclusive rights regarding the text of the Code both concerning other editions in the Latin language and the translations into other languages.¹² Thus, the 1983

* Simply review the Appendix to this dissertation to note the high frequency with which these terms are used to establish invalidating or incapacitating laws in the 1983 Code.

¹⁰ In fact, the probability of such a change in c. 10 is most unlikely.

¹¹ For example, see Woywod, p. iv.

¹² For more on this see, PAPAL SECRETARIAT OF STATE, "Norms for the Protection and Translation of the Revised Code of Canon Law," in J. O'CONNOR (ed.), *The Canon Law Digest*, 10 (1983), pp. 5-6.

Code has been translated into various languages, each approved according to directives of the Holy See.¹³ As a result, the Church has enhanced the opportunity for those persons who must apply the 1983 Code to identify correctly the invalidating and incapacitating laws in the 1983 Code.

However, translation of the Code is more complicated than simply substituting a word in a vernacular language for a Latin word in the Code. In fact, language structures and cultural realities can affect the communication of meaning, to the extent that having one official language for a universal law does not necessarily ensure that the law will find universal applicability.¹⁴ Therefore, since the more diverse the community for whom a law applies, the greater the opportunity to misunderstand and to misapply the law, it follows that the communication of the meaning of a law

¹³ For example, each of the translations of the 1983 Code cited in this dissertation has been approved in accord with norms set by the Holy See, with a citation to this effect appearing in the commentary containing the translation. For instance, the American Commentary notes its use of the translation copyrighted by the Canon Law Society of America, whose text includes the citation, "In keeping with n. 3 of the Norms issued by the Cardinal Secretary of State on January 28, 1983, this translation has been approved by the National Conference of Catholic Bishops. The Latin text is printed with permission of the Holy See and the National Conference of Catholic Bishops."

¹⁴ For more on this point see J. HUELS, "Interpreting Canon Law in Diverse Cultures," in *The Jurist*, 47 (1987), pp. 252-253. This article reports the results of a research study made possible by a grant from the Association of Theological Schools in the United States and Canada. Another article in this regard is, M. DE MUELENAERE, "Cultural Adaptation and the Code of Canon Law," in *Studia canonica*, 19 (1985), pp. 31-59.

requires the use of vocabulary commonly understood by both the legislator and the persons who are subject to the law.¹⁵

In addition, just as Vatican II recognizes the multi-cultural reality of the Church,¹⁶ so too the Holy See recognizes the need for the practical availability of the 1983 Code within each culture. Actually each episcopal conference is responsible to see that any vernacular version of the 1983 Code, prepared for the people of that episcopal conference, restates accurately the significance of the Code.¹⁷ Hence, while the art of culturally sensitive translation challenges canonists and linguists alike, the task of vernacular translation remains an important instrument to identify correctly the invalidating and incapacitating laws in the 1983 Code, especially in light of the wide array of persons in the Church who have a need to use the 1983 Code.

Therefore, two points result: first, a translation of the 1983 Code prepared within and for a particular culture is not necessarily appropriate for another culture, with the result that a person using a translation of the 1983 Code must

¹⁵ For an excellent article in this regard, see L. ÖRSY, "Lonergan's Cognitional Theory and Foundational Issues in Canon Law," in *Studia canonica*, 13 (1979), pp. 177-243.

¹⁶ For example, see *Gaudium et spes*, nos. 53-62, in Flannery, pp. 958-968.

¹⁷ This is presented in, PAPAL SECRETARIAT OF STATE, "Norms for the Protection and Translation of the Revised Code of Canon Law," p. 5.

comprehend the cultural implications affecting that specific translation, lest the Code be misunderstood and misapplied; and second, the requirement of ecclesiastical approval of translations of the 1983 Code helps the communication of the universal law of the Church by means of vernacular languages.

Most importantly, however, sufficient care must be taken so that original legislation articulates the intention and the action of a law with sufficient clarity so that the meaning of the words in the law is not lost in vernacular translations.

E. Canon 15, § 1 strengthened

The final items of newness or innovation that enhance the use of invalidating or incapacitating laws in the 1983 Code rest in two changes in c. 15, § 1, the successor canon to c. 16, § 1 of the 1917 Code. First, since the insertion of the word error eliminates this potential excuse from the laws of invalidity or incapacity, canon 15, § 1 improves the precise effect of these laws. Second, the replacement of *excusat*, the main verb in c. 16, § 1 of the 1917 Code, with the stronger word *impediunt*, the main verb in c. 15, § 1 of the 1983 Code, enhances the relevance of such laws by establishing that neither ignorance nor error impedes these laws. Consequently, canon 15, § 1 has been altered to improve the effectiveness of invalidating and incapacitating laws in the 1983 Code.

F. Conclusion to the discussion of newness in the 1983 Code

As a result of the 1983 Code responding both to the difficulties with invalidating and incapacitating laws in the 1917 Code and to the doctrine and the direction of Vatican II, the focus of these laws in the 1983 corresponds to the spirit of *communio* and *missio*.

IV. QUANTITY OF INVALIDATING AND INCAPACITATING LAWS IN THE 1983 CODE

The frequency with which invalidating and incapacitating laws are present in the 1983 Code demonstrates the conviction of the legislator concerning the need for such laws in the legal system of the Church. Actually the Appendix to this dissertation indicates more than 20 pages of examples of these laws in the 1983 Code. In addition, a very high portion of them concern only three areas of Church life: the sacramental life of the people, the hierarchical constitution of the Church, and institutes of consecrated life and societies of apostolic life, each an area of Church life that pertains to matters of divine revelation, institution, or inspiration.¹⁸ In other words, the legislator uses this unique form of positive legislation to strengthen certain elements of Church life that are intimately connected to divine direction.

¹⁸ For instance, consider that the sacraments and the hierarchical structure of the Church are of divine institution (c. 840 reads, in part: "Sacramenta Novi Testamenti, a Christo Domino instituta [...]"; and c. 375, § 1 reads, in part: "Episcopi, qui ex divina institutione [...]"). Also, institutes of consecrated life and societies of apostolic life operate under the action of the Holy Spirit (c. 573, § 1 reads, in part: "[...] sub actione Spiritus Sancti [...]").

Obviously, therefore, prudence has directed the legislator to protect these most valued gifts from the Holy Spirit to the Church.

However, a question surfaces. In light of the spirit of *communio* formulated by Vatican II, is this quantity of laws truly appropriate? The obvious follow-up question must be, who is competent to answer, given the universal scope of the 1983 Code? In other words, who really can say if all of these invalidating or incapacitating laws are necessary?

A tendency quickly comes forth indicating that as long as some parts of the Church need a particular invalidating or incapacitating law, that inclusion of the law in the universal Code is appropriate. Of course, such a tendency is incorrect. Laws required for a local church, or for more than one local church, should be legislated by the diocesan bishop of the local church that requires the law. As a result, universal law would respond only to the needs of the universal Church. Accordingly, if the legislative need is not universal, in like manner the legislation should not be universal.²⁹

²⁹ Indeed, this is the direction of principle no. 5 of the 1967 principles for the revision of the Code. Furthermore, Castillo Lara writes, "Closely connected with pastoral concern is another characteristic mark of the Code which we may call legislative moderation. [...] This moderation corresponds to the principle of subsidiarity, according to which whatever can be usefully, and perhaps more efficaciously, done at lower levels should not be reserved to higher levels. In other words, decentralization is put into effect. Many competencies pass from the center to the periphery, reserving to the center however, what is considered necessary or useful to ensure unity." See R. CASTILLO LARA,

Therefore, in the final analysis, without data sufficient to indicate the summation of the specific requirements of each local church regarding the public good or church discipline, one cannot determine the appropriateness of the quantity of invalidating or incapacitating laws in the 1983 Code.

V. THE NEED OF LAY PERSONS TO UNDERSTAND THE 1983 CODE

The spirit of *communio* of Vatican II includes the active participation of the laity in the work of the Church.²⁰ Indeed, a variety of canons in the 1983 Code establish this doctrine in legislative terms.²¹ Thus, the Code stands as a practical instrument that serves not only the legal experts

"Some Reflection of the Proper Way to Approach the *Code of Canon Law*," in *Communicationes*, 17 (1985), p. 283.

More is said on this point in the discussion on opportunities for enhancement later in this Chapter Four.

²⁰ For example, *Lumen gentium* teaches, "The apostolate of the laity is a sharing in the salvific mission of the Church. [...] Besides this apostolate which belongs to absolutely every Christian, the laity can be called in different ways to more immediate cooperation in the apostolate of the hierarchy [...]. They have, moreover, the capacity of being appointed by the hierarchy to some ecclesiastical offices with a view to a spiritual end." See *Lumen gentium*, no. 33, in Flannery, pp. 390-391. Also, Vatican II instructs, "the hierarchy entrusts the laity with certain charges more closely connected with the duties of pastors: in the teaching of the Christian doctrine, for example, in certain liturgical actions, in the care of souls." See Second Vatican Council, Decree on the Apostolate of Lay People, *Apostolicam actuositatem*, November 18, 1965, no. 24, in Flannery, p. 790.

²¹ For example, see cc. 129, § 2 (cooperation in the exercise of the power of governance); 228, § 2 (assist as experts and advisors); 229, § 3 (teach the sacred sciences); 517, § 2 (assist in the exercise of the pastoral care of a parish); 519 (assist pastors in their teaching, sanctifying, and governing duties); 785, § 1 (serve as catechists); and 1112, § 1 (assist at marriages).

and those who regularly apply the law, but also all those persons who are entrusted with the pastoral care of the faithful.²²

Furthermore, the increased participation of the laity in church functions brings to the Church a need for these lay persons to understand the law of the Church, at least to the extent that the law concerns the responsibility of the lay person in the ministry of the Church. In other words, persons who are not schooled in canon law now hold positions in which the Code plays a role. Certainly, supervision of these person by other persons well trained in the law is to be expected. However, supervision is a review function, rather than a duplication of effort. Hence, the Code of Canon Law must be sufficiently clear so that the lay persons who need to use the Code can properly understand and apply the Code, especially regarding laws of invalidity and incapacity.

VI. OPPORTUNITIES FOR ENHANCEMENT

Indeed, both the definition and the identification of the invalidating and incapacitating laws in the Code generally enjoy thoughtful and clear articulation. Yet opportunities for enhancement do exist. Therefore, these suggestions are presented in two sections: technical opportunities for enhancement; and theoretical opportunities for enhancement.

²² For more on this, see CASTILLO LARA, "Some Reflection of the Proper Way to Approach the Code of Canon Law," p. 280.

A. Technical opportunities for enhancement

Two specific technical opportunities exist to improve the clarity needed to identify invalidating and incapacitating laws in the *Code of Canon Law*. One opportunity concerns canon 39, while the other regards the role of "context" to identify invalidating and incapacitating laws.

1. Canon 39

Title IV, "Individual Administrative Acts," of Book I in the 1983 Code, presents a new articulation of the regulations concerning individual administrative acts. However, since this new articulation excludes a definition of an individual administrative act, application of these general norms can present serious difficulties.²³ In fact, canon 39, which stipulates the required presence of one of three words for a condition in an administrative act to be an invalidating or incapacitating condition, was noted to be a source of difficulty prior to the promulgation of the 1983 Code.²⁴ Thus, the need to review this situation exists.

²³ For example, one commentary refers to Title IV as "a set of provisions of doubtful cohesion and fragmentary content, which will present difficulties in understanding and application, until doctrine, jurisprudence, and - very probably - necessary legislative reforms resolve these problems." See the *Navarra/Saint Paul Commentary*, p. 101.

²⁴ For example, during a discussion on c. 39 in preparation of the 1980 schema, a member of the Commission made the following comment, "Aliquantulum disceptatum est quia conditiones de se in decreto non apponuntur [...] et quaestio de validitate praesertim ad rescripta applicatur [...]. Tamen, etsi difficile, non est impossibile [...]." See *Communicationes*, 23 (1991), p. 178.

The application of canon 39 concerns the validity of an administrative act, simply because of the wording of the law. Indeed, the presence of *si*, *nisi*, or *dummodo*, used as a conjunction to introduce a condition for an administrative act, at times stipulates that the condition is a matter of validity, while at other times these words do not establish the invalidity. In short, invalidity exists when both one of the three words is present and the condition stated in the canon constitutes an integral condition required for the completeness of the administrative act. Yet distinguishing an integral condition from a non-integral one is very difficult. Accordingly, a review of the complexity helps to focus the situation: first, we examine the confusion in the application of canon 39; and then we view a situation in which opposing signals from the Holy See precipitate inconsistency in the application of canon 39.

a. Individual administrative act in which the status of the condition expressed in the canon is uncertain

Consider canon 269, which says that a diocesan bishop is not to allow the incardination of a cleric "unless [...]," and goes on to list three conditions. Certainly incardination of a cleric is an administrative act and the conditions in c. 269 are preceded by *nisi*. Yet some canonists consider this canon

not to be an invalidating law.²⁵ Therefore, if a diocesan bishop incardicates a cleric while completely ignoring the three conditions of c. 269, the incardination would seem to be valid, at least according to these canonists. Yet is that the intention of the law?

b. A situation in which opposing signals from the Holy See produce the confusion

Canon 579 provides an example of the frustration caused by c. 39. Indeed, canon 579 authorizes a diocesan bishop to erect institutes of consecrated life by a formal decree in his own territory, provided that (*dummodo*) the Apostolic See has been consulted. Indeed, canon 579 concerns an administrative act, the erection of an institute of consecrated life by a diocesan bishop. Also, one of the three words stipulated in c. 39 is present in c. 579, *dummodo*. Hence, the question remains, does the required consultation with the Apostolic See constitute an integral condition, thereby being a matter of validity? In other words, if the diocesan bishop does not

²⁵ For example, see the commentary on c. 269, in the *American Commentary*, p. 195, "These requisites are for licitness only since the canon does not stipulate any invalidating force." Also see CHIAPPETTA, the commentary on c. 269 in *Il Codice di diritto canonico*, I, p. 343, where Chiappetta says these three conditions are "ad liceitatem." Further, note that in the *Salamanca Commentary*, the *Urbaniana Commentary*, and the *Navarra/Saint Paul Commentary* there is no comment on c. 269.

seek this consultation,²⁶ would the subsequent erection of an institute of consecrated life endure as a valid juridic act?

Perhaps the question could be phrased, is the requirement of consultation with the Apostolic See so important to the Church that, as specified by principle no. 3 of the 1967 principles for the revision of the Code of Canon Law, the requirement endures as a most serious reason required for the public good and the discipline of the Church?

Some canonists answer, yes.²⁷ Actually the response of these canonists is well founded because, according to the praxis of the Congregation for Consecrated Life, the *Nihil Obstat* of the Congregation has been regarded as necessary for the valid erection of an institute of consecrated life.²⁸

²⁶ Notice that the issue concerns consultation, not consent. Therefore, no dispute exists as whether the diocesan bishop must follow the advice of the Apostolic See, only if he must seek consultation for the valid erection of an institute of consecrated life.

²⁷ For example, Dortel-Claudot writes, "Ante ipsam erectionem, Episcopus consulere debet Sedem Apostolicam. Si hoc non fecerit, erectio est invalida, quia in canone dicitur dummodo." See M. DORTEL-CLAUDOT, *De institutis vitae consecratae*, Roma, Editrice Pontificia Università Gregoriana, 1986, p. 27. Then Chiappetta writes, "Tale consultazione era richiesta anche nell'ordinamento anteriore (ca. 492, § 1), ma si discuteva nella dottrina se essa fosse necessaria ad validitatem. Nel nuovo ordinamento, non c'è alcun dubbio, per l'uso della congiunzione dummodo (cfr. can. 39)." See CHIAPPETTA, *Il Codice di diritto canonico*, I, p. 677. An addition comment in this regard is, "[...] once the consultation has been made, the bishop could act validly [...]". See *Navarra/Saint Paul Commentary*, p. 413.

²⁸ See M. O'REILLY, in unpublished class notes entitled, "Consecrated Life: Norms (cc. 572-633; 641-746)," Faculty of Canon Law, Saint Paul University, Ottawa, 1993, p. 161.

Yet, an undersecretary of the Congregation for Consecrated Life considers the consultation not to be a matter of validity, meaning that if a diocesan bishop proceeds to erect an institute of consecrated life without consultation with the Apostolic See, the act would be juridically valid.²⁹ Thus, the issue at hand concerns the legally correct understanding of the provision based on the clarity of the canon. That is, do the words of c. 579, understood in their text and context, establish the condition in c. 579 to be a matter of validity, especially in light of the comments made by the undersecretary of the Congregation for Consecrated Life?

c. Conclusion to the discussion of canon 39

The solution to the problems experienced because of the lack of clarity in the application of canon 39 is two-fold. First, the legislator should furnish a definition of an individual administrative act; and second, the legislator should insert into each canon to which canon 39 applies a term that explicitly establishes invalidity.³⁰ As a result, the

²⁹ See Ibid., pp. 161-162, where O'Reilly cites unpublished notes of J. Torres, entitled "Notes on Religious Law," for a course at the Congregation of Consecrated Life, 1988, in which, on p. 24, Torres writes, "Quindi, non si tratta de requisito per la validità dell'erezione; meno ancora sarebbe invalida un'eventuale erezione contro il [...] espresso negativo della Sede Apostolica [...]."

³⁰ Chiappetta clearly agrees when he writes, "Per evitare ogni incertezza, è opportuna che si usi una formula ben precisa: per esempio, sotto pena di nullità." See CHIAPPETTA, the commentary on c. 39, in *Il Codice di diritto canonico*, I, p. 65, note no. 2.

improved clarity will enhance the proper use of the laws about individual administrative acts for the benefit of the Church.

2. The role of "context" in identifying invalidating and incapacitating laws

The term context contains two moments. First, context refers to the fuller setting of the words of a canon, i.e., the location of the canon within the Code and the subject matter of the legislation. Second, context incorporates all the pertinent data from other disciplines that affect the canon, such as theology, philosophy, and history. Hence, regarding both senses of the term context, a consequence can exist in one canon in the 1983 Code solely because of an action in a different canon in the Code or because of data from sources other than the Code.

Furthermore, insofar as the context relates to the identification of invalidating or incapacitating laws in the 1983 Code, in the event that an element of context which establishes invalidity or incapacity goes undetected, either unknown or misunderstood, the invalidating or incapacitating action of the law also will go undetected. In short, if the clue goes unnoticed, the action also remains unnoticed. Thus, relying on context to establish invalidity or incapacity is, at best, unnecessarily risky.

One easy example will illustrate the concern. Canon 1277 says, in part, that a diocesan bishop needs the consent of the

finance council and of the college of consultors in order to perform acts of extraordinary administration besides cases specifically mentioned in universal law or in the charter of a foundation. No word or words of the text indicate that the consent is a matter of validity. However, canon 127, § 1 says that if consent is required for an act, the superior operates invalidly if the superior does not seek the required consent or acts contrary to the opinion of the college or group of persons whose consent is required. As a result, if the invalidating impact of c. 127, § 1 is not recognized by a person reading c. 1277, an act of extraordinary administration could be invalid, simply because the person reading c. 1277 failed to recognize the influence of c. 127, § 1 on c. 1277.

Indeed, the principle of clarity of law calls for a simple solution: allow each canon in the Code to say what it means and to mean what it says. Even though some canons in Book I, such as c. 127, § 1, provide a once for all definition that applies to various canons throughout the Code, such an approach could present an unnecessary risk when considering the quantity of persons not formally trained in canon law who must use the Code. The diocesan finance officer would be one example. Thus, the clear and irrefutable establishment of an invalidating or incapacitating action in a law should not depend upon a contextual meaning. Accordingly, the presence of words that explicitly establish invalidity or incapacity

would protect more effectively the *communio* and *missio* of the Church.

3. Conclusion to the discussion on technical opportunities for enhancement

Invalidating and incapacitating laws play a critical role in protecting the activity of the Church. Indeed, these laws establish the boundaries beyond which actions in the Church lack juridic effect. Thus, since such laws require a clarity in expression, and also since many persons who use the Code of Canon Law are not necessarily well schooled in the Code, any deficiency in clarity must be corrected, using explicit terms whenever possible.

B. Theoretical opportunities for enhancement

Additional opportunities for the enhancement of the invalidating and incapacitating laws in the Code of Canon Law rest in theoretical matters. These theoretical opportunities are discussed in two instances: the role of the diocesan bishop in identifying the requirements for the public good and the discipline of the Church; and the impact of developing theological insight.

1. The role of the diocesan bishop in identifying the requirements for the public good and the discipline of the Church

Principle no. 3 of the 1967 principles for the revision of the Code of Canon Law stipulates that the Code should not

legislate the invalidity of a juridic act or incapacity of a person unless in response to a most serious reason required for the public good and the discipline of the Church. Yet, who in the Church is competent to identify a serious reason required for the public good and the discipline of the Church? In other words, by what means should the Church determine what invalidating or incapacitating laws are necessary for the *communio* and *missio* of the Church?

Clearly a major responsibility in this regard rests with the diocesan bishops, as seen when Vatican II says that, in virtue of the proper, ordinary, and immediate power personally received from Christ, bishops have a sacred right and a duty of legislating for and of passing judgment on their subjects, as well as regulating everything that concerns the good order of divine worship and of the apostolate.³¹

However, while Vatican II instructs that the diocesan bishop is to legislate everything that concerns the good order of divine worship and of the apostolate, Vatican II also says that the bishop has the obligation to safeguard the unity of the faith and to uphold the discipline which is common to the whole Church.³² Thus, while the diocesan bishop has a major responsibility to provide norms appropriate for the people of

³¹ See *Lumen gentium*, no. 27, in Flannery, p. 383.

³² See *Lumen gentium*, no. 23, in Flannery, p. 376.

his diocese, the bishop also must respond to this duty within the context of the universal Church.

Nevertheless, the role of the diocesan bishop in the legislative activity of the Church flows from Vatican II. Truly the diocesan bishop participates in both the creation of universal law along with the enactment of particular law in his own diocese. Thus, since the self-understanding of *communio* can bring about a decrease in the volume of universal law, *communio* frees real space for particular legislation.³³

So, exactly what is the role of the diocesan bishop in identifying the requirements for the public good and the discipline of the Church? The response to this question rests in the process used to develop the 1983 Code.

After the cardinal members of the Commission had met in a few plenary sessions, the committees of consultors prepared drafts for their respective areas of the Code. Then these initial *schemata* were submitted for evaluation to the conferences of bishops throughout the world, the unions of superiors general of religious and secular institutes, the

³³ The point here is that principle no. 5 of the 1967 principles for the revision of the Code calls for the application of the principle of subsidiarity to the legislative process of the Church, meaning that universal laws should be limited only to the universal needs of the Church. Indeed, each diocesan bishop should legislate for the needs of his local church. This approach envisions a true reduction of universal law rather than a duplication of legislative effort. Also see CORECCO, "Theological Justifications of the Codification of the Latin Canon Law," p. 81.

agencies of the Roman Curia, and pontifical universities and faculties. These groups in turn consulted with their own advisors before returning their critiques and suggestions to the Commission.³⁴

Since the identification of legislative needs precedes the drafting of proposed legislation, it would appear that the members of the Commission and/or the members of the committees of consultors were the persons who initially identified the legislative needs for the revision of the Code. Is this appropriate? Unlikely, because other persons in the Church, especially the diocesan bishops of the world, probably experience the needs of the Church community more directly than would the relatively few members of the Commission and/or the member of committees of consultors.³⁵

Therefore, it would seem more appropriate that, before any draft legislation is prepared, the diocesan bishops of the world should: first, determine the universe of requirements

³⁴ For more on this point, see ALESANDRO, "The Revision of the Code of Canon Law: A Background Study," p. 111. In fact, having *schemata* prepared by the Commission, with subsequent distribution to the bishops, follows the approach used in developing the 1917 Code.

³⁵ The concern exists in that a review of and comment to a *schema* provides a reaction to what is in the *schema*, without necessarily being innovative or responsive to the actual needs of the community. On the other hand, a proactive involvement by a very large group of persons before drafting a *schema* allows for a more positive identification of what content should be in the *schema*.

for the public good and the discipline of the Church;³⁶ then determine which items of this universe require enacting invalidating or incapacitating laws; and finally determine which invalidating or incapacitating laws should be legislated by the universal Church and which laws should be legislated by the particular church. Surely such an approach would enhance the inclusion of the diocesan bishop in the legislative role conferred by Vatican II, and at the same time place the local church in a more active participation in the universal Church, also accorded by Vatican II.

In other words, therefore, what is the role of the diocesan bishop in identifying the requirements for the public good and the discipline of the Church? Since the diocesan bishop should participate actively in the determination of necessary invalidating or incapacitating laws, it simply follows that the diocesan bishop would also participate in the identification of the requirements of the public good and the discipline of the Church. As a result, since such a role would be more proactive than reactive, the legislative process of the Church would include the chief shepherd of each diocese at an early stage.

2. The impact of developing theological insight

³⁶ Of course, this step includes defining the terms, public good and Church discipline. Also it would seem reasonable to expect that the diocesan bishops would use the assistance of pastors, theologians, and canonists.

At least at various times in the Church's history, the Church's quest to understand God's gift of faith encounters questions whose answers are not immediately known with any certain consensus. Certainly the current post-Vatican II era holds in high respect the developing theological insight brought about as a result of some teachings of Vatican II.³⁷ Hence, the legal system of the Church also must recognize and embrace the reality of ongoing theological discussion.

Furthermore, one simple touch of wisdom furnishes some helpful direction: never rush what is not yet ready. In fact, the 1983 Code assimilates this wisdom by not attempting to resolve theological questions. Hence, canonists using the 1983 Code also should not attempt to force resolutions to issues when the resolution is not truly present in the Church.

In addition, the presence of developing theological insight in the Church requires that the expression, *expresse statuitur*, remain in c. 10. Although a change to *explicite statuitur* might be an attainable goal some day, to do so now only would add a potentially harmful and unnecessary dimension to the process of theological dialogue: an implied expression of a conclusion when, in fact, no conclusion exists.³⁸ Thus,

³⁷ For example, consider the ongoing discussion concerning the power of governance: what is it and who may exercise it?

³⁸ To put it differently, if canon 10 contained *explicite* instead of *expresse*, the meaning of the c. 10 would be that only those canons in which words of invalidity or incapacity are explicitly established could

so as to protect all necessary and valuable theological dialogue, even though the current expression, *expresse statuitur*, can allow confusion at times, canon 10 should continue to use, *expresse statuitur*."²⁹ In other words, since an implied resolution of that which is not really resolved would not be for the good of the people, any further change to canon 10 is inappropriate, at least so long as substantial developing theological insight is with the Church.

3. Conclusion to the discussion on theoretical opportunities for enhancement

Certainly the Church deserves clearly articulated invalidating and incapacitating laws when the most serious

be held to be invalidating or incapacitating laws. In other words, since *explicite* would exclude *implicite* and "context" from establishing invalidity or incapacity, uncertainty would be removed from the Code. Hence, the legislator would be faced with a sizable dilemma when writing a law concerning a matter that is in some way theologically questionable in respect to invalidity or incapacity. Indeed, since the legislator would not want to enact legislation that would not be for the good of the people, the legislator would not want to create an invalidating or incapacitating law unless the public good or the discipline of the Church truly required such legislation. Yet the absence of an explicit declaration of invalidity or incapacity would be construed as a resolution on the part of the legislator that the canon is not a matter of invalidity or incapacity when no such resolution exists.

²⁹ Certainly laws that feed confusion, not resolution, would not serve the Church. Indeed, to better understand this position, we must recall Pope John Paul II's instruction that the 1983 Code is "to create such an order in the ecclesial society that, while assigning the primacy to love, grace and charisms, it at the same time renders their organic development easier in the life of both the ecclesial society and the individual persons who belong to it." See JOHN PAUL II, in *Apostolic Constitution, Sacrae disciplinae leges*, English translation in the *American Commentary*, p. xxv.

reasons for the public good and Church discipline justify such legislation. Indeed, fruitful attainment of this expectation requires both a true and accurate determination of the most serious of reasons for the public good and the discipline the Church, and also a clear articulation in legislation. Hence, all that can enhance the attainment of this goal merits consideration.

Actually principle no. 3 of the 1967 principles for the revision of the Code provides two helpful guidelines. First, the law of the Code ought to be distinguished from human and secular law by its spirit of charity, temperance, humaneness, and moderation; indeed, justice and equity are to be protected by the Code. Second, the good of the whole Church requires that excessive rigidity be avoided in the norms of a new Code.⁴⁰ As a result of these two guidelines, the people of God may appropriately expect the restricted enactment of laws of invalidity and incapacity.

Truly the spirit of both Christian virtue and pastoral concern, each of which is taught in Vatican II and expressed

⁴⁰ In fact, principle no. 3 reads, in part, "Quare, in legibus Codicis iuris canonici elucere debet spiritus caritatis, temperantiae, humanitatis ac moderationis, quae, totidem virtutes supernaturales, nostras leges distinguunt a quocumque iure humano seu profano. In iure condendo Codex non tantum iustitiam sed etiam sapientem aequitatem colat [...]." Then, principle no. 3 says, "Bonum praeterea totius Ecclesiae postulare videtur ut normae Codicis futuri nimis rigidae non sint." See *Communicationes*, 1 (1969), pp. 79-80 (English translation in CUNNINGHAM, "The Principles Guiding the Revision of the Code of Canon Law," p. 449).

in principle no. 3, counsel the Church's legislative judgment concerning the enactment of invalidating and incapacitating laws of the Church. Indeed, pastoral concern for the people of God encourages each member of the Church to live their gift of faith within the parameters of the personal strengths and weaknesses. Moreover, since the living presence of the Holy Spirit abides in each person, no human action should frustrate the unique motion of God's grace. Therefore, only for a most serious reason of public good or Church discipline should the legislator enact an invalidating or incapacitating law.

VII. CONCLUSION

Chapter Four explains that the definition of invalidating and incapacitating laws in the 1983 Code is faithful both to the appropriate canonical tradition of the Church and to the doctrine of Vatican II, especially as expressed in the 1967 principles for the revision of the *Code of Canon Law*. Yet opportunities for enhancement also exist, especially regarding clarity of expressing invalidity or incapacity. Thus, any future revision of the Code must also include invalidating and incapacitating laws.

FINAL REMARKS

Unquestionably Vatican II affected the definition and the identification of invalidating and incapacitating laws in the 1983 Code. Even though some of the differences between these laws in the 1983 Code and those in the 1917 Code cannot be credited to Vatican II,¹ three of the changes do come from the Council. First, the sense of *communio* and *missio*, in which Vatican II provides an expressed self-understanding of the Church, furnishes the fundamental purpose or role for these laws. In fact, joined directly to this spirit of *communio* and *missio* is the clear charge that invalidating and incapacitating laws merit enactment only in response to the serious matters of the public good and Church discipline. Thus, the focus for all such laws in the Church's legal system finds roots in Vatican II.

Second, the 1983 Code includes new or revised forms of legislation that concern the rights and obligations of the Christian faithful. Indeed, these canonical articulations of the Church's concern for the rights and obligations of each person, some of which affect invalidating and incapacitating laws, represent an advancement in the canonical tradition of the Church that reflects the teaching of Vatican II.

Third, the increased role of lay persons in the mission

¹ For example, the deletion of "vel aequivalenter" and particulars that improve the clarity of the words that establish invalidating and incapacitating laws might have been part of a revision of the *Code of Canon Law*, even without Vatican II.

of the Church, explicitly called for by Vatican II, finds canonical support in the availability of approved vernacular translations of the 1983 Code. Truly, virtually all persons who wish to know the universal law of the Church have such an opportunity. Furthermore, as the lay persons become more familiar with the 1983 Code, including its invalidating and incapacitating laws, these persons will better understand the boundaries within which Church activities operate. In turn, the lay persons who exercise very important responsibilities in the Church will provide increased service to the people of God. Consequently, the *missio* of the Church will be forwarded with new found energy.

Therefore, to answer the thesis question directly, yes, the Second Vatican Council has affected the definition and the identification of invalidating and incapacitating laws in the 1983 Code of Canon Law.

Furthermore, lest the Church suffer by any misuse of these laws in the Code of Canon Law, some additional observations merit presentation.

To begin with, the primary gift of the Holy Spirit to the Church lives in the faith of the people working through acts of love. So, lest this treasure be offended by an inaccurate identification of an invalidating or incapacitating law, a cardinal principle demands recognition. Indeed, presumption must always reside on the side of the validity of an act and the capacity of a person to act in a specific manner. As a

result, the invalidity of an action or the incapacity of a person to act validly in certain way must be proven. In other words, the efforts of the people of God in conducting their assigned mission must never be interrupted by an error in presumption. Accordingly, the legislator clearly bears the responsibility to communicate precisely which circumstances of the public good or the discipline of the Church require the presence of a law of invalidity of incapacity. Hence, a declaration of invalidity or of incapacity requires the presence of certitude.

Then, given the highly consequential yet potentially overly constricting nature of invalidating and incapacitating laws, the legislative process of the Church would perform more significantly if the enormous task of identifying those most serious reasons of the public good or Church discipline which require the enactment of such laws in the universal Code was situated in persons beyond the rather small group of commissioners and consultors. Indeed, a task of such magnitude for the universal Church compels the inclusion of each local church, allowing the cultural features of each local church to permeate the legislative action of the universal Church. Thus, the proactive participation of each diocesan bishop would ripple throughout the entire dynamic of the legislative process. As a result, whatever touches all the people of the Church would also reflect all the people of the Church.

Finally, we must accord the *novus habitus mentis* of Vatican II to call forth from each member of the Church a sincere trust that the Holy Spirit lives in the Church, such that, as a people gathered in *communio* by the love of the Holy Spirit, we truly are able to achieve the assigned *missio*.

Amen.

APPENDIX

EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS IN THE 1983 CODE OF CANON LAW

Canon

Book I

(includes canons that establish the context for other
canons to be invalidating or incapacitating laws)

16, § 3	(<i>vim legis non habet</i>)
30	(<i>ferre non valet nisi</i>)
33, § 1	(<i>omni vi carent</i>)
38	(<i>effectu caret [...] nisi</i>)
39	(<i>tunc tantum ad validitatem [...] cum</i>)
40	(<i>invalide [...] fungitur</i>)
42	(<i>irrite est</i>)
43	(<i>electa industria personae</i>)
14	(<i>electa industria personae</i>)
47	(<i>effectum tantummodo obtinet a momento</i>)
52	(<i>vim habet tantum; see c. 16, § 3</i>)
63, § 1	(<i>Validitati [...] obstat</i>)
63, § 2	(<i>Validitati [...] obstat</i>)
64	(<i>valide [...] concedi nequit</i>)
65, § 2	(<i>valide concedi nequit</i>)
65, § 3	(<i>invalida est [...] nequit valide; see c.</i> <i>134, § 3: Episcopo dioecesano</i>)
66	(<i>non fit irritum [...] dummodo</i>)
72	(<i>see c. 134, § 3: Episcopo dioecesano</i>)
80, § 3	(<i>see c. 119, 2° and 3°</i>)
86	(<i>see c. 124, § 1</i>)

EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
IN THE 1983 CODE OF CANON LAW

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87, § 1	(dispensare valet [...] non tamen; see c. 134, § 3: Episcopo dioecesano)
89	(dispensare non valent nisi)
90, § 1	(est [...] invalida)
97, § 2	(censetur non sui compos)
98, § 2	(see c. 134, § 3: Episcopo dioecesano)
99	(censetur non sui compos)
117	(nulla [...] valet nisi)
119, 1°	(id vim habet iuris quod)
119, 2°	(id vim habet iuris quod)
124, § 1	(Ad validitatem)
125, § 1	(pro infecto habetur)
126	(irritus est)
127, § 1	(ut [...] valeant; see c. 166)
127, § 2, 1°	(invalidus est)
127, § 2, 2°	(invalidus est)
133, § 1	(nihil agit)
134, § 3	(intelleguntur competere dumtaxat [...] exclusis [...] nisi)
135, § 2	(valide delegari nequit; valide ferri nequit)
137, § 2	(electa fuerit industria personae; also, see c. 39: nisi)
140, § 2	(see c. 119)
142, § 1	(potestas delegata extinguitur)

EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
IN THE 1983 CODE OF CANON LAW

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143, § 1	(<i>potestas ordinaria extinguitur</i>)
146	(<i>valide obtinere nequit</i>)
149, § 2	(<i>Provisio [...] irrita tantum est, si [...]</i>)
149, § 3	(<i>Provisio [...] irrita est</i>)
150	(<i>valide conferri nequit</i>)
153, § 1	(<i>est [...] irrita</i>)
153, § 3	(<i>nullum [...] effectum</i>)
154	(<i>see c. 39: dummodo</i>)
155	(<i>nullam [...] potestatem acquirit</i>)
157	(<i>see c. 134, § 3: Episcopo dioecesano</i>)
166, § 1	(<i>valet si</i>)
166, § 2	(<i>valet attamen</i>)
166, § 3	(<i>est [...] nulla</i>)
168	(<i>non potest nisi unicum [...] ferre</i>)
169	(<i>ut valida</i>)
170	(<i>invalida est</i>)
171, § 1	(<i>inhabiles sunt</i>)
171, § 2	(<i>est nullum</i>)
172, § 1	(<i>ut validum</i>)
173, § 3	(<i>nihil est</i>)
174, § 1	(<i>see c. 119, § 3°</i>)
174, § 2	(<i>est invalida</i>)
174, § 3	(<i>ad validitatem</i>)
177, § 1	(<i>effectum non habet</i>)

179, § 4	(nulli sunt)
181, § 1	(ut [...] vim habeat)
181, § 2	(valet [...] si)
182, § 2	(nulla est)
186	(effectu habet tantum)
188	(irrita est)
189, § 1	(ut valet)
189, § 3	(omni vi caret)
190, § 1	(tantum fieri potest - see c. 157)
190, § 3	(ut effectum sortiatur)
192	(see c. 186)
193, § 4	(ut effectum sortiatur)
194, § 1	(ipso iure [...] amovetur)
194, § 2	(urgeri tantum potest si)
196, § 1	(tantummodo fieri potest; see c. 87, § 2)
198	(nulla valet [...] nisi)
199	(see c. 124, § 1, and c. 86)

BOOK II

Part I - The Christian Faithful

262	(excepta; see c. 1108, § 1)
267, § 1	(ut [...] valide; see c. 134, § 3: Episcopo dioecesano)
267, § 2	(effectum non sortitur nisi)
269	(see c. 134, § 3: Episcopo dioecesano)
272	(see c. 127, § 1: consensu aut consilio)

- 291 (uno tantum [...] conceditur)
- 292 (privatur omnibus officiis; also see c.
146)
- 293 (see c. 39: nisi)
- 301, § 1 (unius [...] competentis est)
- 312, § 1 (competens est)
- 312, § 1, 3° (exceptis; see c. 134, § 3: Episcopo
dioecesano)
- 312, § 2 (ad validum; see c. 127, § 2, 1°:
consensus; also see c. 134, § 3:
Episcopo dioecesano)
- 316, § 1 (valide)
- 317, § 1 (see c. 127, § 1: consensu aut consillo)
- 318, § 2 (see c. 127, § 1: consensu aut consillo)
- 320, § 1 (nonnisi supprimi possunt)
- 320, § 3 (see c. 127, § 1: consensu aut consillo)
- 322, § 2 (see c. 39: nisi)

Part II - The Hierarchical Constitution of the Church

- 332, § 2 (ad validitatem)
- 338, § 1 (unius [...] est)
- 339, § 1 (omnibus et solis).
- 349 (context: college of cardinals elects the
pope)
- 373 (unius...est)
- 375, § 1 (see c. 150)

EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
IN THE 1983 CODE OF CANON LAW

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381, § 1	(<i>omnis [...] exceptis [...] reservatur</i>)
382, § 1	(see c. 146)
393	(see c. 134, § 3: <i>Episcopo dioecesano</i>)
409, § 2	(<i>omnes et solas</i>)
413, § 1	(see c. 146)
413, § 2	(see c. 146)
414	(<i>tantum</i>)
419	(see c. 146)
420	(see c. 146)
421, § 2	(see c. 146)
423, § 1	(<i>secus [...] irrita est</i>)
425, § 1	(<i>valide</i> ; also see c. 146 and c. 150)
425, § 3	(<i>si [...] sunt [...] nulli</i> ; also see c. 146)
427, § 1	(<i>exclusis</i>)
430, § 2	(<i>Sanctae Sedi reservatur</i>)
431, § 3	(<i>unius [...] est</i>)
436, § 3	(<i>nulla...competit</i>)
438	(<i>nullam [...] secumfert regiminis potestatem</i>)
442, § 1	(see c. 127, § 1: <i>consensu aut consilio</i>)
443, § 3	(<i>tantum</i>)
443, § 4	(<i>tantum</i>)
443, § 5	(<i>tantum</i>)
444, § 2	(<i>tantum</i>)

EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
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449, § 1	(unius)
450, § 1	(tantum)
454, § 2	(solis)
455, § 1	(tantummodo potest in causis)
455, § 2	(ut valide)
455, § 4	(nec [...] valet nisi; also, see c. 127, § 1: consensu aut consilio)
461, § 1	(see c. 127, § 1: consensu aut consilio)
462, § 1	(solus; also see c. 134, § 3: Episcopo dioecesano)
466	(unus...tantummodo...unus...tantum)
468, § 1	(see c. 134, § 3: Episcopo dioecesano)
468, § 2	(see c. 134, § 3: Episcopo dioecesano)
470	(see c. 134, § 3: Episcopo dioecesano)
474	(ad validitatem)
478, § 1	(the context of the term vicar; see c. 150)
479, § 1	(omnes [...] exceptis)
479, § 2	(tantum [...] exceptis)
481, § 2	(suspenditur; see c. 1331, § 1 and § 2)
485	(see c. 127, § 1: consensu aut consilio; also see c. 134, § 3: Episcopo dioecesano)
494, § 1	(see c. 127, § 1: consensu aut consilio)
494, § 2	(see c. 127, § 1: consensu aut consilio)

**EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
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- 496 (see c. 134, § 3: *Episcopo dioecesano*)
- 500, § 1 (see c. 134, § 3: *Episcopo dioecesano*)
- 500, § 2 (*tantum*)
- 500, § 3 (*numquam agere valet nisi*)
- 501, § 3 (see c. 134, § 3: *Episcopo dioecesano*)
- 502, § 2 (see c. 134, § 3: *Episcopo dioecesano*)
- 504 (*Sedi Apostolicae reservantur*; see c. 381,
§ 1)
- 505 (see c. 134, § 3: *Episcopo dioecesano*)
- 508, § 2 (see c. 134, § 3: *Episcopo dioecesano*)
- 509, § 1 (see c. 127, § 1: *consensu aut consilio*;
also see c. 134, § 3: *Episcopo
dioecesano*)
- 514, § 1 (*tantum*; also see c. 134, § 3: *Episcopo
dioecesano*)
- 515, § 2 (*unius*; also see c. 127, § 1: *consensu aut
consilio*; and see c. 134, § 3:
Episcopo dioecesano)
- 520, § 1 (see c. 127, § 2, 1°: *consensus*)
- 521, § 1 (*valide*; see c. 150)
- 523 (see c. 157; also see c. 134, § 3:
Episcopo dioecesano)
- 524 (see c. 157; also see c. 127, § 2, 2°:
consilium; also see c. 134, § 3:
Episcopo dioecesano)

- 536, § 2 (tantum)
- 538, § 1 (ut [...] valeat)
- 541, § 1 (see c. 146)
- 542, 1° (see c. 521)
- 546 (ut [...] valide; see c. 150)
- 547 (see c. 157; also see c. 134, § 3:
Episcopo dioecesano)
- 552 (see c. 134, § 3: *Episcopo dioecesano*)
- 553, § 2 (see c. 157; also see c. 134, § 3:
Episcopo dioecesano)
- 554, § 3 (see c. 134, § 3: *Episcopo dioecesano*)
- 556 (see c. 150)
- 557, § 1 (see c. 157; also see c. 134, § 3:
Episcopo dioecesano)
- 557, § 2 (see c. 157; also see c. 134, § 3:
Episcopo dioecesano)
- 558 (see c. 530, 4°; also see c. 1108, § 1)
- 564 (see c. 150 and c. 566)
- 566, § 2 (tantum; see c. 566, § 1 and c. 966, § 1)
- 567, § 1 (see c. 127, § 2, 2°: *consilium*; and c.
127, § 1: *consensu aut consilio*)

Part III - Institutes of Consecrated Life and Societies
of Apostolic Life

- 579 (see c. 39: *dummodo*; also see c. 134, § :
Episcopo dioecesano)

EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
IN THE 1983 CODE OF CANON LAW

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- 580 (reservatur competenti auctoritati)
- 582 (uni Sedi Apostolicae reservatur)
- 584 (unam Sedem Apostolicam spectat)
- 587, § 2 (tantummodo; also see c. 127, § 1:
consensu aut consilio)
- 593 (exclusive)
- 595, § 1 (see c. 127, § 1: consensu aut consilio)
- 595, § 2 (see c. 134, § 3: Episcopo dioecesano)
- 605 (uni Sedi Apostolicae reservatur)
- 609, § 1 (see c. 127, § 2, 1°: consensus)
- 612 (see c. 127, § 2, 1°: consensus; also see
c. 134, § 3: Episcopo dioecesano)
- 616, § 1 (see c. 127, § 2, 2°: consilium)
- 616, § 2 (ad Sanctam Sedem [...] reservatur)
- 616, § 4 (ad Sedem Apostolicam pertinet)
- 623 (valide)
- 638, § 2 (valide [...] intra finis sui muneris)
- 638, § 3 (ad validitatem; see c. 127, § 1: consensu
aut consilio)
- 638, § 4 (see c. 127, § 2, 1°: consensus)
- 643, § 1 (invalidae [...] admittitur)
- 644 (see c. 127, § 2, 2°: consilium)
- 647, § 1 (see c. 127, § 1: consensu aut consilio)
- 647, § 2 (ut validus; see c. 127, § 1: consensu aut
consilio)

**EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
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648, § 1	(ut validus)
649, § 1	(invalidum reddit)
656	(ad validitatem)
658	(ad validitatem)
665, § 1	(see c. 127, § 1: consensu aut consilio)
668, § 5	(valide)
681, § 2	(see c. 134, § 3: Episcopo dioecesano)
684, § 1	(see c. 127, § 1: consensu aut consilio)
684, § 3	(see c. 127, § 2, 1°: consensus)
686, § 1	(reservatur; also, see c. 127, § 1: consensu aut consilio; also see c. 134, § 3: Episcopo dioecesano)
686, § 2	(unius [...] est)
686, § 3	(see c. 127, § 1: consensu aut consilio; also see c. 134, § 3: Episcopo dioecesano)
688, § 2	(ut valeat; also see c. 127, § 1: consensu aut consilio)
689, § 1	(see c. 127, § 1: consensu aut consilio)
690, § 1	(see c. 127, § 1: consensu aut consilio)
690, § 2	(see c. 127, § 1: consensu aut consilio)
691, § 2	(Sedi Apostolicae reservatur; also see c. 134, § 3: Episcopo dioecesano)
697	(see c. 127, § 1: consensu aut consilio)
699, § 1	(ad validitatem)

EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
IN THE 1983 CODE OF CANON LAW

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- 699, § 2 (see c. 134, § 3: *Episcopo dioecesano*)
- 700 (*vim non habet [...] ut valeat*; also see
c. 134, § 3: *Episcopo dioecesano*)
- 703 (see c. 127, § 1: *consensu aut consilio*)
- 709 (*unice [...] erigi possunt*)
- 717, § 2 (see c. 146)
- 721, § 1 (*invalide admittitur*)
- 726, § 1 (see c. 127, § 1: *consensu aut consilio*)
- 726, § 2 (see c. 127, § 1: *consensu aut consilio*)
- 727, § 2 (see c. 693)
- 730 (see c. 684, §1)
- 733, § 1 (see c. 127, § 2, 1°: *consensus*)
- 735, § 2 (see c. 643, § 1)
- 741, § 1 (see c. 638)
- 743 (*Sanctae sedi reservetur*; also see c. 127,
§ 1: *consensu aut consilio*)
- 744 (*supremo [...] moderatori [...]*
reservatur; also see c. 127, § 1:
consensu aut consilio)
- 745 (see c. 127, § 1: *consensu aut consilio*)
- 746 (see cc. 694-704)

Book III

- 801 (see c. 127, § 2, 1°: *consensus*)
- 816, § 1 (*constitui tantum possunt*)

Book IV

Part I - The Sacraments

841	(unius [...] est)
842, § 1	(valide)
849	(valide [...] tantummodo)
864	(capax est omnis et solus)
882	(valide)
887	(valide)
889, § 1	(capax est omnis et solus)
900, § 1	(conficere valet [...] est solus)
962, § 1	(valide)
965	(est solus)
966, § 1	(ad validam)
969, § 1	(solus [...] est)
977	(invalida)
1003, § 1	(valide [...] omnis et solus)
1018, § 1, 2°	(see c. 127, § 1: consensu aut consilio)
1024	(valide [...] solus)
1031, § 4	(Apostolicae Sedi reservatur)
1041, 1°	(inhabilis)
1047, § 1	(uni Apostolicae Sedi [...] reservatur)
1047, § 2	(eidem etiam reservatur; see c. 1047, § 1)
1047, § 3	(Apostolicae Sedi [...] reservatur)
1049, § 1	(valet [...] non autem)
1049, § 2	(ad validitatem)
1055, § 2	(validus)

EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
IN THE 1983 CODE OF CANON LAW

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1057, § 1	(nulla [...] valet)
1073	(inhabilem reddit [...] valide)
1075, § 1	(tantum)
1075, § 2	(uni [...] est)
1077, § 2	(una [...] potest)
1078, § 1	(exceptis [...] Sedi Apostolicae reservatur)
1078, § 2	(Sedi Apostolicae reservatur)
1079, § 1	(excepto)
1079, § 2	(solum)
1080, § 1	(ob omnibus [...] exceptis)
1083, § 1	(validum [...] non possunt; see c. 1073)
1084, § 1	(natura dirimit; see c. 1073)
1085, § 1	(invalida; see c. 1073)
1086, § 1	(invalidum est; see c. 1073)
1086, § 2	(see c. 39: nisi; see c. 1073)
1087	(invalida; see c. 1073)
1088	(invalida; see c. 1073)
1089	(nullum [...] potest nisi; see c. 1073)
1090, § 1	(invalida; see c. 1073)
1090, § 2	(invalida; see 1073)
1091, § 1	(irritum est; see c. 1073)
1091, § 2	(irritum est; see c. 1073)
1092	(dirimit; see c. 1073)
1093	(dirimit; see c. 1073)

EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
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1094	(valide; see c. 1073)
1095	(sunt incapaces)
1096	(ut consensus [...] haberi possit; see c. 1057, § 1)
1097, § 1	(invalidum reddit)
1097, § 2	(irritum non reddit nisi; see c. 126)
1098	(invalidae contrahit)
1099	(dummodo [...] non vitiat consensum; see c. 1057, § 1)
1101, § 2	(invalidae contrahit)
1102, § 1	(valide [...] nequit)
1102, § 2	(est validum vel non prout)
1103	(invalidum est)
1104, § 1	(ad [...] valide)
1105, § 1	(ad [...] valide)
1105, § 2	(ut valeat)
1105, § 3	(secus [...] irritum est)
1105, § 4	(invalidum est)
1108, § 1	(tantum [...] valida sunt)
1108, § 2	(intellegitur tantum qui; see c. 1108, § 1)
1109	(nisi [...] valide)
1110	(valide)
1111, § 1	(quamdiu valide officio funguntur)
1111, § 2	(ut valida sit)

EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
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- 1112, § 1 (see c. 134, § 3: *Episcopo dioecesano*)
1127, § 1 (*ad validitatem*)
1127, § 2 (*ad validitatem*)
1144, § 1 (*ut [...] valide*)
1156, § 2 (*ad validitatem*)
1160 (*ut validum fiat*)
1165, § 2 (*concedi [...] nequit si reservatur; see*
c. 134, § 3: Episcopo dioecesano)

Part II - Other Acts of Divine Worship

- 1167, § 1 (*sola potest*)
1169, § 1 (*valide*)
1190, § 2 (*valide*)
1190, § 3 (*valet etiam pro; see c. 1190, § 2*)
1191, § 3 (*nullum est*)
1199, § 2 (*valide nequit*)
1200, § 2 (*nullum est*)
1203 (*una [...] potest [...] dispensare*)

Part III - Sacred Times and Places

- 1215, § 1 (see c. 127, § 2, 1°: *consensus; also, see*
c. 134, § 3: Episcopo dioecesano)
1215, § 2 (see c. 127, § 1: *consensu aut consilio;*
also see c. 134, § 3: Episcopo
dioecesano)
1222, § 2 (see c. 127, § 1: *consensu aut consilio*)
1232, § 1 (*competens est...sola*)

- 1244, § 1 (unius)
1245 (see c. 134, § 3: *Episcopo dioecesano*)

Book V

- 1263 (see c. 127, § 1: *consensu aut consillo*)
1277 (see c. 127, § 1: *consensu aut consillo*)
1281, § 1 (*invalide [...] nisi*)
1281, § 2 (see c. 127, § 1: *consensu aut consillo*)
1284, § 2, 6° (see c. 127, § 2, 1°: *consensus*)
1291 (*ad valide*)
1292, § 1 (see c. 127, § 1: *consensu aut con illo*)
1292, § 2 (*ad validitatem*)
1292, § 3 (*secus [...] irrita est*)
1304, § 1 (*ut [...] valide*)
1305 (see c. 127, § 1: *consensu aut consillo*)
1308, § 1 (*reservatur Sedi Apostolicae*)
1310, § 2 (see c. 127, § 1: *consensu aut consillo*)

Book VI

Part I - Offenses and Penalties in General

- 1317 (*constituti nequit; see c. 135, § 2*)
1331, § 2, 2° (*invalide*)
1331, § 2, 4° (*nequit [...] valide*)
1334, § 2 (*lex, non autem praeceptum; see c. 49*)
1347, § 1 (*valide nequit nisi*)
1355, § 1 (*sit Apostolicae Sedi reservata*)
1355, § 2 (*Sedi Apostolicae [...] reservata*)

1359 (valet tantummodo pro; omnes [...]
exceptis)

1360 (irrita est)

Part II - Penalties for Specific Offenses

(No invalidating or incapacitating laws)

Book VII

Part I - Trials in General

1400, § 2 (deferri possunt solummodo)

1404 (a nemine iudicatur; see c. 1406, § 1)

1405, § 1 (dumtaxat ius est)

1405, § 2 (see c. 1404)

1405, § 3 (Rotae Romanae reservatur)

1406, § 1 (pro infectis habentur)

1406, § 2 (incompetentia est absoluta; see c. 1620,
1°)

1420, § 2 (nequit iudicare [...] reservat)

1420, § 5 (nec [...] amoveri possunt; also, see
c. 427, § 1)

1425, § 1 (see c. 1622, 1°)

1433 (acta irrita sunt nisi)

1437, § 1 (ut nulla habeantur acta)

1440 (incompetentia iudicis est absoluta; see
c. 1620, 1°)

1447 (nequit [...] valide; see c. 1620, 2°)

1452 (procedere potest dumtaxat)

EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
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1463, § 1	(valide nequit nisi)
1465, § 1	(neque valide nisi)
1465, § 2	(numquam [...] valide coarctari)
1478, § 1	(tantummodo possunt per)
1479	(see c. 127, § 2, 2°: consilium)
1481, § 2	(semper habere debet; see c. 1620, 7°)
1484, § 2	(qualibet vi caret; see c. 1620, 4°)
1485	(non potest valide; see c. 1620, 5°)
1486	(ut [...] effectum sortiatur)
1488	(nulla est pactio)

Part II - The Contentious Trial

1501	(nullam [...] potest nisi; see c. 1620, 4°)
1511	(nulla sunt acta)
1514	(valide nequerunt nisi)
1524, § 3	(ut valeat)
1538	(vi caret)
1550, § 2	(incapaces habentur)
1593, § 2	(querela nullitatis; see c. 1622, 6°)
1598, § 1	(sub poena nullitatis; see c. 1620, 7°)
1611, 1°	(sententia debet; see c. 1620, 8°)
1614	(neque [...] vim [...] habet)
1617	(vim non habent nisi)
1620	(insanabilis nullitatis laborat)
1622	(sanabilis nullitatis dumtaxat laborat)

EXAMPLES OF INVALIDATING AND INCAPACITATING LAWS
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- 1629, 1° (see cc. 1442 and 1445)
1629, 2° (vitio nullitatis infecta)
1629, 3° (see cc. 1641-1645)
1629, 4° (see c. 1618)
1656, § 2 (actus [...] sunt nulli)

Part III - Certain Special Procedures

- 1674 (see c. 1620, 5°)
1690 (see c. 1656, § 2; also see c. 1622, 5°)
1697 (soli [...] ius habent)
1698, § 1 (una Sedes Apostolica)
1698, § 2 (uno Romano Pontifice)
1715, § 1 (nequit [...] valide)

Part IV - Penal Procedure

- 1722 (see c. 127, § 2, 2°: consilium)
1724, § 2 (ut valeat)

Part V - On the Manner of Procedure in Administrative

Recourse and the Removal and Transfer of Pastors

- 1734, § 3 (non valent)
1740 (see c. 134, § 3: Episcopo dioecesano)
1742, § 1 (ad validitatem; also see c. 127, § 2, 2°:
consilium)
1745 (ut valide)
1750 (see c. 127, § 2, 2°: consilium)

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