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According to the 1983 *Code of Canon Law*

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THE EXECUTIVE POWER OF THE DIOCESAN BISHOP ACCORDING TO THE 1983 *CODE OF CANON LAW*

by
Valerian M. MENEZES

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AN ABSTRACT

Canon 391, §1 of the 1983 Code distinguishes the power of governance of a diocesan bishop as legislative, executive and judicial. This threefold distinction is based on the division of powers in a secular system of governance. Although, in a democratic civil society, three independent organs exercise legislative, executive and judicial powers, such a division is not possible in the Church because of the nature and the purpose of its power.

In the canonical tradition of the Church, the concepts of legislative and judicial powers have generally remained the same. However, the notion of executive power has been subject to progressive understanding, especially after the Second Vatican Council. The 1917 Code, in c. 335 stated that the bishop governs his diocese with legislative, judicial and coercive powers. The Second Vatican Council described it as right/duty of making laws, passing judgement and moderating. The seventh revision principle of the 1983 Code used the term "administrative" instead of "moderating." While the Code revision process had an inconsistent use of the terms "executive" and "administrative," the Code itself, in cc. 135, §1 and 391, §1 prefers the term "executive." Moreover, the Code also uses the expressions "administrative power" and "acts of administration." Some other documents related to the Code equate "executive power" with "administrative power." There is no consensus concerning these concepts in the post conciliar canonical literature. Therefore, it is difficult to determine the exact nature and scope of the executive power of a diocesan bishop in the Code.

The first chapter of this study discusses the theological nature of the power of the diocesan bishop in the light of the Second Vatican Council. This provides the theological context within which the juridical nature of the diocesan bishop's power of governance is to be understood. The focus of the second chapter is on the nature and scope of executive power in general, and its juridic nature. Here, the study proves that the expression "administrative power" in the Code refers to "executive power" itself. "Acts of administration" in the Code are distinct from "administrative acts," and therefore, they are subject to distinct processes. With this clarification, the study provides a definition of executive power. After analysing the acts of executive power in general (the general and singular administrative acts), in the third chapter, the study makes an attempt in the final chapter to determine the acts of the diocesan bishop's executive power in the 1983 Code, and then draws some conclusions.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

CHAPTER THREE

SPECIFIC ACTS OF EXECUTIVE POWER OF THE DIOCESAN BISHOP

CHAPTER FOUR

EXECUTIVE POWER OF THE DIOCESAN BISHOP IN THE CODE

TABLE OF CONTENTS

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ABBREVIATIONS

AAS	*Acta Apostolicae Sedis*
AkK	*Archive für katholisches Kirchenrecht*
ASS	*Acta Sanctae Sedis*
CCE	Congregation for Catholic Education
CCEO	*Codex canonum Ecclesiarum orientalium*
CD	Decree on the Pastoral Office of Bishops in the Church, *Christus Dominus*
CDF	Congregation for the Doctrine of the Faith
CDWDS	Congregation for Divine Worship and the Discipline of the Sacraments
CEP	Congregation for the Evangelization of Peoples
CFB	Congregation for Bishops
CFC	Congregation for Clergy
CIC 17	*Codex iuris canonici, 1917*
CICLSAL	Congregation for Institutes of Consecrated Life and Societies of Apostolic Life
CIC 83	*Codex iuris canonici, 1983*
CLD	*Canon Law Digest*
CLSA	Canon Law Society of America
CLSAP	*Canon Law Society of America Proceedings*
CLSGBI	Canon Law Society of Great Britain & Ireland
CLSGBIN	*Canon Law Society of Great Britain & Ireland Newsletter*
CpR	*Commentarium pro religiosis*

ABBREVIATIONS

CTSAP	*Proceedings of the Catholic Theological Society of America*
DENZ.	Henricus DENZINGER and Adolfus SCHÖNMETZER (eds.), *Enchiridion symbolorum*, Editio XXXV emandata, Barcinone-Friburgi Brisgoviae-Romae-Neo Eboraci, 1973.
EIC	*Ephemerides iuris canonici*
ETL	*Ephemerides theologicae lovaniense*
FLANNERY I	Austin FLANNERY (gen. ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents* Study Edition, New York, Costello Publishing Company, 1987.
FLANNERY II	Austin FLANNERY (gen. ed.), *Vatican Council II: More Post Conciliar Documents*, vol. 2, New Revised Edition, New York/Dublin, Costello Publishing Company/Dominican Publications, 1982.
IC	*Ius canonicum*
ITQ	*Irish Theological Quarterly*
JCD diss.	Doctoral dissertation in Canon Law
LE	*Leges Ecclesiae*
LG	Dogmatic Constitution on the Church, *Lumen gentium*
ME	*Monitor ecclesiasticus*
m. p.	*motu proprio*
ORE	*L'Osservatore romano*, Weekly English Edition
PCCICR	Pontificia Commissio Codici iuris canonici recognoscendo
PCCICAI	Pontificia Commissio Codici iuris canonici authentice interpretando
PCLTI	Pontificium Consilium de legum textibus interpretandis
PK	*Prawo Kanoniczne*
REDC	*Revista española de derecho canónico*

ABBREVIATIONS

RR	*Roman Replies and CLSA Advisory Opinions*
SCB	Sacred Congregation for Bishops
SCC	Sacred Congregation for the Clergy.
SCCE	Sacred Congregation for Catholic Education.
SCDF	Sacred Congregation for the Doctrine of the Faith
SCDW	Sacred Congregation for Divine Worship
SCEP	Sacred Congregation for the Evangelization of Peoples
SCR	Sacred Congregation of Rites
SCRSI	Sacred Congregation for Religious and Secular Institutes
SCSDW	Sacred Congregation for the Sacraments and Divine Worship
StC	*Studia canonica*
TS	*Theological Studies*

GENERAL INTRODUCTION

The Second Vatican Council clearly proclaimed the divine law principle that the bishops,[1] in virtue of their consecration, are the successors of the apostles and vicars and legates of Christ,[2] and, consequently, are endowed with the threefold functions of teaching, sanctifying and ruling, which are essential for the life of the Church. The shepherding ministry of a diocesan bishop involves all these functions. The focus of this present study, however, is limited to only one aspect of this shepherding ministry, that is, the exercise of executive power of the diocesan bishop, which again is only one of the three aspects of his ruling function.

In a strictly juridical sense, a threefold distinction is made within the ruling function of the bishops, namely legislative, executive and judicial. Following the

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[1] The terms "bishop" or "bishops" in this study may refer to bishops in general or to the diocesan bishops. The specific nature of the reference is to be determined according to the context. In general, matter concerning theological issues is applicable to all bishops, while juridic matters pertain only to the diocesan bishops.

[2] SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church *Lumen gentium* [=LG], 21 November 1964, 22, 27 in *Acta Apostolicae Sedis* [=*AAS*], 57 (1965), pp. 25-26, 32-33; English translation in Austin FLANNERY (gen. ed.), *Vatican Council II: Constitutions, Decrees, Declarations*, A Completely Revised Translation in Inclusive Language [=FLANNERY I], Northport/Dublin, Costello Publishing Company/Dominican Publications, 1996, pp. 29-30, 38. All translations of the Second Vatican Council documents are from this edition.

In fact, even the First Vatican Council had stated that bisops are the successors of the apostles. See FIRST VATICAN COUNCIL, Dogmatic Constitution on the Church of Christ *Pastor aeternus*, 18 July 1870, caput III, in Henricus DENZINGER and Adolfus SCHÖNMETZER (eds.), *Enchiridion symbolorum* [=DENZ.], Editio XXXV emandata, Barcinone-Friburgi Brisgoviae-Romae-Neo Eboraci, 1973, no. 3061, p. 598; English translation from Roy J. DEFERRARI, *The Sources of Catholic Dogma*, St. Louis/London, B. Herder Book Co., 1957, no. 1828, p. 454.

promulgation of the 1917 Code of Canon Law,[3] and especially after the Second Vatican Council, the nature and scope of the bishop's power of governance or jurisdiction, but particularly his executive power, have been the subject of interesting debate and discussion. One would have expected the contentious issues related to the power of governance to have been resolved with the promulgation of the new Code of 1983.[4] And yet, as with any theologico-juridical principles, the matter continues to be discussed and provides ample room for further research and study.

The lack of clarity in the notion of power of governance in the Church has persisted through the past several centuries. The Council of Trent, in reaction to the Reformers' rejection of priesthood and papal primacy, defined the Order of priesthood as a divinely instituted sacrament and the office of the pope and that of the bishops as of divine origin. Implicit in this proclamation was the teaching that the bishops received their power from Christ himself through episcopal consecration. The pope's role in this process consisted in assigning the consecrated bishop to a particular church. According to this view, therefore, episcopal consecration was inconceivable without the power of governance or jurisdiction.[5]

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[3] *Codex iuris canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus* [=*CIC 17*], Romae, Typis polygottis Vaticanis, 1917; English translation in Edward N. PETERS (trans.), *The 1917 Pio-Benedictine Code of Canon Law*, San Francisco, Ignatius Press, 2001. All English translations of the canons of the 1917 Code are from this edition.

[4] *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus* [=*CIC 83*], [Città del Vaticano], Libreria editrice Vaticana, 1983; English translation in *Code of Canon Law*, Latin-English Edition [=*CLSA Translation*], New English translation prepared under the auspices of the Canon Law Society of America, Washington, DC, Canon Law Society of America [=CLSA], 1999. All English translations of the canons of the 1983 Code are from this edition.

[5] See Stephen EHSES (ed.), *Concilii Tridentini actorum*, tomus nonus, Actorum Pars Sexta, Friburgi Brisgoviae, Herder & Co., Typographi Editores Pontificii, 1924, pp. 49-51, 137-139. This work is

Although the Council of Trent by its teaching strengthened episcopacy, it did not shed much light on the nature and source of its power of governance or jurisdiction. The ecclesiology which developed after Trent was influenced more by sociological and political models and theories than by theology. Seamus Ryan describes this situation in the following words: "Post-Tridentine theology tended to see the Church as an institution rather than as mystery, as an organization than as a community. The ecclesiology which then developed conceived the Church in sociological rather than theological categories, and consequently saw the local Church as little more than a practical region of administration, a partial segment of the undivided 'societas perfecta'."[6]

Neither the First Vatican Council (1869-1870), nor the subsequent magisterial teaching changed this course of development. In fact the 1917 Code presented a summary of the Church's doctrine on the power of governance. In brief, it reaffirmed the divine institution of bishops and their apostolic succession (c. 329, §1), repeated the Tridentine teaching on bishops' powers of Order and jurisdiction. The hierarchy of Orders consisted of bishops, priests and ministers. The hierarchy of jurisdiction included the supreme pontiff and the subordinate episcopate (c. 108, §3). Those belonging to the hierarchy

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a part of the 13 volumes series of SOCIETAS GEORRESIANA (ed.), *Concilium Tridetinum: Diariorum, Actorum, Epistularum, Tractatuum*, Nova Collectio, Friburgi Brisgoviae, Herder & Co., Typographi Editores Pontificii, 1901-1938. A summary of this discussion is found in Bonaventure KLOPPENBURG, *The Ecclesiology of Vatican II*, Chicago, Franciscan Herald Press, 1974, pp. 187-188.

At the council, two groups the "immediatists" and the "mediatists" argued differently about the source of episcopal jurisdiction. Both agreed that it derives from God, and that there will always be bishops by divine law. They disagreed on the way individual bishops received jurisdiction. The former said that it was conferred immediately in consecration, whereas the latter said that the pope mediated it when he instituted bishops as pastors. This debate was in the background during the discussions on LG, nos. 21-22. See Aidan NICHOLS, *Holy Order*, Oscott-5, Dublin, Veritas Publications, 1990, p. 130.

[6] Seamus RYAN, "Vatican II: Rediscovery of Episcopate," in *Irish Theological Quarterly* [=*ITQ*], 33 (1966), pp. 227-228.

received their power of Orders by sacred ordination. The Supreme Pontiff received his jurisdiction by divine law itself upon acceptance of his election. Others received it by canonical mission/appointment (c. 109). The bishops had powers and faculties if they were granted to them explicitly (cc. 66, 81-82). For the first time, episcopal jurisdiction was described as consisting of legislative, judicial and coercive powers (c. 335). There was no explicit mention of executive power although this was implied in c. 336 when it stated that the bishops are to urge the observance of ecclesiastical laws, and are to be vigilant so that abuses do not appear in ecclesiastical discipline, especially concerning the administration of sacraments and sacramentals, the cult of God and of saints, preaching the Word of God, sacred indulgences, and the implementation of pious wills.[7]

The Second Vatican Council presented a renewed understanding of the episcopal ministry in the Church. The Council taught that there is one sacred power in the Church. This way the separation between the power of Orders and the power of jurisdiction was eliminated. This one sacred power is bestowed on a bishop through episcopal consecration. However, of their very nature the teaching and the ruling functions can be exercised only in hierarchical communion with the head and members of the college of bishops (LG 21). In other words, the ontological functions received by a bishop directly through episcopal consecration can be actualized only through canonical mission or juridical determination (LG, Preliminary Explanatory Note 2). Speaking more

[7] Canon 336 of *CIC 17* stated "§ 1: Observatiam legum ecclesiasticarum Episcopi urgeant; nec in iure communi dispensare possunt, nisi ad normam can. 81. §2: Advigilent ne abusus in ecclesiasticam disciplinam irrepant, praesertim circa administrationem Sacramentotrum et Sacramentalium, cultum Dei st Sanctorum, praedicationem verbi Dei, sacras indultias, implementum piarum voluntatum [...]."

specifically on the power of governance of the bishop, which is ordinary, proper and immediate, the Council said that the bishops have "the sacred right and duty before the Lord to make laws for their subjects, to pass judgment on them, and to moderate everything pertaining to the ordering of worship and apostolate" (LG 27). This threefold right/duty of the bishop corresponds to the legislative, judicial and executive powers respectively. However, the Council did not present any further clarification or explanation of the different aspects of the power of governance of the bishop. In other words, the Council did not provide direct answers to the following questions: What is the nature of the bishop's power of governance? What is its relationship to the Supreme Pontiff's power? What are the parameters which circumscribe the power of the bishop?

The 1983 Code has in fact attempted to incorporate the Council's teaching on the bishop's power (cfr. cc. 375, 381, §1). The bishop governs his diocese with legislative, executive and judicial power (c. 391, §1). In describing the bishop's threefold power, the Code uses the term "executive" instead of the Council's "moderate," but offers no explanation of the notion of executive power. Canons 1400, §2, 1445, §2 and 1277 of the 1983 Code add further difficulties to a clearer understanding of the notion of executive power. While the first two canons use the expression "act of administrative power" ("*actu potestatis administrativae*"), the latter has "acts of administration" ("*actus administrationis*"). Furthermore, Title IV of Book I on "General Norms" reads: "Singular

Administrative Acts," but there is no mention of "administrative power," although "executive power" is said to be the source of "singular administrative acts." The analytical-alphabetical Index of the 1983 Code provided by the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law seems to equate "executive power" with "administrative power" when it lists it as "*executiva vel administrativa*" among the different kinds of "*Potestas.*"[8] Then what exactly is executive power?

The evolution in the understanding of the power of governance has significantly shaped the notion of executive power as well. The use of the terms such as "coercive," "moderating," "administrative" and "executive," in ecclesiastical legal contexts since the 1917 Code indicates that this process has been gradual. Yet the 1917 Code, the Second Vatican Council, or the 1983 Code do not attempt to define those terms. Nor do they point out clearly the individual functions which are part of the executive power of the diocesan bishop. This lack of clarity in the use of terms gives rise to the following questions: What is the nature of executive power? What is the nature of administrative power mentioned in c. 1400, §2 and c. 1445, §2? What is the relationship between the acts of administration and administrative acts? What kind of power is required to place acts of administration? What are the acts of executive power? What precisely in the *tria munera* of the bishop pertains to his executive power? These questions seem to justify a need to launch a more in-depth scientific inquiry into the nature and scope of the

[8] See PONTIFICIA COMMISSIO CODICI IURIS CANONICI AUTHENTICE INTERPRETANDO [=PCCICAI], *Codex iuris canonici, Fontium annotatione et indice analytico-alphabetico auctus* [=*Fontium annotatione et indice*], Città del Vaticano, Libreria editrice Vaticana, 1989, p. 627.

executive power of governance of the diocesan bishop.

Although much has been written concerning the different aspects of the power of governance in the Church, according to our research, to date there has not been any major study dealing exclusively with the executive power of the diocesan bishop.

In his doctoral thesis, defended at the Catholic University of America in 1990, Ronald J. Bowers analyzes the power of governance of the diocesan bishop.[9] Because the focus of this study is the power of governance in general, the topic of executive power of the diocesan bishop receives minimal treatment.

In another doctoral study completed at the Urbaniana University in Rome in 1993, Joseph Johnson compares the power of governance of the diocesan bishop according to the Latin and Eastern Codes.[10] There is one chapter in this study which deals with the executive power of the diocesan bishop according to both Codes, but its main focus is on the administrative structures at the diocesan and parochial levels, and on the administration of temporal goods.

Although a more recent doctoral thesis, defended in 2000 by Anthony E. Bawyn at Katholieke Universiteit, Leuven, Belgium, deals with the administrative power of the diocesan bishop, the concepts related to administrative power and executive power

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[9] See Ronald J. BOWERS, *Episcopal Power of Governance in the Diocesan Church: From 1917 Code of Canon Law to the Present*, Canon Law Studies No. 535, Washington, DC, Catholic University of America, 1990.

[10] See Joseph JOHNSON, *The Power of Governance of the Diocesan Bishops in the Latin and Oriental Codes: A Comparative Study*, JCD diss., Romae, Facultas iuris canonici, Pontificia Universitas Urbaniana, 1993.

remain unclear.[11] For Bawyn, the former includes the latter, and also comprises other "informal" and "non-juridical" functions. In this respect, the subject matter of his study encompasses more than executive power.

This present study will attempt to analyze in depth the nature and scope of executive power of the diocesan bishop. We will follow a purely analytical method in this pursuit. The schema of the thesis is as follows:

In the apostolic constitution *Sacrae disciplinae leges* through which the 1983 Code of Canon Law was promulgated, Pope John Paul II stated that "in a certain sense this new Code could be understood as a great effort to translate this same conciliar doctrine and ecclesiology into *canonical* language. [...] the Code must always be referred to this image as the primary pattern whose outline the Code ought to express insofar as it can by its very nature."[12] This statement of the pope implies that the canons of the Code(s) must be faithful to the doctrine and ecclesiology presented by the Council. Therefore, the first chapter will present a theological analysis of the power of the diocesan bishop in light of the Second Vatican Council. This will provide the theological context within which the juridical nature of the diocesan bishop's governing power can be understood.

The focus of the second chapter will be directed toward the nature and scope of executive power in general. The notion of executive power is juridic in nature. Therefore,

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[11] See Anthony E. BAWYN, *Discovering the Administrative Power Belonging to the Diocesan Bishop: The Use and Implications of Power and Governing in Book II and Book I of the 1983 Code of Canon Law*, JCD diss., Leuven, Faculty of Canon Law, Katholieke Universiteit, 2000, 2 Parts.

[12] JOHN PAUL II, Apostolic Constitution, *Sacrae disciplinae leges*, 25 January 1983, in *AAS*, 75 [Part II], (1983), p. xi; English translation in *CLSA Translation*, p. xxx.

we will delve into a more comprehensive study of the executive power as understood within its historical context and then try to provide a definition and determine its scope and the principles which govern its exercise.

The third chapter will be concerned mainly with the acts of executive power. Just as legislative power is the source of laws and general decrees, and judicial power of judicial decisions, executive power is used in issuing administrative acts of different kinds. We will identify and analyze the specific acts of executive power of a diocesan bishop and the principles that should be followed in issuing them.

Finally, on the basis of our findings discussed in the preceding chapters, we will attempt in the fourth chapter to locate those instances in the 1983 Code which involve the exercise of executive power of the diocesan bishop. This analysis will provide both theoretical and practical information on how a diocesan bishop can function while exercising his executive power in concrete cases envisaged in the Code. And this will be followed by some general conclusions drawn from the entire study.

CHAPTER ONE

THE NATURE OF THE POWER OF GOVERNANCE OF THE DOCESAN BISHOP

INTRODUCTION

The evolution of the function of the diocesan bishop is closely linked to the unfolding of the mission of the Church. This fact seems evident in the way the office of the diocesan bishop was described in the 1917 Code and in the Second Vatican Council, and finally in the 1983 Code of Canon Law, dubbed by Pope John Paul II as the "final document" of the Council.[1] In the 1917 Code, which epitomized the First Vatican Council ecclesiology, the office of the diocesan bishops as well as their power to govern individual dioceses was subordinated to the authority of the Roman Pontiff. In other words, the bishops depended on the Roman Pontiff in the exercise of their power of governance. In a sense, the concept of "pastoral function" of the diocesan bishops seemed almost alien to the office of the bishops in the 1917 Code.

The teaching of the Second Vatican Council has clearly demonstrated that the ministry of a diocesan bishop cannot be described solely in terms of the power of governance he exercises in his diocese. His pastoral function,[2] theologically rooted in the

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[1] See JOHN PAUL II, Allocution, "Portate alle vostre Chiese particolari la conoscenza del codice del popolo di Dio," 22 November 1983, in *Communicationes*, 15 (1983), no. 2, p. 125; ID., Allocution to the Roman Rota, 26 January 1984, in *AAS*, 76 (1984), no. 2, p. 644; English translation in William H. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota 1939-2002* [=WOESTMAN, *Papal Allocutions*], Ottawa, Faculty of Canon Law, Saint Paul University, 2002, p. 181.

[2] "Function" is an appropriate translation of *munus*. "Office" (*officium*) carries a concept different from "function." For consistency we use "function" for *munus* except when we cite English texts verbatim which may translate *munus* as "office."

apostolic college, includes, besides the function of ruling, the functions of teaching and sanctifying. The *Instrumentum laboris* of the tenth Ordinary General Assembly of the Synod of Bishops expressed this principle in the following terms: "The synod is concentrated in a special manner on the Diocesan Bishop and *every aspect of his ministry* in the particular Church. He is the living presence of Christ, 'Shepherd and Bishop' of our souls (1 Pt 2:25); he is his vicar in the particular Church entrusted to him, vicar not only of his Word but of his Person."[3]

In this Chapter, we will examine briefly the function of a diocesan bishop under three aspects: first, the bishop as the pastor of the diocese; second, as the member of the college of bishops; third, the nature of the power of the diocesan bishop.

First, the conciliar term *pastor*, used by the Council to identify the bishop, provides the foundation for its canonical determinations. The term itself has a deeply biblical connotation. It is this significance of *pastor* that characterizes the function (*munus*) of the bishop as pastoral function (*pastorale munus*). We will attempt to identify the canonical implications of the function of the bishop described as pastoral.

Second, we shall look at the consequences from the bishop's membership in the college of bishops. The episcopal consecration makes its recipients bishops, but that does not automatically make them pastors of particular Churches or dioceses. The assignment of a bishop to a particular Church takes place through another act, that is, the canonical

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[3] GENERAL SECRETARIATE OF THE SYNOD OF BISHOPS, Tenth Ordinary General Assembly, *L'évêque, serviteur de l'évangile de Jésus-Christ pour l'espérance du monde, Instrumentum laboris* [=*L'évêque, serviteur de l'évangile*], Paris, Les éditions du Cerf, 2001, p. 7; English translation, The Bishop: Servant of the Gospel of Jesus Christ for the Hope of the World [=The Bishop: Servant of the Gospel], in http://www. vatican. va/roman_curia/synod/documents/rc_synod_doc_20010601_instrumen..23 June 2001, p. 5. Emphasis added.

mission, which is conferred according to the norms approved by the supreme authority of the Church. However, it is the hierarchical communion together with episcopal consecration which incorporates the newly consecrated bishop into the college of bishops. A bishop, therefore, does not function alone in his diocese, but rather within the context of a *communio* and a college.

Third, the pastoral function of a diocesan bishop necessarily entails a twofold power, the power of order and the power of governance. Although these two powers are intrinsically linked, our focus here would be on the power of governance, which is traditionally divided into legislative, judicial and executive. Since legislative and judicial powers are not the concern of our study, we will deal with the executive power in the second chapter.

1.1 BISHOP AS A PASTOR

In the conciliar and post-conciliar teaching of the Church, the bishop has been consistently referred to as the pastor.[4] This term is faithful to the gospel as received by the Church.[5] Echoing his predecessor Pope John Paul I, the present Holy Father prefers to

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[4] Second Vatican Council has 117 references to *pastor*. However, those references include bishops, diocesan and titular, and parish priests. See Xaverius OCHOA, *Index verborum cum documentis Concilii Vaticani Secundi*, Roma, Commentarium pro Religiosis, 1967, pp. 360-361. *CIC 83* has only 38 references to *pastor*. Most of these are to the diocesan bishops. See ID., *Index verborum ac locutionum Codicis iuris canonici*, Città del Vaticano, Libreria editrice Lateranense, 1984, p. 336.

However, the index for the Code issued by PCCICAI does not have an entry for *pastor* or its other forms. See PCCICAI, *Fontium annotatione et indice*, p. 621.

[5] See Michael RICHARDS, *A People of Priests: The Ministry of the Catholic Church,* London, Darton, Longman and Todd Ltd., 1995, p. 5. Deacons, however, though ordained ministers, are not pastors in the Church. The Directory for the Life and Ministry of Priests, issued by the Congregation for Clergy confirms this when it says "After the bishop, the term *pastor* can only be attributed in a proper and univocal sense to the priest by virtue of the ministerial priesthood received with the Ordination" (CONGREGATION

call himself *pastor* rather than *pontiff* to reflect more accurately the nature of his responsibilities.[6] The *Catechism of the Catholic Church* presents the Good Shepherd as the "model and 'form' of the pastoral function of the bishops."[7] In the words of the Second Vatican Council the bishop as the shepherd must have concern and solicitude not only for the welfare of his own subjects, but also toward those who do not yet belong to his people.[8]

1.1.1 The Biblical Source of the Concept

The term *pastor* in Latin means shepherd,[9] a biblical image which symbolizes the responsibilities of caring for the people of God. The Church has adopted this image for bishops and parish priests to signify their responsibilities towards the people they serve. Therefore, pastor within the ecclesial context means proper shepherd of a particular Church or of a parish entrusted to a parish priest to be ministered to under the authority of the diocesan bishop.[10] Basically, the obligations of a pastor in the Church are modelled on the biblical image of the shepherd.

FOR THE CLERGY, Directory for the Life and Ministry of Priests, 31 January 1994, in *Catholic International*, 6 [February 1995], p. 67).

[6] See Foreword by Basil Hume, in RICHARDS, *A People of Priests*, p. xi.

[7] *Catechismus catholicae Ecclesiae*, Città del Vaticano, Libreria editrice Vaticana, 1997, no. 896, p. 250; English translation in *Catechism of the Catholic Church,* Ottawa, Publications Service, Canadian Conference of Catholic Bishops, 1994, p. 196.

[8] See LG 27, in *AAS*, 57 (1965), p. 33; English translation in FLANNERY I, pp. 38-39.

[9] See D.P. SIMPSON, *Cassell's New Latin-English, English-Latin Dictionary*, London, Cassell, 1962, p. 395.

[10] See Leo F. STELTEN, *Dictionary of Ecclesiastical Latin*, Peabody, Hendrickson Publishers, 1995, p. 318.

In the Old Testament, God manifested himself as the shepherd to his chosen people. He chose shepherds to proclaim his Word and to care for his people.[11] This tradition is continued in the New Testament also.[12] Jesus declared himself the "good shepherd" who knows his sheep and is prepared to give his life for them (John 10). After his resurrection, Jesus wanted his apostles to continue his legacy, that is, to be shepherds of his redeemed people (Mathew 9:35; 10:16; John 21). His final instruction to Peter was expressed in shepherding terms: "feed my sheep" (John 21:15-17).

The image of pastor continued to symbolize the shepherding aspect of a Church's minister during its early years. In fact, the term was useful in expressing more clearly the character or qualities of the leaders of the Church. Pastors and teachers were among those who received the special gifts for building the body of Christ (Ephesians 4:11). There are numerous references which link the term *shepherd* to *episkopos* (e.g., 1 Peter 2:25). *Episkopoi* were the chosen and the appointed leaders of the Christian communities. They had the same connotation as *shepherd.*[13]

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[11] There are many examples of this in the Old Testament. Some of them are Jeremiah 6:3; 23: 4; Ezekiel 34:2, 8; Isaiah 56:11; Zechariah 10:5. For more references, see James STRONG, *Strong's Exhaustive Concordance of the Bible*, Nashville, TN, Thomas Nelson Publishers, 1979, p. 917.

[12] There are 21 references to "shepherd" in the New Testament. See Richard E. WHITAKER and John R. KOHLENBERGER III, *The Analytical Concordance to the New Revised Standard Version of the New Testament*, New York, Oxford, B. Eerdmans Publishing Company, Grand Rapids, MI/Cambridge, U.K., Oxford University Press, 2000, p. 561.

[13] For more on this, see Kenan B. OSBORNE, *Priesthood: A History of the Ordained Ministry in the Roman Catholic Church*, New York/Mahwah, Paulist Press, 1988; John J. O'ROURKE, "Bishop" (in the Bible), in *New Catholic Encyclopedia*, vol. 3, Second Edition, Detroit, Thomson/Gale, in association with The Catholic University of America, Washington, DC, 2003, p. 410.

1.1.2 The Magisterial Teaching on the Concept

Traditionally, the symbolism characterized by the term *shepherd* implied the ministry of worship offered by an ordained minister.[14] In conciliar documents,[15] however, the term *pastor* is used to denote Christ himself, the Roman Pontiff, bishops and the parish priests.[16] When the Council speaks of the bishops as pastors, it uses the term in a generic manner without always distinguishing between the diocesan bishops and the titular bishops.[17] It speaks of the entire episcopate as the successor of the college of the Apostles, and that the bishops are the sacred pastors in the Church. This approach, therefore, would include titular bishops among the pastors in the Church. Although

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[14] See RICHARDS, *A People of Priests*, p. 111.

[15] We limit ourselves to LG and SECOND VATICAN COUNCIL, Decree on the Pastoral Office of Bishops in the Church, *Christus Dominus* [=CD], 28 October 1965, in *AAS*, 58 (1966), pp. 673-701; English translation in FLANNERY I, pp. 283-315, except for some references from other documents of the Council.

[16] See, for example, the Constitution on the Sacred Liturgy, *Sacrosanctum concilium*, 4 December 1963, in *AAS*, 56 (1964), no. 2, p. 98; English translation in FLANNERY I, p. 118; LG 25, in *AAS*, 57 (1965), p. 30; English translation in FLANNERY I, p. 35; CD 2, in *AAS*, 58 (1966), p. 674; English translation in FLANNERY I, p. 283; CD 30, in *AAS*, 58 (1966), p. 688; English translation in FLANNERY I, p. 303.

[17] Since the diocesan bishop is the focus of this study, we do not consider the role of coadjutor bishops and titular bishops who may be auxiliaries.

Titular Sees to which titular bishops are usually appointed are Latin Sees which disappeared due to the decline of Catholicism or the incursion of Islamism, suppressed or occupied by schismatics and heretics. From the 12th century, the Holy See has been nominating bishops to titular Sees in which they were unable to govern or reside. Formerly, a titular bishop was called *episcopus in partibus infidelium*. With his apostolic letter, *In suprema*, 10 June 1882, Pope LEO XIII changed their designation to titular bishops. See *Acta Sanctae Sedis* [=*ASS*], 14 (1882), pp. 529-536; Francis J. WINSLOW, "Titular Bishop" in *New Catholic Encyclopedia*, vol. 14, Second Edition, Detroit, Thomson/Gale, in association with The Catholic University of America, Washington, DC, 2003, pp. 92-93.

The 1983 Code does not define titular bishops. Contrasting them with diocesan bishops, c. 376 describes titular bishops as those bishops who are not entrusted with the care of a diocese. Titular bishops have no jurisdiction over the titular Sees to which they are appointed. However, they exercise the functions of the office to which they are assigned, for example, auxiliary bishops, legates of the Holy See, territorial abbots, apostolic vicars, apostolic administrators and officials of the Roman Curia or any others. Retired diocesan bishops and coadjutor bishops are not titular bishops.

In the context of a diocese, both auxiliary and coadjutor bishops assist the diocesan bishop in the governance of the diocese in accord with the norms of law. Coadjutor bishops have the right of succession but the auxiliary bishops do not. Their specific functions are prescribed in cc. 403-411.

bishops are called by different titles, such as vicars of Christ, high priests, Ordinaries, the term *pastor* seems to indicate the genuine nature of the function a diocesan bishop exercises. This has been reinforced by the use of *pastoral* in the title of the decree *Christus Dominus*. This is intended to remind bishops that their image ought to symbolize a pastor to their people, a father to whom they can turn for help and advice in their needs. By their consecration bishops assume the function of a good shepherd who offers full pastoral care for his people.[18] The Directory on the Pastoral Ministry of Bishops, in its conclusion, emphasizes that it refers to bishops as pastors because that image expresses the true nature of their ministry.[19]

In conciliar and post-conciliar documents, we can see bishops' characterization as pastors in two senses. In a broad sense, the conciliar reference to bishops as pastors implies the totality of their functions. As pastors bishops are teachers of doctrine, priests of sacred worship and ministers of government.[20] This is the implication of the conciliar statement which affirms that Christ, the eternal pastor, willed that the bishops should take the place of the Apostles[21] and be the proper, ordinary and immediate pastors in his

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[18] See John MOORMAN, "The Ministry," in Bernard C. PAWLEY (ed.), *The Second Vatican Council: Studies by Eight Anglican Observers*, London, Oxford University Press, 1967, pp. 89-90.

[19] SACRED CONGREGATION FOR BISHOPS, Directory on the Pastoral Ministry of Bishops, *Ecclesiae imago* [=*Ecclesiae imago*], 22 February 1973, Typis polyglottis Vaticanis, 1973, p. 219; English translation by the Benedictine Monks of the Seminary of Christ the King [=*Directory*], Ottawa, Ontario Publication Service of the Canadian Catholic Conference, 1974, p. 114.

[20] See LG 23, 20, in *AAS*, 57 (1965), pp. 28, 24; English translation in FLANNERY I, pp. 32, 27.

[21] See LG 20, 21, in *AAS*, 57 (1965), pp. 24; English translation in FLANNERY I, p. 28.

Church.[22] This is the affirmation of bishops as pastors in their entire pastoral function directed toward the salvation of souls.

The more recent Directory issued by the Congregation for the Clergy in 1994 confirms that the qualifier "pastoral" refers to all the threefold functions of episcopal ministry. In this Directory we read: "The attribute 'pastoral', in fact, refers both to the *potestas docendi et sanctificandi*, and to the *potestas regendi*."[23] In the light of this statement, it seems obvious that the role of a pastor must be understood in an inclusive sense comprising all its functions. Thus, it would include whatever task a pastor undertakes as a part of his mission to care for souls.[24]

In its narrow sense, however, the bishops are pastors in their ruling function because it is referred to as pastoral function (*pastorale munus*), in contradistinction to the teaching and sanctifying functions. The Council states that the bishops are constituted true and authentic teachers of faith, pontiffs and pastors.[25] In a way even Christ is referred to as pastor in the narrow sense when the Council states that the bishop, taking the place

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[22] LG 18, in *AAS*, 57 (1965), p. 22; English translation in FLANNERY I, p. 25. CD 2, 11, in *AAS*, 57 (1965), pp. 674, 677; English translation in FLANNERY I, pp. 283, 289. Proper, ordinary and immediate are also the characteristics of their power (LG 27) which will be discussed later in this chapter.

[23] CFC, Directory for the Life and Ministry, p. 67.

[24] In response to the question whether administration of material things by a bishop is non-pastoral, Louis BOUYER rightly argues that bishops must involve themselves in the administration of material things to the extent it is related to the pastoral care of souls. See Louis BOUYER, "Bishops in the Church: The Catholic Tradition," in Peter MOORE (ed.), *Bishops: But What Kind?*, London, SPCK, 1982, p. 36.

[25] See CD 2, in *AAS*, 58 (1966), pp. 674; English translation in FLANNERY I, p. 284.

of Christ, is in the image of Christ who is eternal priest, teacher and shepherd of our souls.[26]

1.1.3 The 1983 Code on a Bishop as a Pastor

Although the term *pastor* is frequently attributed to priests and bishops in the 1983 Code,[27] its use is limited compared to that in conciliar documents. While the Code refers to the pope as the supreme and universal pastor, bishops and priests too are called sacred pastors or pastors of souls.[28]

When the Code uses the expressions *sacred pastors* and *pastors of souls*, it seems to include in them bishops and priests, because the duties and rights assigned to pastors in relevant canons are attributed also to the priests.[29] The lead canon 375, §1, in the section on bishops in general (cc. 375-380), states that bishops are divinely constituted as pastors

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[26] See LG 41, 20, in *AAS*, 57 (1965), pp. 45, 25; English translation in FLANNERY I, pp. 60, 29.

[27] The Code seems to makes a distinction between *pastors* and *proper pastors*. Canon 381, §2 holds territorial prelates, territorial abbots, apostolic vicars, apostolic prefects and apostolic administrators as equivalent to diocesan bishops. Canons 369 and 381, §1 regard the diocesan bishop as the proper pastor of his diocese. Moreover, c. 370 recognizes territorial prelate and a territorial abbot as proper pastors like diocesan bishops. However, c. 371, §§1-2 does not consider apostolic vicars, apostolic prefects and apostolic administrators as proper pastors since they govern in the name of the Supreme Pontiff. Nevertheless, they also can be called pastors since by the very nature of their functions they shepherd the people entrusted to them and provide pastoral care.

[28] See, for example, cc. 331; 332, §2; 228; 515, §1. Congregation for the Clergy restricts the use of *pastor* at the parish level only to the priests. "Clericalization of the laity tends to diminish the ministerial priesthood of the priest. After the bishop, the term *pastor* can only be attributed in a proper and univocal sense to the priest by virtue of the ministerial priesthood received with the Ordination" (CFC, Directory for the Life and Ministry, p. 67).

[29] See, for example, cc. 213; 773; 843, §2; 890; 898. In addition, sacred ministers are also mentioned in the same sense as sacred pastors. See c. 843, §1.

to be the teachers of doctrine, priests of sacred worship, and ministers of governance. This description of pastors includes all functions of the bishops.

It appears that the Council understands bishops as pastors in the broad sense and sees their ruling function in terms of pastoral authority. The pastoral function, in the words of the Council, is the daily care of the faithful entrusted to the bishop.[30] However, the daily care of the faithful includes also the teaching and the sanctifying functions. Therefore, a bishop is a pastor not merely because he governs, but also because he is a teacher of doctrine and a priest of worship. The Code adopts this broad meaning of the conciliar understanding of bishops as pastors which includes all three functions, namely those of teaching, sanctifying and governing.[31]

1.2 THE BISHOP AS THE PASTOR OF A DIOCESE

The Second Vatican Council teaches that episcopal consecration confers on a bishop the fullness of the sacrament of Orders. It also confers, together with the function of sanctifying, the functions of teaching and ruling. However, the functions of teaching and ruling, by their very nature, are to be exercised only in hierarchical communion with

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[30] See LG 25-27, in *AAS*, 57 (1965), pp. 29-33; English translation in FLANNERY I, pp. 34-39; CD 13-16, in *AAS*, 58 (1966), pp. 678-681; English translation in FLANNERY I, pp. 290-294.

[31] William H. ONCLIN seems to equate bishops' pastoral function to *munus pascendi seu regendi*, distinct from *munus docendi* and *munus sanctificandi*. In his opinion it is the power to exercise *munus pascendi* that becomes *potestas iurisdictionis*. See William H. ONCLIN, "The Church Society and the Organization of Its Powers," in *The Jurist*, 27 (1967), p. 1. However, *munus pascendi*, to be equivalent to bishop's pastoral function, should include all the aspects of pastoral care. It cannot be restricted only to governance because full pastoral care must include bishop's teaching and sanctifying functions.

the head and the members of the college.[32] That means, although episcopal consecration makes one a bishop, it does not automatically turn him into a pastor of a diocese.

As discussed above, a bishop receives his threefold *munera* through episcopal consecration and together with the hierarchical communion he becomes a member of the college of bishops. However, he cannot exercise his teaching and ruling functions till he receives a canonical mission, which can be given by legitimate customs that have not been revoked by the supreme and universal authority of the Church, or by laws made or acknowledged by the same authority, or directly by the Roman Pontiff himself.[33] This was explicitly stated in the dogmatic constitution *Lumen gentium* 24 where we find the expression "canonical mission." Moreover, the Explanatory Note of the constitution uses "canonical or juridical determination through hierarchical authority."[34] That means to

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[32] "[...] episcopali consecratione plenitudinem conferri sacramenti Ordinis, [...] Epicopalis autem consecratio, cum munere sanctificandi, munera quoque confert docendi et regendi, quae tamen natura sua nonnisi in hierarchica communione cum Collegii Capite et membris exerceri possunt" (LG 21, in *AAS*, 57 [1965], p. 25; English translation in FLANNERY I, p. 29).

[33] J. James CUNEO defines canonical mission as "a specific, juridical concept referring to a juridical act whereby an individual or group is endowed with rights and obligations to exercise certain functions in the name of the Church" and further says that the canonical mission, in fact, is from the college of bishops, the supreme authority in the Church. Since the college cannot function without the head, the pope as its head, confers it. See J. James CUNEO, "The Power of Jurisdiction: Empowerment for Church Functioning and Mission Distinct from the Power of Orders," in *The Jurist*, 39 (1979), pp. 185, 207.

[34] "Episcoporum autem missio canonica fieri potest per legitimas consuetudines..." (LG 24, in *AAS*, 57 [1965], p. 29; English translation in FLANNERY I, p. 34).

"Ut vero talis expedita potestas habeatur, accedere debet *canonica* seu *iuridica determinatio* per auctoritatem hierarchicam" (LG, Nota explicativa praevia [=NEP] 2, in *AAS*, 57 [1965], p. 73; English translation in FLANNERY I, p. 93).

Whether canonical mission is same as the hierarchical communion mentioned in LG 21 is not clear. Velasio DE PAOLIS finds that hierarchical communion has taken the form of canonical mission in the course of the centuries. Hence, it is not different from hierarchical communion, rather a juridic form of the latter. See Velasio DE PAOLIS, "De natura sacramentali potestatis sacrae," in *Periodica*, 65 (1976), pp. 88-89. For Carlos WARNHOLTZ, proposing a name to be a bishop, electing him and appointing him are all elements of hierarchical communion. For more on this, see Carlos WARNHOLTZ, *The Nature of the Episcopal Office According to the Second Vatican Council*, Canon Law Studies No. 455, Washington, DC, The Catholic University of America, 1968, p. 136.

transform bishop's teaching and ruling functions received in the episcopal consecration into exercisable power, an external ordering through canonical mission by hierarchical authority must occur.[35]

Furthermore, the Explanatory Note to *Lumen gentium* offers the reason for the juridical determination of a diocesan bishop. According to this Note, the canonical mission is necessary to activate the *tria munera*. It is also an external sign of the diocesan bishop sharing in hierarchical communion with the head and members of the college of bishops.[36]

The constitutive task of canonical mission is clearly laid down in the Directory *Ecclesiae imago*. It states, "the individual bishop is constituted through a canonical

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Despite all these explanations, questions about canonical mission linger. When a diocesan bishop retires, he will not be exercising his ministry as his canonical mission determined at the time of his appointment as the diocesan bishop. Nevertheless, he remains in hierarchical communion. Therefore, it seems difficult to conclude that the hierarchical communion and canonical mission are the same.

The development of canonical mission has its roots in the practice of absolute ordination in the Church. In the early Church, ordination conferred the power of Order as well as the office. This practice in the Church was called relative ordinations. When absolute ordinations started and later continued despite a ban on them, conferral of ordination was separated from conferral of the office. This led to a gradual distinction between the power of Order and the power of jurisdiction. While the ordination conferred the power of Orders, canonical mission conferred the power of jurisdiction. For more on ordination in the early Church, see Matthäus KAISER, *Die Einheit der Kirchengewalt nach dem Zeugnis des Neuen Testamentes und der Apostolischen Väter*, Münichen, K. Zink, 1956. For more on absolute and relative ordination, see Vinzenz FUCHS, *Der Ordinationstitel von seiner Entstehung bis auf Innozenz III*, Amsterdam, P. Schippers, 1963. A concise treatment of the development of the canonical mission and its relationship with absolute ordination can be found in Wilhelm BERTRAMS, *The Papacy, the Episcopacy, and Collegiality*, (trans. Patrick BRANNAN), Westminster, The Newman Press, 1964, pp. 49-54.

[35] For an extensive treatment on the power of a diocesan bishop, especially in light of the conciliar teaching and its analysis, see José A. SOUTO, "La potestad del Obispo diocesano," in *Ius canonicum* [=*IC*], 7 (1967), pp. 365-449.

[36] See NEP 2, in *AAS*, 57 (1965), p. 73; English translation in FLANNERY I, p. 93.

mission the shepherd of a definite portion of the flock of Christ on whose behalf he exercises his sacred power."[37]

Canonical mission can be conferred in different ways. *Lumen gentium* allows it to be conferred by legitimate customs. It can also be conferred by law made or acknowledged by the supreme authority of the Church, or it can be granted directly by the Supreme Pontiff himself. If the Supreme Pontiff objects or refuses apostolic communion, the bishop cannot be admitted to the office.[38]

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[37] "Episcopus singulis, licet, interveniente missione canonica, pastor constituatur determinatae portionis gregis Christi in cuius servitium suam exercet sacram potestatem [...]" (*Ecclesiae imago*, 50b, p. 54. *Directory*, p. 29).

[38] See LG 24, in *AAS*, 57 (1965), p. 29; English translation in FLANNERY I, p. 34. In the context of canonical mission, footnote 74 of LG cites canons from the "Code of Canon Law for the Oriental Church": 216-314 on patriarchs; 324-339 on major archbishops; 362-391 on other dignitaries and 238, §3, 216, 240, 251, 255 on the nomination of bishops by the patriarch. Some of the canons cited pertain to persons other than diocesan bishops, for example, exarchs and apostolic exarchs (cc. 362-387). See *AAS*, 57 (1965), p. 29; English translation in FLANNERY I, footnote 38, p. 45.

BERTRAMS is of the opinion that though the conferral of the canonical mission belongs to the Roman Pontiff by virtue of his supreme power, in every single case it need not be given directly by him. It can be conferred through others either by the authority of the Roman Pontiff or in union with the authority of the Roman Pontiff. See BERTRAMS, *Papacy, Episcopacy, Collegiality*, p. 63.

Furthermore, there are differing views on whether a competent ecclesiastical authority can withdraw the office from a bishop according to law. Karl RAHNER, for example, argues that the office can be withdrawn. See Karl RAHNER, "On the Divine Right of the Episcopate," in Karl RAHNER and Joseph RATZINGER, *The Episcopate and the Primacy*, Freiburg, Herder, 1962, pp. 72-117. BERTRAMS too expresses the same idea. See Wilhelm BERTRAMS, "De quaestione circa originem potestatis jurisdictionis episcoporum in Concilio Tridentino non resoluta," in *Periodica*, 52 (1963), pp. 458-476; ID., "De potestatis episcopalis exercitio personali et collegiali," in *Periodica*, 53 (1964), pp. 455-481; ID., *De relatione inter episcopatum et primatum*, Roma, Universitas Gregoriana, 1963, pp. 57-90; ID., *Papst und Bischofskollegium als Träger der kirchlichen Hirtengewalt*, Münichen Paderborn Wien, Verlag Ferdinand Schöningh, 1965, pp. 10-29; ID., "Die Einheit von Papst und Bischofskollegium in der Ausübung der Hirtengewalt durch den Träger des Petrusamtes," in *Gregorianum*, 48 (1967), pp. 34-36. Klaus MÖRSDORF seems to hold the opposite view. See Klaus MÖRSDORF, "Die hierarchische Verfassung der Kirche, insbesondere der Episkopat," in *Archiv für katholisches Kirchenrecht* [=*AkK*], 134 (1965), pp. 88-97.

1.2.1 Pastoral Character of the Function of a Diocesan Bishop

The 1983 Code describes a diocesan bishop's function as pastoral, but it does not define what "pastoral" is.[39] However, the Code uses "pastoral" to qualify various functions, institutes and organisms in the Church. An overuse of "pastoral" could weaken its meaning and significance.[40] Therefore, it is important to understand the meaning of the term in order to appreciate the significance of the functions and institutes it qualifies.

The term "pastoral" is derived from the Latin noun "*pastor*," which means shepherd.[41] Therefore, "pastoral" signifies that which relates to a shepherd or a pastor. Its verbal form *pascere* means to lead sheep to pasture or to feed, nourish the sheep with authority.[42] A pastor's or a shepherd's pastoral task is to feed the flock or to lead them to pasture.[43] Applying this to a pastor in the Church, a pastor's function is to care for the people entrusted to him by providing the spiritual means for their spiritual nourishment.

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[39] There is widespread difference of opinion and debate about the precise meaning of the term "pastoral." Riccardo TONELLI defines "pastoral" as "Pastorale è l'azione multiforme della communità ecclesiale, animata dallo Spirito Santo, per l'attuazione nel tempo del progetto di salvezza di Dio sull'uomo e sulla storia, in riferimento alle concrete situazione di vita" (Riccardo TONELLI, *Pastorale giovanile oggi*, Ricerca teologica e orientamenti metodologici, Roma, Libreria Ateneo Salesiano, 1977, p. 166). Wesley CARR observes that "pastoral" is a word against which little can be said and against whose often pejorative use one must be cautious. See Wesley CARR, *Handbook of Pastoral Studies*, London, SPCK, 1997, p. 9. For more definitions and discussion on "pastoral," see R. John ELFORD, *The Pastoral Nature of Theology: An Upholding Presence*, London/New York, Cassell, 1999, pp. 1-3.

[40] An overuse of *pastoral* can make it a worn out term. In fact, as a word it is more powerful in its meaning than commonly understood by its users. See "Pastoral: Pastorale?," Editorial, in *The Clergy Review*, 63 (1978), pp. 443-444.

[41] See SIMPSON, *Cassell's Dictionary*, p. 395.

[42] See ibid., p. 394.

[43] See WARNHOLTZ, *The Nature of the Episcopal Office*, p. 60.

1.2.1.1 Theological Meaning

In a broad sense, the term "pastoral," as discussed above, may be regarded as synonymous with the mission of teaching, baptizing and nourishing the people. These tasks express two spheres of the Church's mission: evangelization or strictly missionary activity directed to non-Christians in order to bring them in the Christian fold,[44] and teaching, worshiping and the building up the Body of Christ, God's people. Accordingly, the term "pastoral" would include two types of activities, namely, evangelizing those who have not heard the message of salvation in Christ, and teaching, sanctifying and ruling the faithful.[45]

The Second Vatican Council, known as the pastoral Council, used "pastoral" in several documents.[46] The term became very popular after the Council and its excessive use seems to have diluted its original meaning. Nevertheless, the term "pastoral" as understood by the Council highlights the nature of the functions of the bishop.

In spite of its wide use in conciliar documents, the term "pastoral" appears in the titles of only two of them. It is found first in the Decree on the Pastoral Office of Bishops

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[44] See "Pastoral: Pastorale?," Editorial, p. 443.

[45] See Paul WINNINGER, "A Pastoral Canon Law," in *Concilium*, 8/5 (1969), p. 28.

[46] There are 127 occurrences of "pastoral" in its various forms in the Council documents compared to 117 occurrences of "pastor." Out of 127, 36 are in CD alone. See Philippe DELHAYE, Michel GUERET and Paul TOMBEUR, *Concilium Vaticanum II: concordance, index, listes de fréquence, tables comparatives*, Louvain, Publications du CETEDOC, Université Catholique de Louvain, 1974, pp. 9, 473-475; OCHOA, *Index verborum Concilii Vaticani*, pp. 361-362.

Winfried AYMANS recalls that a certain anti-juridicism was disseminated in the Second Vatican Council. It was not canon law that was questioned, rather an imbalanced predominance of describing the Church in terms of juridical thinking and juridical categories. This sort of criticism appeared especially in the earliest drafts of LG. However, CD especially shows that the Council was able to proceed also on juridical lines. See Winfried AYMANS, "Ecclesiological Implications of the New Legislation," in *Studia canonica* [=*StC*], 17 (1983), pp. 64-65.

in the Church, *Christus Dominus*.[47] The use of the expression in this title was deliberate to emphasize precisely the pastoral nature of episcopal ministry.[48]

The decree *Christus Dominus* itself does not explain what the word "pastoral" really means. However, it speaks of the two aspects of that pastoral function of the bishop,[49] namely, the care of the Christian faithful and evangelisation of non-Christians.[50] The three chapters of the decree focus on the bishop's role in the universal Church, in their own dioceses and within various ecclesiastical organisms such as Bishops' Synods, Councils and Episcopal Conferences.[51]

The second document which includes "pastoral" in its title is The Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*. Unlike the decree *Christus Dominus*, *Gaudium et spes* explains in a footnote why it is called *pastoral*. The footnote says:

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[47] See in *AAS*, 58 (1966), p. 673; English translation in FLANNERY I, p. 283.

[48] See Klaus MÖRSDORF, "Decree on the Bishops' Pastoral Office in the Church," in Herbert VORGRIMLER, (ed.), *Commentary on the Documents of Vatican II*, vol. II, New York/London, Burns & Oates/ Herder and Herder, 1968, pp. 165-170.

[49] Pastoral function mentioned in the singular form in the title of the decree *Christus Dominus* seems ambiguous compared with pastoral functions (*munera pastoralia*) in the plural which appear in its other parts. See, for example, CD 22, in *AAS*, 58 (1966), p. 683; English translation in FLANNERY I, pp. 296-297. Its use of *munus* in the sense of *officium* adds to the ambiguity. For example, *munus* and "*officio*" in CD 21, in *AAS*, 58 (1966), p. 683 is translated as *office* in both instances in FLANNERY I, pp. 296. Bishops' pastoral function expressed in singular form seems to be equated to the apostolic function. Moreover, the translation of *munus* itself in FLANNERY I is also not consistent. He translates it as *office* and *function*. See CD 6, 11, 19, 20, in *AAS*, 58 (1966), pp. 677-678, 682, 683; English translation in FLANNERY I, pp. 289, 295, 296.

[50] See CD 6, 13, in *AAS*, 58 (1966), pp. 676, 679; English translation in FLANNERY I, pp. 286, 290-291.

[51] See CD 36-38, in *AAS*, 58 (1966), p. 692-694; English translation in FLANNERY I, pp. 310-312.

> [...] The Constitution is called 'pastoral' because, while resting on doctrinal principles, it seeks to set out the relation of the church to the world and to the people of today. In Part I, therefore, the pastoral emphasis is not overlooked, nor is the doctrinal emphasis overlooked in Part II.[52]

This footnote indicates that "pastoral" is the way the Church relates to the world and to people. From this one should not conclude that doctrine is non pastoral, and the way of dealing with the problems of society is pastoral and non doctrinal. This is further reiterated in the Post-Synodal Apostolic Exhortation, *Reconciliatio et paenitentia* when it states, "what is *pastoral* is not opposed to what is *doctrinal*. Nor can pastoral prescind from doctrinal content, from which in fact it draws its substance and real validity."[53] In this sense both parts of the constitution *Gaudium et spes* are interdependent and complementary for the nature of the document.

Papal teachings further emphasize and explain the pastoral character of the Church's doctrine and juridic system. In his very first announcement of the convocation of the Second Vatican Council, Pope John XXIII stressed its pastoral nature. He said:

> The substance of the ancient doctrine of the deposit of faith is one thing, and the way in which it is presented is another. And it is the latter that must be taken into great consideration with patience if necessary, everything being measured in the forms and proportions of a *magisterium* which is predominantly pastoral in character.[54]

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[52] SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, 7 December 1965, in *AAS*, 58 (1966), footnote 'a', p. 1025; English translation in FLANNERY I, pp. 172-173. Paul VI referred to this explanation in his allocution to the Roman Rota on 8 February 1973. See *AAS*, 65 (1973), p. 102; English translation in WOESTMAN, *Papal Allocutions*, p. 121.

[53] JOHN PAUL II, Post-Synodal Apostolic Exhortation, *Reconciliatio et paenitentia*, 2 December 1984, in *AAS*, 77 (1985), p. 241-242; English translation in Michael MILLER (ed.), *The Post-Synodal Apostolic Exhortations of John Paul II*, Huntington, WV, Our Sunday Visitor, Inc., 1998, p. 305.

[54] JOHN XXIII, Opening Speech to the Second Vatican Council, 11 October 1962, in *AAS*, 54 (1962), pp. 791-792; English translation in Walter M. ABBOT (ed.), *The Documents of Vatican II*, Piscataway, NJ, New Century Publishers, Inc., 1966, p. 715.

Pope Paul VI continued to emphasize the same theme on nature of the Council in similar words. He stated:

> We are not here primarily to discuss certain fundamentals of Catholic doctrine [...] but to study them afresh, and to reformulate them in contemporary terms [...] must work out ways and means of expounding these truths in a manner consistent with a predominantly pastoral view of the Church's teaching office.[55]

The Directory on the Pastoral Ministry of Bishops, *Ecclesiae imago*, issued as per the Council's direction,[56] emphasizes both aspects of episcopal ministry as explained above. After dealing in detail with the pastoral function of the bishops, the directory identifies some important features of the pastoral nature of the bishops' ministry. The principal goal of the bishops' pastoral ministry is the glory of God and the salvation of souls. The salvation of souls is the most important aspect that defines a bishop's function. The pastoral spirit described in terms of charity, wisdom, kindness and courtesy, as per the example and words of Jesus the Good Shepherd, is the foundation of a bishop's everyday life of teaching, sanctifying and governing. For a bishop, to preside is to be useful, to oversee is to serve, to govern is to love and to be honoured is to be burdened.[57]

At the same time, the popes have warned against a false understanding of the notion of "pastoral." In particular, the popes have spoken against an attitude of anti-juridicism, disregard for laws of the Church. For example, in his Rotal allocution of 29 January 1970, Pope Paul VI said:

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[55] PAUL VI, Address at the Opening of the Second Session of the Second Vatican Council, 29 September 1963, in *AAS*, 55, (1963), pp. 844-845; English translation in *The Pope Speaks*, 9/2 (1964), p. 128.

[56] See CD 44, in *AAS*, 58 (1966), pp. 695-696; English translation in FLANNERY I, pp. 314-315.

[57] See *Ecclesiae imago*, pp. 219-221. *Directory*, pp. 114-115.

> Any learned ecclesiastic who interprets the laws of the Church or frames them in such a way that everything he teaches or expounds has reference to the reign of charity, neither sins nor errs; for when he pays attention to the salvation of his neighbours, he is directing his actions toward the proper goal of sacred institutions.[58]

For Paul VI, christian charity which adds greater dignity and greater fruitfulness to equity should be the new pastoral style of those who exercise the ministry of law.

However, the same pontiff spoke clearly against making a distinction between a juridical Church and a charitable Church. He said: "Whoever distinguishes between a juridical Church and a Church of charity is wrong. This is not so; the Church, which is juridically founded, with the pontiff as head, is the same Church of Christ, the Church of charity, and the universal family of Christians."[59]

Setting aside the criticism and rejection of the system of law in the Church that it is legalism, Paul VI says that "a community without law, far from being or from the power of being, in this world a community of charity, will never be anything else but a community of the capricious."[60]

According to Pope Paul VI, the spirit of Christ's charity and meekness must be the mark of all legislation. The objective of the Church is to lead people to salvation. The

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[58] "Quicumque ergo ecclesiasticus doctor ecclesiasticas regulas ita interpretatur aut moderatur, ut ad regnum charitatis cuncta quae docuerit vel exposuerit referat, nec peccat, nec errat; cum saluti proximorum consulens, ad finem sacris institutionibus debitum pervenire intendat" (PAUL VI, Allocution to the Roman Rota, 29 January 1970, in *AAS*, 62 [1970], pp. 111-112. WOESTMAN, *Papal Allocutions*, p. 98).

[59] "[...] a torto si distingue una Chiesa giuridica dalla Chiesa della carità. Non è così; ma quella Chiesa, ch'è giuridicamente fondata, con a capo il Pontefice, è la medisima Chiesa di Cristo, la Chiesa della carità e la famiglia universale dei cristiani" (PAUL VI, Allocution to the Roman Rota, 25 January 1966, in *AAS*, 58 [1966], p. 153. WOESTMAN, *Papal Allocutions*, p. 84).

[60] "[...] una communità senza legge, lungi dall'essere o dal potere essere, in questo mondo, la communità della carità, non è mai stata e non mai sarà altro che la communità dell'arbitrio" (PAUL VI, Allocution to the Roman Rota, 28 January 1972, in *AAS*, 64 [1972], p. 203. WOESTMAN, *Papal Allocutions*, p. 113).

law of the Church is aimed at the salvific goal of the Church. Therefore, by its very nature ecclesiastical law is pastoral. "Any talk about *pastoral plan* today suggests another meaning, which is intimately linked with the pastoral duty of the episcopate and the apostolic mission of the Church."[61] A pastoral plan is the well thought-out organization of the apostolate. It is concerned with persons, human beings, who seek the truth, and who are meant to grow in Christ. It "promotes, directs, instructs, educates and sanctifies mankind in Christ, which adheres to Him in faith and charity."[62]

In his Rotal allocution of 18 January 1990, John Paul II also followed up on the pastoral nature of ecclesial law. He said:

> This distortion lies in attributing pastoral importance and intent only to those aspects of moderation and humanness in the law which are linked immediately with canonical equity (*aequitas canonica*)-that is holding that only exceptions to the law, the potential non-recourse to canonical procedures and sanctions, and the streamlining of judicial formalities have any real pastoral relevance. One thus forgets that justice and law in the strict sense-and consequently general norms, proceedings, sanctions, and other typical juridical expressions, should they become necessary-are required in the Church for the good of souls and are therefore intrinsically pastoral.[63]

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[61] "Ma parlare oggi di *Pastorale* comporta un altro significato, che ha un legame profondo col compito pastorale del'episcopato e la missione apostolica della Chiesa" (PAUL VI, Allocution to the Roman Rota, 8 February 1973, in *AAS,* 65 [1973], pp. 101-102. WOESTMAN, *Papal Allocutions*, p. 121). WOESTMAN seems to prefer to translate "*pastorale*" as "pastoral plan" or "pastoral program." See ibid., footnote 29, p. 121.

[62] PAUL VI, Allocution to the Roman Rota, 8 February 1973, in *AAS,* 65 (1973), p. 96; English translation in WOESTMAN, *Papal Allocutions*, p. 116. See also JOHN PAUL II, Post-Synodal Apostolic Exhortation, *Pastores dabo vobis*, 25 March 1992, in *AAS*, 84 (1992), no. 22, p. 690; English translation in MILLER, *The Post-Synodal Exhortations*, pp. 522-523. This exhortation elaborates on the pastoral aspect of the priests' ongoing formation in nos. 71-72, in *AAS*, 84 (1992), pp. 782-787. See MILLER, *The Post-Synodal Exhortations*, pp. 597-601.

[63] JOHN PAUL II, Allocution to the Roman Rota, 18 January 1990, in *AAS,* 82 (1990), p. 873; English translation in WOESTMAN, *Papal Allocutions*, p. 210. On how false "pastoral" approach does not confront the problems of human redemption, see Zenon GROCHOLEWSKI, "Theological Aspects of the Judicial Activity of the Church," in *The Jurist*, 46 (1986), pp. 565-566.

In the same allocution the pope expressed this principle: "In the Church, true justice, enlivened by charity and tempered by equity, always merits the descriptive adjective *pastoral*."[64] Thus, the pastoral nature of the Church's mission must also be reflected in its administration of justice, its procedures, sanctions and other legal activities related to the salvation of souls.

It is in this sense as we have discussed that the 1983 Code presents the pastoral function of the bishop.

1.2.1.2 The Juridical Implications

Through the centuries of its development, the function of the bishop seems to have lost its original meaning of "shepherding." One commentator expresses this situation in the following words: "Bishops increasingly moved from the pastoral to administrative roles."[65] One of the criticisms levelled against the 1917 Code was precisely this, that is, it was purely juridical and scarcely pastoral.[66] The concept of

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[64] "La vera giustizia nella Chiesa, animata dalla carità e temperata dall'equità, merita sempre l'attributo qualificativo di pastorale" (JOHN PAUL II, Allocution to the Roman Rota, 18 January 1990, in *AAS,* 82 (1990), p. 874; English translation in WOESTMAN, *Papal Allocutions*, p. 211).

[65] Donald WARWICK, "The Centralization of Ecclesial Authority," in *Concilium*, 1/10 (1974), p. 112. What seems to be implied here is to be merely engaged in the temporal affairs of the Church to the neglect of other responsibilities. To be an ecclesiastical administrator does not necessarily imply to be non-pastoral.

There are other criticisms charged against bishops. One of them is that the bishops have not yet learnt to function as team heads instead of being solo performers. See "Pawns or Pastors?," Editorial, in *The Clergy Review*, 63 (1978), p. 1. Commenting on the activities of some pastors, Lesslie NEWBIGIN says that there are pastors who spend time in committee meetings and seminars and conferences, who run all over the country attending meetings, producing statements instead of giving costly love and care for the people entrusted to them. See Lesslie NEWBIGIN, *The Good Shepherd*, Grand Rapids, MI, William B. Eerdmans Publishing Co., 1977, p. 14.

[66] See Peter SHANNON, "The Code of Canon Law, 1918-1967," in *Concilium*, 8/3 (1967), p. 29. Linking the First Vatican Council and the 1917 Code, John A. ALESANDRO opines that the 1917 Code

pastoral function did not figure in the Code. According to the 1917 Code, pastoral theology for seminarians had to include teaching catechesis to children, hearing confessions, visiting and assisting the sick and the dying.[67]

The emphasis on the pastoral nature of the Church in the Second Vatican Council has undoubtedly influenced the 1983 Code in its deeply pastoral orientation. In his inaugural address to the Pontifical Commission for the Revision of the Code of Canon Law, Paul VI stressed the pastoral thrust of the new Code of Canon Law. He said:

> Now, however, with the changing conditions - for life seems to evolve more rapidly - canon law must be prudently reformed: specifically, it must be accommodated to a new way of thinking proper to the Second Vatican Council, in which pastoral care and new needs of the people of God are met.[68]

This emphasis was reflected in the ten fundamental principles guiding the revision of the Code.[69] The third principle explicitly stated that pastoral care should be the

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chronologically followed upon First Vatican Council, but in a strict sense it did not implement it. Rather, it incorporated the results of that Council and related them to the canonical tradition inherited from the ages in the Church. See John A. ALESANDRO, "The Revision of the Code of Canon Law: A Background Study," in *StC*, 24 (1990), p. 93.

[67] See c. 1365, §3, *CIC 17*. Such a notion of pastoral field seemed to belong only to the priests. Paul ANCIAUX is of the view that today that there are non-ordained persons like psychiatrists, doctors, social workers and many other professional persons who work in the pastoral field. But the distinction and the danger is that of the ordained ministers neglecting their role, which they alone can fulfil, and identifying themselves with a role which others can fulfil. See Paul ANCIAUX (trans. Thomas F. MURRAY), *The Episcopate in the Church*, Dublin, Gill & Son, 1965, p. 8.

[68] *Communicationes*, 1 (1969), p. 41. Commenting on *novus habitus mentis*, an expression repeatedly used by Pope Paul VI about the Second Vatican Council, Ladislas ÖRSY says that canon lawyers, whether legislators, interpreters, judges, must always go beyond the legal categories without denying them. Their higher viewpoint may come from theology, philosophy, history, human sciences or by any combination of the different branches of learning. They should see the legal norms in a broader context, raise new questions, discover new answers and integrate the same norms into the life of the community in such a way that all can experience, taste and enjoy the freedom that was given in Jesus Christ. See Ladislas ÖRSY, "*Novus habitus mentis*: New Attitude of Mind," in *The Jurist*, 45 (1985), p. 258.

[69] See *Communicationes*, 1 (1969), pp. 77-85; English translation in Jordan F. HITE and Daniel J. WARD (eds.), *Readings, Cases, Materials in Canon Law*, Revised edition, Collegeville, MN, The Liturgical Press, 1990, pp. 86-87. The summary of the principles in English is in Richard G. CUNNINGHAM, "The Principles Guiding the Revision of the Code of Canon Law," in *The Jurist*, 30 (1970), pp. 447-455. See

hallmark of the Code. The Code should be neither simply a exhortatory document nor overly preceptive. Laws should be marked by a spirit of charity, temperance, humaneness and moderation. Norms should not be too rigid. Law must not only favour justice but also prudent equity. The law should not impose obligations when it would be sufficient to give exhortations. There should be reasonable amount of discretionary authority in the hands of the Church's pastoral leaders.

The Code itself frequently uses the term "pastoral."[70] However, it does not attempt to define its meaning anywhere. Its meaning is to be deduced from our preceding discussion on the matter. The Apostolic Constitution, *Sacrae disciplinae leges*, through which the 1983 Code was promulgated, does not contain the term "pastoral," but it clearly states that the Code is a translation of the conciliar ecclesiology into canonical language, and its norms are juridically, canonically and theologically founded.[71]

From what we have seen above, it seems that the term "pastoral" connotes that which promotes salvation of human beings. In other words, "pastoral" signifies the

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also ALESANDRO, "The Revision: Background Study," pp. 106-110; Francis G. MORRISEY, "The Revision of the Code of Canon Law," in *StC*, 12 (1978), pp. 186-189.

[70] The 1983 Code uses the term "pastoral" in a variety of ways in the canons. For example, bishop's visits to the parishes (c. 398), seminary formation (cc. 279, §2, 258), juridical bodies (c. 511). For detailed references of the use of "pastoral" in the Code, see OCHOA, *Index verborum iuris canonici*, p. 336.

The 1983 Code is not free from allegations that it is non-pastoral. They stem from a distinction between pastoral and non-pastoral juridicism. One of the allegations is that merely defining the governing system in the Church as pastoral, the governance structures of the Church will not be well organized. Governance structures are juridical and not pastoral. See Gregorio Delgado DEL RIO "The Organization of the Church's Central Government," in *Concilium*, 127 (1979), p. 39.

[71] JOHN PAUL II, *Sacrae disciplinae leges*, in *AAS*, 75 (1983), pp. xi, xiii; English translation in *CLSA Translation*, pp. xxx, xxxi.

salvific action and mediation of the Church in Christ's work of redemption. And the realm of ecclesiastical legislation is an instrument at the disposal of this mission.

The function of bishops consists not only of teaching the doctrine of the Church but also of relating the doctrine to the people. Therefore, in the exercise of this function, any practice not rooted in doctrine cannot be regarded as pastoral. This principle concerns the whole Church, including pastors and the faithful. The juridic system in the Church strives to ensure that such practices are founded in the doctrine.

Pastoral function certainly involves more than just the administration of sacraments and services by an ordained minister. The total pastoral care of a community involves an appropriate response to the needs of people. This requires the collaboration between Christian faithful and ordained ministers. In this sense, pastoral leadership of a community is not defined exclusively in terms of ordained ministry. All Christian faithful, whether lay or religious, have to assume the responsibilities of providing pastoral care within the context of institutions and parishes in accord with the norms of law.[72] Every faithful in the Church has a role in the pastoral mission of the Church. As community leader, one's pastoral experience is not limited to any one sphere. In conclusion, it can be said that it is this understanding of "pastoral" that characterises the function of a diocesan bishop.

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[72] See William BORDERS, "You Are a Royal Priesthood: A Pastoral Letter," in *Origins*, 18 (18 August 1988), p. 175.

1.3 THE BISHOP AS A MEMBER OF THE COLLEGE OF BISHOPS

The Second Vatican Council teaches that the college of bishops, with its head and never without him, is the successor of the apostolic college. In the words of the Council, "[...] the bishops have by divine institution taken the place of the apostles as pastors of the Church."[73] The pope is at the same time divinely constituted as the head of the college. The unity between the pope and the bishops is such that the bishops cannot act as the college of bishops without the pope. Any such distinction is possible only between the college with the pope as its head, and the pope alone ("*seorsim*").[74] *Lumen gentium* points out that the doctrine on bishops' succession to the apostles should not be understood in the sense of succeeding to the extraordinary powers of the apostles. Moreover, apostolic succession does not imply the equality between the head and the

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[73] "Proinde docet Sacra Synodus Episcopos ex divina institutione in locum Apostolorum successisse, tamquam Ecclesiae pastores..."(LG 20, in *AAS*, 57 [1965], pp. 24; English translation in FLANNERY I, p. 28). See also LG 22, in *AAS*, 57 (1965), p. 25; English translation in FLANNERY I, p. 29.

The First Vatican Council and the 1917 Code recognized the bishops as successors of the Apostles (DENZ. 3061, p. 598; DEFERRARI, *Sources of Catholic Dogma*, 1828, p. 454; c. 329, *CIC 17*). However, it remained an empty title. They depended upon the Pope for their power. Seamus RYAN considers it as a mere title to guarantee that the bishops ruled the dioceses. See RYAN, "Rediscovery of Episcopate," p. 209; Vincent M. WALSH, "The Theological and Juridical Role of the Bishop: Early 20th Century and Contemporary Views," in *Apollinaris*, 44 (1971), p. 67; see also John. E. LYNCH, "The Changing Role of the Bishop: A Historical Survey," in *The Jurist*, 39 (1979), p. 302.

Bernard COOKE says that though it seems so simple that Jesus chose the twelve, and the twelve chose bishops as their successors, things are not so simple and direct as they had seemed. Modern critical scholarship raises a number of issues that the Catholic teaching must face to maintain its claim for the origin of episcopacy. For more on this point, see Bernard COOKE, "'Fullness of Orders': Theological Reflections," in *The Jurist*, 41 (1981), pp. 418-420. see also Antonio JAVIERRE, "Notes on the Traditional Teaching on Apostolic Succession," in *Concilium*, 4/4 (1968), pp. 10-15; Hans KÜNG, "What is the Essence of Apostolic Succession," in *Concilium*, 4/4 (1968), pp. 16-19; Johannes REMMERS, "Apostolic Succession: an Attribute of the Whole Church," in *Concilium*, 4/4 (1968), pp. 20-27; Arnold Van RULER, "Is there a 'Succession to Teachers'?" in *Concilium*, 4/4 (1968), pp. 33-37; Maurice VILLAIN, "Can There be Apostolic Succession Outside the Continuity of the Laying on of Hands?" in *Concilium*, 4/4 (1968), pp. 45-53. For a recent study that traces the origins of episcopacy to the apostles, see Francis A. SULLIVAN, *From Apostles to Bishops*, New York/Mahwah, NJ, The Newman Press, 2001.

[74] See NEP 3, in *AAS*, 57 (1965), p. 74; English translation in FLANNERY I, p. 93.

members of the college. The relationship between bishops and the pope in the college of bishops is not the same as the relationship between the apostles and Peter in the college of apostles. Therefore, the Council uses the expression "in like manner" ("*pari ratione*") rather than "in the same manner" ("*eadem ratione*") to describe the nature of the succession of the college of bishops.[75] The Explanatory Note further states that it is a succession of proportionality between the two relationships: Peter - apostles and pope - bishops.[76] The Explanatory Note further explains "the word *College* is not taken in the *strictly juridical* sense, that is, as a group of equals who transfer their powers to their chairperson, but as a permanent body whose form and authority is to be ascertained from revelation."[77]

1.3.1 Principle of Collegiality

Though there is no definition of collegiality in the Council documents, it seems to imply the united action of bishops when they are together or dispersed. In the exercise of collegiality the college of bishops exercises the supreme authority in the Church.[78] In

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[75] See *AAS*, 57 (1965), pp. 22, 73; English translation in FLANNERY, I, pp. 29, 93. LG uses the expression "*pari ratione*" in 22 and explains it in NEP 1. FLANNERY translates it as "*in like fashion*" in LG 22, and as "in like manner" in NEP 1.

[76] See NEP 1, in *AAS*, 57 (1965), p. 73; English translation in FLANNERY I, p. 94.

[77] NEP 1, in *AAS*, 57 (1965), p. 73; English translation in FLANNERY I, p. 93

[78] William ONCLIN, "Collegiality and the Individual Bishop," in *Concilium*, 8/1, (1965), p. 44. During the counter reformation period, amidst emphasis on speaking in one voice, much of the important agenda such as the creed, the index of the prohibited books, the catechism, missal, editions of the Bible and breviary were left to the personal disposition of the Pope which led to the expansion and the reorganization of the Roman Curia. Gradually, papal nunciatures exercised a supervisory role over bishops, promoted the implementation of the curial directives and guarded against innovations. This brought about an obscurity in collegiality. It took four centuries since then for it to emerge. See LYNCH, "Changing Role of Bishop," pp.

other words, collegiality implies that a bishop is not only the shepherd of a particular diocese but he is also a member of a group or college of bishops which is responsible for the welfare of the whole Church. Not only the diocesan bishops, but also the titular bishops share in the supreme authority of the Church and responsibility for it. The Council in this way restored the bishops' role in the universal Church and also strengthened their position as heads of the particular Churches. In other words, the pope is not the only supreme authority in the Church. The bishops as a body, with the pope as its member and the head, are also a supreme authority.[79] Power of the individual bishops is a participation in the power of the college which precedes their becoming pastors of their dioceses. Therefore, the power of the college pre-exists the power of the individual bishops.[80]

Since the college of bishops is the subject of the supreme and full power over the universal Church, it can collegially exercise that supreme power over the universal

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300-301. For more on this issue, see Giuseppe ALBERIGO, "The Council of Trent: New Views on the Occasion of Its Fourth Centenary," in *Concilium*, 7/1 (1965), pp. 38-48.

Collegiality, communion and subsidiarity are the issues that generated numerous contributions from bishops in the recent Synod of Bishops. Their presentations also dealt with the institution of collegiality in the form of the synod of bishops itself, and episcopal conferences. A dominant view that emerged in these contributions is that collegiality and subsidiarity should be further strengthened to fortify the communion that unites the Church. These interventions in the Synod are reported in *ORE*, 10 October 2001, pp. 9-10; 17 October 2001, pp. 8-13; 24 October 2001, pp. 8-10; 7 November 2001, p. 8.

[79] See Roger MATZERATH, "The Episcopacy in the Light of Vatican II," in Titus CRANNY (ed.), *The Episcopate and Christian Unity*, A Symposium Conducted by the Graymoor Friars, Saint Pius X Seminary, September 1-4, 1964, Garrison, Chair of Unity Apostolate, 1965, p. 149. Eugenio CORECCO opines that subjecting the bishop to the episcopal conference in the form of inter-diocesan discipline, and providing for the advisory function of the priests and laity to the bishop are restrictions imposed on him from above and below respectively. See Eugenio CORECCO, "The Bishop, Head of the Local Church and Discipline," in *Concilium*, 8/4 (1968), p. 52.

[80] See JOHN PAUL II, Apostolic Letter issued *motu proprio*, On the Theological and Juridical Nature of Episcopal Conferences, *Apostolos suos*, 21 May 1998, in *AAS*, 90 (1998), pp. 650; English translation in *ORE*, Special Insert (29 July 1998), p. II.

Church. The supreme power can be exercised in a solemn way in an ecumenical Council approved and accepted by the Roman Pontiff. Moreover, it can be exercised as the bishops are spread throughout the world provided that the Roman Pontiff calls them to act collegially or at least freely accepts their joint action.[81] This way of exercising collegiality is not less authoritative than when it is done in an ecumenical Council. While the bishops recognise the primacy and the pre-eminence of the Roman Pontiff, the bishops acting collegially while they are dispersed, do not function as his delegates, but as pastors of the entire Catholic Church and for its benefit.[82]

When bishops act as a college they act on behalf of and for the good of the entire Catholic Church. The good of a particular Church and that of the entire Church are intrinsically linked.[83] Therefore, the bishops have the responsibility to foster unity of faith, to uphold common discipline, to form the faithful in love as the members of the

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[81] See LG 22, in *AAS*, 57b (1965), p. 27; English translation in FLANNERY I, p. 31; CD 4, in *AAS*, 58 (1966), pp. 674-675; English translation in FLANNERY I, p. 285.

[82] See JOHN PAUL II, *Apostolos suos*, in *AAS*, 90 (1998), p. 647; English translation in *ORE* Special Insert (29 July 1998), p. II. For more on the primacy of the Pope and the collegiality of the bishops, see Alexander GANOCZY, "How can one Evaluate Collegiality vis-à-vis Papal Primacy?" in *Concilium*, 4/7 (1971), pp. 84-94; for a recent Holy See document on the primacy of the Pope, see CDF, "The Primacy of the Successor of Peter in the Mystery of the Church," in *ORE* (18 November 1998), pp. 5-6.

[83] Cf. Angel SUQUÍA, "The Church-One and Diverse-in Service to Mission," in *The Jurist*, 52 (1992), p. 7. For the relationship between the particular Church and the universal Church, see JOHN PAUL II, Universal Church/Local Church; Message to U.S. Bishops' Meeting, in *Origins*, 16 (20 November 1986), pp. 398-400; Hubert MÜLLER, "How the Local Church Lives and Affirms Its Catholicity," in *The Jurist*, 52 (1992), pp. 340-364; Olegario G. DE CARDEDAL, "Development of a Theology of the Local Church from the First to the Second Vatican Council," in *The Jurist*, 52 (1992), pp. 11-43; Eugene LA VERDIERE, "Local Churches in a Universal Church," in *Origins*, 19 (15 June 1989), pp. 65, 67-71; James MALONE, "The Church: Its Strengths and Its Questions; Address to U.S. Bishops," in *Origins*, 16 (20 November 1986), pp. 393, 395-398; see also Hervé LEGRAND, "'One Bishop per City': Tensions Around the Catholicity of the Local Church since Vatican II," in *The Jurist*, 52 (1992), pp. 369-400; Liliane VOYÉ, "Response to Hervé Legrand," in *The Jurist*, 52 (1992), pp. 401-410.

mystical Body of Christ, especially the poor, the suffering and the persecuted, and to proclaim the good news of salvation to the world.[84]

In the context of collegiality, the issue of the relation between the power of the pope and that of a bishop needs to be mentioned. By virtue of his supreme authority in the Church, the pope has power over an individual bishop in the sense that he can regulate the exercise of bishop's power for the common good, but the pope does not have such power over the entire episcopate. He could remove a particular bishop from office for legitimate reasons and install another bishop or an apostolic vicar or an administrator, but he cannot act similarly in relation to the whole episcopate. In other words, the pope cannot deny or restrict the power of the college itself.[85]

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[84] See LG 23, in *AAS*, 57 (1965), pp. 27-28; English translation in FLANNERY I, pp. 31-32.

[85] See Karl RAHNER, *Bishops: Their Status and Function*, London, Burns & Oates, 1964, pp. 20, 22. ID., "On the Divine Right of the Episcopate," in RAHNER-RATZINGER, *Episcopate and the Primacy*, pp. 73-74, 109.

The criticism that papal and episcopal powers are monarchical is rendered groundless by the doctrine of collegiality. The pope is not a monarch because he is elected and his office is not hereditary. Besides, he is bound by divine law. He cannot change the constitution of the Church which is beyond the arbitration of human beings. Moreover, one's rights and responsibilities in the Church are rooted on the sacramental basis, and not on the basis of papal concessions.

It is true that there is one bishop in each particular Church who is its visible principle of unity. But episcopacy is also collegial as it serves and represents the unity of several particular Churches in the one universal Church. In addition, in the particular Church itself, the bishop is the head and the centre of two colleges of priests and deacons. He is obliged to function in fraternal union and in association with his priests and deacons.

Finally, about the argument that jurisdiction is associated with monarchy, it can be said that ecclesiastical law does not describe jurisdiction in the Church in monarchical terms. It relates to power of ruling. If the ruling power in the Church is considered as public power, then it can be equivocally or analogously interpreted according to different types of states, peoples, and communities. See RYAN, "Rediscovery of Episcopate," pp. 231, 234; CUNEO, "Power of Jurisdiction," p. 188; F. Donald LOGAN, "The 1875 Statement of the German Bishops on Episcopal Powers," in *The Jurist*, 21 (1961), p. 290; John A. ALESANDRO, "Pastoral Opportunities," in *Chicago Studies*, 23 (1984), p. 106; Karl RAHNER, "The Episcopacy and the Primacy," in RAHNER-RATZINGER, *Episcopate and the Primacy*, pp. 14-17; Adrian HASTINGS, *A Concise Guide to the Documents of the Second Vatican Council*, vol. 2, London, Darton Longman & Todd, 1969, p. 121.

Collegiality is the consequence of the mystery of the Church as the communion of Churches. This notion of the Church of Churches (*ecclesia ecclesiarum*) signifies communion among diverse Churches existing all over the world. Their external visible elements are subordinated and ordained to the internal invisible unity of the Church.[86] The visible communion in the Church is manifested through its external principle - the episcopal college with its head.[87] The internal invisible unity is concretely expressed in the unity of faith, the sacraments and community life under the authority of the successor of Peter and the bishops in communion with him. In fact, the invisible communion produces, conserves and strengthens the visible communion in the Church.[88]

1.3.2 Principle of Subsidiarity

The principle of subsidiarity, which has been a part of the Church's theological and social doctrine for the past two centuries, is closely linked to the principle of collegiality. According to the Church's teaching articulated by Pope Pius XI, the principle of subsidiarity essentially means that it is wrong on the part of those in authority to withdraw from the individuals what they can accomplish and commit to the community at large. Similarly, it is an injustice, a grave evil, and a disturbance of the right order for a larger organisation to reserve to itself the functions which can be

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[86] See SC 2, in *AAS*, 56 (1964), pp. 97-98; English translation in FLANNERY I, p. 117.

[87] See LG 18, in *AAS*, 57 (1965), p. 22; English translation in FLANNERY I, pp. 25-26.

[88] See SCB, Draft Statement on Episcopal Conferences, in *Origins*, 17 (7 April 1988), p. 732.

performed efficiently by smaller and lower bodies.[89] Pope Pius XII affirmed that this principle is valid for the Church's life without prejudice to its hierarchical structure.[90] The principle attained prominence in the Church after the Second Vatican Council. The fifth principle guiding the revision of the Code of Canon Law stated that the purpose of the principle is to strengthen the legislative unity in all the fundamental and major pronouncements of law of any complete and internally structured society. The principle also allows individual institutions to provide for their own needs by enacting laws proper to their needs. While canon law must remain a unified system for the universal Church, greater flexibility should be allowed to particular legislation, especially at the national and local levels, so that appropriate provisions could be made for the special needs of particular Churches.[91]

Subsidiarity in the Church implies that suitable and necessary discretionary latitude is granted to pastors to provide for the particular needs of their people. This would necessarily imply that the higher authority or structure should intervene only when the common good demands it.[92] In the life of the Church this principle would mean that

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[89] See PIUS XI, Encyclical Letter, *Quadragesimo anno*, 15 May 1931, in *AAS*, 23 (1931), p. 203; English translation in *Forty Years After: Reconstructing the Social Order*, Encyclical Letter of His Holiness, Pope Pius XI, National Catholic Welfare Conference, Washington, DC, 1940, pp. 26-27.

[90] "Parole veramente luminose, che valgono per la vita sociale in tutti i suoi gradi, ed anche per la vita della Chiesa, senza pregiudizio della sua struttura gerarchica" (PIUS XII, Address to the College of Cardinals at a Public Consistory, 20 February 1946, in *AAS*, 38 [1946], p. 145).

[91] Fifth principle is found in *Communicationes*, 1 (1969), pp. 80-82; English translation in HITE-WARD, *Readings, Cases, Materials*, pp. 87-89.

[92] See Kevin E. MCKENNA, *The Ministry of Law in the Church Today*, Notre Dame, IN, University of Notre Dame Press, 1998, pp. 17-18. For detailed studies on subsidiarity, see Rachel M. HARRINGTON, *The Application of the Principle of Subsidiarity According to the Code of Canon Law*, JCD diss., Ottawa, Saint Paul University, 1997; Joseph S. GEORGE, *The Principle of Subsidiarity-With Special Reference to Its Role in Papal and Episcopal Relations in the Light of Lumen Gentium*, Canon Law Studies No. 463,

the supreme authority should leave to bishops those functions which are in keeping with the nature of their function. The supreme authority should intervene only when the common good of the Church would call for it. Similarly, the principle is applicable also to bishops as well as to priests. It means that the bishops leave to the priests, and the priests to the faithful, those responsibilities which they can fulfill effectively on their own.[93]

Although the principle of subsidiarity has been incorporated in the 1983 Code, the recent Synod of Bishops called for its recognition in the governance of the Church. It was even suggested that subsidiarity should be seen as the divinely instituted principle for designing cooperation between the various levels of the Church's governance.[94] But the *Relatio post-disceptationem* issued by the Synod refers to the synodal interventions about subsidiarity and says that the divinely willed hierarchical structure of the Church excludes a univocal application of subsidiarity to the Church exactly in the same way as it works in the social life. It goes to the extent of saying that the relationship between the powers of the pope and the bishops can not be resolved automatically by applying the principle of subsidiarity. The coexistence of proper, ordinary and immediate power of the pope and of the bishops requires the principle of communion rather than the principle of

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Washington, DC, The Catholic University of America, 1968; Wilhelm BERTRAMS, "De principio subsidiaritatis in iure canonico," in *Periodica*, 46 (1946), pp. 3-65; Ad LEYS, "Structuring Communion: The Importance of the Principle of Subsidiarity," in *The Jurist*, 58 (1998), pp. 84-123; John J. BURKHARD, "The Interpretation and Application of Subsidiarity in Ecclesiology: An Overview of the Theological and Canonical Literature," in *The Jurist*, 58 (1998), pp. 279-342.

[93] See Hans KÜNG, *Structures of the Church,* (trans. Salvator ATTANASIO), New York, NY, Thomas Nelson and Sons, 1964, p. 242.

[94] See Tenth Ordinary General Assembly of the Synod of Bishops, Contribution of the Synod Fathers and Members, in *ORE*, 7 November 2001, p. 8. See also *ORE*, 10 October 2001, p. 10.

subsidiarity.[95] This statement does not seem to be in agreement with the Synod's call for a more effective implementation of the principle of subsidiarity in the Church. Yet, we believe that the principle of subsidiarity, with appropriate adaptations suitable to the nature of particular Churches, can make the principle of communion within the Church more effective and visible.

1.4 PASTORAL FUNCTION OF A DIOCESAN BISHOP

By stating that the *tria munera* are conferred through the sacramental consecration, the Second Vatican Council did away with the pre-conciliar distinction between the power of Orders as the source of the sanctifying function and the power of jurisdiction as the source of the teaching and ruling functions. Teaching and ruling are not merely juridical functions but are truly sacramental powers necessary to build up the Church. The Explanatory Note to *Lumen gentium* makes it clear that the bishop receives an ontological participation in the three functions by the sacrament of episcopal consecration. The Note also clarifies that function ("*munus*") is not power ("*potestas*"). For the function to become power ordered to action ("*ad actum expedita*"), canonical or juridical determination by the hierarchical authority is required.[96]

Episcopal consecration has the same effect on all the bishops, whether one would be a diocesan pastor, an auxiliary bishop, or a titular bishop. Episcopate itself, which shares in the apostolic ministry, is one without any distinction between the diocesan

[95] See *ORE*, 24 October 2001, p. 6. The *Relatio* cites Popes Pius XII, Paul VI, and John Paul II's address to the Roman Curia on 28 June 1986 (*AAS*, 79 [1987], p. 198) in support of this statement.

[96] See NEP 2, in *AAS*, 57 (1965), p. 73; English translation in FLANNERY I, p. 93.

bishops and titular bishops. It is because of this theological principle that participation of titular bishops in an ecumenical Council with deliberative voting rights is justified.[97] However, in a diocese it is the diocesan bishop who exercises his apostolic function as its proper pastor.

1.4.1 The *tria munera* of the Diocesan Bishop

The Second Vatican Council defines the ministry of the bishop as the teacher, shepherd and priest which is the ministry of Christ himself. The three aspects of this ministry are conferred on a bishop in the episcopal consecration.[98] As vicar of Christ, the bishop reflects Christ to his people, just as the apostles reflected him to their people. Teaching and proclaiming the gospel, sanctifying by priestly actions in the celebration of the sacraments and other acts of divine worship, and serving others by ruling are the three ways in which a bishop partakes in Christ's ministry. All these three aspects are

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[97] The 1917 Code did not say that titular bishops have any right to participate in the Council. Canon 223 said that the titular bishops have a decisive vote if they are called to the Council, and if it is provided for in the decree of convocation of the Council.

[98] LG 21, in *AAS*, 57 (1965), p. 25; English translation in FLANNERY I, p. 29.

The threefold division of the ministry in the Church is a result of historical developments. The earliest Patristic reference to Christ as priest, teacher and king was by Eusebius. Its systematic use in the Church began after the Reformation movement. The German speaking Catholic theologians borrowed it from Lutheran theologians in the 18th century. John Henry Newman also borrowed it from Calvin's *Institutes*. Newman applied it to the Church as well as to its ministry. Pope LEO XIII affirmed the threefold mission of the Church in his encyclical *Satis cognitum* of 1896. This threefold division became popular in the 20th century. Pope PIUS XII incorporated it in his two encyclicals *Mystici corporis* of 1943 and *Mediator Dei* of 1947. From these documents, it passed to the Second Vatican Council. For more on the development of the threefold division of the ministry in the Church, see NICHOLS, *Holy Order*, pp. 127-128; David John WALKOWIAK, *The Diocesan Bishop and the Munus sanctificandi: A Study of Its Legal Development*, Canon Law Studies No. 520, Washington, DC, The Catholic University of America, 1987, pp. 27-39; Joseph H. CREHAN, "Priesthood, Kingship and Prophecy," in *Theological Studies*, 42 (1981), pp. 216-231.

indivisible and intrinsic to episcopal ministry. Negation of any one of them would obscure the mystery of Christ himself.[99]

Although the Second Vatican Council classifies the episcopal ministry into three aspects as teaching, sanctifying and ruling, there is no strict separation among them. In fact, a fundamental unity can be seen among them in the sense that all three constitute one ministry. The directive letter *Mutuae relationes* unambiguously states:

> These, however, are not three separate ministries: since Christ, in the New Law, has united in Himself the three functions of Teacher, Priest and Pastor, there is only one ministry, unique in its origin. That is why the episcopal ministry in its various functions has to be exercised in an indivisible way.
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> If at times circumstances demand that one of these three aspects be given greater prominence, the other two must never be isolated or ignored, lest the fundamental unity of the entire ministry be endangered. The Bishop not only governs, not only sanctifies, not only teaches, but with the help of his priests, he feeds his flock by teaching, sanctifying and ruling it in an unique and indivisible action.[100]

The distinction among the *tria munera* is functional rather than ontological. It is not splitting one entity into three different powers. The sanctifying function is not restricted to mere cultic actions; proclamation of the gospel also has a sanctifying

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[99] See DE CARDEDAL, "Episcopacy: Root and Branch," in MOORE, *Bishops: But What Kind?*, pp. 59, 61.

Karol WOJTYLA, later Pope John Paul II, in his paper delivered to the European Bishops' Symposium in 1975, reminded the bishops to understand and carry out their ministry without forgetting that the People of God too receive the triple functions of Christ. See Karol WOJTYLA, "Bishops as Servants of Faith," in *ITQ*, 43 (1976), pp. 265-266.

[100] "Non autem de tribus ministeriis agitur; sed, cum Christus in Nova Lege tria munera, et Magistri et Litantis et Pastoris, inter se radicitus confuderit, de ingenito uno et unico ministerio agitur. Itaque ministerium episcopale indivisa ratione in variis suis functionibus exerceri debet.

Sin autem res ipsae interdum postulaverint, ut unus ex tribus his aspectibus in evidentiore luce ponatur, numquam tamen reliqui duo separandi vel neglegendi erunt, ne intima totius ministerii ullo modo infirmetur integritas. Episcopus igitur non solum gubernat nec tantum sanctificat nec tantum docet, sed, presbyteris adiuvantibus, una atque indivisa ratione et docendi et santificandi et gubernandi gregem pascit" (SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES and SACRED CONGREGATION FOR BISHOPS, Directives for Mutual Relations between Bishops and Religious in the Church, *Mutuae relationes*, 23 April 1978, in *AAS*, 70 [1978], p. 478; English translation in Austin FLANNERY (gen. ed.), *Vatican Council II: More Post Conciliar Documents*, vol. 2 [=FLANNERY II], New Revised Edition, New York/Dublin, Costello Publishing Company/Dominican Publications, 1982, p. 214).

dimension. Though *Lumen gentium* presents the ruling function as distinct from teaching and sanctifying functions, it is not limited to the sphere of ruling alone. The ruling function extends to the other two functions too. In both the teaching and sanctifying functions there is need to issue disciplinary guidelines and for authoritative leadership. The *Instrumentum laboris* of the Tenth Ordinary Assembly of the Synod of Bishops expresses the unity of the *tria munera* in these words: "The Bishop proclaims the gospel of Hope in word; he celebrates it in the liturgy; he lives and spreads it through his pastoral service."[101] Playing down any one of them or placing them in an order of priority would amount to rending "into pieces the seamless garment of the apostolic ministry."[102] A brief discussion on each of these functions can help us in understanding the fundamental unity among them.

1.4.1.1 The Teaching Function

The Second Vatican Council explains in detail the significance of the teaching function of the bishops.[103] Among the more important duties of the bishop, the Council

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[101] TENTH SYNOD OF BISHOPS, *Instrumentum laboris*, no. 100, *L'évêque, serviteur de l'évangile*, p. 86; The Bishop: Servant of the Gospel, p. 43.

[102] NICHOLS, *Holy Order*, pp. 128-129. See ANCIAUX, *The Episcopate*, p. 53; Barbara Anne CUSACK, "Power of Governance: Theoretical and Practical Considerations," in *CLSA Proceedings,* (1990), p. 191; COOKE, "Fullness of Orders," p. 410; MÖRSDORF, "Bishops' Pastoral Office," p. 209. Here Klaus MÖRSDORF observes that the threefold distinction of the ministry in LG is a thought which it (LG) had superseded with the doctrine of one power.

[103] For more on the teaching function of the diocesan bishop, see Joseph TOBIN, *The Teaching Office of the Diocesan Bishop*, JCD diss., Ottawa, Saint Paul University, 1983; Joseph RATZINGER, "The Bishop as Teacher of the Faith; Address at the March 8-11 Meeting of Pope John Paul II and Vatican Officials with 35 U.S. Bishops," in *Origins*, 18 (23 March 1989), pp. 681-686; Francis G. THOMAS, "The Bishop in His Teaching Office and Those Who Assist Him," in *StC*, 21 (1987), pp. 209-238; also published in *CLSGBI Newsletter*, 73 (1988), pp. 7-17; also see Thomas F. O'MEARA. "The Teaching Office of Bishops in the Ecclesiology of Charles Journet," in *The Jurist,* 49 (1989), pp. 23-47; John P. BOYLE,

considers preaching the gospel as having pride of place. Bishops are called the heralds of the faith ("*fidei praecones*") before they are called authentic teachers ("*doctores authentici*").[104] This signifies the priority of preaching the gospel over doctrinal teaching. As heralds of faith and authentic teachers, they proclaim the same Christ. As heralds, they make new disciples of Christ, and as authentic teachers, they urge their faithful to practice their faith. Because they teach with the authority of Christ, individual bishops who teach in communion with the Roman Pontiff and the college of bishops are to be respected with a religious docility. Though an individual bishop is not infallible in his teaching function, while he proclaims in union with the Roman Pontiff and the college, he teaches the infallible teachings of Christ. The Roman Pontiff is endowed with the charism of infallibility in the very act of defining, under certain conditions, a particular doctrine concerning faith and morals. Infallibility is present in the body of bishops too, when it exercises the supreme teaching function in union with the Roman Pontiff. In an

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"Church Teaching Authority in the 1983 Code," in *The Jurist*, 45 (1985), pp.136-170; Juan I. ARRIETA, "The Active Subject of the Church's Teaching Office," in *StC*, 23 (1989), pp. 243-256 (the entire issue 23/2 of *StC*, is on the teaching function of the Church); Thomas J. GREEN, "The Church's Teaching Mission: Some Aspects of the Normative Role of Episcopal Conferences," in *StC*, 27 (1993), pp. 23-57. For discussion on some canons on the teaching function, see John M. HUELS, "The Ministry of the Divine Word (Canons 756-761)," in *StC*, 23 (1989), pp. 325-344; James H. PROVOST, "Brought Together by the Word of the Living God (Canons 762-772)," in *StC*, 23 (1989), pp. 345-371; WOJTYLA, "Bishops as Servants," pp. 260-273.

[104] See LG 25, in *AAS*, 57 (1965), p. 29; English translation in FLANNERY I, p. 34; CD 12, in *AAS*, 58 (1966), p. 678; English translation in FLANNERY I, p. 289. Barbara A. CUSACK finds the term "authentic" for the Latin "*authentici*" of LG unfortunate because "authentic" has the connotation of "true." In this sense LG 25 means that bishops are true teachers. But the bishops are "authoritative" teachers, teaching with the authority of Christ. See Barbara A. CUSACK, *A Study of the Relationship Between the Diocesan Bishop and Catholic Schools Below the Level of Higher Education in the U.S.: Canons 801-806 of the 1983 Code of Canon Law*, Canon Law Studies No. 525, Washington, DC, The Catholic University of America, 1988, pp. 85-86. It could be noted that LG 25 does illustrate what "authentic teachers" means by adding "*seu auctoritate Christi praediti...*" Thus it can be understood that the bishops are true and authoritative teachers.

ecumenical Council, bishops are teachers and judges in the matters of faith and morals whose definitions are binding in obedience of faith.[105]

The decree *Christus Dominus* further elaborates on the teaching function of the bishops. In exercising his teaching function, the bishop assumes the roles of preacher, catechist and missionary. His teaching extends to those who are already believers in Christ and also to those who have not yet accepted Him as their Saviour. He preaches not only the gospel of Christ, but also teaches truths related to the human person, freedom, family, peace, justice, human society, work and leisure, arts and technology, poverty and wealth, etc. Bishops are to use all the modern means available, including press and media, to proclaim the Christian doctrine. The manner of teaching must be relevant to the needs of the times and its difficulties and problems. The catechetical instruction of children as well as of adults, based on Scripture, tradition, liturgy and the teaching of the Church, finds special mention in *Christus Dominus.*[106]

1.4.1.2 The Sanctifying Function

While speaking of the sanctifying function of the bishops, the Council says that the bishops are invested with the fullness of the sacrament of Orders.[107] They are the

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[105] See LG 25, in *AAS*, 57 (1965), pp. 29-31; English translation in FLANNERY I, pp. 34-36.

[106] See CD 12-14, in *AAS*, 58 (1966), pp. 678-679; English translation in FLANNERY I, pp. 289-291. For detailed norms on the exercise of the teaching function by the bishops, see *Ecclesiae imago*, 55-74, pp. 61-77. *Directory*, pp. 32-41. For more on bishop as a catechist, see Joseph TOBIN, "The Diocesan Bishop as Catechist," in *StC*, 18 (1984) pp. 365-414.

[107] LG does not mention "full power of Order" or "fullness of the power of Order." The expression closest to these is "*plenitudine sacramenti Ordinis insignitus*" found in LG 26. For more on the sanctifying function of the bishop, see WALKOWIAK, *The Diocesan Bishop and Munus sanctificandi.*

stewards of the grace of the supreme priesthood[108] especially in offering the Eucharist or in ensuring that it is offered. It is in preaching the gospel and celebrating the Eucharist under the ministry of the bishop in the communities that the one, holy, catholic and apostolic Church is constituted. The bishops regulate the lawful celebration of the Eucharist and other sacraments.[109] They are called the original (*originarii*) ministers of confirmation. They confer sacred Orders. Moreover, they establish directives concerning the conferral of baptism and celebration of penance.[110] The bishop receives the sanctifying function through episcopal consecration. Although the teaching and the ruling functions have to be exercised in hierarchical communion with the head and the members of the college of bishops, no such condition has been attached to the exercise of the bishop's sanctifying function.[111] Should a bishop exercise his sanctifying function without

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[108] "Priest" and "priesthood" are used in different senses in the documents of the Second Vatican Council. Bernard COOKE says that the Council uses the terms at least in five senses: 1) as a sociological denomination pertaining to those who occupy a certain position and exercise certain functions in a religious group; 2) to refer to a particular cultic function or to those who perform that function; 3) to refer to certain aspects of the pastoral function in the broad sense; 4) to refer to the entire pastoral function which includes teaching and ruling functions; 5) to refer to the sacramental existence of the Church or a group within it. See COOKE, "Fullness of Orders," foot note 5, p. 407.

[109] LG 26 assigns the bishops ministerial or regulatory roles in matters concerning sacraments, but among the sacraments mentioned, it does not list the sacraments of matrimony and anointing of the sick.

[110] See LG 26, in *AAS*, 57 (1965), pp. 31-32; English translation in FLANNERY I, pp. 36-37. LG does not say how the sanctifying function is related to the teaching and the ruling functions. The preaching of the gospel gathers the faithful and the mystery of the Lord's supper is celebrated. However, LG attributes the regulatory role in the matters concerning the Eucharist to the bishops. The disciplinary role of the bishops in matters pertaining to the sacraments is an allusion to their ruling function in the sacramental life of the Church.

[111] NEP 2 recalls the teaching of the tradition that the consecration gives ontological share in the sacred functions. NEP 2 further adds that these functions could be exercised only with a canonical determination by hierarchical authority. However, here there is no mention that the sanctifying function does not need canonical determination to become power ordered to action. See *AAS*, 57 (1965), p. 73; English translation in FLANNERY I, p. 93.

being in hierarchical communion with the head and the members of the college of bishops, his sanctifying acts could be presumed valid.[112]

The decree *Christus Dominus*, while reaffirming the teaching that bishops are the principal dispensers of the mysteries of God, emphasizes the priestly role of the bishop. Enjoying the fullness of the sacrament of Orders, they are appointed to offer gifts and sacrifices for sins. Priests and deacons share in the bishop's sanctifying function. Furthermore, being the principal dispensers of the divine mysteries, bishops have the responsibility of directing, promoting and protecting the entire liturgical life in their dioceses.[113]

1.4.1.3 The Ruling Function

The dogmatic constitution on the Church *Lumen gentium* teaches that the bishops rule their dioceses as vicars and ambassadors of Christ. It also presents the ruling function as distinct from the teaching and the sanctifying functions.[114] The latter two are

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[112] LG 15 assumes the validity of the sanctifying acts of bishops not in communion with the head and the members of the college of bishops. See *AAS*, 57 (1965), p. 19; English translation in FLANNERY I, p. 21. Karl RAHNER raises a question whether the Church can restrict the exercise of the sanctifying function of the bishops to make their acts invalid if bishops exercise them without being in hierarchical communion, though the Church does not say so. The recognition of the validity of certain sacraments in the Orthodox Church leads to the presumption that such acts are valid. This question has also ecumenical implications. See Karl RAHNER, "The Hierarchical Structure of the Church, with Special Reference to the Episcopate," in VORGRIMLER, *Commentary on Vatican II*, vol. I, p. 194.

[113] See CD 15, in *AAS*, 58 (1966), pp. 679-680; English translation in FLANNERY I, pp. 291-292. *Ecclesiae imago*, 75-91, pp. 79-93, has more directives for the exercise of the sanctifying function. *Directory*, pp. 41-49.

[114] William H. ONCLIN defines the ruling function as "the office of direction for the realization of the supernatural common good of the faithful" (ONCLIN, "The Church Society," p. 1).

Unlike the teaching and the sanctifying functions, 1983 Code does not devote a book to the ruling function. It is treated in the entire Code, for example the power of governance in Book One, hierarchical

more significant than the ruling function in the sense that the ruling function is meant to coordinate the exercise of the other two functions. Since ruling function of the bishop is also sacramental in the Church, the bishop acts in the person of Christ not only in sacramental or cultic actions, but also in the ruling and teaching functions. The sacramental character of the ruling function is derived from episcopal consecration. Therefore, consecration, not canonical mission, is the source of the ruling function. *Lumen gentium* points out that bishops rule in two ways. They rule by their counsel, exhortations, and example, as well as by their authority and sacred power. In other words, while the bishop rules by exercising his power as determined by law, he also rules without using his power. This is an indication that the ruling function is broader than the ruling power.[115] Whenever the bishop rules with power, he must act in the spirit of service, for the edification of his people in truth and holiness, keeping before his eyes the example of the Good Shepherd. In exercising his power in his diocese, the bishop is the lawgiver, the judge and the moderator of everything that pertains to the ordering of worship and the apostolate. Furthermore, *Lumen gentium* reminds the bishop that his human experience of weaknesses should help him identify with those who are weak and helpless and be compassionate toward them. A life of prayer, preaching and works of

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constitution in Book Two, temporal goods in Book Five, ecclesiastical sanctions in Book Six, and procedures in Book Seven.

[115] See LG 27, in *AAS*, 57 (1965), pp. 32-33; English translation in FLANNERY I, pp. 38-39. The ruling function is not equivalent to the ruling or governing power. They are related but not identical. Ruling function also encompasses activities which do not involve the ruling power. John M. HUELS illustrates this in his recent article "The Power of Governance and Its Exercise by Lay Persons: A Juridical Approach," in *StC*, 35 (2001), pp. 62-63.

charity are ways of caring for his people and also for those who do not yet belong to his fold.

The decree *Christus Dominus* specifically mentions those who are the object of the bishop's ruling function, namely, the priests, the lay Christian faithful, the separated brethren and the non-Christians. His relationship with his priests should be marked by a genuine solicitude toward them like his sons and friends, and therefore he should be concerned about their spiritual, intellectual and material well-being. The bishop's solicitude should extend also to the faithful of all ages, condition or nationality. Not only should the bishop himself be solicitous of the welfare of the separated brethren in love, he should also urge his faithful to be kind and charitable to them. Moreover, his concern must be directed for the welfare of the non-baptized so that he becomes a witness of Christ's redeeming love to all people.[116]

The Directory *Ecclesiae imago* urges the bishop to be gentle with fortitude in the governance of the diocese. The Directory admonishes the bishops that "certain evils are removed not roughly or harshly or in a tyrannical way, but rather by teaching than by commanding, more by admonition than by threat."[117] At the same time, the Directory cautions the bishop not to be afraid of losing human favour, nor hesitate to act sternly

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[116] See CD 16, in *AAS*, 58 (1966), pp. 680-681; English translation in FLANNERY I, pp. 292-294. *Ecclesiae imago* has a detailed section on how a bishop must exercise his authority. It emphasizes kindness, courtesy, humility, patience, firmness, prudence and solicitude. See *Ecclesiae imago*, 32-38, 92-209, pp. 37-40, 94-212. *Directory*, pp. 21-23, 49-111. The *Instrumentum laboris* has a longer section on the ruling function of the bishop. It includes the personal life style of the bishop, pastoral visitation, diocesan synod, and the administration of funds. His characteristic in the ruling function is repeatedly described as pastoral charity. See TENTH SYNOD OF BISHOPS, *Instrumentum laboris*, nos. 117-126, *L'évêque, serviteur de l'évangile*, pp. 98-106; The Bishop: Servant of the Gospel, pp. 49-52.

[117] *Ecclesiae imago*, 30, p. 35. *Directory*, p. 21.

toward transgressors and the powerful.[118] However, the bishop should be careful not to be a source of embitterment and alienation among his flock. A balanced approach to the way a bishop should exercise his ruling function can be found in the Directory when it states, "[...] in his behaviour a bishop avoids everything which smacks of imperious domination or mere juridical procedures as well as the exaggerated fatherly approach commonly referred to as paternalism."[119] The personal example of the bishop, which *Lumen gentium* called for, is not less significant in the fulfillment of his threefold functions. It is noteworthy that in the Church sanctification takes place not merely by the administration of the sacraments but also by a bishop's personal holiness. A bishop learns by teaching and proves himself a servant of his people by governing justly and equitably.[120]

1.5 FUNCTIONS AND THE POWER ORDERED TO ACTION

The dogmatic constitution *Lumen gentium* makes it abundantly clear that the functions conferred upon a bishop through episcopal consecration are not powers. The Explanatory Note to the constitution explicates, "the word function is deliberately used in preference to powers which can have the sense of power ordered to action."[121] Episcopal consecration effects an ontological sharing by the ordained in the *tria munera* but not in the power. It is obvious that they are not the same.

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[118] See *Ecclesiae imago*, 30, p. 35. *Directory*, p. 21.

[119] *Ecclesiae imago*, 36, pp. 39-40. *Directory*, p. 23.

[120] See ALESANDRO, "Pastoral Opportunities," p. 106.

[121] "Consulto adhibetur vocabulum *munerum*, non vero *potestatum*, quia haec ultima vox de potestate *ad actum expedita* intelligi posset" (NEP 2, in *AAS*, 57 [1965], p. 73; English translation in FLANNERY I, p. 93).

1.5.1 Distinction Between Function and Power

Although according to *Lumen gentium* function and power are not synonymous, it does not explain the differences between them. It only states that the functions become exercisable power with canonical mission or juridical determination.[122]

It must be noted here that the Council documents are not consistent in the use of the term *function*. They use the term in singular and plural forms.[123] Whenever the use is in singular form, function is seen equated with the entire mission. The title of the Decree on the Pastoral Office of Bishops is one such example[124] in which, "*munus*" encompasses all the three functions of the bishops. There are other similar uses in the documents.[125]

When the plural form is used, functions are equated with the three traditional functions of teaching, sanctifying and ruling. Episcopal consecration conferring these three functions on bishops is an example. In the same sense, *Lumen gentium* deals with the three functions individually. We have already discussed them.

Furthermore, the Council also refers to *functions* within each of the three individual functions. They are multiple activities or tasks pertaining to each of the three

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[122] Considering that the canonical mission turns functions into power ordered to action, one shortcoming of the distinction between function and power is that the bishop's office becomes abstract as if it could exist without the relationship to the diocese for which a bishop is consecrated. See David N. POWER, "The Basis for Official Ministry in the Church," in *The Jurist*, 41(1981), p. 315.

[123] Rik TORFS cites a similar use in the 1983 Code and refers to it as "function" at the macro level and "functions" at the micro level. "*Pastorale munus*" is a function at the macro level, and "*tria-munera*" are three functions at the micro level. See Rik TORFS "Auctoritas-potestas-jurisdictio-facultas-officium-munus: A Conceptual Analysis," in *Concilium*, 197/3 (1988), pp. 69-71.

[124] The title in Latin reads: "Decretum de pastorali episcoporum munere in Ecclesia." See *AAS*, 58 (1966), p. 673. FLANNERY I translates "*munus*" as "office," instead of "function." See FLANNERY I, p. 283.

[125] See, for example, LG 22, 24, 28, in *AAS*, 57 (1965), pp. 26, 29, 33; English translation in FLANNERY I, pp. 30, 33, 40.

functions. For example, administering baptism, reserving and distributing the Eucharist, assisting and blessing marriages, etc., are cited as a deacon's functions.[126] However, when the Council explains that the functions are rendered into power ordered to action, it refers to the three functions of a bishop, and not to the multiple tasks within those individual functions.

Canonists have attempted to explain the difference between functions and power. William H. Onclin describes functions in terms of various social activities necessary for the realization of the end of a society, the common good. However, he restricts the notion of functions to legislative, administrative and judicial. According to Onclin, persons or institutions are the constituted powers fulfilling these functions. These persons and institutions can have several organs to ensure the concrete exercise of functions.[127] This distinction seems to be deficient from the viewpoint of the Council which teaches that teaching and sanctifying functions too become powers. Klaus Mörsdorf on the other hand describes function as what is to be done, and power as the active principle or the authority exercised in the fulfillment of a function.[128] According to this description every

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[126] See SC 26, in *AAS*, 56 (1964), p. 107; English translation in FLANNERY I, p. 128. Similarly, for instance, ruling function has various tasks on law making, promulgating them, executing those laws with administrative means, etc.

[127] See Willy ONCLIN, "L'organisation des pouvoirs dans l'Eglise," in BIBLIOTHEQUE DE LA FACULTÉ DE DROIT CANONIQUE DE PARIS, *Actes du Congrès de droit canonique, cinquantenaire de la Faculté de droit canonique, Paris 22-26 avril 1947*, Paris, Letouzey & Ané, 1950, p. 370; ID., "The Church Society," p. 9.

[128] See Klaus MÖRSDORF "Munus regendi et potestas iurisdictionis," in PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO [=PCCICR], *Acta conventus internationalis canonistarum, Romae diebus 20-25 maii 1968 celebrati*, In Civitate Vaticana, Typis polyglottis Vaticanis, 1970, p. 199.

James CUNEO raises a series of questions about power. He says that various discussions or statements about power take the basic definition of power for granted. Some of his questions are: Is power a function? Is it a personal capacity to fulfil a function? In what does the power consist? What is the being

function requires power for its exercise. Without power there is no function. This does seem to correspond to what the Council taught on transforming functions into power. The description of power as capacity to bring about, influence, sustain or change a human community or as the actual carrying out of these activities also seems to be in harmony with the Council, provided the activities described here pertain to the life and the mission of the Church.[129]

In this context, it must be noted that while the three functions become powers, each of these individual functions has its own multiple tasks or functions. Some of them require power to exercise them, others do not. Functions are wider than the acts of power in the Church.[130] For example, baptizing someone does not involve the power of governance. However, c. 775, §1 requires the diocesan bishop to issue norms concerning the catechetical matters in accordance with the provisions of the Apostolic See. This is a function requiring the exercise of power. The same canon holds the diocesan bishop responsible for making available appropriate means of catechesis within his diocese. He has to even prepare a catechism if that seems suitable. Moreover, he has to promote and co-ordinate catechetical initiatives. These are some functions which do not specify any act of the exercise of power.[131]

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of power? Does Vatican II mean that power for all the three functions comes only from ordination? See CUNEO, "Power of Jurisdiction," footnote 32, pp. 197-198.

[129] See POWER, "Basis for Official Ministry," p. 329.

[130] See John M. HUELS, "The Ministry of the Divine Word (Canons 756-761)," in *StC*, 23 (1989), p. 62.

[131] The final chapter of this study will identify the functions of the bishop which require him to exercise executive power in the Code.

1.5.2 Canonical Mission/Juridical Determination

As already seen above, *Lumen gentium* teaches that the ontological participation in the threefold functions received in the episcopal consecration is not exercisable power in the case of the teaching and ruling functions. This is reiterated by its Explanatory Note. Canonical mission or juridical determination from a competent hierarchical authority empowers the bishop to exercise the powers of teaching and ruling.[132] In other words, both the ontological participation in the functions and the canonical mission assigning the bishop to a diocese or to another office render the functions into exercisable power.[133]

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[132] With canonical mission, two functions are rendered into exercisable power. How these two powers correspond to three functions still remains a question. If the sanctifying function does not require canonical mission for it to be exercisable power, in what way it is conferred differently than the other two in the episcopal consecration is also unclear. It is also not clear whether the power authorized by canonical mission or power ready to go into action is power of jurisdiction. It can also be asked whether the canonical mission is a condition for the validity of the act of power conferred by episcopal consecration. See RAHNER, "The Hierarchical Structure of the Church," p. 194.

[133] In view of the theology of the episcopate, the practice of consecrating titular bishops, especially those bishops who are neither auxiliaries nor coadjutors, raises a question. The problem centres around the fact that titular bishops have no community assigned to them to exercise the functions they receive in the consecration. Karl RAHNER considers that the curial officials ordained to the episcopate possess pastoral responsibility for the whole Church in virtue of their membership of the episcopal college. Another opinion is that the auxiliaries, coadjutor and retired bishops need not be assigned titular sees since they exercise pastoral responsibility to a community under the local Ordinary. However, there are other opinions which suggest that to consecrate titular bishops, who are neither auxiliaries nor coadjutors, is undermining the episcopate in its *communio* aspect. In these cases the sacramental ministry of a bishop becomes a mere honorary and administrative title. Titular sees to which they are assigned are often deserted villages. This is more so in the case of apostolic nuncios, apostolic delegates, masters of ceremonies, secretaries of commissions, prelates of the Roman Congregations who are said to be functionaries of the Pope. Episcopacy seems to be a means merely to enhance their dignity. The participation of such bishops in the ecumenical councils cannot be a justified on the basis of their honorary title as bishops. See Richard R. GAILLARDETZ, "An Ecclesiology of Communion and Ecclesiastical Structures," in *Église et théologie*, 24 (1993), pp. 185-186; Karl RAHNER, *Über das Ius divinum des Episkopats*, pp. 113-114, cited in ANCIAUX, *The Episcopate*, p. 72; RAHNER, "On the Divine Right of the Episcopate," in RAHNER-RATZINGER, *Episcopate and the Primacy*, p. 122; MOORMAN, "The Ministry," p. 92; BOUYER, "Bishops in the Church," p. 37; DE CARDEDAL, "Episcopacy: Root and Branch," pp. 60, 64, 66.

The requirement that an auxiliary bishop or a coadjutor bishop should be appointed episcopal vicars or vicar general (CD 26; c. 406 §2) seems to indicate that titular bishops even if they are auxiliaries have no ordinary powers in virtue of episcopal consecration and the canonical mission. Their power depends on the power of the local Ordinary. This seems to strengthen the contention that having titular bishops undermines the teaching on episcopacy.

Joseph Lécuyer explains that in the episcopal consecration the bishop receives personal power, but this is not sufficient for the exercise of the functions. The personal power received by the bishop needs a concrete community upon whom to exercise it. It is canonical mission which enables the bishop to exercise his personal, supernatural power over the community.[134] According to Cuneo, the role of canonical mission is to confer relational power. He maintains that canonical mission constitutes a relationship between the bishop and a particular community of the Christian faithful. This relationship invests the bishop with the power to exercise his episcopal ministry. The purpose of constituting this relationship is to affirm the principle of communion in the Church which is the basis of the bishop's relationship to the college of bishops and its head, and to the universal Church.[135]

Wilhelm Bertrams proposes two ways of understanding canonical mission.[136] First, in a broad sense, canonical mission is an act of the authority of the Church recognizing or accepting the bishop as a member of the college of bishops, and granting permission for his legitimate consecration. In this way, the bishop is incorporated into the college of bishops. Second, in a strict sense, canonical mission is an act by which persons and issues over which the bishop exercises his power are determined. Through this act

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[134] See Joseph LÉCUYER, "Orientations présentes de la théologie de l'Épiscopat," in Yves M. J. CONGAR and Bernard D. DUPUY (eds.), *L'Épiscopat et l'Église universelle*, Paris, Les Éditions du Cerf, 1962, pp. 803-811.

[135] See CUNEO, "Power of Jurisdiction," p. 206. This article explores in depth the relational aspect of the canonical mission.

[136] Bertrams does not seem to make a distinction between hierarchiacal communion and canonical mission.

the passive subject of the power is constituted. The assignment of a diocese or an office to a newly consecrated bishop implies such determination.[137]

Klaus Mörsdorf situates canonical mission in the different gradations of episcopal ministry which are the work of Church's constitutive power. Although the substance of each ministry is of divine law, episcopal offices are given concrete existence by competent ecclesiastical authority except for papacy and episcopal college. Canonical mission in this context is the instrumental cause of bestowing power. Its causality is instrumental because the ecclesiastical authority conferring it grants nothing of its own. It merely passes on the gift of Christ to exercise the *tria munera* and determines the concrete parameters of the episcopal ministry.[138]

1.5.3 Canonical Possession

After the consecration of a bishop and his appointment as the pastor of a diocese, the bishop cannot exercise his power until he takes canonical possession of that diocese. Obviously, this means that the consecration must precede taking canonical possession of the diocese. The 1983 Code presents three circumstances of bishops taking canonical possession within the stipulated period of time unless legitimately impeded. First, if a

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[137] See BERTRAMS, "De quaestione circa originem potestatis jurisdictionis," pp. 458-476; ID., *De relatione inter episcopatum et primatum*, pp. 57-90; ID., "De potestatis episcopalis constitutione et determinatione in Ecclesia, sacramento salutis hominis," in *Periodica*, 60 (1971), pp. 353-414. ID., "De subiecto supremae potestatis Ecclesiae," in *Periodica*, 54 (1965), pp. 173-232. A brief summary of Bertram's theory on canonical mission can be found in WARNHOLTZ, *Nature of Episcopal Office*, pp. 140-148. WARNHOLTZ considers BERTRAMS' theory as a good combination of the theological, canonical and philosophical aspects of the doctrine on the pastoral function, and also more balanced than any other opinion.

[138] See MÖRSDORF, "Bishops' Pastoral Office," p. 208.

presbyter is appointed as a diocesan bishop, he must receive episcopal consecration within three months from the receipt of the apostolic letter of appointment and take canonical possession of the diocese within four months of the receipt of the same letter. Second, if one who is appointed diocesan bishop is already in the episcopate, he must take canonical possession within two months from the receipt of the apostolic letter.[139] If a diocesan bishop is transferred from one diocese to be the diocesan bishop of another diocese, he retains the powers of a diocesan administrator in the diocese from which he is being transferred until he takes possession of the new diocese. It means that he cannot exercise his power as the diocesan bishop in his new diocese until he takes canonical possession of it.[140] Third, if a diocese has a coadjutor bishop, he becomes the diocesan bishop immediately when the See becomes vacant, provided he legitimately takes canonical possession of it.[141]

Canonical possession takes place when the bishop personally or through a proxy shows the apostolic letter of his appointment to the college of consulters in the diocese to which he is appointed. The chancellor of the curia must be present and record the event. If a diocese is newly erected, canonical possession takes place when the bishop communicates his apostolic letter of appointment to the clergy and the faithful present in

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[139] See cc. 379; 382, §§1, 2.

[140] See c. 418.

[141] See c. 409, §1. An episcopal See can become vacant by the death of the bishop, by resignation accepted by the Supreme Pontiff, by transfer, and by deprivation notified to the bishop. See c. 416.

the cathedral church. In this case, the senior priest among those present must record the event.[142]

1.5.4 The Characteristics of Episcopal Power

Power in the Church is sacred because of its origin, content, finality and the manner in which it is conferred. Power is also personal because the consecration and the canonical mission are conferred on the person of the bishop. Its juridical and moral responsibility affect only the conscience of the diocesan bishop in an immediate and non-transferable way.[143] *Lumen gentium* describes this sacred power (*sacra potestas*) as proper, ordinary and immediate although its exercise is ultimately regulated by the supreme authority of the Church.[144]

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[142] See c. 382, §3.

[143] See Julián HERRANZ CASADO, "The Personal Power of Governance of the Diocesan Bishop," in *Communicationes*, 20 (1988), p. 291.

[144] LG 27, in *AAS*, 57 (1965), p. 32; English translation in FLANNERY I, p. 38.

These three characteristics were also attributed to the papal power by the First Vatican Council. Bismarck challenged this teaching of the council with his seven propositions. He argued that the Pope is a monarch and that the bishops' power is subsumed by the papal power. German bishops responded to Bismarck denying that the Pope is a monarch, and affirmed the personal responsibility of the bishops. Pius IX unconditionally approved what the German bishops had stated about the power of the bishops. The text of Bismarck's propositions was published in *Deutscher Reichs-Anzeiger und königlich preussischer Staats-Anzeiger*, no. 304 (Berlin), 29 December 1874, as cited in LOGAN, "The 1875 Statement," footnote 4, p. 286; the statement of the German bishops in response to Bismarck's propositions originally appeared in *AkK*, 27 (1875), pp. 344-348. Its German version is reprinted in Olivier ROUSSEAU, "La vraie valeur de l'Épiscopat dans l'Église d'après d'importants documents de 1875," in CONGAR-DUPUY, *L'Épiscopat et l'Église universelle*, pp. 729-734. Its English translation is found in LOGAN, "The 1875 Statement," pp. 287-292; the approval of Pius IX given on 2 March 1875 to the statement of the German bishops in his Apostolic Letter *Mirabilis illa constantia* was published in original Latin in *AkK*, 27 (1875), pp. 465-466. Its Latin version is reprinted in ROUSSEAU, "La vraie valeur de l'Épiscopat dans l'Église," pp. 734-735. Its English translation is found in LOGAN, "The 1875 Statement," pp. 293-294.

A brief summary of these events is found in KLOPPENBURG, *Ecclesiology of Vatican II*, pp. 178-182. In spite of these developments, RAHNER observes that the compatibility of the papal and the episcopal power is not immediately evident in theory or in practice, because it is difficult to point out which are the

1.5.4.1 Proper

The First Vatican Council declared that episcopal jurisdiction is ordinary and immediate. The Council did not say that it is also proper.[145] The 1917 Code reiterated the same teaching by affirming that the power of bishops is ordinary and immediate. Bishops had the right and duty to govern their dioceses with legislative, judicial and coercive power, in spiritual and temporal matters. The Code did not say that their power is also proper.[146]

The dogmatic constitution *Lumen gentium*, however, taught that the power of the bishop is also proper. It is called proper because it is exercised in his own name and not in the name of or on behalf of someone else. Naturally, this means that the bishops are not the vicars of the Roman Pontiff in their dioceses. They are vicars of Christ.[147] The power of the bishops is not a participation in the power of Peter and his successors. Rather it is a participation in the power conferred by Christ upon the apostolic college and transmitted to its successor, the episcopal college. Ontologically, therefore, the power

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inalienable and irrevocable rights of the bishop vis-à-vis the supreme power of the Pope. See RAHNER, "On the Divine Right of the Episcopate," pp. 66-68.

[145] See DENZ., 3061, p. 598; DEFERRARI, *Sources of Catholic Dogma*, 1828, p. 454.

[146] Canons 329, §1, 334, §1, 335, §1. Though the Code did not say that bishops' power is proper, other papal documents prior to the Code and the Second Vatican Council had said so. See LEO XIII, Letter to the Archbishops and the Bishops of Bavaria, *Officio sanctissimo*, 22 December 1887, in *ASS*, 20 (1887), p. 264; ID., Encyclical, *Satis cognitum*, 29 June 1896, in *ASS*, 28 (1895-1896), p. 723; English translation in Claudia CARLEN (comp.), *The Papal Encyclicals 1878-1903*, Wilmington, NC, McGrath Publishing Company, 1981, pp. 387-404; PIUS XII, Encyclical, *Mystici corporis*, 29 June 1943, in *AAS*, 35 (1943), pp. 211-212; English translation in Claudia CARLEN (comp.), *The Papal Encyclicals 1939-1958*, [Wilmington, NC], McGrath Publishing Company, 1981, pp. 37-63.

[147] LG 18 and 27 call the pope and the bishops respectively the vicars of Christ. Canon 331 of *CIC 83* states the same about the Pope but c. 381 does not state it in the case of bishops. Howevwe, c. 178 of *CCEO* states it concerning the eparchial bishops.

of bishops is derived from sacramental consecration and not from the Supreme Pontiff. Just as the apostles had exercised their power under the authority of Peter, so also the bishops exercise their power under the authority of the Supreme Pontiff.[148]

1.5.4.2 Ordinary

Lumen gentium does not define the nature of ordinary power. The 1983 Code, however, states that the ordinary power is that which is joined to a certain office by the law itself (c. 131, §1). Accordingly, the power of the bishop is ordinary because it is attached to his office by law.[149] It is not a power delegated by mere human authority. Since the episcopal office is stable, the power attached to the office is also stable. As such it extends to all aspects of the pastoral function of the bishop in his diocese, as the teacher of faith, the priest of worship and the minister of governance.

1.5.4.3 Immediate

The immediacy of the power of the bishop consists in the fact that he can exercise his power directly over the people and the things which are under his

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[148] See CD 2, 11, in *AAS*, 58 (1966), pp. 673-674, 677-678; English translation in FLANNERY I, pp. 283-284, 288-289.

[149] Canon 967, §1 says that the cardinals have the faculty to hear confessions of the faithful everywhere in the world by the law itself. Canon 131, §1 says that the ordinary power is attached to an office by law itself. This raises a question whether the cardinalate is an office, if not, whether a cardinal's faculty to hear confessions everywhere is ordinary power. These faculties cannot be ordinary faculties because cardinalate is not an office. It is debatable whether they are habitual faculties because c. 132, §1 applies the prescripts of delegated power to habitual faculties. Faculties of the cardinals are not delegated, rather they are granted by law itself. This seems to be an exceptional case of this nature in the 1983 Code. If they are to be considered ordinary faculties, it could be seen as an example of the Roman Pontiff, as the supreme legislator, granting and circumscribing the exercise of the ordinary power granted to persons in the cardinalate without changing the law itself.

jurisdiction. In other words, the bishop can exercise his power at any moment over any matter without any intermediary. This does not mean, however, that a bishop is to act without the cooperation of other persons and structures in the Church provided by the ecclesiastical law for this very purpose. These persons and structures assist the bishop in the exercise of his ministry. For the good of the diocese bishops need to utilise the gifts and talents of all Christian faithful including vicars, pastors, and all those in leadership roles in the particular Church.[150]

1.6 TWO DIMENSIONS OF THE ONE SACRED POWER

Lumen gentium does not categorize power in the Church as power of Order and jurisdiction. The unity of the sacred powers in the Church is most obvious in the college of bishops. In fact, they are inseparable in the episcopal college. The mission of the Church cannot be conceived either without the power of Orders or without the power of jurisdiction or governance. Both are in a way constitutive of the Church. Their oneness makes the means of sanctification efficacious in the Church. It is the same power that is conferred on the bishops.

With regard to individual bishops in their dioceses, the traditional doctrine viewed the power of Orders as power over the Eucharistic body of Christ, and the power of jurisdiction as power over the Mystical Body of Christ.[151] While acts of worship were

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[150] See HERRANZ CASADO, "Personal Power of Governance," p. 293; Thomas J. GREEN, "The Pastoral Governance Role of the Diocesan Bishop: Foundations, Scope and Limitations," in *The Jurist*, 49 (1989), pp. 483.

[151] See NICHOLS, *Holy Order*, p. 127.

associated with the power of Orders, the teaching and the ruling functions were linked with the power of jurisdiction. When *Lumen gentium* stated that episcopal consecration is the source of the *tria munera* of a bishop, it eliminated the traditional distinction between the power of Orders conferred through episcopal consecration and the power of jurisdiction conferred by the canonical mission. This was evident in *Lumen gentium*'s statement that the bishops govern their dioceses "also by the authority and sacred power" without mentioning the power of jurisdiction.[152] The context of these words of the Council is the ruling function of the bishop. As a result the traditional distinction between the two powers is not found in the conciliar documents although the word *jurisdiction* is found.[153] From the conciliar understanding of the sacred power one can say that the sacred power is a participation in the authority of Christ who transmitted it to the apostolic college. It is communicated to the members of the college of bishops in the Church

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The origin of the distinction of powers in the Latin Church dates back to the 12th century. The distinction became so divisive that there seemed to be two different ministries of Order and jurisdiction. Later this duality took the form of three distinct functions of teaching, sanctifying and ruling. The Second Vatican Council broke away from this separation of powers to embrace the patristic understanding of one power. For more on the evolution of the division of powers in the Church, see MÖRSDORF, "Bishops' Pastoral Office," footnote 16, p. 207; BERTRAMS, *Papacy, Episcopacy, Collegiality*, pp. 49-54; Kazimierz NASILOWSKI, "De distinctione potestatis ordinis et iurisdictionis a primis Ecclesiae saeculis usque ad exeuntem Decretistarum periodum peracta," in *Prawo Kanoniczne* [=*PK*], 19/1-2 (1976), pp. 13-48; Seamus RYAN, "Episcopal Consecration: Trent to Vatican II," in *ITQ*, 33 (1966), pp. 133-150; CUSACK, "Power of Governance," pp. 187-190.

[152] "[...] etiam auctoritate et sacra potestate [...]" (LG 27, in *AAS*, 57 [1965], p. 32; English translation in FLANNERY I, p. 38).

[153] See, for example, LG 45, in *AAS*, 57 (1965), p. 51; English translation in FLANNERY I, p. 69; NEP 2, in *AAS*, 57 (1965), p. 73; English translation in FLANNERY I, p. 94; CD 35, in *AAS*, 58 (1966), pp. 691; English translation in FLANNERY I, p. 308. For more references, see OCHOA, *Index verborum Concilii Vaticani*, p. 274.

Karl RAHNER views the Council's teaching on one power difficult to reconcile with the traditional teaching of two powers. Nonetheless, he finds the sacramental founding of the entire ministry of the bishop to be incalculably significant. See Karl RAHNER, "Observations on the Episcopacy in the Light of Vatican II," in *Concilium*, 3/1 (1965), pp. 11.

through the sacrament of Orders. It does not belong to the Christian community at large nor is it a regulatory power in the hands of those who are endowed with it to control those who do not have any share in it.[154] Ecclesiastical power is entirely at the service of the mission of the Church. In this sense, power of Order and power of governance can be considered as two complementary dimensions of the one sacred power in carrying out the mission of the Church.[155]

Despite the Council's teaching, there is no unanimity of opinion concerning the unity or duality of the one sacred power. The 1983 Code makes explicit references to the power of order and governance.[156] The dispute over the issue continues in theological and canonical circles.[157] We will attempt to explore these two dimensions very briefly.

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[154] See AYMANS, "Ecclesiological Implications," p. 87.

[155] A question that is still discussed is whether the power of governance is equivalent to sacred power. HERRANZ CASADO is of the opinion that though the power of the bishop is clear in c. 381, §1, the Code did not address the issue because the questions of doctrinal nature are yet to be resolved. See HERRANZ CASADO, "Personal Power of Governance," footnote 5, p. 291.

Though the 1983 Code refers to power of governance, in ecclesiastical documents the power of jurisdiction continues to be mentioned. In his recent address to the bishops of Brazil, Pope JOHN PAUL II mentioned about the sacramental origin of power of jurisdiction. See JOHN PAUL II, *Ad limina* address to the Bishops of Brazil, "Pastors Should be Men of Faith, United, Capable of Facing the Secularized Society," in *ORE*, 18 September 2002, p. 8.

[156] See, for example, cc. 274, §1; 292; 966, §1 1333, §1,1°;1338, §2 for power of Order, and cc. 129, §1; 135, §1; 436, §3; 596, §2; 1319, §1 for power of governance.

[157] Some authors defend the unity of power in the Church. For instance, see Jean GALOT, *Theology of the Priesthood* (trans. Roger BADUCELLI), San Francisco, CA, Ignatius Press, 1984, p. 186; CUSACK, "Power of Governance," pp. 190-191.

Some others claim that the 1983 Code contradicts the Conciliar teaching on power. Therefore, the "absurd cleavage" of two powers remains in c. 129. See AYMANS, "Ecclesiological Implications," pp. 87, 92; Jean BEYER, "La nouvelle définition de la 'Potestas regiminis'," in *L'Année canonique*, 24 (1980), pp. 53-67; ID., "De natura potestatis regiminis seu iurisdictionis recte in Codice renovato enuntianda," in *Periodica*, 71 (1982), pp. 93-145; CUNEO, "Power of Jurisdiction," pp. 199, 203; John M. HUELS, "Another Look at Lay Jurisdiction," in *The Jurist*, 41 (1981), pp. 62-63; CUSACK, "Power of Governance," p. 190. See also BERTRAMS, *Papacy, Episcopacy, Collegiality*. p. 84; ID., "De potestatis episcopalis exercitio," pp. 445-481; ID., "De potestatis episcopalis constitutione et determinatione," pp. 353-414; ID., "De quaestione circa originem potestatis jurisdictionis," pp. 458-476. ID., "De relatione inter officium episcopale et

1.6.1 Power of Orders

The traditional understanding of the power of Orders, received in the sacramental ordination or consecration,[158] identifies the power of sanctifying with the power exercised within the context of divine worship, especially the Eucharist, the celebration of the sacraments and sacramentals. The indelible character imprinted on the recipient by the reception of the sacrament of Orders is the ontological source of this power. In the conciliar understanding of the one sacred power, the power of Orders is not exclusively linked to the sanctifying functions, rather it includes also the teaching and the governing functions. The sanctifying function does not simply mean priestly and cultic acts in contrast to the ruling and the teaching functions. Rather, the power of Orders

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primatiale," in *Periodica*, 50 (1961), pp. 3-29; ID., "De constitutione Ecclesiae simul charismatica et institutionali," in *Periodica.*, 57 (1968), pp. 281-330.

Furthermore, there are also arguments to suggest that the Council and the Code ambiguously present episcopal ministry both as unified and divisible. See CUNEO, "Power of Jurisdiction," pp. 194-197, 198-199.

Klaus MÖRSDORF observes that the two powers overlap with relation to the three functions of teaching, sanctifying and ruling. See Klaus MÖRSDORF, "De sacra potestate," in *Apollinaris*, 40 (1967), p. 53; ID., "Ecclesiastical Authority," in Karl RAHNER (ed.), *Sacramentum mundi*, vol. 2, London, Burns & Oates, 1968, pp. 133-139; ID., "Munus regendi et potestas jurisdictionis," pp. 199-211.

While stating that the attribute "pastoral" refers to all the three powers, CFC explicitly mentions teaching, sanctifying and governing powers. See CFC, Directory for Life and Ministry, p. 67.

In spite of the Council's stance on one power in the Church, the debate continues about the number of powers as indicated by Adriano CELEGHIN, who reviews about 148 authors who are theologians and canonists having different views on the sacred power. The book has 49 pages of bibliography. See Adriano CELEGHIN, *Origine e natura della potestas sacra: posizioni postconciliari*, Brescia, Morcelliana, 1987.

[158] Canon 210 of *CIC 17* stated "Power of orders committed to a person or attached to an office by a legitimate ecclesiastical Superior cannot be passed on to others, unless this is expressly allowed by law or by the indult of grant." This seems to suggest that non-sacramental transmission of the power of Order was possible. *CIC 83* does not have such a canon.

ontologically participates in the exercise of bishop's *tria munera* conferred in the sacrament of episcopal consecration.[159]

We have already seen that the bishop shares in the power of the college of bishops which in turn shares in the power of the college of apostles. We also know that the bishop has the power to teach, sanctify and govern. One would presume that these powers are from the college of bishops. However, in the words of *Lumen gentium*, the episcopal college succeeds the apostolic college in teaching and pastoral authority. *Lumen gentium* does not mention the sanctifying power of the college of bishops.[160] Interestingly, it does mention the ministry of the apostles as teaching, sanctifying and ruling.[161]

1.6.2 Power of Governance or Jurisdiction

Traditionally, power of governance has been described as the public ecclesiastical power.[162] If it is a public power in the Church, its conferral by the pope through canonical

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[159] See CUNEO, "Power of Jurisdiction," pp. 189, 195, 200.

[160] Cf. LG 22, in *AAS*, 57 (1965), p. 26; English translation in FLANNERY I, p. 30.

[161] "[...] predicare Regnum Dei [...] sanctificarent et gubernarent [...]" (LG 19, in *AAS*, 57 [1965], p. 22; English translation in FLANNERY I, p. 26).

[162] Ecclesiastical jurisdiction is defined as "the active potency, spiritual and public, given by Christ or the Church by injunction or canonical mission, whereby a man authoritatively acts as a principal second cause in directing the faithful to their supernatural end" (Bernard DEUTSCH, *Jurisdiction of Pastors in the External Forum*, Canon Law Studies No. 378, Washington, DC, The Catholic University of America, 1957, p. 129). Thus, every power, which fulfills this concept, including faculty or authority, is jurisdiction. ONCLIN succinctly describes jurisdictional power as the power of direction demanded by the *munus pascendi seu regendi*. See ONCLIN, "The Church Society," p. 1.

CUNEO describes this power in terms of a moral relationship established by canonical mission between the person who rules and those who are ruled. See Cuneo, "Power of Jurisdiction," p. 189; see also Francisco X. WERNZ and P. Pietri VIDAL, *Ius canonicum*, vol. II, Romae, Apud aedes universitatis Gregorianae, 1928, pp. 58-59, 66.

John M. HUELS defines the power of governance as "the lawfully granted, public power necessary for validly performing a juridical act that is legislative, executive, or judicial" (HUELS, "The Power of Governance," pp. 65-66).

mission would make the bishop ruler of a specific territory of the Church in pope's name.[163]

Canon 196 of 1917 Code specifically named power of jurisdiction. However, there was no definition of it in the Code. Jurisdiction was conferred by canonical mission, except in the case of papal election where the pope received his power of governance (jurisdiction) by divine right immediately upon his election and acceptance.[164] While the source of the sanctifying function was ordination, the source of teaching and ruling functions was jurisdiction. Furthermore, the teaching power (*potestas magisterii*) was also classified as a species under the power of jurisdiction. This was because of the sub-division of jurisdiction into genus and species. As genus, jurisdiction referred to both teaching and ruling functions. The two species of jurisdiction referred to teaching and ruling powers. Nevertheless, this caused ambiguity and confusion.[165] Evidently, sacred Orders were not considered the source of the power of governance or jurisdiction, rather the pope was the source of the bishops' power of jurisdiction.

An analysis of some definitions of jurisdiction can be found in DEUTSCH, *Jurisdiction of Pastors*, pp. 124-128. Bernard COOKE suggests that the origin of the term "jurisdiction" grew out of the legal function of passing judgement, especially in Roman law. Ecclesiastical use broadened its meaning to the more general sense of power to govern. Jurisdiction is intrinsically linked to office. See COOKE, "Fullness of Orders," footnote 25, p. 413. For more on the power of governance, see BOWERS, *Episcopal Power of Governance*; LÉCUYER, "Orientations présentes de la théologie," pp. 803-811.

[163] For Bernard COOKE, governing is not the heart and the source of Church's ministry. Some governance may help in Church's ministry to saving Word and Spirit of God. The Church attains its goals through other authority and other ministry, and not through institutionalized functions. He cites correct understanding of the faith, communicating it accurately in teaching, and witnessing to it authentically in sacrament as "other authority and other ministry." See COOK, "Fullness of Orders," p. 414.

[164] Cfr. cc. 109, 196, 219, *CIC 17.*

[165] See CUNEO, "Power of Jurisdiction," p. 195.

The Second Vatican Council did not treat the power of jurisdiction. It presented the bishop's ministry in terms of three functions, transformed into power ordered to action with canonical mission. With the renewed conciliar notion of functions and power, jurisdiction or governance no longer simply means the power to rule. In its scope jurisdiction extends to the whole range of ecclesial ministry of teaching, sanctifying and governing.[166]

Canon 129 of 1983 Code while referring to the power of governance equates it with the power of jurisdiction.[167] Though its definition is not found in the Code, c. 381, §1 sets the bishop's power in the context of his pastoral function. Canon 135, §1 classifies the power of governance as legislative, judicial and executive. Since our focus is on the executive power, we will not deal with the legislative and judicial powers. Our next chapter will treat the nature of the executive power.

CONCLUSION

In this chapter on the nature of the power of governance of the diocesan bishop, we have approached the issue from three perspectives. First, we looked at the diocesan bishop as the pastor of his diocese. Though bishops in general are pastors in the Church, the conciliar and the post conciliar documents including the 1983 Code significantly present the diocesan bishop as the pastor of the diocese. Though the episcopal consecration makes one a bishop, one becomes the pastor of a diocese with the canonical

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[166] See ibid., p. 200.

[167] In the revision process, the term "governance" was preferred to "jurisdiction" to be in accordance with history and assertions in LG. Moreover, "jurisdiction," commonly and in civil legislations, refers to judicial power. See *Communicationes*, 8 (1976), p. 234.

mission. The image of pastor is appropriate for the diocesan bishop because just as a shepherd leads the flock to pasture and nourishment, the bishop leads his people to spiritual nourishment and salvation.

As the pastor in his diocese, the bishop exercises not merely the ruling function, rather he is the pastor in his entire pastoral function. In addition to ruling with power, the bishop also teaches and sanctifies with power.

From the image of the pastor, the bishop's function is characterized as pastoral. As a term, "pastoral" came to be widely used after the Second Vatican Council. Though there is no specific explanation of what "pastoral" means in the context of the episcopal ministry, various papal pronouncements and magisterial teachings depict what "pastoral" is. When we apply this interpretation of "pastoral" to a bishop's function, we can perceive that a bishop has to exercise his ministry for the salvation of the faithful in accordance with the doctrine and law of the Church. It is also evident from the magisterial documents that a bishop's pastoral function implies dual responsibility to the Christian faithful and non-Christians as well. However, only the faithful are subject to bishop's exercise of power.

In his episcopal mission to the faithful, the bishop exercises his one ministry though traditionally it has been categorized into three aspects of teaching, sanctifying and ruling functions. The three aspects are intrinsically one. Each of these functions are interrelated with the other two. While the bishop uses his power for exercising each of his three functions, not all of the multiple tasks within each of those functions require power.

Therefore, the realm of a bishop's functions is broader than his power. Teaching, sanctifying and ruling takes place even without placing a specific act of power.

Second, we situated the bishop's ministry in his diocese within the context of the college of bishops. In fact, the principle of collegiality circumscribes the diocesan bishop's power. Before a bishop is constituted a diocesan bishop, he is a member of the college of bishops. When he becomes the pastor of a diocese it is the power of the college that the bishop shares in. Therefore, the principle of collegiality entrusts to the bishop the dual responsibility of the good of the particular Church as well as of the universal Church. While the diocesan bishop has ordinary, proper and immediate power in his diocese, he exercises it also as a member of the college for the good of the entire Church. Consequently, he is obliged to exercise his ministry in accordance with the doctrine and the prescripts of the universal Church. Exercising collegiality can take two modes. Bishops can act collegially when they gather together in an ecumenical Council convened or approved by the head of the college, or when they are called to act collegially as they are spread throughout the world.

From the principle of collegiality unfolds the principle of subsidiarity. Just as the principle of collegiality holds the bishop responsible for the good of his particular diocese as well as of the universal Church, subsidiarity holds the bishop as well as the clergy, the faithful, the institutions, offices responsible for the good of the particular Church. Accordingly, the bishop is not required to exercise all of his power personally.

Third, we surveyed the notion of power in the Church. The Second Vatican Council traced power in the Church to the sacrament of episcopal consecration. Although

it did away with the traditional distinction of power as the power of Order and the power of jurisdiction, specific references in the 1983 Code to the power of Order and power of jurisdiction make it obvious that this distinction remains in the Church. In the light of these two sources we can say that the bishop shepherds his diocese with the one sacred power which has two dimensions. It is one power with two dimensions because it cannot be denied that both are linked to each other in the pastoral mission of the bishop and the Church. The efficacy of the pastoral mission of the bishop depends on both the power of Order and the power jurisdiction.

The 1983 Code distinguishes the power of jurisdiction into legislative, judicial and executive. Since the first two are not the objects of our study, our next chapter will focus specifically on the nature of executive power.

CHAPTER TWO

THE NATURE AND SCOPE OF EXECUTIVE POWER

INTRODUCTION

The 1917 Code distinguished the power of governance or jurisdiction on the basis of its functions into legislative, judicial and coercive.[1] This distinction was based on the civil law concept of the division of power promoted by the political theories of John Locke and Baron de Montesquieu. According to their theories, although the power of the state is one with legislative, judicial and executive branches, distinct persons or organs of the state exclusively exercise these three powers in order to prevent all possible abuse in their exercise. This concept of power is adopted by democratic states.[2]

The civil law concept of threefold power has become part of the Church's governing structures. However, the civil concept of different organs exercising power does not apply to power in the Church. In civil societies, people themselves are generally believed to be the source of the power, whereas in the Church God himself is the source of power.[3] Pope Paul VI emphasized this radical difference when he warned those involved in the revision of the Code against incorporating legal concepts and juridic order

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[1] See cc. 196; 197; 201, §§2, 3; see also DEUTSCH, *Jurisdiction of Pastors*, pp. 118-124.

[2] See ONCLIN, "The Church Society," pp. 10-11 ; ID, "L'organisation des pouvoirs," p. 370 ; cf. Francisco J. URRUTIA, "Administrative Power in the Church According to the *Code of Canon Law*," in *StC*, 20 (1986), p. 271.

[3] See HERRANZ CASADO, "Personal Power of Governance," p. 298.

modelled on civil law and principles into canon law. He insisted on crafting a law proper to the unique nature of the Church.[4]

The 1983 Code makes a threefold distinction within the power of governance or jurisdiction in the Church, namely legislative, judicial and executive. The Code itself does not provide any definition of these aspects of the power of governance. Executive power of the diocesan bishop being the focus of our study, it is important that we explore the possibility of identifying the nature and scope of executive power in general. We propose to do this in the following manner.

First, because the theories of Locke and Montesquieu had influenced the development of concepts and principles related to the power of governance and its exercise within the newly emerging democratic states, we consider it necessary to briefly analyse those theories in order to understand the impact they might have had on the ecclesiastical legal system.

Second, the terminology used by the new Code in relation to executive power certainly lacks clarity and consistency. This causes confusion and makes it difficult to define or describe it clearly. The important question in this matter is whether the notions of executive and administrative power are identical in the Code or are they different. Resolution of this issue would help us in our discussion toward defining executive power.

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[4] See PAUL VI, Address to the Second International Congress of Canonists, 17 September 1973, in *The Pope Speaks*, 18 (1973), p. 283.

Third, several important principles govern the possession and exercise of the executive power of governance. We consider it necessary to have a brief review of these principles in order to determine the different modes of its legitimate exercise.

Fourth, the acts of executive power are either of a general or singular nature. And these are juridic acts. A clear grasp of the nature and elements of a juridic act would be necessary to understand how executive power is legitimately exercised. Therefore, a brief analysis of the nature and elements of a juridic act is essential in this study.

2.1 THE THEORY OF SEPARATION OF POWERS AND EXECUTIVE POWER

The threefold division of the power of governance into legislative, executive and judicial is generally accepted in civil law and civil government. This distinction has its foundation in the theory of separation of powers, that is, different organs of the state exercising different political functions. This theory emerged on the European political scene in the 17th century and was consolidated in the 18th century in reaction to monarchic absolutism of the times. Since its propagation by John Locke (1632-1704) and Baron de Montesquieu (1689-1755), the principle of separation of powers has remained an important constitutive element of every democratic state as a means to prevent abuse of power and to safeguard the freedom of its citizens.[5]

[5] Article 16 of the 1789 French declaration on human rights and the rights of citizens stated: "Every society, in which the guarantee of rights is not ensured, and the separation of powers is not determined, lacks the constitution." See Pereira MENAUT, *Lecciones de teoría constitucional*, Madrid, 1987, p. 113, cited in Eduardo LABANDEIRA, "La distincion de poderes y la potestad ejecutiva," in *IC*, 28 (1988), p. 85. The Declaration of Rights in the Massachusetts' Constitution of 1780 contained the principle in these words: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men." See Massachusetts' Bill of

Although the origin of this theory is disputed, it was first proposed as a political principle by John B. Locke.[6] In his *The Second Treatise on Civil Government*, Locke warned of the danger of abuse of power when the same person or organ possesses and exercises all power in the state. When that happens, the laws would be established and executed by the same authority, and consequently there would be no check against their abuse or arbitrary application. Therefore, he suggested the separation of the legislative and executive powers. For Locke, judicial power is a part of executive power because both are applications of law to specific cases. He also proposed, what he termed, "federative power" for dealing with external affairs, war and peace, and treatises. Locke advocated unification of this power with executive power.[7]

According to Locke's conceptualization of the separation of powers, in a constitutional monarchy, the monarch would hold the pre-eminent place. The parliament elected by the people would be the legislature exercising legislative power which would be supreme because it is the source of laws. Application of laws would be done by a permanent executive branch which would be competent to apply law in purely executive or judicial contexts. In the absence of law for particular situations, the monarch would intervene.

Rights, Article XXX (1780), in COMMAGER, *Documents of American History*, Appleton-Century-Crofts, 1949, p. 107, cited in William O. DOUGLAS, *The Anatomy of Liberty*, New York, Trident Press, 1963, pp. 53-54.

[6] See DOUGLAS, *The Anatomy of Liberty*, p. 53; TORFS, "A Conceptual Analysis," in *Concilium*, 197/3 (1988), p. 66.

[7] See LABANDEIRA, "La distinción de poderes," p. 86; Franz NEUMANN, "Editor's Introduction," in Baron de MONTESQUIEU (trans. Thomas NUGENT), *The Spirit of the Laws*, New York and London, Hafner Publishing Company, 1966, pp. lvi-lvii.

According to Locke, the powers thus divided are not equal. The legislative power holds the supreme place among them. In case of any emergency it can assume executive and federative powers. If confidence in the executive branch is lost, it can be dismissed; similarly, if confidence in the legislature is lost, it can be dissolved. Should the monarch turn tyrannical, the people can dethrone him as well.[8]

With a careful scrutiny of Locke's theory, one could identify four divisions of power, namely legislative, executive, federative and the one possessed by the people to free themselves from tyrannical authority and thus safeguard their liberty and property. However, a clear demarcation between the legislative, executive and judicial powers cannot be found in Locke's scheme of powers. In fact it was Montesquieu who, influenced by Locke, attempted to clarify the distinction and balance among the three powers.

Montesquieu studied the British governmental system in reaction to French monarchic absolutism and formulated his own theory on the separation of powers. He presented it in his book *De l'esprit des lois* published in 1748.[9]

The central concern underlying Montesquieu's theory was to prevent abuse of power, defend the independence of the three powers from one another, and to find a balance among them so that power could control power. He expressed this in the

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[8] See NEUMANN, "Editor's Introduction," in MONTESQUIEU, *The Spirit of the Laws*, footnotes 62, 63, pp. lv-lvi; James G. CLAPP, "Locke, John," in Paul EDWARDS (ed.), *The Encyclopedia of Philosophy*, vol. 4, New York/London, The Macmillan Company & The Free Press/Collier-Macmillan Limited, 1967, p. 500.

[9] Baron de MONTESQUIEU, "De l'esprit des lois," in M. André MASSON (ed.), *Oeuvres complètes de Montesquieu*, tome I, Paris, Les éditions Nagel, 1950, pp. 1-430; English translation in MONTESQUIEU, *The Spirit of the Laws*.

following words: "To prevent this abuse of power, it is necessary from the very nature of things that power should be a check to power."[10] According to his view, ideologies and beliefs by themselves do not control power, rather only a counter power can control power. In his distinction among legislative, executive and judicial powers, legislative power enacts, amends or abrogates existing laws. Executive power has two dimensions, namely external executive power and internal executive power. The external executive power deals with peace and war, diplomatic relations, public security and protection from external threats of aggression. The internal executive power, also known as judicial power, punishes criminals, and resolves disputes between individuals. This power is to be exercised by tribunals constituted of persons selected from among the people in accord with the norms of law.[11]

Montesquieu argues that the three powers should be not only legally and organizationally but also socially distinct and separate. This implies that three distinct social groups would hold and exercise each power. For Montesquieu, all three powers are subject to social and political changes. He postulates this principle in order to safeguard the sovereignty which is secure in the combination of all three powers. The exercise of each power must be subordinate to their common agreement.[12] If the legislative and executive powers are possessed by the same authority, there is a distinct possibility for deprivation of liberty and security of the people. The situation would be similar if the

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[10] MONTESQUIEU, *The Spirit of the Laws*, p. 150.

[11] See ibid., pp. 151, 153.

[12] See NEUMANN, "Editor's Introduction," in MONTESQUIEU, *The Spirit of the Laws*, p. lviii.

judiciary is not separated from legislative and executive powers. With the combination of judicial and legislative powers, the judge in a case, also as the legislator, might arbitrarily apply laws. If judicial and executive powers are merged, the judge himself or herself could become a tyrant.[13] Therefore, in a democratic state the legislature would have the right to supervise the execution of laws.[14] This theory promoted by Montesquieu is generally adopted by most democratic states around the world.

2.1.1 Separation of Powers in Civil States

The two most common systems of governance in democratic states consist of either parliamentary or presidential constitutions. In the parliamentary system, the relationship between the legislative and the executive branches is one of reciprocal control. The parliament elects the leader of the government which may collapse for a variety of reasons. The weakness of this system is the possibility of having an overly dominating legislature and constant change in government due to internal political and partisan strife.[15]

The presidential system adopts the principle of separation of powers rather restrictively. In some way the executive tends to dominate in this system. Although

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[13] See MONTESQUIEU, *The Spirit of the Laws*, p. 152.

[14] See ibid., pp. 157-158.

[15] See LABANDEIRA, "La distinción de poderes," pp. 87-88.

legislative and executive powers may be assigned to different organs, there may be matters common to both.[16]

In real situations of both these systems of governance, it appears that the balance between the powers proposed by Montesquieu is not applied because that balance somehow gets concentrated in the legislative or in the executive branch. Locke's theory seems more realistic in democratic systems because of subordination of the executive to the legislative branch or vice versa. Legislative and executive powers exercised in a democratic state to promote and protect the freedom and well-being of its citizens may be described briefly as follows:

2.1.1.1 Legislative Power

In a democratic state legislative power is exercised in a collegial manner. With its exercise at intermittent periods and by providing for certain situations, it promotes and protects the rights and freedoms of its citizens. Because it expresses the will of the people, it is supreme and in principle holds everyone as equal. It is rational in the sense that it is expected not to go beyond the dictates of reason, thus excluding any possibility of abuse and arbitrary use of power.[17]

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[16] LABANDEIRA cites the constitution of USA and the current constitution of France as examples. See ibid., p. 88.

[17] See ibid., p. 89.

2.1.1.2 Executive Power

Executive power is exercised either by an individual (a president, governor or prefect, etc.), or by a college (council of ministers, board of directors, etc.). Since its primary objective is to provide for the public good in accordance with law, it is necessarily subordinate to the legislature. By its very definition the function of executive power is to apply the law. Unlike legislative power, executive power is constantly exercised to meet ongoing social needs.[18]

2.1.1.3 Judicial Power

Although Locke and Montesquieu considered judicial power as an aspect of executive power itself,[19] in today's civil states they are not identical. First, executive power is used in implementing laws over citizens in general. Judicial power is exercised over individuals. Second, the judiciary exercises judicial power independent of legislative and executive organs. The judiciary consists of persons from the body of people so that the accused has confidence in the person who renders judgement which may concern punishing criminals or resolving a dispute.[20] Third, while executive power pertains to

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[18] See ibid., pp. 89-90.

[19] Locke holds judicial power at par with executive power because both are applications of law. See NEUMANN, "Editor's Introduction," in MONTESQUIEU, *The Spirit of the Laws*, pp. lvi-lvii. For Montesquieu, judicial power being internal executive power, there remain only two powers, legislative and executive: "[...], the judiciary is in some measure next to nothing: there remain, therefore, only two" (MONTESQUIEU, *The Spirit of the Laws*, p. 156).

[20] See ibid., p. 153.

administrative implementation of laws, the judiciary applies laws by rendering judgements which conform to the letter of law.[21]

The separation of powers, which checks abuse of power and protects the freedom of citizens, is not admitted in the Church because its nature and mission are radically different from that of the state. The Church respects and is committed to the protection of human rights and freedoms. Nonetheless, its primary goal is to lead the faithful to their eternal salvation.

2.1.2 Significance of the Distinction of Powers in the Church

In the Church the Supreme Authority exercises fullness of power over the universal Church and the bishops over their particular Churches. The unitary nature of their power makes it indivisible and inseparable. Nevertheless, a separation or distinction among the functions involved in the Church's power is possible. Thus, one can speak of the distinction of functions and not the division of power. While c. 335, §1 of the 1917 Code distinguished jurisdiction into legislative, judicial and coercive power, c. 135, §1 of the 1983 Code distinguishes among legislative, executive and judicial power. It is significant that these canons make a distinction rather than a division. The threefold categorization of power is not an attempt to divide it, rather to determine the competencies of different persons and offices.[22]

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[21] See NEUMANN, "Editor's Introduction," in ibid., pp. li;

[22] See LABANDEIRA, "La distincion de poderes," pp. 90-91.

This distinction of functions is significant from at least two perspectives. First, it determines the authorities competent to exercise a particular function. For instance, in a diocese, the bishop alone carries out the legislative function. While the executive function can be exercised also by vicars general, episcopal vicars, and their delegates, the judicial function is exercised by the judicial vicars and judges.

Second, the authorities which deal with controversies arising from the exercise of these functions are not the same. Any arbitrary exercise of the executive power can be challenged through hierarchical or administrative recourse, whereas disputes of judicial nature can be contested in ordinary tribunals. Therefore, to protect both superiors and subjects, and to avoid any suspicion of arbitrariness in ecclesial governance, the threefold distinction of power seems appropriate and helpful.[23]

2.2 EXECUTIVE POWER IN THE CHURCH

The concept of ecclesial power in its varied aspects has evolved over several centuries. Different terms were used in various Church documents to indicate the three categories of the power of governance. Although this classification is presented principally in the 1917 and 1983 Codes, the issue had been dealt with either directly or indirectly also in other documents. This section is an attempt to trace the evolution of the concept of executive power in the Church.

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[23] Although 1917 Code had sufficient provision for the protection of rights of the faithful through the judicial process, the possibility for challenging the acts of hierarchical superiors was not so clear. In order to fill this *lacuna*, the acts of executive power need to be distinguished from those of legislative and judicial.

2.2.1 Before the First Vatican Council

In his apostolic constitution *Ad assiduas*, promulgated in 1755, Pope Benedict XIV spoke of the power of the Church by stating that Christ conferred on the Church the power not only to direct the faithful through advice and persuasion, but also to command through laws and to impose appropriate penalties on the delinquent.[24] He referred in that constitution to another constitution, *Licet iuxta doctrinam* of John XXII, dated 23 October 1327, which had condemned Marsilio of Padua for denying coercive power in the Church.[25]

Ad assiduas was followed by the dogmatic constitution *Auctorem fidei* of Pius VI in 1794, which merely repeated what Benedict XIV had affirmed about the power of the Church.[26] Both documents explicitly mentioned legislative and coercive power, but the coercive power seems to have been restricted to the imposition of penalties.

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[24] "[...] ut collatam a Christo Domino et Salvatore nostro Ecclesiae suae potestatem, non solum dirigendi per consilia et suasiones, sed etiam iubendi per leges, ac devios, contumacesque exteriore iudicio et salubribus poenis, coercendi atque cogendi, labefactet, convellat, et prorsus eliminet" (BENEDICT XIV, Apostolic Constitution, *Ad assiduas,* 4 March 1755, in BENEDICTI XIV, *Bullarium*, tom. III, pars secunda, Prati, In typographia Aldina, 1847, p. 225).

[25] See BENEDICT XIV, *Ad assiduas,* pp. 225-226. A summary of JOHN XXII, Constitution, *Licet iuxta doctrinam*, 23 October 1327, is found in Petri GASPARRI (ed.), *Codicis iuris canonici fontes*, Concilia generalia-Romani Pontifices usque ad annum 1745, vol. I, Romae, Typis polyglottis Vaticanis, 1926, pp. 36-37. The constitution cites denial of coercive power to the Church as the fifth error of Marsilio of Padua. The effect of this denial resulted in its affirmation in the 1917 Code.

[26] See PIUS VI, Dogmatic Constitution, *Auctorem fidei*, 28 August 1794, in *Bullarii romani continuatio*, constitutiones, litteras in forma brevi, epistolas ad principes viros, et alios, atque allocutiones complectens, tomus sextus, pars III, Pii VI continens pontificatus ab anno XV usque ad annum XX, Prati, In typographia Aldina, 1849, p. 2704.

2.2.2 First Vatican Council

The first schema of the constitution on the Church of Christ, *De Ecclesia Christi*, prepared for the First Vatican Council, affirmed the power of jurisdiction in the internal and external fora, and made a distinction among legislative, judicial and coercive power.[27] Canon 12 of the schema reaffirmed this threefold distinction.[28] The revised schema of the same constitution also retained the threefold distinction of power.[29] Because the Council's focus was primarily on the papal primacy and infallibility, the threefold distinction of the power of jurisdiction did not receive further attention in its final documents. The Council could not complete its work because of historical, political events in Italy.

2.2.3 Papal Teaching after the First Vatican Council

Further references to the threefold power came from Pope Leo XIII in his two encyclicals, *Immortale Dei* of 1885 and *Satis cognitum* of 1896. In the first encyclical,

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[27] "Cum vero ecclesiae potestas alia sit et dicatur ordinis, alia iurisdictionis: de hac altera speciatim docemus, eam non solum esse fori interni et sacramentalis; sed etiam fori externi ac publici, absolutam atque omnio plenam, nimirum legiferam, iudiciariam, et coercitivam" (FIRST VATICAN COUNCIL, *Primum schema constitutionis De Ecclesia Christi cum animadversionibus in illud a patribus scripto exhibitis* [=*De Ecclesia Christi*], caput X, *De Ecclesiae potestate*, in Joannes Dominicus MANSI, *Sacrorum conciliorum nova et amplissima collectio*, Parisiis, H. Welter, vol. 51, 1926, col. 543).

[28] "Si quis dixerit, a Christo Domino et Salvatore nostro ecclesiae suae collatam tantum fuisse potestatem dirigendi per consilia et suasiones, non vero etiam iubendi per leges, ac devios contumacesque exteriori iudicio ac salubribus poenis coercendi atque cogendi; anathema sit" (*De Ecclesia Christi*, vol. 51, col. 552). Notes 18, 19, and 20 for the chapter *De Ecclesiae potestate* of the schema provide an explanation for the threefold division into sanctifying, teaching, and ruling, and for the source of power of ordination and jurisdiction. See *De Ecclesia Christi*, vol. 51, col. 583-589. Notes on c. 12 are found in ibid., col. 625-626.

[29] "Si quis dixerit, hanc potestatem esse tantum directivam, non vero legislativam, iudiciariam et coercitivam; anathema sit" (*De Ecclesia Christi*, vol. 53, col. 316; also see col. 314). As a footnote to this statement, the schema cited Pope BENEDICT XIV, *Ad assiduas* of 4 March 1755.

Leo XIII stated that Christ gave to his apostles the authority to make laws and also the twofold right to judge from which followed the right to punish.[30] Eleven years later, in his second encyclical, while speaking of the jurisdiction of the office of Peter, Leo XIII justified the necessity of the power to command, to forbid and to judge in order to fulfill effectively the responsibilities entailed in that office. According to the Pope, the words of Jesus addressed to Peter entrusting to him the keys to bind and loose on earth were the source of the threefold power.[31]

2.2.4 Distinction of Jurisdiction in the 1917 Code

Canon 201, §§2-3 of the 1917 Code made a twofold distinction in the power of governance or jurisdiction, namely voluntary (non-judicial) and judicial (non-voluntary). This distinction was based on persons over whom the power was exercised. Judicial power was regarded as non-voluntary because it was exercised over persons against their will.

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[30] "Revera Iesus Christus Apostolis suis libera mandata dedit in sacra, adiuncta tum ferendarum legum veri nominis facultate, tum gemina, quae hinc consequitur, iudicandi puniendique potestate" (LEO XIII, Encyclical Letter on Christian Constitution of States, *Immortale Dei*, 1 November 1885, in *ASS*, 18 [1885], p. 165); English translation in CARLEN, *The Papal Encyclicals: 1878-1903*, no. 11, p. 109. The paragraph number is from the translation, as there are no paragraph numbers cited in the Latin original.

[31] "Igitur Petri est sustinere Ecclesiam tuerique non solubili compage connexam ac firmam. Tantum vero explere munus qui possit sine potestate iubendi, vetandi, iudicandi, quae vere proprieque *iurisdictio* dicitur? [...] Ligandi solvendique translata locutio ius ferendarum legum, item iudicandi vindicandique designat potestatem" (LEO XIII, *Satis cognitum*, in *ASS*, 28 (1895-1896), pp. 726, 727); English translation in CARLEN, *The Papal Encyclicals 1878-1903*, no. 12, p. 397.

The interest of our study concerns voluntary power, as it includes all non-judicial power which would consist of legislative and coercive power, although such a distinction of voluntary power was not made until the promulgation of the 1917 Code.[32]

The distinction between voluntary and non-voluntary powers, although present in several canons of the 1917 Code, was not at all clear. For example, when recourse was made to a higher authority, the "voluntary power" (*voluntaria potestas*) of the subordinate authority, whether ordinary or delegated, was not suspended.[33] However, in the case of judicial jurisdiction (non-voluntary power), legitimate appeal to the Apostolic See suspended the exercise of judicial power of the subordinate judge.[34]

Canon 205, §1 of the 1917 Code is another example of this confusion. This concerns collegial (*collegialiter*) or joint (*in solidum*) delegation of jurisdiction. The canon stated the presumption in favour of joint (*in solidum*) delegation in voluntary (non-judicial) matters, and collegial (*collegialiter)* in judicial (non-voluntary) matters. Nowhere in the Code was any indication of what was a strictly voluntary (non-judicial) or a non-voluntary (judicial) matter.

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[32] Canon 335, §1 of the 1917 Code distinguishes a bishop's power of jurisdiction as legislative, judicial and coercive. It was not classified in the Code as voluntary and non-voluntary within this context.

It was disputed whether legislative power was contentious or voluntary. Many agreed that law making is of contentious jurisdiction. Others like F. X. WERNZ and J. D'ANNIBALE were of the opinion that legislative power was of voluntary jurisdiction. In civil terms, legislative activity is neither contentious nor voluntary. BALDO of Ubaldi (1327-1400), a commentator in the middle ages, doctor of both civil and canon law, distinguished jurisdiction as contentious and voluntary. He explained that making laws and statutes was statutory (*statutaria*). See ONCLIN, "The Church Society," p. 10.

[33] See c. 204, *CIC 17*. Canon 1048 of *CIC 17* was one of its practical applications.

[34] See cc. 1569, §2; 1725,2°, 5°, *CIC 17*.

In the threefold categorisation of jurisdiction, the 1917 Code in c. 335, §1 stated that the bishop had legislative, judicial and coercive power for the governance of his diocese in spiritual and temporal matters.[35] The functions of his coercive power were described as the right/obligation to impose ecclesiastical penalties, either spiritual or temporal, on contumacious and obstinate delinquents.[36] Charles Augustine explains that these functions were to ensure respect for legislative and judicial powers, and to render them truly efficacious.[37]

Furthermore, there was no clear indication in the 1917 Code of the competent authority to exercise coercive power. The Code seemed to attribute it to those who had legislative and judicial power. A superior having the power to enact laws or to impose precepts could attach penalties to a law or precept. The relationship between legislative and coercive power was further reinforced by cc. 2221 and 2222 of the 1917 Code. Those who had judicial power also could exercise coercive power by imposing penalties

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[35] "Ius ipsis et officium est gubernandi diocesim tum in spiritualibus tum temporalibus cum potestate legislativa, iudiciaria, coactiva ad normam sacrorum canonum exercenda" (c. 335, §1, *CIC 17*). None of the three encyclicals we referred to above appears among the sources cited for this canon. See *Codex iuris canonici*, Pii X Pontificis maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus, praefatione, fontium annotatione et indice analytico-alphabetico ab emo. Pietro Card. Gasparri auctus, Typis polyglottis Vaticanis, 1933, p. 89. The latest encyclical letter cited is that of Pope LEO XIII, *Cum multa*, 8 December 1882 (*ASS*, 15 [1898], pp. 241-246; English translation in CARLEN, *The Papal Encyclicals 1878-1903*, pp. 75-79), which does not seem to imply the three fold distinction of the power of jurisdiction. It says, however, that in their jurisdiction bishops have the power of leading, supporting, or correcting, and generally of deciding in such matters as may seem to affect religion. See *ASS*, 15 (1898), p. 243. CARLEN, *The Papal Encyclicals 1878-1903*, p. 77.

[36] See c. 2214, §1, *CIC 17*.

[37] See Charles AUGUSTINE, *A Commentary on the New Code of Canon Law*, vol. 1, Sixth Revised Edition, St. Louis/London, B. Herder Book Co., 1936, pp. 198-199. Rendering legislative and judiciary power efficacious is not merely a matter of imposing penalties. Therefore, these functions do not bring out the real scope of that power. Therefore, it must consist of more than merely penal provisions.

established by law.[38] When a law had no sanction attached for its violation, the legitimate superior could punish the violator with a just penalty even without any prior threat of it if the violation was scandalous or grave.[39] However, a vicar general was excluded from inflicting penalties without a special mandate (c. 2220, §2).[40] Nestled in these relationships was a category of power not only to impose penalties but also to establish penalties outside of a judicial procedure.[41] This unnamed category did not cleanly fit into legislative, judicial or coercive powers, and the Code did not clarify its nature.

The task of clarifying this ambiguity was left to noted commentators of the Code. To the threefold powers found in the 1917 Code, Philip Maroto adds a fourth one which he calls executive power for governance or administration.[42] Its exercise could be voluntary (non-judicial) and contentious (judicial). The voluntary jurisdiction includes power exercised in the external forum and in the internal forum except in the sacramental forum. The power in the external forum could be legislative, voluntary (*potestas*

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[38] See c. 2220, §1, *CIC 17*.

[39] See c. 2222, §1, *CIC 17*.

[40] According to c. 368 of *CIC 17*, the vicar general had the jurisdiction of the bishop except in those matters reserved to the bishop or when a special mandate was required from the bishop. However, he did not have legislative power because c. 362 said that the bishop is the sole legislator even in the diocesan synod. He does not have judicial power also because according to c. 1573, the vicar general could not be the judicial vicar. Therefore, according to c. 1572, although judicial power could be delegated or ordinary, the vicar general could not exercise it in either case. If he could not inflict penalties, the question is what power of jurisdiction did he have? Obviously, coercive power must have more content than its name signifies.

[41] See Piero G. MARCUZZI, "Distinzione della 'Potestas regiminis' in legislativa, esecutiva e giudiziaria," in *Salesianum*, 43 (1981), p. 278.

[42] "[...] hinc in iurisdictione comprehenduntur potestates legislativa, iudicialis, coercitiva, exequutiva sive quoad gubernationem sive quoad administrationem" (Philippo MAROTO, *Institutiones iuris canonici ad normam novi codicis*, tomus I, Editio tertia diligentius recognita, Romae, Apud commentarium pro Religiosis, 1921, p. 662).

gratiosa), and administrative or governing power (*potestas administrativa, gubernativa*). Moreover, under voluntary (*gratiosa*) power there is another power that is not legislative. It is not judicial either because it is not exercised in a strictly judicial manner. Nevertheless, it includes contentious or criminal cases. For Maroto this power is distinct from the traditional threefold powers, and he adds it to executive power.[43]

Alfredo Ottaviani makes a threefold distinction in the notion of jurisdiction, namely legislative, judicial and executive. He subdivides executive power into the power to govern people according to law, to administer goods and property for the benefit of the society, and to coerce those unwilling to abide by the law or to punish the guilty.[44]

Highlighting the inadequacies of 1917 Code in its c. 335, §1 with regard to the notion and scope of coercive power, Ottaviani explains that the legislator did not intend to offer an adequate distinction of the bishop's power of jurisdiction. The canon merely identified the coercive aspect of the bishop's executive power because during the

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[43] See MAROTO, *Institutiones iuris canonici*, pp. 862-864. This power is voluntary because in MAROTO's opinion voluntary power should not be understood in a strict sense to imply its exercise only over those who are willing. For him voluntary simply means a power that is non-judicial.

[44] "Haec potestas dividi solet, ut supra notavimus [...], in gubernativam, quae est potestas circa personarum regimen ad normam legum; in administrativam, quae est potestas curandi seu administrandi bona societatis; in coactivam, quae est potestas vim physicam adhibendi in socios ad finem consequendum, poenis quoque, si oportuerit, irrogatis" (Alaphridus OTTAVIANI, *Institutiones iuris publici Ecclesiastici*, vol. I, Ecclesiae constitutio socialis et potestas, editio quarta, emendata et aucta, [Vaticanum], Typis polyglottis Vaticanis, 1958, p. 95. See also pp. 71, 74, 96-112).

In footnote 42, p. 75, OTTAVIANI describes the books of the Code as an indication of how the Church exercises its jurisdiction. Book II, *de personis*, deals with those over whom power is exercised; Book III, *de rebus* is concerned with goods for whose use and administration norms are enacted; and Book IV, *de poenis*, deals with sanctions and penalties.

preceding centuries the coercive power of the Church was questioned.[45] However, the powers to govern and to administer were not denied.[46]

Severino Ragazzini repeats substantially Ottaviani's views on legislative, executive and judicial powers. However, for him legislative power would be either constitutive or ordinary. Constitutive legislative power establishes the general organization of the Church; ordinary legislative power issues rules or norms ultimately meant for the attainment of people's eternal salvation.[47] Executive power includes also coercive non-judicial power. In his view, the one who is competent to exercise judicial power can also exercise executive power and vice versa.[48]

While noting the categories of voluntary and judicial power found in the Code as inadequate, Gomar Michiels understands ecclesiastical jurisdiction in the external forum as legislative and executive. Legislative power issues objective norms, and executive power urges the observance of norms of law. Furthermore, executive power could be administrative, judicial and coercive ("*subdividitur in potestatem administrativam*

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[45] LABANDEIRA, "La distinción de poderes," p. 90, mentions Marsilio of Padua, Juan of Janduno, Jansenists as those who questioned the coercive power of the Church. The preoccupation with coercive power in the Church was such that in dealing with executive power in the thinking of Pope Benedict XIV, Tarcisio BERTONE, in his work, speaks only of coercive power. See Tarcisio BERTONE, *Il governo della Chiesa nel pensiero di Benedetto XIV (1740-1758)*, Biblioteca di Scienze religiose 21, Roma, Libreria Ateneo Salesiano, 1977, pp. 151-168.

[46] See OTTAVIANI, *Institutiones iuris ecclesiastici*, vol. I, p. 75. John J. COUGHLIN observes that the division of powers in *CIC 17* was not technical but descriptive. See John J. COUGHLIN, "The Historical Development and Current Procedural Norms of Administrative Recourse to the Apostolic Signatura," in *Periodica*, 90 (2001), p. 479.

[47] See Severino M. RAGAZZINI, *La potestà nella Chiesa*, Quadro storico-giuridico del diritto costituzionale canonico, Roma, Pontificia Universitas Lateranense, 1963, pp. 190-191.

[48] See RAGAZZINI, *La potestà nella Chiesa*, pp. 196-204; 217-221.

praecisive sumptam, judiciariam et coercitivam"). Michiels considers this distinction adequate to fulfill all functions entailed in the notion of jurisdiction.[49]

Felix Cappello, in addition to his treatment of the bishop's legislative, judicial and coercive powers, also deals with a fourth power, namely, administrative which is based on c. 336, §§1-2. Some of the functions specified in this canon urge the observance of ecclesiastical laws, vigilance against the abuse of ecclesiastical discipline, implementation of pious wills, and preservation of the purity of faith and morals.[50]

2.2.5 Post 1917 Code

In his encyclical *Quas primas*, through which the feast of Christ the King was established, Pope Pius XI alluded to the powers of Christ as lawgiver and judge. For Pius XI, Christ's kingship would not be comprehensible without these powers. Christ's judicial power consisted in rewarding and punishing people. Obedience to the rule of Christ and imposition of sanctions belonged to the realm of executive power.[51] The newly used term "executive" did not differ in its scope from that of coercive power.

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[49] See Gomarus MICHIELS, *De potestate ordinaria et delegata, commentarius tituli V libri II Codicis juris canonici*, Parisiis-Tornaci-Romae-Neo Eboraci, Typis societatis S. Joannis Evangelistae, Desclée et Socii, 1964, pp. 86-88 ; see also, pp. 224-230.

[50] See Felix M. CAPPELLO, *Summa iuris canonici in usum scholarum*, vol. I, editio quarta accurate recognita, Romae, Apud aedes universitatis Gregorianae, 1945, pp. 329-332. Some other canonists made a similar distinctions of jurisdiction. However, administration pertained only to temporal matters on the basis of c. 1519. See John A. ABBO and Jerome D. HANNAN, *The Sacred Canons*, vol. 1, St. Louis, B. Herder Book Co., 1952, p. 362; AUGUSTINE, *A Commentary on the New Code*, vol. II, p. 354.

[51] "[...] Christum Iesum hominibus datum esse utique Redemptorem, cui fidant, at una simul legislatorem, cui obediant. [...] Iudiciariam vero potestatem sibi a Patre attributam [...] At praeterea potestas illa, quam exsecutionis vocant, Christo adiudicanda est, utpote cuius imperio parere omnes necesse sit, et ea quidem denuntiata contumacibus irrogatione suppliciorum, quae nemo possit effugere" (PIUS XI, Encyclical Letter, *Quas primas*, 11 December 1925, in *AAS*, 17 [1925], p. 599; English translation in CARLEN, *The Papal Encyclicals 1903-1939*, no. 14, pp. 273-274). Canon 399, §1 of the motu proprio *Cleri*

2.2.6 Distinction in the Second Vatican Council

The first schema of the dogmatic constitution on the Church *De Ecclesia* of the Second Vatican Council repeated the traditional threefold distinction of the bishop's power. With an emphasis on coercive power, the schema urged the bishop to act with prudence and charity in coercing the faithful for the good of the individual and of the community.[52]

The second draft of *De Ecclesia* presented a different text. The bishop's governing functions were described in terms of a sacred right and a duty before the Lord to prescribe and administer, and indeed to coerce in love.[53] The use of the terms "prescribe," "administer," and "coerce" suggested three functions. However, the meaning of "prescribe" and "administer" did not correspond to that of "legislative," and "judicial."[54] Because of the confusion in the schema, this text was dropped from the final draft of the document.

The final draft of the constitution appeared with a new title, *De populo Dei*. It contained the threefold distinction of power in more precise words which were

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sanctitati on persons in the Eastern Churches specified the governing power of an eparch as legislative, judicial and executive. See PIUS XII, Apostolic Letter issued *m. p.*, *Cleri sanctitati*, 2 June 1957, *AAS*, 49 (1957), p. 550; English translation and commentary in Victor J. POSPISHIL, *Code of Canon Law: Law on Persons*, Ford City, St. Mary's Ukrainian Catholic Church, 1960, p. 178. However, canonists had already adopted executive power into the system of power in the Church. LEGA was the first one to do so, followed by CAVAGNIS and CAPPELLO. See ONCLIN, "L'organisation des pouvoirs," p. 371.

[52] See *Acta synodalia Sacrosancti Concilii Oecumenicii Vaticani II* [=*Acta synodalia*], vol. I/IV, caput IV, [In Civitate Vaticana], Typis polyglottis Vaticanis, 1971, no. 13, p. 25.

[53] "Episcopus, qui sacrum ius et coram Domino officium habet praescribendi et administrandi, imo, ubi opus est, ex amore coercendi [...]" (ibid., vol. II/I, caput II, no. 21, pp. 239-240).

[54] See MARCUZZI, "Distinzione della 'Potestas regiminis'," p. 287.

incorporated in the promulgated text of *Lumen gentium*. Accordingly, the bishop has the sacred right and duty before the Lord of making laws for his subjects, of pronouncing judgements, and of moderating all things which pertain to the good order of worship and the apostolate.[55] The doctrinal commission of the Council said that the new formula tends to follow closely the three traditional functions of the power of governance, namely making laws, pronouncing judgements, and administering diocesan affairs in various ways.[56] It is worth noting that *Lumen gentium* did not use the term "*executiva*" despite its use in papal documents prior to the Council. Nevertheless, the Council did use "executive," "administer" or their equivalents in its other documents.[57] This indicates that the choice of the terms "*moderandi*" and "*moderator*" was deliberate to point out the power implied in them.[58]

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[55] "Vi huius potestatis Episcopi sacrum ius et coram Domino officium habent in suos subditos leges ferendi, iudicium faciendi, atque omnia, quae ad cultus apostolatusque ordinem pertinent, moderandi" (*Acta synodalia*, vol. III/I, caput III, textus emendatus, no. 21, p. 224; LG 27, in *AAS*, 57 [1965], pp. 32-33; English translation in FLANNERY I, p. 38).

[56] "Nova redactio huius formulae, quae partim provenit ex T. P. [textus prior] lin. 33-39, ad id tendit ut *tria munera*, potestate regendi inhaerentia, iuxta terminologiam traditionalem recenseantur, scilicet leges ferendi, iudicium faciendi et variis modis administrandi" (*Acta synodalia,* vol. III/I, Relatio de N. 27, Antea N. 21, D, p. 254).

[57] See DELHAYE, GUERET, TOMBEUR, *Vaticanum II: Concordance, Index, Listes*, p. 253; OCHOA, *Index verborum Concilii Vaticani*, p. 27.

[58] See MARCUZZI, "Distinzione della 'Potestas regiminis'," pp. 288-289. Conciliar documents use "*moderatio*" and "*moderator*" also to describe the bishop's ruling function in his diocese. See OCHOA, *Index verborum Concilii Vaticani*, pp. 308-309.

2.2.7 Post Second Vatican Council Developments

The term "*moderandi*" used in *Lumen gentium* did not find a place in the documents issued subsequently. The ambiguity recurred with the use of other terms in post conciliar documents.

2.2.7.1 *Regimini Ecclesiae universae*

Among the post-conciliar documents, which have or had some bearing on clarifying the notion of executive power, was the apostolic constitution *Regimini Ecclesiae universae* issued by Paul VI on the reformation of the Roman Curia.[59] This constitution created the Second Section within the Apostolic Signatura to handle disputes claiming or alleging a violation of some law in the exercise of administrative (not judicial) power.[60] The constitution, however, did not provide a precise definition of administrative power.[61]

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[59] See PAUL VI, Apostolic Constitution on the Roman Curia, *Regimini Ecclesiae universae*, 15 August 1967, in *AAS*, 59 (1967), pp. 885-928; English translation in *Canon Law Digest* [=*CLD*], 6, pp. 324-357.

[60] See no. 106, in *AAS*, 59 (1967), p. 921; English translation in *CLD*, 6, p. 351.

[61] During the 1983 Code revision process, a schema on administrative procedure, prepared in 1972, described the process involved in administrative recourse and the function of the Second Section of the Signatura in it, and presented norms applicable to acts of administrative power in the Church, but it offered no further clues on the nature of administrative power. The schema was not integrated into the Code. See PCCICR, *Schema canonum de procedura administrativa*, Typis polyglottis Vaticanis, 1972, pp. 5-7.

In 1968, a special law providing rules for the internal functioning of the Apostolic Signatura was promulgated.[62] It spelled out in detail the procedures to be followed by the Signatura,[63] but it offered no clue on the nature of administrative power. However, the law section of a decision of 1 February 1970 of the Apostolic Signatura described administrative acts as pastoral because through them the ministry of shepherding the flock of God is exercised.[64]

2.2.7.2 The Revision Process

In the same year the apostolic constitution *Regimini Ecclesiae universae* was promulgated, the first Ordinary General Assembly of the Synod of Bishops was convened.[65] This synod approved the ten fundamental principles to guide the revision process of the Code.[66] The seventh principle required establishment of a clear procedure to protect subjective rights in the Church. It emphasized the need to clearly distinguish the various functions of ecclesiastical power, namely the legislative, administrative and

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[62] See SECRETARIAT OF STATE, *Normae speciales in Supremo Tribunali Signaturae Apostolicae ad experimentum servandae*, 25 March 1968 [=*Normae speciales*], [In Civitate Vaticana], Typis polyglottis Vaticanis, 1968; English translation in *CLD*, 7, pp. 246-272.

[63] See nos. 96-126, *Normae speciales*, pp. 20-28; English translation in *CLD*, 7, pp. 263-271.

[64] "Actus administrativi bene dicuntur pastorales, quia per illos exercetur ministerium pascendi gregem Dei, auctoritatis ecclesiasticae proprium [cf. *Christus Dominus*, n. 11; *Presbyterorum ordinis*, n. 7]" (SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Sectio Altera, Decision, 1 December 1970, in *Apollinaris*, 44 [1971], p. 612). In URRUTIA'S opinion, the Signatura intended to distinguish "administrative power" from judicial power, rather than from legislative power. See URRUTIA, "Administrative Power," footnote 8, p. 256.

[65] From 29 September to 29 October 1967.

[66] See PCCICR, Principia quae Codicis iuris canonici recognitionem dirigant, in *Communicationes*, 1 (1969), pp. 77-85; English translation in HITE-WARD, *Readings, Cases, Materials*, pp. 84-92.

judicial.[67] The focus of the seventh principle was on defining the competence of different organs or structures ("*organis*") of governance in exercising the threefold functions so that the protection of rights of the faithful could be provided for. For this purpose, the principle suggested the establishment of administrative tribunals at different levels.[68]

The terminology of the seventh principle was not consistently used in the earlier drafts of the Code. In the first draft of the *Lex Ecclesiae fundamentalis*, the power of the Church and of the bishops was distinguished as legislative, executive and judicial.[69] In his report on the draft, Willy Onclin spoke of legislative, executive and judicial functions of the one governing power. However, in the third paragraph of the same article of his report he mentioned the administrative function instead of executive power.[70] The revised text retained the distinction found in the previous text (*textus prior*) both at the level of the supreme authority and at the level of the particular Church.[71] With regard to the power of governance of the diocesan bishop the schema retained right through the traditional

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[67] "[...] potestatis ecclesiasticae clare distinguantur diversae functiones, videlicet legislativa, administrativa et iudicialis, atque apte definiatur a quibusdam organis singulae functiones exerceantur" (*Communicationes*, 1 [1969], p. 83; English translation in HITE-WARD, *Readings, Cases, Materials*, p. 90).

[68] See *Communicationes*, 1 (1969), p. 83; English translation in HITE-WARD, *Readings, Cases, Materials*, p. 90.

[69] Canons 74, §1; 80, §2, PCCICR, *Schema legis Ecclesiae fundamentalis cum relatione*, Typis polyglottis Vaticanis, 1969, pp. 41-42, 45.

[70] See Article 3 of "Relatio super schemate legis Ecclesiae fundamentalis," in PCCICR, *Schema legis Ecclesiae fundamentalis*, p. 112. MARCUZZI considers this as a preoccupation to latinize the term *executive* as used by Pius XI in *Quas primas*. See MARCUZZI, "Distinzione della 'Potestas regiminis'," p. 292.

[71] Canon 74, §1, of the *textus prior*, which became c. 135 of *CIC 83*, said "[...] potestas legislativa, potestas exsecutiva et potestas iudicialis, ad bonum spirituale fidelium commune quae requiruntur." The revised text of the same canon in 75, §2 of the schema repeated in similar terms the threefold distinction of power. See PCCICR, *Schema legis Ecclesiae fundamentalis, textus emandatus cum relatione de ipso schemate deque emendationibus receptis*, [In Civitate Vaticana], Typis polyglottis Vaticanis, 1971, p. 46.

classification of legislative, judicial and executive powers.[72] An inconsistency can be noted here not only in the use of terms "power" and "function" but also in the indiscriminate use of "executive" and "administrative." In the formulation of canons the term "executive" replaced "administrative."

Canon 100, §1 of the schema on general norms distinguished the power of governance as legislative, executive and judicial. Paragraph 2 of the same canon introduced another distinction within the executive power, namely voluntary ("*gratiosa*"), if exercised on those willing to accept it, and coercive ("*coercens*"), if exercised on those unwilling to submit themselves to it. In c. 103 the schema prescribed norms on exercising voluntary and coercive powers.[73] This distinction between voluntary and coercive executive power was dropped from subsequent schemas on general norms.[74] Canon 244 of the schema on the People of God attributed the same threefold powers to

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[72] Canon 80, §2 of *textus prior* of the schema, which became c. 391 of *CIC 83*, said, "[...] potestatem legislativam habet solus Episcopus diocesanus, ad normam iuris exercendam; potestatem exsecutivam quam vocant exercet per se ipsum atque etiam per alios ad normam iuris constituendos, qui vicariam qua instruuntur potestatem nomine Episcopi exercent; iudicialem potestatem exercet per tribunalia ad normam iuris constituta, quae nomine Episcopi causas sibi legitime commissas cognoscunt et iis iudicant." Canon 81, §2 in the revised text of the schema repeated the same distinction. See PCCICR, *Schema legis Ecclesiae fundamentalis, textus emendatus*, pp. 46, 50.

[73] Paragraph 1 of the canon said that unless it is otherwise evident from the nature of things or from the provision of law, one could exercise voluntary executive power over one's own subjects even when they are absent from the power holder's territory, over wanderers present in his territory and over oneself. One could also exercise it even when he himself is outside his territory. According to paragraph 2, coercive executive power could not be exercised while being outside his own territory. However, one could exercise it on his subjects even when they are outside his territory through personal precepts or decrees. Travelers living in his territory could be ordered to obey both universal and particular laws in accordance with c. 14, §2, 2°. See PCCICR, *Schema canonum libri I de normis generalibus*, [In Civitate Vaticana], Typis polyglottis Vaticanis, 1977, pp. 34-35.

[74] Even the schema on penal law mentioned merely coercibility in the Church, and the very first canon declared the necessity of coercing Christ's faithful with penal sanctions. No mention was made of coercive power as such, as the 1917 Code did. See PCCICR, *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia Latina denuo ordinatur*, [In Civitate Vaticana], Typis polyglottis Vaticanis, 1973, pp. 11, 16.

the diocesan bishop without any reference whatsoever to voluntary and coercive powers.[75] The subsequent schema retained the same threefold distinction of power of governance which remained unchanged in the final text promulgated in 1983.

2.2.7.3 The 1983 Code

Executive power is mentioned primarily in cc. 135, §1 and 391, §1.[76] The first canon distinguishes the power of governance into legislative, executive and judicial. The other ascribes the same threefold power to the diocesan bishop.[77] In addition, cc. 1400, §2 and 1445, §2 mention administrative power. Since there is no indication in the Code on the exact nature of this power, the question has been raised whether it is a distinct power, or a different term for executive power.[78]

The inadequacy of terms used for executive power in the evolution of its concept, in fact, reflects uncertainty of its nature and scope. Difficulties in neatly classifying executive power continue to persist even after the promulgation of the new Code. This is evident in the way executive power is linked to legislative and judicial functions. For example, judges in ecclesiastical tribunals, in addition to exercising their judicial power

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[75] See c. 244, PCCICR, *Schema canonum libri II de populo Dei,* [In Civitate Vaticana], Typis polyglottis Vaticanis, 1977, p. 104.

[76] Canons 985 and 191, §1 of the *Code of Canons of the Eastern Churches* [=*CCEO*], promulgated in 1990 have the same distinction of the power of governance of an eparchial bishop; English translation in *Code of Canons of the Eastern Churches*, Latin-English Edition, New English Translation, Prepared under the auspices of the Canon Law Society of America, Washington, DC, Canon Law Society of America, 2001.

[77] Other canons, which deal with executive power in greater detail, will be discussed later in this chapter.

[78] This issue will be discussed later in this chapter.

while dealing with contentious and criminal cases, also seem to exercise executive or administrative power in their function.[79] Executive power exercised in this situation does not stand on its own, rather it seems to be included within the context of exercise of judicial power. Similarly, legislative power also seems to include activities of an executive or administrative nature. For example, an act promulgating a law is strictly not a legislative but an executive act. In this state of confusion, the natural question to be answered is: What is the precise nature of executive power? We shall try to respond to this question in the following section.

2.3 THE NATURE OF EXECUTIVE POWER

Before attempting to define executive power, it is necessary to briefly survey how canonists present the relationship between executive and administrative powers. This debate centres on cc. 1400, §2 and 1445, §2 which mention acts of "administrative power." To clarify the matter we need to trace the roots of "administrative power" and also the nature of acts of administration (c. 1277), which resemble administrative acts, to determine their linkage with administrative power.

2.3.1 Administrative Power and Executive Power

There are four principal differing views on the concepts of administrative power and executive power. First, those who equate the two powers maintain that there is no administrative power strictly speaking, and therefore, argue that the references in cc.

[79] For example, see cc. 1505, §1; 1507, §§1,2; 1513, §3; 1514; 1519, §2; 1592, §1.

1400, §2 and 1445, §2 to administrative power must be understood as executive power. In fact, administrative organs exercise executive power.[80] These references in the cited canons are an evidence of an inconsistent use of terms caused by a lack of careful editing of the content of the Code and direct assumption of European civil law terminology and structures into the canonical system.[81]

The second view claims that administrative power is the fourth category of power. The proponents of this opinion argue that the Code itself mentions administrative power

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[80] See, for example, Wilhelm ONCLIN, "De potestate regiminis in Ecclesia," in Peter LEISCHING, Franz POTOTSCHNIG and Richard POTZ (eds.), *Ex aequo et bono, Willibald M. Plöchl zum 70. Geburtstag*, Innsbruck, Univesitätsverlag Wagner, 1977, pp. 227-228; ID., "L'organisation des pouvoirs," pp. 371; ID., "The Church Society," in *The Jurist*, 27 (1967), pp. 13-14; Julian HERRANZ, "De principio legalitatis in exercitio potestatis Ecclesiasticae," in PCCICR, *Acta conventus internationalis canonistarum*, pp. 221-238; Luigi CHIAPPETTA, *Dizionario del nuovo Codice di diritto canonico*, prontuario teorico-practico, seconda edizione, Napoli, edizioni Denoniane, 1986, pp. 793, 796; Gianfranco GHIRLANDA, *Il diritto nella Chiesa mistero di communione*, compendio di diritto ecclesiale, Milano/Roma, Edizioni Paoline/Editrice Pontificia Universitas Gregoriana, 1990, pp. 451-452; Eduardo LABANDEIRA, "La potestad ejecutiva en la Iglesia," in INSTITUTO MARTIN DE AZPILCUETA, *Manual de derecho canonico*, Pamplona, Ediciones universidad de Navarra, S.A., 1988, pp. 265-267; Thomas J. GREEN, *Manual for Bishops*, Washington, DC, National Conference of Catholic Bishops, 1983, pp. 27-58.

Already before the Code revision process, this view was being discussed. For example, during the International Congress held on the fourth centenary of the Gregorian University, the following authors equated executive power with administrative power. See Nicolaus MÖRSDORF, "De relationibus inter potestatem administrativam et iudicialem in iure canonico," in ANALECTA GREGORIANA CURA PONTIFICIAE UNIVERSITATIS GREGORIANAE EDITA, *Questioni attuali di diritto canonico* [=*Questioni attuali*], Relazioni lette nella sezione di diritto canonico del Congresso Internationale per il IV centenario della Pontificia Universitas Gregoriana, 13-17 ottobre 1953, Romae, Apud aedes Universitatis Gregorianae, 1955, pp. 399-418; Leopoldo UPRIMNY, "De la distinción entre las funciones judicial et administrativa," in *Questioni attuali*, p. 495.

[81] See Michael R. MOODIE, "The Administrator and the Law: Authority and Its Exercise in the Code," in *The Jurist*, 46 (1986), p. 45. See also Elizabeth MCDONOUGH, "The *Potestas* of Canon 596," in *Antonianum*, 63 (1988), p. 600; Charles TORPEY, "Offices of the Diocesan Curia: Interrelationships and Creative Possibilities," in *CLSAP*, 45 (1983), p. 114. Alan MCCORMACK, *The Term "Privilege": A Textual Study of Its Meaning and Use in the 1983 Code of Canon Law*, JCD diss., Roma, Editrice Pontificia Universitas Gregoriana, 1997, pp. 38-40. MCCORMACK also notes here that one of the reasons for inconsistent use of the terms *executive* and *administrative* in the Code may be due to a lack of sufficient editorial coordination between those who prepared the *schema* on procedure for the protection of rights or processes in 1976 and those who developed the *schema* on general norms in 1977.

and not all acts in the Code can be associated with legislative, executive or judicial power. Therefore, those acts should be placed under administrative power.[82]

The third view holds administrative power as broader than executive power, the former subsuming within itself the latter. As per this argument, while executive power produces general and particular administrative acts, there are administrative activities which do not proceed from executive power. Furthermore, certain acts of temporal administration do not always involve exercise of any aspect of the power of governance. Such acts proceed from the power of leadership which presupposes some power of governance. Therefore, administrative power involves administrative acts of executive power as well as administrative activities not requiring power.[83]

The fourth view maintains that executive power is broader than administrative power. This view is somewhat akin to the sub-distinctions of the executive power proposed by Ottaviani as discussed above. According to this view, executive power extends to every aspect of non-legislative and non-judicial diocesan governance. Administrative power, in this context, pertains only to the management of temporal goods.[84]

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[82] See James H. PROVOST, "The Participation of the Laity in the Governance of the Church," in *StC*, 17 (1983), pp. 439-440.

[83] See BAWYN, *Administrative Power of the Diocesan Bishop*, pp. 76-77; BERTONE, *Il governo della Chiesa*, pp. 93-94; URRUTIA, "Administrative Power," pp. 261-262. URRUTIA thinks this could be the reason why the term "administrative" found in the seventh directive principle was dropped and "executive" was adopted in the Code to name this power.

[84] See BOWERS, *Episcopal Power of Governance*, pp. 260-292. See also James E. MCMANUS, *The Administration of Temporal Goods in Religious Institutes*, Canon Law Studies No. 109, Washington, DC, The Catholic University of America, 1937, p. 79; See AUGUSTINE, *A Commentary on the New Code*, vol. 2, p. 354.

In spite of the debate centred on executive and administrative powers and their relationship to each other, the more common view seems to regard both terms, and therefore, both powers as synonymous. An exploration of the origins of the term "administrative power" would help in determining so or otherwise.

2.3.2 The Sources of the Term "Administrative Power" in the 1983 Code

The Code in cc. 1400, §2 and 1445, §2 mentions administrative power. Nowhere in the Code is there any indication of the source of this power. The *fontes* of the 1983 Code cite c. 1601 of the 1917 Code, a reply of the Code Commission dated 22 May 1923, and article 106 of *Regimini Ecclesiae universae* as the sources of c. 1400, §2.[85]

Canon 1601 of the 1917 Code is situated within the context of competence of ordinary tribunals of the Apostolic See. This particular canon stated that against the decree of the Ordinary there was no appeal, that is, no recourse to the Rota; such recourses were to be dealt with exclusively by the Sacred Congregations.[86] The canon mentioned neither administrative nor executive power. Charles Augustine explains that

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There are others whose opinions do not correspond exactly to those discussed above. For example, Marian ZUROWSKI deems executive power in the strict sense equivalent to administrative power, but in a broad sense administrative power is wider than executive power. See Marian A. ZUROWSKI, "Problem wladzy wykonawczej," in *PK*, 28 (1985), pp. 46-48. Marcello MORGANTE includes within the realm of executive power also the teaching and sanctifying functions, sanctions (cc. 1311-1399), and contentious trials (cc. 1400-1500). See Marcello MORGANTE, *La Chiesa particolare nel Codice di diritto canonico*, Milano, Edizioni Paoline, 1987, pp. 86-88. For Charles LEFEBVRE, executive power does not consist merely in executing laws in the strict sense. It includes, in addition to power of government, administration in the proper sense, also the non-judicial coercive power. See Charles LEFEBVRE, "Pouvoirs de l'Église," in Raoul NAZ (ed.), *Dictionnaire de droit canonique*, vol. VII, Paris, Librerie Letouzey et Ané, 1965, cols. 85-86.

[85] See PCCICAI, *Fontium annotatione et indice*, p. 389.

[86] "Contra Ordinariorum decreta non datur appellatio seu recursus ad Sacram Rotam; sed de eiusmodi recursibus exclusive cognoscunt Sacrae Congregationes" (c. 1601, *CIC 17*).

this applied to whatever the local Ordinary settled administratively, and recourse against his actions had to be made to the Sacred Congregations. If a case was tried judicially in a diocese, the diocesan tribunal had to pass a sentence, and then it could be appealed "to Rome."[87]

The response of 22 May 1923 by the Code Commission was to a query whether or not a judicial action could be initiated against the decrees, acts and dispositions of Ordinaries relating to the administration of their dioceses; and whether a judicial action could be instituted for damages caused by such acts of the Ordinary so that he could be summoned before the Roman Rota. The Code commission replied in the negative to both. The examples of administration cited in the first question were appointments to benefices, offices, etc., or refusal to make such appointments. The negative reply to the second question implied that the Sacred Congregations were to take cognizance of such decrees and of damages, if any.[88] Neither this reply nor the former Code provided any new insight into the nature of administrative power, although administration of the diocese in the Code could be seen to imply a non-legislative and non-judicial mode of issuing juridic acts.

Article 106 of *Regimini Ecclesiae universae* reserved to the Second Section of the Signatura controversies arising out of acts of ecclesial administrative power.[89] It had no

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[87] See AUGUSTINE, *A Commentary on the New Code*, vol. VII, p. 52. Appeal to Rome seems to be to the Rota.

[88] See PONTIFICIA COMMISSIO AD CODICIS CANONES AUTHENTICE INTERPRETANDOS, Reply, 22 May 1923, in *AAS*, 16 (1924), p. 251; English translation in *CLD*, 1, p. 739.

[89] "Per ALTERAM SECTIONEM Signatura Apostolica contentiones dirimit ortas ex actu potestatis administrativae ecclesiasticae, et ad eam, ob interpositam appellationem seu recursum adversus

further explanation on the nature of this power. "Administrative power" apparently referred to the acts of administrative nature which are placed in virtue of executive power.

The new apostolic constitution *Pastor bonus* on further reorganizing the Roman Curia, promulgated by John Paul II on 28 June 1988, avoids the use of the terminology altogether. Its article 123, §1 has the expression "singular administrative acts" to identify the object of recourses, namely acts issued by the dicasteries of the Roman Curia or approved by them.[90] Moreover, the norms in canons of Section I (cc. 1732-1739 on recourse against administrative decrees) of Part V, Book VII are applicable to all singular administrative acts issued in the external forum. This section does not mention that administrative acts flow from administrative power. Since c. 35 makes it clear that one who possesses executive power issues singular administrative acts within the limits of that person's competence, we can conclude that administrative power mentioned in cc. 1400, §2 and 1445, §2 refers to executive power.

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decisionem competentis Dicasterii, delatas, quoties contendatur actum ipsum legem aliquem violasse" (PAUL VI, Apostolic Constitution, *Regimini Ecclesiae universae*, in *AAS*, 59 [1967], p. 921; English translation in *CLD*, 6, p. 351).

[90] "Praeterea cognoscit de recursibus, intra terminum peremptorium triginta dierum utilium interpositis, adversus actus administrativos singulares sive a Dicasteriis Curiae Romanae latos sive ab ipsis probatos, quoties contendatur num actus impugnatus legem aliquem in decernendo vel in procedendo violaverit" (JOHN PAUL II, Apostolic Constitution on the Roman Curia, *Pastor bonus*, 28 June 1988, in *AAS*, 80 [1988], p. 891; English translation in *CLSA Translation*, p. 721).

Since *Pastor bonus* does not mention the Second Section of Signatura, it is being suggested by some that the Second Section has been abolished to transform it into a single jurisdiction. There is no indication of such an intent in *Pastor bonus*. Therefore, Signatura seems to function as two sections. Article 122 of *Pastor bonus* corresponds to the First Section, article 123 corresponds to the Second Section. Yet it is unified organ. For more on this issue, see Kenneth K. SCHWANGER, "Contentious-Administrative Recourse Before the Supreme Tribunal of the Apostolic Signatura," in *The Jurist*, 58 (1998), pp. 173-175; COUGHLIN, "Development and Current Procedural Norms of Recourse," pp. 492-494.

Canon 1445, §2 has as its sources articles 106 and 107 of *Regimini Ecclesiae universae*, article 96 of the special norms on the Apostolic Signatura, decisions of the Apostolic Signatura dated 10 May 1968, 21 May 1968, 24 March 1969, 15 December 1970 and its declaration of 9 November 1970.[91] These sources deal with the competence of the Second Section of the Signatura.[92] Therefore, they do not seem to offer any new insight into the nature of administrative power.

The Code of Canons of the Eastern Churches further proves the argument presented above. Its c. 1055, §2 (parallel of c. 1400, §2 of the 1983 Code), does not use the term "administrative power." In its place the canon has "an act of executive power of governance."[93] The mind of the legislator seems clear in this matter, that is to say, the terms "executive power" and "administrative power" are synonymous in the 1983 Code.

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[91] See PCCICAI, *Fontium annotatione et indice*, p. 400.

[92] For example, article 107 of *Regimini Ecclesiae universae* said "Through the same Section, it also adjudicates conflicts of competence among the Departments of the Apostolic See; examines administrative matters referred to it by the Congregations of the Roman Curia; and decides questions entrusted to it by the Supreme Pontiff" (*AAS*, 59, [1967], pp. 885-928; English translation in *CLD*, 6, p. 351). Special norms on the Signatura had similar provision in its article 96. See *Normae speciales*, p. 20; English translation in *CLD*, 7, p. 263. For the declaration of the Signatura, see SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Declaration, 9 November 1970, in *Periodica*, 60 (1971), pp. 349-350.

[93] "In controversiis vero ortis ex actu potestatis regiminis exsecutivae competens est solummodo auctoritas superior ad normam cann. 996-1006" (PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS [=PCLTI], *Codex canonum Ecclesiarum orientalium*, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione auctus, Città del Vaticano, Libreria editrice Vaticana, 1995, p. 373). Interestingly, this canon also has as sources, among others, articles 106 and 123 of *Regimini Ecclesiae universae* and *Pastor bonus* respectively. There is no parallel canon in *CCEO* for c. 1445, §2 of *CIC 83*.

2.3.3 Acts of Administrative Power and Acts of Administration

The 1983 Code uses the term "administration" in a broad sense with a variety of meanings.[94] It ranges from the administration of sacraments and temporal goods to administration of a diocese or its legal equivalent. Moreover, the Code employs the expression "acts of administration" in c. 1277 seemingly referring to the financial management of public ecclesiastical institutions.[95] In c. 1413, 1°, there is provision for bringing a party to trial before the tribunal of the place in which the administration was conducted. It seems proper to suggest here that the Code makes a distinction between "acts of administration" and "acts of administrative power." Although it is difficult to clearly demarcate these two types of juridic acts, they must be regarded as distinct. Although the acts of administration are juridic acts, they do not proceed from executive power. On the other hand, acts of administrative power are also juridic acts, but they proceed from executive power. As distinct acts, they are subject to distinct ecclesiastical processes.[96]

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[94] "*Administratio*" in a broad sense means direction, government, or the care of things. See Aegidio FORCELLINI, *Lexicon totius latinitatis*, vol. I, Pattavii, Typis seminarii, 1940, p. 90; P. Francisco WAGNER, *Lexicon latinum*, Brugis, Sumptibus et typis Societatis Sti Augustini, Desclée, de Brouwer & Sociorum, 1878, pp. 20-21. It is interesting that the adjective "*executiva*" cannot be found in these Lexicons. For the use of "administration" in *CIC 17* and *CIC 83*, see URRUTIA, "Administrative Power," pp. 253-273.

[95] See MOODIE, "The Administrator and the Law," p. 45.

[96] Michael R. MOODIE suggests a way of distinguishing what can be challenged in the tribunal and what can be challenged in hierarchical recourse. A parish priest, for example, governs his parish community and also acts as the representative of the juridic person of the parish. In the former capacity, he acts with executive authority, in the latter, he represents the parish as a corporate entity. While conflicts arising from the former role would be subject to hierarchical recourse, suits against the parish, such as financial management, would go before the ordinary tribunal. Thus, the role played by the officeholder in exercising the power is significant in determining the forum for resolution of the conflicts. See MOODIE, "The Administrator and the Law," pp. 61-62. For some examples of acts of administration which would go

The preceding discussion establishes that the expression "administrative power" in the Code refers to executive power which is the source of all general and singular administrative acts. In the following section we will attempt to provide a descriptive definition of executive power.

2.3.4 Definition of Executive Power

Because of the complex nature of executive power, it is not easy to provide a precise definition. Canonists have adopted different approaches in trying to define it. Ioannes Chelodi and Pio Ciprotti describe executive or administrative power as one that

> urges the observance of canons, sees to it that abuses in ecclesiastical discipline do not occur, moderates divine worship and ensures that liturgical laws are respected, erects and confers offices and benefices, controls and directs inferior authorities in the accomplishment of their charges, corrects those who neglect their duties, receives and dismisses clerics, orders and manages the administration of ecclesiastical goods, executes the mandates and pontifical rescripts, fosters and promotes all that is necessary and useful for the good of souls.[97]

Considering administrative and executive powers as synonymous, Ignacio Gordon defines administrative power in similar terms. He says:

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before the ordinary tribunal of the diocese, see John P. BEAL, "Protecting the Rights of Lay Catholics," in *The Jurist*, 47 (1987), pp. 156-157.

[97] Ioannes CHELODI and Pius CIPROTTI, *Ius canonicum de personis*, editionem IV curavit Pius Ciprotti, Vicenza, Editrice S.A.T., 1957, no. 190, p. 301.

Pio Vito PINTO provides a descriptive definition in similar terms. According to him, executive power: "is part of the power of jurisdiction which within the limits of the law guarantees the public good, either by executing the laws, or by interpreting them, or by supplementing them or by completing them with laws or decrees as the case may be, while resolving the controversies through its hierarchical organs, finally by imposing penalties if necessary" (Pio Vito PINTO, *Commento al codice di diritto canonico*, seconda edizione, Città del Vaticano, Libreria editrice Vaticana, 2001, p. 83).

Marius CASTELLANO, considering the field of the bishop's administrative function too vast to be adequately described in few words, defines administrative power as "subditos regit intra limites legis, curat et fovet publicum bonum, libere ex arbitrio procedens, singulis aptans quae generice a lege statuuntur" (Marius CASTELLANO, "De decreto episcopali administrativo," in *Monitor ecclesiasticus*, 77 [1952], pp. 79, 78).

> It is part of the power of jurisdiction which, within the limits of the law, promotes public good by executing laws and, to some extent, if necessary, by interpreting laws, by supplementing and complementing laws by means of decrees and dispositions, by resolving controversies through appropriate procedure, or by imposing certain penalties.[98]

Both these definitions subordinate executive or administrative power to law. By listing its various functions they seem to describe the vast scope of executive power rather than the nature of power itself.

Eduardo Labandeira defines executive power as a "part of the power of governance which includes all that does not pertain to the judicial or to the legislative, and which - being subordinate to the latter, accomplishes the ends of the Church through proper procedures."[99]

This is a definition in negative terms, since it determines within the scope of executive power all that is non-legislative and non-judicial.

Anthony E. Bawyn does not define executive power.[100] Considering executive and administrative functions distinct and the latter broader than the former, he defines the executive function as "either an individual task or collection of tasks, performed by an authority who possesses the power of governance, which apply and enforce the law or, at times, go beyond or against it, in order to promote the common good and the well being

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[98] Ignatius GORDON, "De tribunalibus administrativis propositis a commissione Codici I. C. recognoscendo et suffragatis ab Episcoporum Synodo," in *Periodica*, 57 (1968), p. 610.

[99] Eduardo LABANDEIRA, *Tratado de derecho administrativo canónico*, Segunda edición actualizada, Pamplona, EUNSA, Ediciones Universidad de Navarra, S.A., 1993, p. 150.

[100] In his opinion, executive power can be defined neither from the perspective of its holder nor from the perspective of matters it treats. This is so because more than one authority exercises it and some matters it treats pertain either to legislative or judicial function. See BAWYN, *Administrative Power of the Diocesan Bishop*, p. 79.

of the faithful."[101] Bawyn defines the administrative function as "either an individual task or collection of tasks, performed by a competent authority, which apply the law by both juridical or non-juridical and formal or informal means in order to promote the common good and well being of the faithful."[102]

Bawyn's first definition clearly identifies what executive power is. It is that part of the power of governance by which laws are applied. The application of the laws could be accomplished through formal and juridic acts or tasks of a general nature or of an individual nature. He seems to presume that dispensations and privileges do not correspond to execution of laws because they are contrary to and beyond the law. The administrative function is broader in scope. It includes formal and juridic acts of the executive function, as well as other "activities," which Bawyn calls "informal and juridical" (e.g., to exercise vigilance over, to promote, to provide for), and "informal and non-juridical" (e.g., to persuade, to counsel, to instruct are informal; to communicate, to present, to advise are non-juridical).[103] In this type of classification, the attribution of non-juridic and informal activities to administrative power is confusing because some informal and juridic activities, in fact, may not be juridic. Unlike "formal and juridic acts," "informal and non-juridic activities" do not require power of governance. Tracing the latter two categories to administrative power seems to weaken the juridic concept of

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[101] Ibid., p. 72.

[102] Ibid., p. 71.

[103] See ibid., pp. 269-271, 304-308.

power. This necessitates a distinction between functions which necessarily presuppose power, and those which do not.

The following definition that we provide might shed some light in clarifying the nature of executive power:

"Executive power is that aspect or part of the power of governance, that is, the power of jurisdiction, which enables the one who possesses it to execute ecclesiastical laws through administrative acts of a general or singular nature in accord with the norms of law."

This descriptive definition of executive power contains several important elements which call for a more precise explanation.

- **"power of governance, that is, power of jurisdiction":** The theological concept, with which this expression is closely linked, is "*munus regendi*," which occurs more frequently in conciliar teaching on the threefold functions of the Church, namely "*munus docendi*," "*munus sanctificandi*," and "*munus regendi*." The "function of ruling" ("*munus regendi*") is much broader in scope and it comprises a wide array of activities related to the internal and external organization of the Church.[104] And the "power of governing," that is, the "power of jurisdiction," has a much narrower connotation. From a strictly canonical viewpoint, the "power of governing," that is, the "power of jurisdiction," is related to the Church's organizational activities at all levels that are related strictly to ecclesial law (*ius*), namely legislative, judicial and executive functions. The term "jurisdiction" ("*ius dicere*") used in this context connotes the underlying

[104] See HUELS, "The Power of Governance," pp. 62-63.

concept. Therefore, the "power of governance," that is, the "power of jurisdiction," means "that power which enables the one who possesses it to place acts of a legislative, judicial and executive nature, in accord with the norms of law."

- "**aspect or part of the power of governance, that is, power of jurisdiction**": As indicated above, this phrase implies that executive power represents only one aspect or part of the power of governance, related to the law, the other two being legislative and judicial. Although it is only a part, its scope extends also to those activities that are related to the teaching and sanctifying functions.[105]

- "**enables the one who possesses it**": This expresses the fundamental principle that in order to validly place a juridic act a person must be qualified (*habilis*) to do so (c. 124, §1). Actual possession of the power of governance is essential to place juridic acts that originate from it. Therefore, one cannot place acts of executive power without first possessing it either in virtue of an office or by lawful delegation. In other words, without possessing this power one cannot validly place juridic acts of an executive nature.

- "**to execute ecclesiastical laws**": This phrase states the intrinsic and extrinsic functional scope and limitations of executive power. The intrinsic parameters of executive power limit it to the execution of ecclesiastical laws, which means that one who possesses only executive power cannot place legislative or judicial acts.[106]

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[105] In the teaching function, for example, in accordance with c. 805, the local Ordinary has the right to appoint or approve teachers of religion, and also to remove them or demand their removal. Canon 830 empowers the local Ordinary to appoint a competent person to judge books. For more examples, see cc. 790; 801; 802; 813; 819. Similarly, in the sanctifying function, the diocesan bishop issues and revokes dimissorial letters (cc. 1015, §1; 1023). For more examples, see 1112, §1; 1207; 1169, §1; 1206.

[106] Cfr. c. 135, §1. It is not within the scope of executive power to dabble with civil laws. In other words, one who enjoys executive power in the Church cannot interfere with civil law.

- "**through administrative acts**": This phrase defines the nature of the acts that can be placed in virtue of executive power. In a strict sense, the juridic acts through which ecclesiastical laws are executed are administrative in nature.[107] One who possesses only executive power can place neither legislative nor judicial juridic acts. Even the "general decrees," which are laws, issued by one with executive power in virtue of legitimate delegation from a competent legislator are not administrative, but legislative juridic acts, because they originate from legislative power, even if delegated (c. 30).

- "**of a general or singular nature**": The types of administrative acts emanating from executive power are specified by this phrase. They are either general or singular in nature. Acts of a general nature concern the entire community to which they are directed; whereas acts of a singular nature are issued for individual persons, physical or juridic.

- "**in accord with the norms of law**": The emphasis here is on the fact that any juridic act which has legal consequences must be issued in accord with the stipulations stated in respective legal norms. All acts of public power, which executive power is, should be in conformity with laws. Thus, for example, an act of executive power, being a juridic act, must meet all the requirements prescribed in c. 124.

Some authors distinguish between general executory decrees, which directly execute laws, and general administrative norms which do not directly execute any law. These latter are also referred to as "independent norms." See LABANDEIRA, *Tratado de derecho administrativo*, pp. 254-257; John M. HUELS, "A Theory of Juridical Documents Based on Canons 29-34," in *StC*, 32 (1998), footnote 27, p. 348. It might seem that not every act of executive power is in a direct sense a mere execution of law. Nevertheless, such an act is based in law. Alan MCCORMACK recalls Msgr Onclin's remark during the revision process in which he said that not every administrative act is an application of the laws. MCCORMACK then explains that each administrative act is founded in law, and executive authority must act as defined and legitimized by the legislator. See MCCORMACK, *The Term "Privilege,"* pp. 279-280.

[107] It should be noted that even judicial juridic acts in a sense constitute the execution of ecclesiastical laws.

2.4 SCOPE OF EXECUTIVE POWER

In determining the scope of executive power, more than one criterion seems to be implied in the Code. The following is a brief explanation of each one of them.

2.4.1 Territorial and Personal Exercise

Canon 136 implies that the executive power can be exercised within one's territory on all those who are subject to that power.[108] Accordingly, unless the nature of the matter or a prescript of law establishes otherwise, one who has executive power can exercise it within his territory and over his subjects even when either he or they, or both are outside the territory. Those who are one's subjects is determined in accordance with law.[109]

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[108] It is disputed which executive authority can exercise executive power in accordance with c. 136. One view is that all the Ordinaries mentioned in c. 134, §1 can do so. See Pedro LOMBARDÍA, "Power of Governance," in Ernest CAPARROS, Michel THÉRIAULT, and Jean THORN (eds.), *Code of Canon Law Annotated* [=*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, Montréal, Wilson & Lafleur Limitée, 1993, p. 146. The second view is that c. 136 refers to those who have territorial and personal power. See Luigi CHIAPPETTA, *Il Codice di diritto canonico*: *commento giuridico-pastorale*, vol. I, seconda edizione, Roma, Edizioni Dehoniane, 1996, p. 220. The third one claims that the canon relates only to local Ordinaries. The scope of the power of personal Ordinaries must be determined by proper legislation. See Aidan MCGRATH, "Power of Governance," in Gerard SHEEHY et al. (eds.), *The Canon Law, Letter & Spirit*: *A Practical Guide to the Code of Canon Law* [=*Letter & Spirit*], London, Geoffrey Chapman, 1995, p. 82.

It seems reasonable to suggest that the canon relates to all Ordinaries since even those who are not local Ordinaries exercise executive power for their own members. The eighth revision principle considered territory as a determinant of the portion of the people of God in which they live. Therefore, territory could not be the sole criterion of determining a portion of the people of God. See *Communicationes*, 1 (1969), p. 84. Thus, there is no reason why Ordinaries other than local Ordinaries cannot exercise their power over their subjects outside their own territory.

[109] See cc. 13, §2, 2°; 107, §1.

2.4.2 Administrative Acts

Executive power can issue only administrative acts. They can be general or singular administrative acts, statutes, or rules of order.[110] General administrative acts (cc. 29-34) are directed to a community in general. Singular or individual administrative acts (cc. 35-93) are issued in favour of individual persons, whether physical or juridic. Moreover, statutes (c. 94) and rules of order (c. 95) oblige only the aggregates of persons or things, and assemblies and other celebrations as the case may be, for whom they are issued in accordance with law.

2.4.3 External and Internal Forum

The external forum relates to the ecclesial community and the common good whereas the internal forum relates to an individual and private good. Canon 196 of the 1917 Code divided jurisdiction into the external forum and internal forum. The internal forum, which could be sacramental or non-sacramental, was identified with the forum of conscience. However, the Code did not clearly define the nature and scope of internal forum jurisdiction.[111] Canon 202, §1 stated that an act of power in the external forum can

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[110] Statutes are administrative acts except those prescripts of statutes established and promulgated by virtue of legislative power. The latter are laws (c. 94). The following chapter of this study will have more discussion on them.

[111] In Felicianus DE OLIVA's opinion, forum could be ecclesiastical or secular. The ecclesiastical forum could be external or contentious, and internal or non-contentious. The internal forum could be sacramental or non-sacramental or even the forum of conscience. The penitential forum could pertain to the forum of conscience, but not vice versa, because many things that could pertain to the forum of conscience could belong outside the penitential forum. See Felicianus DE OLIVA, *Tractatus de foro Ecclesiae, principaliter materiam utriusque potestatis spiritualis, scilicet & temporalis respiciens*, Pars prima, Coloniae Allobrogum, Sumptibus Leonardi Chovët, 1678, q. I, no. 4, pp. 1-2. For more discussion on fora, especially the internal forum, see DEUTSCH, *Jurisdiction of Pastors*, pp. 47-52.

be applied also in the internal forum but not *vice versa*. Thus, the power validly exercised in the external forum was also valid in the internal forum. The lack of clear demarcation between the concepts and related principles led to confusion in the exercise of jurisdiction.

The new Code has a much clearer treatment of the exercise of jurisdiction in the internal forum. This is in accord with the second principle guiding the revision of the Code aimed at achieving harmony between the external and internal forum.[112] The internal forum could be sacramental or non-sacramental but cannot be equated with the forum of conscience.[113] Although there is a twofold distinction of the internal forum in the 1983 Code, the expression "forum of conscience" is not found in it.[114]

For James P. KELLY, external forum jurisdiction is "that power which regulates the social actions of the faithful primarily and directly respecting the public good and having its judicial and social effects recognized *coram Ecclesia*;" and internal forum is "that power which regulates the moral relations of the faithful, primarily and directly respecting the private good and having its effects only *coram Deo*." He further subdivided the internal forum into sacramental jurisdiction, if it can be exercised only within or upon the occasion of the sacrament of penance, and extra-sacramental, if it can be used outside the tribunal of penance. See James P. KELLY, *The Jurisdiction of the Simple Confessor,* Canon Law Studies No. 43, Washington, DC, The Catholic University of America, 1927, p. 13.

[112] See *Communicationes*, 1 (1969), p. 79; English translation in HITE-WARD, *Readings, Cases, Materials*, p. 86.

[113] During the revision process, the forum of conscience was dissociated from the power of governance in the internal forum. Consequently, the power of jurisdiction exercised for the hearing of confessions was named as the faculty to hear confessions: "De se communiter exercitium huius potestatis effectus producit pro foro interno (relate ad ipsam personam in causa) et pro foro externo (ergas omnes alios). Potest autem fieri ut pro solo foro interno, i. e. relate ad personas in causa tantum, effectus producat, scilicet potest fieri ut effectus exercitii limitentur ad ipsas personas in causa et ut illi effectus non extendantur ad alias personas aut ab aliis personis non cognoscantur. Hoc in casu exercetur haec potestas pro solo foro interno. Ceterum non potest haec potestas quae pro solo foro interno exercetur dici fori conscientiae. Itaque, potestas regiminis qua conceditur sic dicta iurisdictio ad confessiones, nunc dicitur et rectius apellatur facultas ad confessiones audiendas" (*Communicationes*, 8 [1976], pp. 234-235).

[114] See, for example, cc. 1082; 1357, §1. Nor is it found in *CCEO*.

Canon 130 of the 1983 Code states that those who have power for the external forum can exercise it also for the internal forum. Normally power is exercised in the external forum but it can sometimes be exercised for the internal forum alone. For example, some persons exercise executive power exclusively in the internal forum (cc. 508; 1079, §3 and 1357, §1 on the canon penitentiary, confessor). Usually the power exercised in the internal forum involves matters relating to remission of penalties, dispensation from occult impediments, vows, etc.

Often, in the long run, actions placed in the internal forum have effect also on the community.[115] However, c. 130 prescribes that these effects are not recognized in the external forum except in the cases provided for in the law (e.g., c. 1082).

2.4.4 Common Error

The purpose of the exercise of ecclesial power of governance is twofold: service of the Church and the good of souls. In order to avoid any serious harm to the faithful, especially of a spiritual nature, both in case of "factual" or "legal common error," and similarly, in "positive" and "probable doubt of law or of fact," the executive power of governance, whether ordinary or delegated (including habitual faculties, c. 132, §1), is

[115] See Francis G. MORRISEY, "Power of Governance," in George NEDUNGATT (ed.), *A Guide to the Eastern Code*, Rome, Pontificio Istituto Orientale, 2002, p. 661. For example, a favour granted orally in the internal forum can be used freely at all times in the internal forum. However, its use in the external forum has to be proved if someone lawfully requests it (c. 74).

supplied in the external as well as in the internal forum by the law itself ("*ipso iure supplet ecclesia*") whenever it is lacking in those who exercise it.[116]

"Factual common error" is "that error which is either actual or virtual, since virtual error too implies the *fact of error*."[117] "Virtual error" is "that which was once actual and now continues to exist at least subconsciously, just as a virtual intention was once actual and continues to exert its influence."[118] Thus, "factual common error" is verified when all the faithful of a place or of a community, or at least the majority of them are actually in error, thus creating a conviction which does not correspond to the truth concerning the power possessed by the person. And this error, as stated above, can be either "actual or virtual."

"Legal common error" is "that which is a fiction of law. It is not factual."[119] Thus, a fact that of its nature would lead many into error is not actual "common error"; yet to this phrase the law could attach such meaning, if the legislator so willed. Such is only an interpretative error. Thus, "legal common error" is present when the error determines a circumstance of a public nature, capable of leading a good number of people into error, even if in reality they are only a few. This is a fiction of law.

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[116] For a comprehensive treatment of this topic, see Francis S. MIASKIEWICZ, *Supplied Jurisdiction According to Canon 209*, Canon Law Studies No. 122, Washington, DC, The Catholic University of America Press, 1940; also see Raymond A. KEARNEY, *The Principles of Delegation*, Canon Law Studies No. 55, Washington, DC, The Catholic University of America, 1929, pp. 122-139.

[117] See KEARNEY, *The Principles of Delegation*, p. 128.

[118] See ibid., p. 128.

[119] See ibid., pp. 128-129.

Canon 144, §1 states: "In factual or legal common error [...], the Church supplies executive power of governance [...]." As per this canon, therefore, one cannot say that the Church supplies only in cases of "factual common error" but it does so also when there is "legal common error."

The second part of c. 144, §1 concerns "positive and probable doubt of law or of fact." The "error" is on the part of the faithful, while the "doubt" is in the mind of the person who exercises the power and it concerns the "effective possession" of the power in question.

Doubt in the strict sense is "a state of mind in which the intellect suspends certain judgment about some proposition because of the fear of error," and, doubt in the broad sense is "that condition in which the mind lacks certitude and vacillates between two contradictory decisions."[120]

A doubt is "positive" when it is based on "real" (objective) reasons which nevertheless do not provide certainty.

A doubt is "negative" when one has no reason at all or has weak reason(s) which are not sufficient to produce certainty because it effectively coincides substantially with ignorance. In case of negative doubt "the Church does not supply" and the validity of the act would depend exclusively on the actual possession of the power in question.

A doubt may be "prudent" or "imprudent," "probable" or "improbable" inasmuch as the doubt is based on a "solid" or "weak" foundation. A doubt is considered

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[120] See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 28; R.P. Udalricus BESTE, *Introductio in Codicem*, editio quinta, Neapoli, M. D'Auria Pontificius editor, 1961, p. 75.

"probable" insofar as the reasons have certain seriousness, even if the opposing reasons are equally serious.

A doubt may affect the law ("doubt of law" = *dubium iuris*) with respect to its existence, binding force, sense, its extension and cessation. For example, a doubt may concern the extension of a norm in which a given meaning is disputed by some canonists.

A doubt may affect the "application of the law to a fact" ("doubt of fact" = *dubium facti),* that is, when the doubt concerns a concrete fact of a particular circumstance, or when it is uncertain whether a fact or its circumstances possess all the requisite elements to bring it within the ambit of the law. For example, the doubt may concern the expiry of the executive power delegated to dispense; it may concern the determination of real danger of death to apply (c. 976); whether a certain person has completed the 18th year to be bound by the law of fast, etc. In either case, the Church supplies, and the use of power is not only valid but also licit.[121]

Doubt may be "objective" when it is founded on the obscurity of a law or a fact; doubt is *subjective*, if it is founded on a defect of the one who doubts.

In virtue of c. 144, §1, in "positive and probable" doubt of law or of fact, the Church supplies faculties for both the internal and external forum. This provision is to afford those exercising executive power an authorized reflex principle by which practical certitude can be attained, when they are confronted by a difficulty arising from the interpretation of law; and at the same time to make remote the possibility of anxiety and scruples when in the exercise of their ministry a doubt of fact presents itself.

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[121] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. 1, p. 228.

In brief:

- in both "factual and legal common error" there actually is, or there is a concrete possibility for, a false judgment (in the minds of the faithful) about the existence of the executive power in the authority exercising it; in this situation, the power is certainly absent, but the Church supplies it in view of the common good;

- in cases of "positive and probable doubt," (in the mind of the one exercising executive power), no judgment is made because the mind hesitates between the opposites (e.g., does the priest in question have/not have the faculty?); the executive power is doubtfully absent and the Church supplies it saying equivalently: "If per chance you do not have the faculty, I give it to you."

The second paragraph of c. 144 states that the faculties mentioned in cc. 883, 966 and 1111, §1 are governed by the norms concerning common error and positive and probable doubt. This is a new paragraph.

Canon 883 concerns persons with the faculty granted by law itself of administering the sacrament of confirmation: those who are equivalent in law to the diocesan bishop; a presbyter who by reason of office or mandate of the diocesan bishop baptizes one who is no longer an infant or one already baptized whom he admits into the full communion of the Church; any priest, in danger of death. Commentators agree that a priest who baptizes or receives baptized adults into full communion is the parish priest, parochial vicar, chaplain or priest with some pastoral function. Common error or positive and probable doubt may arise concerning the norm of this canon.

Similarly, c. 966 stipulates that for the valid absolution of sins it is required that, besides the power received through sacred Ordination, the minister possess the faculty to exercise that power. This faculty can be given to a priest either by law itself or by a concession granted by competent authority. Common error or positive and probable doubt also can arise in particular situations where a certain priest, for one reason or another, has not received that faculty.

Canon 1111, §1 concerns the delegation of the faculty to assist at marriages. In his decree of 18 December 1989,[122] dealing with a marriage case from the Middle East, Victorius Palestro states:

> It is evident from the study of c. 144 of *CIC* in conjunction with c. 152 of M.P. '*Cleri sanctitati*' [...], that in case of common error of fact or of law, similarly in the case of positive and probable doubt of law or of fact, the Church supplies the executive power of governance for both external and internal forum in relation to the valid assistance at marriage on the part of a local Ordinary within the limits of his territory (cfr. can. 144, §2 in conjunction with can. 1111, §1), because the jurisdiction is supplied not only in the case of those who would have that power in virtue of office, but also in the case of those who would need a delegation to do so while in fact they do not have it; and therefore, in case of common error jurisdiction is supplied in case of necessary delegation as well as in case of probable doubt of necessary general delegation [...].[123]

In all these three situations (Confirmation, Penance and Marriage), if there is *factual or legal common error*, or if there is *positive* and *probable doubt* about law or about fact, the Church supplies the faculty. This principle is applicable also to habitual faculties (c. 132, §1). According to cc. 596, §3 and 732, the principle *ecclesia supplet* applies also to executive acts of Superiors and of Chapters of institutes of consecrated life

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[122] See *Ius Ecclesiae,* 5 (1993), pp. 197-205; published also in *Il diritto ecclesiastico,* 102/2-3 (1991), pp. 198-203.

[123] See *Ius Ecclesiae,* 5 (1993), pp. 198-199. See also decisions *coram* STANKIEWICZ, 15 December 1992, in ROTAE ROMANAE TRIBUNAL, *Decisiones seu sententiae,* 84 (1995), pp. 664-679; English translation in *StC,* 29 (1995), pp. 515-531; *coram* Stankiewicz, 15 December 1992, in *StC,* 29 (1995), pp. 531-538; *coram* BOCCAFOLA, 22 October 1992, in *StC,* 29 (1995), pp. 539-546.

and of societies of apostolic life irrespective of whether they are clerical of pontifical right.[124] Some doubt whether the same principle may be applied to one who is delegated invalidly for one particular act.[125]

As canonical doctrine explains, the supply of jurisdiction is not a question of the sanation of an invalid act, nor prorogation of existing power which has ceased, but of a *true* and *proper* delegation of the power or faculty by law (*a iure*) of a *transitory* nature, which renders an act valid.

The supply of power, however, refers exclusively to *executive* or *administrative* power and not *legislative* or *judicial* power, much less to the power of orders. The power of orders is of *divine law* and the Church does not have the competence over it. In fact, the Church, for example, cannot supply the lack of priestly power for a sacramental absolution to a layperson.[126]

We should note that the two cases in which the supply of executive power of governance takes place (common error and positive and probable doubt) are taxative. But the norm, through express disposition of law, is applicable also to the three particular *faculties* which are, strictly speaking, beyond the sphere of executive power of governance. It also applies to all habitual faculties in virtue of c. 132, §1.

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[124] See *Communicationes*, 14 (1982), p. 154, c. 141.

[125] See KEARNEY, *The Principles of Delegation*, p. 135.

[126] See CHIAPPETTA, *Il Codice di diritto canonico,* vol. 1, p. 227.

2.4.5 Principles of Interpretation

The Code provides two types of interpretation directed specifically to executive power. According to c. 138 ordinary executive power and the power delegated for all cases is subject to broad interpretation. Any other power is to be interpreted strictly. One who has delegated power is understood to have been granted all those things without which the delegate cannot exercise this power. According to c. 132, §1, the norms concerning delegated power are applicable also to habitual faculties. Nevertheless, according to c. 132, §2, habitual faculties granted to an Ordinary are generally considered to have been granted to his office unless the grant expressly provides otherwise, or the Ordinary was chosen for personal qualifications. Therefore, when that Ordinary ceases from office, his habitual faculties do not cease, rather they pass on to his successor.

2.5 POSSESSION OF EXECUTIVE POWER

On the basis of the manner of acquiring it, executive power could be ordinary or delegated. Following is a brief analysis of these two modes of possessing executive power.

2.5.1 Ordinary Executive power

Ordinary power is attached to an office in virtue of law itself. It is obtained through appointment to an office. This power could be proper or vicarious. Ordinary proper power is that which is exercised in one's own name, while ordinary vicarious power is exercised in another person's name. For example, within his diocese a diocesan

bishop has ordinary proper executive power because he possesses it in virtue of his office and exercises it in his own name. A vicar general has ordinary vicarious executive power by virtue of his office but he exercises it in the name of the diocesan bishop.

Those who have ordinary executive power in the Church are more numerous than those having legislative and judicial powers. All those who are Ordinaries in law possess ordinary executive power. Such Ordinaries are the Roman Pontiff, diocesan bishops and their legal equivalents as per c. 368, vicars general and episcopal vicars, major superiors of clerical religious institutes of pontifical right and of clerical societies of apostolic life of pontifical right (c. 134, §1). Executive power attributed in law to the diocesan bishop pertains to him and his legal equivalents alone. Likewise, if it is attributed to local Ordinaries, it belongs to all the above mentioned Ordinaries except the major superiors, who have power over members of their institutes subject to them in accord with the norms of their constitutions. When this power is ascribed to Ordinaries, it belongs to all the Ordinaries.

2.5.2 Delegated Power

Executive power acquired through delegation, either by law itself or by an act of competent authority, is called delegated power.[127] Unless the law provides otherwise,

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[127] CUSACK observes that it is possible to establish an office without attaching executive power to it, but delegate the person appointed to the office with faculties. See CUSACK, "Power of Governance," p. 203. It is not clear what the nature of such an office would be. If the faculties are delegated to such an office by law, then it assumes the nature of ordinary power. It would not, then, retain the character of delegation. If delegation is to a person, there seems to be no need to establish the office. Therefore, delegation by law is possible only to an individual, and not to an office. See DEUTSCH, *Jurisdiction of Pastors*, pp. 120-121.

ordinary executive power can be delegated for an individual case and for all cases. The executive power delegated by the Apostolic See can be subdelegated for an individual act or for all cases, unless the delegate was chosen for personal qualifications, or if the Apostolic See expressly prohibits subdelegation (c. 137, §§1-2).

The executive power delegated for all cases by one holding ordinary power other than the Apostolic See can be subdelegated only for individual cases. If such delegation was for a single act or for determined acts, it cannot be subdelegated without the express permission of the one delegating. The subdelegated power cannot be further subdelegated unless the delegating authority has expressly made provision for it (c. 137, §§3-4).

In addition, the Code specifies three other types of delegation. *In solidum* delegation occurs when executive power is delegated to several persons to act on one and the same matter. In such a situation, the one who begins to act first excludes the others from doing so unless that person is subsequently impeded or does not wish to proceed further in carrying it out.[128]

In *collegial* delegation several persons are delegated to act as a college (*collegialiter*). When this type of delegation is exercised, the principles of c. 119 are to be followed, unless the mandate itself provides otherwise (c. 140, §2).

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[128] See c. 140, §§ 1-3. Since executive power delegated to several persons is presumed to be *in solidum*, any claim for collegial delegation must be proved. See MCGRATH, "Power of Governance," p. 84.

In case of *successive* delegation several persons are delegated successively to act individually in the same matter. In such situations, the law itself stipulates that the one whose mandate is prior to others and has not been later revoked is to act.[129]

A delegate is to exercise executive power in accord with the terms of the mandate. Therefore, a delegate who exceeds the limits of the mandate with respect to matters or to persons acts invalidly. However, a delegate may act in a manner other than that determined in the mandate. In this situation, the delegate is not considered to have exceeded the limits of the mandate unless a particular way of acting was prescribed for validity by the one delegating (c. 133).

In the ecclesiastical system, it is possible to have more than one authority competent to act on the same matter. For this reason, the legislator has set down specific rules of procedure when several authorities may be equally competent to act on a particular matter. Unless the law determines otherwise, the fact that a person approaches some competent authority, even a higher one, does not suspend the executive power, whether ordinary or delegated, of another competent authority. Nonetheless, a lower authority is not to interfere in such cases. If it does for grave and urgent causes, it is to notify immediately the higher authority concerning the matter (c. 139).[130] If, however, the higher authority refuses a favour requested, and subsequently it is sought from a lower

[129] See c. 141. The mandate can be revoked either by a separate act or by a subsequent mandate containing a revocation either explicit or implicit. See MCGRATH, "Power of Governance," p. 84.

[130] For example, in a case in which all the local Ordinaries are competent to grant a dispensation requested by a person, if it was requested first from the bishop, and then for a grave reason from the vicar general or episcopal vicar, either of the latter two can grant it in such a situation. However, the one who grants it should immediately notify the bishop about it. The act of granting in this case is valid because the one who conceded it is competent in the matter. Therefore, no permission or confirmation from the bishop is necessary.

competent authority, or if a lower authority refuses it, but subsequently it is sought from the higher authority, then the principles of c. 65 would apply.

2. 6 CESSATION AND SUSPENSION OF EXECUTIVE POWER

Ordinary executive power ceases with the loss of office. An office can be lost by the passage of predetermined time, by reaching the age established by law, by resignation, by transfer, by removal and by deprivation. The law makes it clear that an office is not lost when the authority of the one who conferred that office expires, unless the law provides otherwise (cc. 143 §1; 184 §§1-2).

According to c. 143, §2, unless the law provides otherwise, ordinary executive power remains suspended when a legitimate appeal is made or recourse is lodged against a decision depriving or removing one from office. However, the office holder would retain *de iure* possession of the office until the appeal or the recourse is resolved.

Delegated executive power can cease in six different ways: (a) upon the completion of the mandate for which it was delegated; (b) with the expiration of the time for which it was granted; (c) with the completion of the number of cases for which the power was given; (d) with the cessation of the motive which had prompted the delegation; (e) with legitimate revocation of delegation directly communicated to the delegate; (f) by resignation legitimately intimated to and accepted by the delegating authority. However, as in the case of ordinary power, delegated power does not cease when the authority of the one delegating expires, unless the mandate of delegation

provides for it. In virtue of c. 142, §2, an act of delegated power exercised inadvertently in the internal forum alone after the lapse of the time limit of the grant is valid.[131]

2. 7 JURIDIC ACT IN THE EXERCISE OF EXECUTIVE POWER

Every act of executive power is a juridic act. Therefore, its exercise is governed by the legal principles applicable to juridic acts. Canons 124-128 provide the "general norms" that govern juridic acts in general. Those who exercise the power of governance, especially executive power, must observe these norms because they determine the juridic certainty concerning the validity of its acts which have juridic effects.

2.7.1 Definitions of Juridic Act

There is not a single universally accepted definition of a juridic act in canonical literature.[132] The Code does not define it but leaves the task to canonists. However, those who venture into defining it offer varied definitions. The most commonly cited authors who have written widely on this matter are Olís Robleda and Gomar Michiels. Robleda defines a juridic act as "an externally manifested act of the will by which a certain

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[131] *CCEO* has an additional provision. An act of delegated power inadvertently placed in the internal forum alone, after completion of the number of cases, is valid. See *CCEO*, c. 992, §2.

[132] Juridic acts are sometimes referred to as juridic business (*negotium iuridicum* in Latin, *rechtsgeschäft* in German, *negozio giuridico* in Italian, and *negocio jurídico* in Spanish). A juridic act is clearly distinct from a simple juridic fact which is a non-intentional event with juridic consequences. In the case of a juridic fact, a juridic effect does not depend upon one's intention because the law itself provides that a juridic effect will follow upon a particular event. For example, the status of quasi domicile in a parish is obtained automatically regardless of the intention of the resident. Similarly, age, consanguinity, etc. have unintentional consequences in law. See Michael HUGHES, "A New Title in the Code: On Juridical Acts," in *StC*, 14 (1982), p. 393; Aidan MCGRATH, "Juridical Acts," in *Letter & Spirit*, p. 72.

juridical effect is intended."[133] Michiels provides a twofold definition, a broad and a strict one. In the broad sense, a juridic act "is any external fact ("*factum externum*"), freely placed by the human person, to which the law attributes a determined juridic effect, independently from both the intrinsic object of the act, and from the purpose directly intended by the agent."[134] In the strict sense, it is "a social human act which is legitimately placed and declared, and for which a determined juridic effect is recognized in law, because and in so far as it is intended by the agent."[135] "Human act" in the strict definition implies that it is an act of decision, placed by a human person endowed with the faculties of the intellect and will.[136]

The difference between this act of decision and other types of decisions lies in the intention of the one placing the act to bring about a certain juridic effect. By this decision one commits oneself or others under one's authority to a particular obligation.[137] The intention of the author of the act is the common element in all the juridic acts. The juridic

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[133] Olís ROBLEDA, *Quaestiones disputatae iuridico-canonicae*, Romae, Libreria editrice dell'Università Gregoriana, 1969, p. 13. Though the definition says "externally manifested act of the will," the validity of the juridic act does not always depend on the declared will of the author of the act. For example, in marriage it is the real will that prevails rather than the declared will. However, congruence between the real will and its external manifestation is presumed. Moreover, in some cases the interior will alone is sufficient to produce legal effects, as for example, some cases in the internal forum. See HUGHES, "A New Title in the Code," p. 399; Helmuth PREE, "On Juridic Acts and Liability in Canon Law," in *The Jurist*, 58 (1998), p. 46.

[134] Gomarus MICHIELS, *Principia generalia de personis in Ecclesia: commentarius libri II Codicis iuris canonici, canones praeliminares 87-106*, Tornaci, Desclée, 1955, p. 572.

[135] Ibid., p. 572.

[136] See ibid., pp. 586-588; HUGHES, "A New Title in the Code," p. 392.

[137] See HUGHES, "A New Title in the Code," pp. 392-393. Here HUGHES also observes that such decisions, for example, could be a contract of service, sale of goods or property, financial borrowings, membership in an association, marriage, religious profession, appointment of a pastor to a parish, passing a law or a judicial sentence.

effect of such decisions is determined and recognized by law to the extent the agent intends it.

"Social act" requires that a juridic act be externally manifested in order that the authority concerned define and make evident its will. A totally internal intention does not show itself on the social scene. Hence, it has no socially recognized juridic effects. The importance of their external manifestation is obvious in the way they are regulated. For example, a law needs to be promulgated, a judicial sentence needs to be published, and an administrative act needs to be legitimately notified. Even when the law is silent on this point, the nature of a particular act demands some form of external expression without which there is no act.[138] The fundamental principle here is that a juridic act must be placed and declared according to the requirements and formalities stipulated by the law.

2.7.2 Personal Capacity to Place a Juridic Act

The agent of a juridic act must be capable (*habilis*) to place it. This capacity can be natural or legal. The natural capacity is a person's ability to place a human act which, by its very nature, presupposes sufficient knowledge, deliberation and free choice of its object. In the absence of this capacity one cannot validly place a juridic act. The legal capacity consists in the competence derived from positive ecclesiastical law (c. 96).[139]

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[138] See ibid., p. 394; Patrick VALDRINI, "The Exercise of Power and the Principle of Submission," in *Concilium*, 197/3 (1988), pp. 94-95.

[139] For example, a person should be free from ecclesiastical impediments to marry validly, or one should have executive power of governance to issue a singular administrative act either in virtue of an office or by legitimate delegation.

2.7.3 Essential Elements of a Juridic Act

The essential elements of a juridic act relate to the essence of the act. They are determined either by divine or positive ecclesiastical law. These elements constitute an act without which the act cannot exist or it would be invalid.[140] The difference between a non-existent and an invalid act consists in the fact that a non-existent juridic act cannot be validated or sanated because the Church cannot supply the missing element. However, when a juridic act is correctly placed with respect to its external elements, namely the requisites and formalities required by law for its validity, it is presumed to be valid (c. 124). Law presumes conformity between the internal will and the manifested will when a juridic act is placed in accordance with its norms. This presumption can be overturned by contrary proof.[141]

2.7.4 Formalities Necessary for a Juridic Act

All juridic acts are subject to certain external formalities. However, not all formalities concern their validity, depending upon how the law deals with a specific formality. This principle is contained in c. 124, §1 which states that for a formality to have invalidating effect, the law must expressly impose it for the validity of the act (cfr. c. 10; for instance, cc. 127; 474; 1108; 1524, §3). In other cases, any compliance with a

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[140] The phrase "things which essentially constitute the act itself" in c. 124 was proposed to be dropped during the revision process because of its general character. The proposal was rejected with the reply that the phrase could be found in the juridic tradition and it would be sufficiently clear. See *Communicationes*, 14 (1982), pp. 144-145.

[141] See *Communicationes*, 6 (1974), p. 102.

formality stated by law would be required only for the liceity of the act (e.g., cc. 500, §2; 501, §3; 1112, §1; 1189).

2.7.5 Requisites Necessary for a Juridic Act

According to c. 124, §1, only those requisites imposed by law for validity affect a juridic act to that effect (cfr. c. 10). Such requisites are factors extrinsic to a juridic act. They may take the form of conditions for or manner of placing a juridic act.[142] Non-observance of requisites stipulated by law for validity would render a juridic act invalid.[143] The Code has also other requisites which are not expressly said to be necessary for the validity of a certain juridic act. Hence, non-observation of such stipulation would not invalidate the act, rather the act would only be illicit (e.g., cc. 149 §2; 1025 §2).

2.7.6 Defective Juridic Act

A juridic act is fundamentally a human act. Therefore, it must proceed from a deliberate and free decision of the will. Any factor that impedes sufficient deliberation and internal freedom of the agent of an act would affect its validity. Canons 125-126 list force, fear, deceit, ignorance and error as factors that are likely to influence the validity of a juridic act.

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[142] See *Communicationes*, 6 (1974), pp. 101-102. Helmuth PREE has the following canons as examples of requisites for an act: 127; 134, §3; 149, §3; 170; 172, §1,1°-2°; 174, §2; 1291. See PREE, "On Juridic Acts and Liability," p. 54.

[143] For example, see cc. 117; 176; 312, §2; 455, §2; 515, §2; 579; 609, §1; 1292, §§ 1-2.

Force is physical coercion inflicted from the outside on a person which he or she is unable to resist.[144] Canon 125, §1 states that an act placed as a result of force "is considered as never to have taken place" (*pro infecto habetur*), which would technically mean that it does not exist in the juridic order.[145] However, if the person could resist the force but chooses not to do so, then the act would be valid, because the freedom necessary to place the act would remain substantially intact. The principle governing the juridic effect of force mentioned in c. 125, §1 is applicable also to juridic acts performed by juridic persons. In this case, force does not necessarily have to be exerted on all members of the juridic person, but it suffices that the force is exerted only on its representatives.[146]

Grave fear is the disturbance of the mind caused by impending present or future danger. According to c. 125, §2, an act performed under the influence of direct or indirect fear is valid even if the fear was grave and inflicted unjustly. The presumption in this context is that the person acting under the influence of fear possesses sufficient

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[144] External force is equated by some authors with physical force as in c. 1323, 3°. Others include the use of psychic and chemical means as force. See Eduardo MOLANO, "Juridical Acts," in *Canon Law Annotated*, p. 142; Myriam WIJLENS, "Juridic Acts," in John P. BEAL, James A. CORIDEN, and Thomas J. GREEN (eds.), *New Commentary on the Code of Canon Law* [=*New Commentary*], Commissioned by The Canon Law Society of America, New York/Mahwah, Paulist Press, 2000, p. 179. In addition, some authors distinguish force as physical and moral, direct and indirect. The criterion in c. 125, §1 is whether the person is able to resist the force or not, no matter how it was inflicted. Irresistibility is to be seen according to individual circumstances and not according to any uniform standard. See PREE, "On Juridic Acts and Liability," p. 68.

[145] It is disputed whether acts placed under force are invalid or non-existent. Helmuth PREE considers them as non-existent which do not need to be declared as such (*ipso facto*). Canon 124, §2 does not seem to apply to them. Resolution of this issue is significant to determine whether an act could be confirmed, sanated, or ratified, as non-existent acts cannot be sanated. In case of controversy on non-existence and invalidity, one who has a legal interest can sue for the declaration of non-existence. See PREE, "On Juridic Acts and Liability," pp. 69-70.

[146] See MICHIELS, *Principia generalia*, p. 615.

knowledge and will to place a true human act. However, there are instances in the Code where certain acts performed out of fear, even indirect fear, are regarded as invalid provided that such acts were the result of fear which could not be resisted by their agents.[147] The gravity of fear in these instances is weighed by taking into consideration both the objective and subjective criteria. Canon 125, §2 prescribes that acts placed under the influence of fear can be rescinded by the decision of a judge, either at the instance of the injured party, or that party's successors in law, or even *ex officio*.

Deceit is the deliberate manipulation of another person by lying or concealing the truth so that the other is persuaded to place a juridic act. It directly distorts the perception of the object of the act and thereby influences the will of the agent. In stating that an act placed under deceit is valid, c. 125, §2 presumes that the author of the act somehow possesses due knowledge and sufficient freedom to effect it, unless the law provides otherwise. Nevertheless, law also provides for the rescission of acts placed as a direct result of deceit. Such an action can be initiated either by the injured party, his/her successor in law or *ex officio*.

Ignorance and error are treated in c. 126 as factors that could affect a juridic act. Both factors directly influence the intellect and only indirectly the will of the person. Ignorance or error that concerns the substance of a juridic act is substantial, and an act placed because of substantial ignorance or error is invalid by the natural law itself. Furthermore, ignorance or error can also be accidental if it concerns the accidental

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[147] For example, see cc. 172, §1,1°; 188; 643, §1, 4°; 656,4°; 1103; 1191, §3; 1200, §2; 1360; 1620, 3°; also c. 1538.

elements (object) of an act. In this situation, ignorance or error would invalidate an act only if the error or ignorance amounts to *conditio sine qua non*. In this case, an accidental quality becomes the quality that is directly intended, therefore, the direct object of the will. Canons 1088, 1096, 1097 and 1099 are applications of these principles.

CONCLUSION

The three branches of the power of governance in civil democratic society, legislative, executive and judicial, have a clear separation, as different organs exercise them independently of one another. Nonetheless, one power could have controlling influence over the other.

The power of governance, that is, the power of jurisdiction, which exists in the Church by divine institution (cf. c. 129, §1), has the same three aspects. In fact, the threefold distinction is modelled on the civil concept of power. However, in the Church all the three aspects of power are exercised by one person or organ. Thus, the Pope and the college of bishops possess the fullness of power over the universal Church. The diocesan bishop exercises this power in the particular Church. Montesquieu's idea that "power stops power" is not applicable to power in the Church.

The notion of executive power in the Church, though based on the civil law concept, has evolved slowly over the years. Though the Church documents commonly used the term *coercive power*, canonical doctrine first introduced the term *executive power*, with different connotations, into the concept of power in the Church. The term made its way into Church documents only in the twentieth century. Subsequently, the

term *administrative* was used to identify the same power. The use of both these terms in the new Code does not suggest that they are two different types of powers, but rather they suggest one power that is executive, within the power of governance. Any definition of executive power, therefore, needs to take into account its distinctive nature and scope. Accordingly it may be defined as "that aspect or part of the power of governance, that is, the power of jurisdiction, which enables the one who possesses it to execute ecclesiastical laws through administrative acts of a general or singular nature in accord with the norms of law."

Compared to legislative and judicial powers, the authorities competent to exercise executive power are broader. While legislative power is exercised by the legislator alone, and the judicial power by the bishop, or by the judicial vicar, or by the judges, executive power can be exercised by all those who are Ordinaries in law. Moreover, it can be exercised through delegates.

Similarly, the Code has different criteria to determine those who are subject to a particular executive authority, manner of its exercise (forum), and the means for its actual exercise. Territory and the persons themselves are the factors that determine the competence of an executive authority. The legislator has the good of the faithful as his utmost concern which he manifests by granting competence to executive power in the external and the internal forum as well as in cases of common error and doubts of law or fact. This is an eminently pastoral provision within the Church's legal system.

The concept of power is juridic. Therefore, acts of executive power, placed whether in the external or internal forum, fundamentally are juridic acts through which

the power is exercised. By determining the elements of competence of an executive authority to place an executive juridic act, and by prescribing the requisites and formalities for a valid juridic act, the Code ensures the juridic concept of executive power and sets the parameters for different executive authorities in placing executive acts. In this way, the law also protects the authority who exercises executive power, and the persons who are subject to it by minimising controversies and disputes, thus fostering the common good in the Church.

The juridic acts proceeding from executive power are administrative acts, either general or singular, statutes, or rules of order. They can be issued by all executive authorities within the limits of their competence. Since the executive power of the diocesan bishop is the focus of this study, in the next chapter, we will analyse his administrative acts.

CHAPTER THREE

SPECIFIC ACTS OF EXECUTIVE POWER OF THE DIOCESAN BISHOP

INTRODUCTION

The Supreme Authority of the Church possesses the fullness of power over the universal Church.[1] Since the fullness of power includes also executive power, it can be said that the Supreme Authority possesses, and consequently exercises executive power over the universal Church. Moreover, the offices of the Roman Curia vicariously exercise executive power in the name and by the authority of the Roman Pontiff for the good of the Churches and service to the bishops.[2]

The diocesan bishop exercises executive power in his particular Church. Moreover, the vicar general and the episcopal vicars also vicariously exercise executive power in the diocese within the confines of their competence. The acts of executive power issued by a diocesan bishop and his vicar general and episcopal vicars are of the same nature as executive acts of higher ecclesiastical authorities.

The Code refers to acts of executive power as administrative acts. They can be general or singular in nature. General administrative acts can be general executory decrees, instructions, statutes (unless these last are issued in virtue of legislative power),

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[1] While c. 331 acknowledges this power of the Roman Pontiff, c. 336 attributes it also to the college of bishops. For the parallels of these canons in the eastern Code, see *CCEO*, cc. 43; 49-50.

[2] See c. 360; JOHN PAUL II, *Pastor bonus*, Introduction, no. 8, in *AAS*, 80 (1988), pp. 850-851; English translation in *CLSA Translation*, p. 692.

and rules of order. Individual administrative decrees can be singular decrees, singular precepts, and rescripts which include privileges, dispensations, permissions or other favours, such as faculties and indults.

In this chapter, we will briefly analyse each of these administrative acts. First, we will explore general executory decrees and instructions. Second, we will examine statutes and rules of order. Although the Code does not place them among general or singular administrative acts, we consider statutes and rules of order as general administrative acts unless it is clear that they proceed from legislative power. Third, we will discuss in detail the concepts related to different singular administrative acts and the common norms and particular norms applicable to them.

3.1 GENERAL ADMINISTRATIVE ACTS

The 1983 Code does not have a title *General Administrative Acts*. However, in Book I, cc. 31-34 of Title III (general executory decrees and instructions), and cc. 94-95 of Title V (statues and rules of order) deal with general administrative acts.[3]

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[3] General decrees (cc. 29-30) in Title III are legislative, not administrative.

The 1917 Code did not treat general executory decrees and instructions. *CCEO* does not have canons on general administrative acts. Canon 245 of *Cleri sanctitati* mentioned that a Patriarch could issue decrees, mandates, general ordinances, instructions, and encyclical letters. The *coetus* on general norms of *CCEO* was of the view that it is for the particular law of the eastern Churches to establish norms on the competence of different organisms of power in a particular Eastern Church and to determine the legal weight and the titles of the juridic documents issued by different authorities in a patriarchal Church. At the eparchial level, it is for the eparch, who has legislative and administrative power (*Cleri sanctitati*, c. 399, §1), to determine what is eparchial law and what is not, by means of terminology that is in usage in that Church. It is not for the common law to establish norms on these issues. Moreover, a title on General Administrative Acts never existed in the eastern canonical collection, yet no serious problems were encountered. It is also not opportune to follow in these matters the distinctions of authority in civil society. See *Nuntia*, 10 (1980/1), pp. 106-109.

This does not rule out the possibility that the Apostolic See can issue general executory decrees and instructions for the eastern Churches. Velasio DE PAOLIS mentions that the Congregation for the Oriental Churches issued an Instruction in 1996 which is found in *Enchiridion Vaticanum*, vol. 15,

3.1.1 General Executory Decrees

General executory decrees, which are issued by one who has executive power, are administrative in nature (c. 31, §1).[4] Because the diocesan bishop is endowed with executive power, he can issue general executory decrees within the realm of his competence. Moreover, the vicar general can issue them for the entire diocese, while an episcopal vicar can do so for that part of the territory assigned to his ministry, or for the type of affairs, or for the faithful of a specific group or rite for which he is competent.

The title of the document through which the bishop may issue a general executory decree might not be uniform. For example, a general executory decree may appear under the title "Directory" (c. 33, §1).[5] In such a situation, its content or tenor would reveal its

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Bologna, Edizioni Dehoniane, pp. 5-235. See Velasio DE PAOLIS, "Law, Custom and Administrative Acts," in NEDUNGATT, *A Guide to the Eastern Code*, pp. 816-817. This Instruction has not been published in *AAS*.

[4] At the universal level, the supreme authority of the Church and the dicasteries of the Roman curia can issue general executory decrees. At the supra-diocesan level, episcopal conferences can issue them. Competent major superiors of clerical as well as non-clerical institutes of consecrated life and societies of apostolic life can issue them for their subjects.

The term "decree" can have different meanings. In legislative matters, they can be general decrees issued by councils or other competent authorities. In administrative matters, they can be decisions of the competent executive authorities. In judicial matters, a judge issues various decisions through decrees, which are not necessarily directly related to the object of the case. See Francis G. MORRISEY, *Papal and Curial Pronouncements: Their Canonical Significance in Light of the 'Code of Canon Law,'* 2d edition, revised and updated by Michel Thériault, Faculty of Canon Law, Ottawa, Saint Paul University, 1995, pp. 25-26. At times, certain canonical collections can also be called decrees, for example, the decree of Gratian.

In the Code, "general decree" may refer to a legislative or administrative act. The Code Commission had stated that the term "decree" signifies both laws and administrative acts which execute laws. See *Communicationes*, 3 (1971), p. 92. The same view was reiterated by the response of the PCCICAI which stated that the term "general decree" in c. 455, §1 includes general decrees as well as general executory decrees. See PCCICAI, Authentic Interpretation, 1 August 1985, in *AAS*, 77 (1985), p.771; English translation in *Canon Law Annotated*, p. 1289.

[5] Such instances are found in the practice of the Holy See. For example, see CFC, General Catechetical Directory, *Ad normam Decreti*, 11 April 1971, in *AAS*, 64 (1972), pp. 97-176; English translation, *General Catechetical Directory*, Washington, DC, United States Catholic Conference, 1971. Other titles that may be used for general executory decrees are "circular letters" (*litterae circulares*), "regulations" (*ordinationes*), "letter" (*epistulae*), "declaration," "notification," "norms" and "procedure" (*ratio agendi*) for the examination of doctrines. See HUELS, "Theory of Juridical Documents," p. 355.

nature rather than the title itself.[6] Because its function is merely execution of an existing law, a general executory decree, regardless of the title under which it has been published, has no effect on the status of the law. It neither revokes, abrogates, nor derogates from a law, rather it merely provides guidelines for the application of law or urges its observance. Any provision contained in a decree, which contradicts the law, has no force whatsoever.[7]

Although a general executory decree is not a law, the bishop must promulgate it in the same way as a law is promulgated in accordance with c. 8 (c. 31, §2).[8] The purpose of promulgating an executory decree is to place it before the community just as a law must be placed before the community.

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[6] See James E. RISK, "Individual Administrative Acts," in James A. CORIDEN, Thomas J. GREEN and Donald E. HEINTSCHEL (eds.), *The Code of Canon Law: A Text and Commentary* [=*CLSA Commentary*], Commissioned by the Canon Law Society of America, Study Edition, New York/Mahwah, Paulist Press, 1985, p. 47.

[7] John M. HUELS notes such an instance of conflict in the case of universal law and a general executory decree issued for the entire Church. No. 159 of the Directory for the Application of the Principles and Norms on Ecumenism of 1993 (*AAS*, 85 [1993], pp. 1039-1119; English translation in *Catholic International*, 4 [August 1993], pp. 351-399) allows the diocesan bishop to permit the celebration of the Eucharist at a mixed marriage. However, the 1990 *Rite of Marriage* allows the local Ordinary to grant this permission. The *Rite of Marriage* has legislative force, therefore, it carries greater weight than the Directory does although it was promulgated earlier. See John M. HUELS, "The 1993 Ecumenical Directory: Theological Values and Juridical Norms," in *The Jurist*, 56 (1996), p. 420; ID., "General Norms I," Class Notes for the Private Use of the Students, Faculty of Canon Law, Saint Paul University, Ottawa, 2000-2001, p. 18. These notes have been used *passim* in this chapter with the author's kind permission.

[8] Promulgation does not seem to be the sole criterion for distinguishing general executory decrees and laws from other documents issued by the Holy See. At times, the pope approves *in forma communi* general decrees emanating from executive authority and orders them to be *published*, the same expression used for instructions and similar documents. At times, the pope orders the publication of a legislative text rather than its promulgation. Even a doctrinal text can be promulgated without making it law. Promulgation in this sense indicates its approval and authorization for publication. For example, the Latin edition of the *Catechism of the Catholic Church* was approved and promulgated by JOHN PAUL II, through the Apostolic Letter, *Laetamus magnopere*, 15 August 1997, in *Philippiniana sacra*, 43 (1998), pp. 33-35.

Through a general executory decree the bishop applies the law or urges the observance of law. This does not suggest that general executory decrees would simply repeat the law in different words. These decrees could include warnings and even threats of penalties for failing to execute or observe the law. As Urrutia notes, "... they can prescribe certain practices which, while not expressed in the law itself, are concrete applications of it. These concrete practices can be said to be virtually contained in the law as they dynamically expand its very prescriptions. These *new* concrete norms, therefore, are not the extensions of law, in the sense that they are in no way contained under the terms of the law in its broad meaning."[9]

A general executory decree may involve execution of a particular law or a universal law. Thus, the executive power exercised in a diocese may concern not only the particular laws, but also, within the limits of the competence of one who exercises it, the universal laws of the Church. This is clearly implied in c. 392, §1 which requires the bishop to promote the common discipline of the whole Church and urge the observance of all ecclesiastical laws.[10]

Since a general executory decree issued by the bishop presupposes the existence of a law, it obliges the entire community bound by the same law and whose application it determines or whose observance it urges. A law may be uniform for the entire

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[9] URRUTIA, "Administrative Power," p. 268. For example, Urrutia, here, refers to c. 230, §1 which allows lay men to be instituted as lectors and acolytes. However, the same canon leaves it to the episcopal conference to determine the required age and talents to be acolytes and lectors. The norms issued by the episcopal conference in this regard are not extensions of c. 230, §1, rather they are virtually contained in it.

[10] Canons 592, §2 and 732 place similar requirement on the Moderators of institutes of consecrated life and of societies of apostolic life.

community, but its application may vary from one executive authority to another.[11] For example, an executory decree issued in respect of a universal law or a particular law obliges all those who are subject to that law.[12] Although a law from a higher legislator binds all those who are subject to that law, a general executory decree from the bishop binds only those who are under his jurisdiction.[13] Thus, the jurisdiction of a legislator does not necessarily coincide with the jurisdiction of an executive authority.

Canon 33, §2 provides three ways in which a general executory decree may cease to have force: through explicit, or implicit revocation made by the bishop, or through the cessation of the law for whose execution it was issued. Revocation is explicit when the bishop expressly states so. Revocation is implicit if a later law or administrative norm is contrary to the earlier one, or completely reorders its matter. A general executory decree does not cease when the authority of the bishop who issued it expires unless the contrary is expressly provided. In this case, it would be explicit revocation. However, the bishop's successor, or the Holy See can order its continuance. In case of doubt about the revocation of a general executory decree, the analogy of c. 21 on doubtful revocation of law would seem to apply. That is, the decree is to be presumed to remain in force.

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[11] See Michael R. MOODIE, "General Decrees and Instructions," in *New Commentary*, p. 99. MOODIE calls this a lack of precision in c. 32.

[12] See Augustine MENDONÇA, "General Decrees and Instructions," in *Letter & Spirit*, p. 27. A general executory decree of a Roman dicastery with regard to a universal law obliges the entire Church.

[13] For example, a prescript of the 1983 Code may oblige all the members of the Latin rite. However, a general executory decree issued by an episcopal conference, implementing that prescript, obliges only those who are under the authority of that episcopal conference.

3.1.2 Instructions

Instruction is a new entity in the 1983 Code.[14] Their role is to clarify the law itself, to elaborate upon it and to determine methods to be observed in fulfilling it (c. 34, §1).[15] Since they depend upon laws, their relationship to laws is similar to that of general executory decrees. Instructions do not derogate from or abrogate laws. Nor do they substitute for a law.[16] An instruction, which cannot be reconciled with the provisions of

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[14] The 1917 Code did not use the term "instruction" for a juridic document. However, the Roman Curia issued many "instructions." At times these instructions created new laws. For example, the Instruction concerning the processing of matrimonial nullity cases, *Provida Mater Ecclesia*, issued on 15 August 1936 by the Sacred Congregation for the Sacraments (*AAS*, 28 [1936], pp. 313-370; English translation in *CLD*, 2, pp. 471-530) had the force of law, although the 1917 Code took precedence in case of a conflict between them. Pope BENEDICT XV restricted the legislative activity of the Roman Curia through his *motu proprio*, *Cum iuris canonici*, 15 September 1917, in which he stated: "The ordinary function [of the Congregations as regards general decrees] will therefore be not only to see that the prescriptions of the Code are religiously observed, but also to issue *Instructions*, as need arises, whereby those prescriptions may be more fully explained and appropriately enforced. These documents are to be drawn up in such a manner that they shall not only be in reality explanations of and complements to the canons, but also that they may be clearly seen to be such" (*AAS*, 9 [1917], p. 484; English translation in *CLD*, 1, p. 56).

It must be noted that juridic instructions are different from doctrinal instructions. For example, CDF, Instruction on Liberation Theology, 6 August 1984, in *AAS*, 76 (1984), pp. 876-909; English translation in *Origins*, 14 (13 September 1984), pp. 193, 195-204. This is a doctrinal instruction.

[15] John R. SCHMIDT describes the instruction as that which "belongs to the genus or class of *decreta*, because in the sphere of issuing decrees the Sacred Congregations exercise vigilance concerning the observance of law and opportunely publish instructions to furnish greater clarity to the laws and promote their greater efficacy; they will be explanations on the application of the law" (John R. SCHMIDT, "The Juridic Value of the *Instructio* Provided by the motu proprio '*Cum iuris canonici*' September 15, 1917," in *The Jurist*, 1 [1941], p. 292).

[16] Nevertheless, many changes to laws were routinely made through instructions in the 1960's and 1970's after the Second Vatican Council. Therefore, this rule does not seem to be applicable to the documents prior to the 1983 Code in every case. Although the 1983 Code does not seem to suggest that instructions could be approved *in forma specifica* by the Roman Pontiff, on 15 August 1997, the pope approved an instruction *in forma specifica*. See CFC et al., Interdicasterial Instruction, *Ecclesiae de mysterio*, 15 August 1997 (*AAS*, 89 [1997], pp. 852-877; English translation in *ORE*, Special Insert [19 November 1997], pp. II-VII). For studies on this instruction, see James H. PROVOST, "Approval of Curial Documents *in forma specifica*," in *The Jurist*, 58 (1998), pp. 213-225; John M. HUELS, "Interpreting an Instruction Approved *in forma specifica*," in *StC*, 32 (1998), pp. 5-46; Julio G. MARTÍN, "Instrucción 'Ecclesiae de mysterio': algunas observaciones," in *Commentarium pro religiosis* [=*CpR*], 80 (1999), pp. 179-213.

The Roman Pontiff, by approving *in forma specifica* a document issued by the Roman Curia, makes it his own and accords it legislative force. Thus, a document, or a part of a document so approved

law, has no force (c. 34, §2).[17] Any modification or abrogation of a law would affect instructions issued for its execution.

Instructions are acts of executive power. In a diocese, the bishop, the vicars general, and the episcopal vicars can issue instructions within the limits of their competence (c. 34, §1).[18] Instructions may be published under various titles such as directive norms, directives, circular letters, letters (*epistulae*), and *ratio fundamentalis*.[19]

There are certain features of instructions that distinguish them from general executory decrees. Instructions are issued for the use of those whose duty it is to see that laws are executed and oblige them in the execution of the laws (c. 34, §1). Accordingly, the diocesan bishop may address them to his vicars general, episcopal vicars, judicial vicar, curial officials, deans, parish priests, major superiors, directors of religious education, etc. Moreover, a diocesan bishop who has authority over several religious institutes of diocesan right may issue an instruction on the execution of diocesan policies

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assumes the force of papal law. See HUELS, "Interpreting an Instruction Approved *in forma specifica*," p. 10.

[17] At times the Holy See imposes new obligations on the executors of law through an instruction. For example, CFB and CEP, Instruction on the Diocesan Synods, *In constitutione apostolica* [=*In constitutione apostolica*], 19 March 1997, requires the bishop to send a copy of the diocesan synodal documents to the Apostolic See for its information. See *AAS*, 89 (1997), p. 721; English translation in *Origins*, 27 (23 October 1997), pp. 328-329. John M. HUELS observes that this requirement is nowhere in the law. Nevertheless, the norm has some juridical value because it is contained in an instruction binding executors of law. He categorises it as an "independent norm" in curial documents. See HUELS, "Theory of Juridical Documents," footnote 88, p. 365.

[18] At the universal level, the pope and the dicasteries of the Roman Curia are competent to issue instructions.

[19] See HUELS, "Theory of Juridical Documents," p. 355.

for religious and address it to the supreme moderators of the concerned institutes. Instructions do not require promulgation since they are not directed to the community.[20]

An instruction can cease in three ways. The bishop who issued the instruction or the Holy See can explicitly revoke it. It can be revoked implicitly when a subsequent instruction is contrary to the previous one. Furthermore, an instruction ceases when the law for whose further specification it was issued ceases (c. 34, §3).

3.1.3 Statutes

Title V of Book I of the Code deals with statutes and rules of order.[21] Normally, statutes are norms of executive power. Therefore, the diocesan bishop, his vicar general, and episcopal vicars can issue or approve them within their competence and in accordance with law.[22]

Canon 94, §1 defines statutes as "ordinances (*ordinationes*) which are established according to the norm of law in aggregates of persons (*universitates personarum*) or of

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[20] This was affirmed in the revision process of the Code. See *Communicationes*, 23 (1991), pp. 174-175.

[21] The 1917 Code did not explicitly deal with statues or rules of order in the context of its general norms (Titles I-VI, Book I). However, the Code did mention statutes in its canons (e.g., 410; 416; 689; 715, §1). Roman Congregations regularly issued statutes though the Code did not have any guiding principles for issuing them. Therefore, principles to determine the meaning and juridic value of statutes and rules of order were introduced in the revised Code. See *Communicationes,* 9 (1977), p. 234. The Eastern Code provides no canons on this matter.

[22] Statutes acquire the force of law when they are approved by a legislator who promulgates them with the force of law, or by his approval *in forma specifica* followed by promulgation in the manner of laws (cc. 7-21). When a legislative authority approves statutes, it should not be presumed that they have the force of law unless the proper formalities of promulgation are followed. A legislator cannot approve a statute contrary to a law enacted by a higher authority. Canon 94, §3 makes it clear that statutes in general are not laws because they are not acts of legislative power. Moreover, the simple approval by a competent authority does not grant them the force of law (cc. 117; 299, §3; 314; 322, §2; 816, §2; 1232, §1, etc.). Approval itself is an act of executive power.

things (*universitates rerum*) which define their purpose, constitution, government, and methods of operation."[23] This definition itself sets forth the scope of statutes whose purpose is to ensure that the activities of the aggregates are compatible with the mission of the Church.

Statutes are not singular in nature because they regulate specific groups and entities in the Church. The statutes of an aggregate of persons (*universitas personarum*) bind only its legitimate members. The statutes of an aggregate of things (*universitas rerum*) oblige only those who direct it (c. 94, §2).

3.1.4 Rules of Order

Canon 95, §1 defines rules of order (*ordines*)[24] as "rules or norms (*regulae seu normae*), which must be observed in meetings, whether convened by ecclesiastical

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[23] For example, aggregates of persons could include presbyteral councils, pastoral councils, parish pastoral councils, associations of the faithful, conferences of bishops. Aggregates of things could include shrines, trust funds, Mass foundations, seminaries, universities, cemeteries, etc. The latter are always controlled by one or more physical persons. Aggregates of persons or things may be juridic persons, or they may be organized entities without juridic personality. For example, the statutes of operation of a diocesan curia; the curia itself is not a juridic person, rather it is a part of the structures of the diocese, which is a juridic person.

The Code expressly mentions the statutes of several institutions, for example, a cathedral or collegial chapter (cc. 505; 506, §§1-2; 507, §§1-2); catechumenate (c. 788, §3); non-parochial church (c. 562); college of cardinals (c. 833, 2°); conferences of bishops (cc. 450, §1; 451; 452, §1, etc.); seminaries (cc. 237, §2; 239, §3); catholic universities (c. 810, §1); ecclesiastical universities (c. 810, §2); diocesan presbyteral councils (cc. 496; 497, 1°-2°, etc.). Some of these statutes would be issued directly by the competent ecclesiastical authority, while others would be formulated by the organization itself and approved by the competent ecclesiastical authority. For statutes of institutes of consecrated life and societies of apostolic life, the Code uses the term "Constitutions" rather than "statutes" (c. 587, §1). For a comprehensive list of references to statutes found in the Code, see CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, pp. 140-141.

[24] The terms "*ordines*" and "*ordinationes*" have been translated differently. CLSA translates *ordines* as "rules of order," whereas CLSGBI puts it as "ordinances." While CLSA translates *ordinationes* as "ordinances," CLSGBI uses "regulations."

authority or freely convoked by the faithful, and other celebrations."[25] In a sense, rules of order are supplementary to statutes. While statutes provide a decision making process in an organisation, rules of order facilitate the full and orderly participation by its members during its meetings. Rules of order regulate the development of such assemblies or celebrations by determining their constitution and procedure. Therefore, an organization in the Church must have not only statutes governing its structures and activities, but also rules of order to direct its activities. Rules of order are approved by the competent ecclesiastical authority. In a diocese, the bishop, vicar general, and episcopal vicars can approve them within the limits of their competence. They can be modified or changed in accordance with the norms of law to suit the needs and changing circumstances which affect all organizations.

The rules of order of an organization oblige all who participate in its assemblies or celebrations (c. 95, §2). Special rules may govern the participation of observers admitted to the sessions. Statutes emanating from executive power and rules of order are usually published as such; they do not appear in special form.[26]

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[25] For example, rules of order can be adopted to regulate meetings by parish pastoral councils, the presbyteral council, the diocesan pastoral council, the diocesan synod, etc. The authority to approve them is determined in the statutes.

Some of the rules of order issued by the Apostolic See, for example, are: JOHN XXIII, Regulations for the Celebration of the Second Vatican Council, 6 August 1962, in *AAS*, 54 (1962), pp. 609-611; English translation in *CLD*, 5, pp. 243-245; PAUL VI, Revised Plans for the Second Session of the Second Vatican Council, 13 September 1963, in *AAS*, 55 (1963), pp. 740-744; English translation in *CLD*, 6, pp. 224-226; SECRETARIATE OF STATE, The Order of Celebrating the Synod of Bishops, 18 December 1963, in *AAS*, 59 (1967), pp. 91-103; English translation in *CLD*, 6, pp. 400-412.

[26] See Augustine MENDONÇA, "General Norms I," Commentary for the Private Use of the Students, Ottawa, Faculty of Canon Law, Saint Paul University, 2002-2003, p. 203. These notes are used *passim* in this chapter with the author's kind permission.

3. 2 SINGULAR ADMINISTRATIVE ACTS

Title IV of Book I of the 1983 Code deals with singular administrative acts.[27] The Code does not define a singular administrative act.[28] The key feature of a singular administrative act is its particularity as it is directed to an individual or to a group of persons in a particular case. An individual person can be a physical person or a juridic person (e.g., parish, an association of the faithful). A group of persons can be several persons as a group (e.g., a family), or some other particular group of persons.

Canon 35 mentions decrees, precepts and rescripts as the three types of singular administrative acts. However, c. 49 defines a precept as a decree. Moreover, c. 59, §1 groups together privileges, dispensations, permissions and other favours under rescripts. Therefore, singular administrative acts broadly are of two types: decrees and rescripts.[29]

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[27] The 1917 Code did not have a title on singular administrative acts, though it had titles on rescripts (cc. 36-62), privileges (cc. 63-79) and dispensations (cc. 80-86). *CCEO's* title (Chapter III of Title XXIX) on the subject reads "Administrative Acts" without specifying the acts as "singular." This is because *CCEO* does not have a title on "General Decrees and Instructions."

[28] Canonists have attempted to define it in different ways. CHIAPPETTA defines a singular administrative act as: "an act of governance posited by a competent authority in the exercise of his functions, and directed to an individual or even to a community in a concrete and particular case" (CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 89). Thomas E. Molloy defines it as "an ordinance passed for the common good by one having executive power. It affects only the individual named and should be in accord with general and particular law" (Thomas E. MOLLOY, "Administrative Recourse in the Revised Code of Canon Law," in *CLSAP*, 44 [1982], p. 263). The second definition contains concepts whose character does not correspond to singular administrative acts. For instance, "ordinance" [*ordinatio*] could be either legislative or administrative depending upon the authority who issues it. In either case, it is general in nature (see cc. 94, §§1, 3). Moreover, "ordinance" does not seem to correspond to the nature of rescripts which are favours. Primarily, the purpose of a singular administrative act is the good of an individual, or of a particular group or community although indirectly it might contribute to the common good in some cases.

[29] Canons 35 and 59, §1 list the types of singular administrative acts. Indults and faculties, however, are not mentioned among them. It seems they are implied under the category of "other favours" because indults and faculties, whether issued by the Holy See or by the diocesan bishop are singular administrative acts. See Michael R. MOODIE, "Singular Administrative Acts," in *New Commentary*, p. 101.

3.2.1 Common Norms

Canons 35-47 present common norms applicable to all individual administrative acts.[30] Those who have executive power can issue singular administrative acts, whether they are decrees, precepts, or rescripts, within the limits of their competence. At the diocesan level the bishop, vicar general and episcopal vicars are competent to issue singular administrative acts. However, in accordance with c. 76, §1, privileges can be issued by a legislator as well as by an executive authority to whom this power has been granted by the legislator (c. 35).[31] Thus, a vicar general or an episcopal vicar can grant privileges only if the bishop concedes this power to them.

An administrative act is to be understood according to the proper meaning of words and the common manner of speaking. It seems to be presumed here that the authority issuing an administrative act communicates its meaning clearly without confusing the issue.[32] However, in case of doubt, c. 36, §1 lists five situations in which an administrative act must be strictly interpreted: acts concerning lawsuits or litigation; acts threatening or imposing penalties; acts restricting rights; acts restricting the acquired

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CCEO seems to suggest that singular administrative acts are of three types. Canon 1510, §2 describes them as decrees, precepts, and rescripts. Interestingly, this canon does not define a singular precept as singular decree.

[30] *CCEO*, in cc. 1510-1516, sets forth general principles concerning administrative acts, their time of effectiveness, interpretation, revocation, execution and conditions of administrative acts. Article I (cc. 1517-1520) relates to the procedure to be followed in issuing extra-judicial decrees, and Article II (cc. 1521-1526) lays down principles that govern the execution of administrative acts.

[31] Canon 1510, §1 of *CCEO* does not specify singular administrative acts. The canon reads: "Administrative acts can be placed, within the limits of their competence, by those who have executive power of governance as well as by those who have received such power explicitly or implicitly by the law itself or by legitimate delegation."

[32] See MOODIE, "Singular Administrative Acts," pp. 101-102.

rights of others; and acts contrary to a law which benefits a private person. The rest are to be interpreted broadly. Furthermore, an administrative act is to be applied only to the person or persons or the matter for which it was issued (c. 36, §2).[33] They cannot be extended to other persons or situations regardless of how similar they may be. Therefore, when there is a need for an administrative act in another case, a specific act must be issued by the competent authority, rather than applying the one provided for other persons in a similar situation.[34]

The bishop may attach a condition to a singular administrative act. A condition is a circumstance attached to an act in such a manner that the act depends on it. However, not every condition in an administrative act affect its validity. The violation of only those conditions attached with the terms "if" (*si*), "unless" (*nisi*), or "provided that" (*dummodo*) affect the validity of singular administrative acts (c. 39).[35] Any other condition would affect only the liceity of the act, and not its validity.

The power of governance is exercised normally in the external forum and sometimes only in the internal forum (c. 130). This requires the bishop to issue an administrative act for the external forum in writing. If he issues it in commissorial form,

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[33] The first two paragraphs of c. 1512 of *CCEO* correspond to the two paragraphs of c. 36 of *CIC 83*. However, c. 1512 of *CCEO* has a third paragraph which is the equivalent of c. 77 of *CIC 83*. This paragraph states: "In the case of privileges, that interpretation must always be used so that the person to whom the privilege was granted actually does obtain some favour."

[34] See MOODIE, "Singular Administrative Acts," p. 102; Augustine MENDONÇA, "General Decrees and Instructions," in *Letter & Spirit*, p. 29.

[35] Canon 1516 of *CCEO* has an additional phrase. The canon reads "Conditions attached to administrative acts are considered to affect their validity only when they are expressed by particles, *si*, *nisi*, *dummodo*, or by similar words in the vernacular."

the act of its execution must also be put in writing (c. 37; *CCEO* c. 1514).[36] However, since c. 58, §2 allows him to orally impose a precept, it can be presumed that an administrative act need not always be in written form.[37] Moreover, as a general norm, the requirement that an act be in writing seems to concern only its liceity, because c. 10 regards only those laws as invalidating and disqualifying which expressly establish the written form for validity.[38] A requirement for the validity of a juridic act must be expressed in law (c. 124, §1). Canon 37 prescribes no such form for the validity of an administrative act.

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[36] Canons 40-45 treat functions of an executor. They do not directly concern the executive authority's exercise of power. An executive authority issuing the administrative act may entrust the execution of the act to another person. The law calls this process as an issuance of an act in commissorial form (*in forma commissoria*). When executive authority issues an administrative act, without an executor, directly to the person who requested it, it is said to be issued *in forma gratiosa*. This latter act can be executed simply by handing the written document to the person concerned, or forwarding it, or at least by notifying its content to the person for whom it is issued. See MOODIE, "Singular Administrative Acts," p. 103.

Canon 54, §2 of *CIC 17*, which is not incorporated in *CIC 83*, provided that the executor could execute a rescript or deny it depending upon his or her discretion. This was, in fact, a distinction between a necessary executor and a voluntary executor. A necessary executor was an agent of the authority issuing the administrative act. Such an executor had no power to verify the motives of the petition. The executor's function was to receive the rescript, ensure its authenticity and integrity, and execute it without further inquiry. A voluntary executor, on the other hand, could take cognisance of the cause and grant or refuse the favour in virtue of the jurisdiction delegated by the author of the act. However, the executor's decision had to be based on his or her conscientious judgement after a careful examination of the veracity of the petition. See CAPPELLO, *Summa iuris canonici*, pp. 124-125; ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 85-86. The 1983 Code does not make this distinction. The nature of an execution needs to be verified on the basis of the words of the act. If the executor is ordered to execute the act, he or she is a necessary executor, even though a clause such as "at your discretion or according to your conscience" could be added. If the executor is granted "necessary and opportune faculties" for execution, the executor is considered voluntary. See CAPPELLO, *Summa iuris canonici*, p. 125; see also CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 96.

[37] If an administrative act is granted orally in the external forum, it would not carry any weight in that forum unless it is authenticated by the competent authority through an official document. See CAPPELLO, *Summa iuris canonici*, p. 111. The requirement that administrative acts be in writing does not apply to internal forum cases. Neither does the canon prohibit issuing them in written form. However, executive authorities dealing with internal forum cases need to follow specific directives, if any, issued in order to regulate their activities in that forum. See MOODIE, "Singular Administrative Acts," p. 102.

[38] For example cc. 186; 190, §3; 193, §4; 312, §2; 474; 638, §3; 1281, §1; 1304, §1.

Unless the bishop has expressly added a derogating clause, an administrative act lacks efficacy in three circumstances even if it was issued *motu proprio* (c. 38; *CCEO* c. 1515)[39] when it: harms acquired rights of another (cc. 4, 1196); is contrary to a law whether universal or particular including a general decree of legislative nature; is contrary to an approved custom (c. 23). It is to be noted that in a diocese, only the bishop, because of possessing executive and legislative powers, or the one who is delegated according to the norms of law (c. 30) can add such a derogating clause. Unless the bishop expressly mentions the derogating intention in the act, acquired rights, laws, and customs take precedence over administrative acts. A diocesan bishop can derogate only from acquired rights, ecclesiastical laws, and customs that are within his competence. Since the vicar general and episcopal vicars possess only executive power, they cannot add such a derogatory clause in an administrative act.

An administrative act does not cease when the bishop who issued it ceases to be in office unless the law expressly provides otherwise (c. 46; *CCEO* c. 1513, §2).[40] Generally, a contrary law enacted by the bishop or another legislator does not revoke a singular administrative act. In specific cases, either the particular or universal law (e.g.,

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[39] *Motu proprio* refers to a juridic document issued on the initiative of a competent authority. However, it does not always mean that no petition was made for its issue. A diocesan bishop may issue juridic documents on his own initiative within the limits of his competence, but the term *motu proprio* is normally used only in case of papal acts. See RISK, "Individual Administrative Acts," p. 50. For an example of *motu proprio* letter of general nature, see JOHN PAUL II, Apostolic Letter issued *motu proprio*, *Ad tuendam fidem*, 18 May 1998, in *AAS*, 90 (1998), pp. 457-461; English translation in *ORE* (15 July 1998), pp. 1-2.

[40] For example, cc. 33, §2; 81; 132, §2 contain the same principle.

cc. 58, §2; 81; 481) may provide that a particular act ceases when the authority of the bishop who issued it expires.[41]

A competent authority can revoke an administrative act through another administrative act. The bishop can revoke an administrative act issued by him through another administrative act. Moreover, his successor, or the Holy See can revoke it in the same way. However, revocation takes effect only when the subsequent act is legitimately notified to the person for whom it has been issued (c. 47; *CCEO* c. 1513, §3). If the act concerns the external forum, its revocation must be in writing.[42] In other words, notification should be formal and official, sent by the competent authority or by a duly delegated person.

An administrative act ceases with the lapse of the time for which it was granted, or with the death of the person for whom it was issued. Any contrary law, either universal or particular, does not revoke an administrative act unless it specifically adds a clause to that effect.

3.2.1.1 Singular Decrees

Canon 48 defines a singular decree as "an administrative act issued by a competent executive authority in which a decision is given or a provision is made for a

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[41] For instance, the bishop can provide that a certain singular act remains in force only while he remains in office. This must be expressly stated in the law or in the administrative act, leaving no room for doubt. See RISK, "Individual Administrative Acts," p. 52; Augustine MENDONÇA, "Singular Administrative Acts," in *Letter & Spirit*, p. 32.

[42] See MENDONÇA, "Singular Administrative Acts," pp. 32-33.

particular case according to the norm of law."[43] This definition contains the essential elements of a singular decree.

As an administrative act, a singular decree is distinct from legislative and judicial acts. Within the limits of their competence, the diocesan bishop, vicar general, and episcopal vicars can issue singular decrees in a diocese. The competence of a delegate is to be specified in the mandate.

A singular decree is issued for a particular case. A particular case may refer to an individual either physical or juridic, or a group of persons. The object of a singular decree is to give a decision or to make a provision.[44]

A singular decree must be issued in accordance with the norms of law. In this regard, both universal and particular laws concerning the decree itself and the matter of the decree are to be observed.[45] A decree issued by the bishop cannot be contrary to the

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[43] *CCEO* c. 1510, §2, states: "Administrative acts are chiefly: 1° decrees which give a decision or make a canonical provision for a special case"; 2°-3° of the canon concern singular precepts and rescripts.

[44] The decisions and provisions, in general terms, may include: approval of entities and concession of juridic personality; erection, extinction, joining, or division of ecclesiastical provinces; promotion of pastoral and apostolic activities: judgements of suitability; appointments, etc. See Pedro LOMBARDÍA, "Singular Administrative Acts," in *Canon Law Annotated*, p. 106. More specifically, decisions concern: transfer; removal from office; suppression of a juridic person; dismissal from religious life; imposed exclaustration; administrative imposition of penalties or exoneration of an accused from culpability. And provisions relate to matters such as: appointment to an office; establishment of an association of the faithful; establishment of a juridic person; convocation of councils, synods of bishops, or chapters; assignment of religious to communities; approval of budgets and statutes, and issuing of dimissorial letters, etc.

[45] Canons that need to be observed while issuing singular decrees are 35-47, 48-58, 124-128 and 129-144. Moreover, there are canons to be observed regarding the matter of the decree, e.g., cc. 1740-1747 in the case of removing a parish priest from office.

administrative acts of a higher authority.[46] Failure to observe these norms could render the act illicit or even invalid.

A singular decree generally does not presuppose any petition for its issuance. This explains the difference between a decree and a rescript. The latter is issued in response to a petition. However, the Code seems to allow issuing a decree in response to a petition (c. 57, §1) and a rescript without a request (c. 63, §1).[47]

3.2.1.2 Singular Precepts

According to c. 49, a singular precept is "a decree which directly and legitimately enjoins a specific person or persons to do or omit something, especially ("*praesertim*") in order to urge the observance of law."[48] In other words, through a precept a competent executive authority could oblige its recipient to do or prohibit from doing something. The obligation so imposed could be either in the internal or in the external forum (c. 37). In the internal forum, the obligation concerns solely the spiritual good of the individual. In the external forum, the obligation concerns both the good of the individual and also the governance of the community.[49] In accordance with c. 52, a precept follows the person

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[46] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 100.

[47] Issuing a decree in response to a request could imply that whatever the competent authority grants is not a favour, but rather something for which the person was entitled to by law. See LOMBARDÍA, "Singular Administrative Acts," p. 106.

[48] Canon 1510 §2, 2° of *CCEO* does not define a singular precept as a decree as c. 49 of *CIC 83* does. Rather it considers a singular precept as an administrative act when it states: "Administrative acts are chiefly: singular precepts which directly and legitimately enjoin a specific person or persons to do or omit something, especially in order to urge the observance of the law." The 1917 Code, in c. 24 dealt with singular precepts, but this canon did not define a precept.

[49] A penal precept (c. 1319) warns the person to end violating a law and to begin its observance. Failure to comply with it would result in the individual incurring a penalty.

everywhere, even outside the territory where it was issued. However, it is temporary in character.

The validity of a precept presupposes two conditions. First, the person who issued it must have competence over the person to whom it is directed, or in the matter addressed in the precept. Second, whatever obligation is imposed or demanded in the precept must be already contained in the law. Only the bishop or other competent legislator can enact a new obligation.

A precept is similar to a decree in the sense that it is binding on an individual person or a group of persons. However, a precept differs from a decree. By issuing a decree, the bishop resolves a matter (unless the person has recourse); by issuing a precept he commands someone to do or to stop doing something. Until the person obliges, the matter is not settled, and the precept remains in force. If the obligation of a precept involves repetition of certain acts, the precept remains in force till the person completes those acts. Through a precept, a singular administrative act, the bishop cannot introduce a new law, rather he simply commands the observance of an existing norm. However, the term "especially" ("*praesertim*") in c. 49 suggests that the bishop could attach other motives to a precept.

3.2.1.3 Norms Common to Singular Decrees and Precepts

Canons 50-58 generally refer to singular decrees, although c. 58, §2 concerns the cessation of precepts. This reference to precepts in c. 58, §2 indicates that the law recognizes the need of an additional norm governing the cessation of precepts. That

means, the norms which regulate decrees are applicable also to precepts because c. 49 defines a precept as a decree.

Before issuing a decree, the bishop is to seek necessary information and proofs, and to the extent possible, is also to hear those whose rights could be harmed (c. 50).[50] An administrative act should promote the good of the persons and of the Church. It can be achieved through respect for the rights of the faithful, proper investigation and prudent judgement prior to issuing a decree. An arbitrary use of authority could cause more harm than good.

The Code provides that the bishop is to issue a decree whenever the law orders it to be issued, or when an interested party legitimately petitions or has recourse to obtain it. In other words, the law itself or a legitimate petition may place an obligation on the bishop to issue a decree.[51] Unless a different period of time is prescribed by law, the bishop has three months from the receipt of the petition or recourse to provide for the situation unless the law prescribes a different time period.[52] If at the end of the three-

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[50] Canon 1517, §1 of *CCEO* states: "Before issuing an extra-judicial decree, an authority is to seek out the necessary information and proofs, hear or consult those who should by law be heard or consulted, and also hear those whom the decree directly touches and especially those whose rights can be injured." Paragraph 2 has further norms: "The authority is to disclose to the petitioner and also to the one who legitimately opposes the information and proofs which can be known without danger of public and private harm, and present the arguments that are perhaps contrary while giving them the possibility to respond, even through an advocate, within the time-limit established by the authority itself." This canon is situated in Art. I, Chapter III of Title XXIX: Law, Custom and Administrative Acts. The same principles in *CIC 83* are found dispersed in procedural law.

[51] For example, when a candidate's election or presentation requires installation or confirmation, the competent authority must respond in accordance with cc. 163 and 179, §2. Canon 163 requires the competent authority to install the one legitimately presented whom the authority has found suitable and who has accepted. Similarly, c. 179, §2 directs the competent authority not to deny confirmation of the person legitimately elected if that person is found suitable according to the norm of c. 149, §1.

[52] For example, cc. 268, §1; 1734-1735 provide a different time period. In accordance with cc. 201, §1, 202-203, the three months period mentioned in c. 57, §1 is understood to be continuous time.

month period the requested decree has not been issued, the law presumes that the bishop's response is negative. In other words, silence is understood to be denial of the request.[53] This silent negative reply gives the petitioner the right to have recourse against the inaction of the bishop. The negative reply indicated by his silence or inaction would not relieve him of the obligation of issuing the decree, and of repairing harm done in accordance with c. 128 (c. 57).[54]

Canon 51 requires that a decree be issued in writing, and if it involves a decision, it must contain reasons for it at least in summary form.[55] This canon does not expressly state that the decree must be signed. Nevertheless, this requirement is implied in the condition that the decree be issued in writing. Non-compliance of these norms renders a decree invalid. If the decree is not countersigned, it would be merely illicit (cfr. cc. 474; 483, §1).

A decree has effect only in respect of the matter it deals with, and of the person to whom it is directed. It cannot be extended to additional cases or to persons in similar

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[53] In certain circumstances, silence of the competent authority could suggest approval. For example, in accordance with c. 268, §1, the silence of the bishop amounts to his approval for granting incardination to a cleric who seeks it in accordance with law.

[54] For example, if parishioners of a particular parish request the diocesan bishop that their parish priest should be removed for reasons specified in c. 1741, or be transferred in accordance with c. 1751, the bishop is obliged to respond within the prescribed time period. If he neglects to do so in spite of the existence of those reasons he is still obliged to issue the decree of removal or transfer and also to repair the damage done to the community.

CCEO c. 1518 is more detailed; however, it does not contain the norm on the authority's obligation to repair the damage caused by its failure to issue the decree within the stipulated time period.

[55] *CCEO* c. 1514 requires that an administrative act meant for the external forum be in writing, and also that the act of execution be in writing if that act is issued *in forma commissoria*. The condition that an extra-judicial decree contain reasons for its issue, at least in summary form, is stated in c. 1519, §2. This latter canon provides that if there is a danger of public or private harm in disclosing reasons, they are to be expressed in a secret book. These reasons are to be shown to the person who handles the recourse if it is introduced, and if that person requests that book.

situations. Nor does a decree create a binding precedent for the future.[56] It is personal in application in the sense that it obliges the person regardless of the territory in which the person resides, unless it is otherwise evident (c. 52). Therefore, its binding force transcends territory and obliges the person everywhere, even if its recipient should move away from the territory of the authority who issued it, unless it is provided otherwise. The decree remains in effect until it is revoked or otherwise legitimately abrogated.[57]

There may be two difficulties in the application of decrees. First, the bishop could issue more than one conflicting decree for the same matter. Second, the decrees could conflict with each other because of their equally general or particular nature. If there is a conflict between decrees, a particular decree prevails over a general decree. If decrees are equally general or particular, the conflicting elements in the later one in time modify the earlier one (c. 53). There seem to be two presumptions at work here. First, that the intention of the bishop in providing for the good of the recipient of the decree is better reflected in the action more immediate in time. Second, the decrees proceed from the same executive authority, for example, in a diocese from the bishop, or the vicar general, or the episcopal vicar. In case conflicting decrees are issued by the bishop and the vicar general or episcopal vicar, the one from the bishop supersedes that of others.[58]

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[56] See MOODIE, "Singular Administrative Acts," p. 112. Canon 16, §3 states that an interpretation given in the form of a judicial sentence or of an administrative act in a particular matter binds only the persons for whom it is given, and affects only the matter for which it is granted.

[57] See MOODIE, "Singular Administrative Acts," p. 112.

[58] See MOODIE, "Singular Administrative Acts," pp. 112-113.

The bishop may issue a decree *in forma commissoria* or *in forma gratiosa* (cfr. c. 54, §1). In both cases the decrees take effect from the moment the concerned persons are informed of them, although the methods of their notification differ. A singular decree issued *in forma commissoria* takes effect from the moment of its execution. A decree issued *in forma gratiosa* binds the person from the moment it is made known to the recipient (c. 54, §1).[59] To be enforceable in the external forum, the bishop must issue a decree in writing and he must make it known by a legitimate document according to the norm of law (c. 54, §2).[60] Having observed the norms of cc. 37 and 51, when a very grave reason prevents the bishop from handing over of the written text of a decree, the decree is considered to have been made known if it is read to the person to whom it is destined in the presence of a notary or two witnesses. That is, the bishop who issued the decree or his delegate is to read the decree to the person concerned, in the presence of a notary or two witnesses. With this the decree is considered to have been communicated. The bishop must ensure that a record of this act is prepared and signed by all present (c. 55).[61] This document would serve as the evidence of lawful notification of the decree.

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[59] *CCEO* c. 1511 provides different norms for the efficacy of rescripts and other administrative acts: "An administrative act has effect from the moment it is intimated or, in the case of rescripts, at the moment the letter is given. However, if the application of the administrative act is entrusted to an executor, it has effect at the moment of execution."

[60] *CCEO* c. 1520, §1 has an additional clause. The canon states: "A decree has legal force after it has been intimated to the one to whom it is destined in the way that is safest according to the laws and conditions of places."

Although cc. 37 and 51 of *CIC 83* require that decrees be issued in written form, they do not provide any specific criterion to determine this authenticity. Normally, written documents include identifying marks such as letterhead, the signature of the competent authority, office seal, countersignature of a notary, and date of issue, etc. See RISK, "Individual Administrative Acts," p. 54.

[61] Canon 1520, §2 of *CCEO* states: "If the danger of public or private harm precludes the text of the decree being given in writing, the ecclesiastical authority can order the decree to be read to the person to whom it is destined before two witnesses or a notary. After a written record of the proceedings has been

The Code does not specify what would constitute "a very grave reason" which prevents the handing over of the written text of the decree. The bishop as the author of the decree would have to prudently determine such a reason. It is generally understood, however, that something truly detrimental to the common good or to the good of the persons involved would constitute such "a very grave reason." Others include: when there is a danger that contents of the decree might reach a community hostile to the Church or to its particular members; when the divulging of a decree to a possibly unfriendly or prejudiced press would cause distortion or serious misunderstanding concerning the nature and the purpose of the decree. Simple convenience is not a reason for the exception.[62]

The law provides another form for the presumed legitimate communication of a decree in difficult circumstances. When the bishop properly summons a person to whom a decree is directed to receive or hear the decree, but that person either does not appear without a just cause, or refuses to sign the required document after hearing it,[63] the decree is considered to have been made known and it takes effect immediately (c. 56).[64] A

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prepared, all those present must sign it. Having completed these things, the decree is considered to have been intimated."

[62] See RISK, "Individual Administrative Acts," p. 55; see also MOODIE, "Singular Administrative Acts," p. 113.

[63] The recipient of the decree should be summoned again if he or she has a just cause for not appearing after the first summons.

[64] *CCEO* c. 1520, §3 contains the same norms, but in a detailed manner. The canon reads: "However, if the person to whom the decree is destined has refused intimation, or having been summoned according to the norm of law to receive or hear the decree, did not appear without a just cause in the estimation of the authority of the decree, or refused to sign the written record of the proceedings, the decree is considered to have been intimated." Canon 1510 of *CIC 83* (*CCEO* c. 1192, §3) is a similar norm in judicial procedure.

refusal to accept a decree or to sign for it does not affect its juridic efficacy. In either case, the bishop should prepare a document stating the circumstances and the fact that the decree has become efficacious on a particular day upon its legitimate communication.

A singular decree issued by the bishop ceases when he, his successor or the Holy See legitimately revokes it, or through cessation of the law for whose execution it was given (c. 58, §1). The former is known as extrinsic revocation and can be either explicit or implicit as stipulated in c. 33, §2. The latter is known as intrinsic revocation. The first paragraph of c. 58 mentions only decrees, but not precepts; on the contrary, the second paragraph mentions only precepts. This means that the norms of the former apply to the latter as well. The purpose of the second paragraph is to provide an additional norm for the cessation of a precept. Accordingly, a precept not imposed by a legitimate document ceases when the authority of the bishop who issued it expires (c. 58, §2).[65] His authority could cease through transfer, resignation, privation made known to him, or death (c. 416).[66]

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[65] *CCEO* c. 1513, §5 states: "A singular decree or precept ceases to have force through cessation of the law for whose execution it was given; a singular precept also ceases when the authority of the one who issued it expires, unless it was imposed by a legitimate document." This canon does not state that a decree can be revoked by competent authority. However, the norm of paragraph 3 of the same canon, which deals with the revocation of an administrative act by another administrative act of a competent authority, would apply to decrees and precepts. Canon 24 of *CIC 17* allowed the cessation of precepts with the expiry of the authority who issued them unless they were imposed by legitimate document or in the presence of two witnesses. This last clause is not found in c. 58 of the revised Code. This indicates that a precept imposed only by a legitimate document will not cease with the cessation of the authority who issued it.

[66] The authority of the vicars general and episcopal vicars can cease also through expiration of their term in office or by removal.

3.2.1.4 Rescripts

A rescript is defined as "an administrative act issued in writing by a competent executive authority; of its very nature, a rescript grants a privilege, dispensation, or other favour at someone's request" (c. 59, §1).[67] Though rescripts resemble other administrative acts, elements in the definition indicate their specific character. A rescript is singular in character even if it is directed to a group of persons, or to a juridic person. It must be issued in writing for it to be effective in the external forum, although c. 74 allows for the oral granting of favours in the internal forum. In a diocese, the bishop, the vicar general, episcopal vicars can issue rescripts in accordance with the law. The person who issues a rescript must have the competence over its matter and the person to whom it is addressed.

A rescript concedes a favour at someone's request. It could be a privilege, dispensation, or some other favour (c. 59, §1). The Code does not say permission (*licentia, permissio*) [68] is a favour, but applies the norms on rescripts to it, and also to a favour granted orally, unless it is otherwise evident (c. 59, §2).[69] The Code elsewhere

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[67] Canon 1510, §2, 3° of *CCEO* differs slightly in naming the types of rescripts. It reads, "Administrative acts are chiefly: [...] rescripts which grant a privilege, dispensation, permission or another favor." It does not specifically define a rescript, rather it presents privileges, dispensations, permissions and other favours as species of a rescript.

[68] Generally, the term "*licentia*" in the Code is translated as "permission." The Code also uses the term "*permissio*," which is also translated as "permission." Although the terminology is different, there does not seem to be any difference in the juridic nature of "*licentia*" and "*permissio*."

[69] The corresponding c. 1527, §1 of *CCEO* does not mention permissions. The canon states: "The canons established for rescripts are valid also for the oral granting of favors unless it is otherwise clearly evident." This is because permission is specified as a rescript in c. 1510, §2, 3°.

uses generic terms such as faculty and indult to indicate favours granted.[70] The norms on rescripts would apply also to them.

A rescript need not always be issued in response to a request. The bishop may issue a rescript *motu proprio*, that is, on his own initiative, even if a petition was presented requesting it. In this case, the clause *motu proprio* suggests that the bishop did not agree with the reasons presented, or that they were insufficient. The clause may also indicate that the rescript is issued out of the generosity of the bishop.

The bishop can issue rescripts to all those who request it.[71] It can be sought by all those who are not expressly prohibited from doing so (c. 60).[72] The canon seems to

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[70] The 1983 Code also uses other terms which suggest granting of rescripts. For example, commutations, reduction of obligations, confirming postulation, approval, transfer from a religious institute to a secular institute, etc. The next chapter of this study will identify more such instances in the Code.

[71] The validity of a rescript depends upon three factors in the request for it. Canon 63 states: "§1. Subreption, or concealment of the truth, prevents the validity of a rescript if in the request those things were not expressed which according to law, style, and canonical practice must be expressed for validity, unless it is a rescript of favor which is given *motu proprio*. §2. Obreption, or a statement of falsehood, also prevents the validity of a rescript if not even one proposed motivating reason is true. §3. The motivating reason in rescripts for which there is no executor must be true at the time when the rescript is given; in others, at the time of execution." Subreption and obreption are punishable in accordance with c. 1391.

CCEO c. 1529 states: "§1. The concealment of truth in the request does not prevent a rescript from having force, provided that those things have been expressed which must be expressed for validity according to the style of the curia of the hierarch who granted the rescript. §2. Nor does a statement of falsehood prevent a rescript from having force, provided that at least one proposed motivating reason is true." This canon does not contain "canonical practice," but is more specific that "the style of the curia" pertains to the curia of any hierarch. The notion of hierarch is specified in c. 984, §§1, 3 and is equivalent to the notion of "Ordinary" in *CIC 83*. In view of *CCEO* canon, "style and canonical practice" in c. 63, §1 of *CIC 83* seem to refer to the Roman, the diocesan, or the religious curia, as the case may be. The style and practice may vary from one curia to another, or from one office to another within a curia.

[72] Canon 36 of *CIC 17* stated: "§1 Rescripts, whether from the Apostolic See or other Ordinaries, can be petitioned freely by anyone who is not expressly prohibited from doing so. §2 Favours and dispensations of any sort can be granted by the Apostolic See and are valid even for those afflicted by a censure, with due regard for the prescriptions of cc. 2265, §2, 2275, 3° and 2283." Canons cited in the second paragraph referred to those excommunicated "*vitandi*," to those who were excommunicated, or suspended through a declaratory or condemnatory sentence, and to those who were personally interdicted. It seems even these persons could validly obtain favours from the Holy See if the mention of the censure was made in the petition. Other canons of the Code, e.g., 2291, 9°, 2294, declared certain persons *inhabiles* to receive any ecclesiastical favours or offices. Likewise, after a declaratory sentence, apostates, heretics

include even non-Catholics and the non-baptized among those who can request a rescript.[73] One's ineligibility would depend upon one's condition and the nature of the rescript being requested.[74]

Unless it is otherwise evident, one can request a rescript from the bishop for another person even without the latter's consent. Such a rescript has force even before that person accepts it or even knows about it.[75] Its validity does not depend upon the consent of the recipient who is not bound to accept it. However, the law or the rescript itself could have clauses to the contrary (c. 61; *CCEO* c. 1528).[76] If the bishop issues a rescript *in forma gratiosa*, it takes effect from the moment it is issued. If he issues it *in forma commissoria*, it takes effect at the moment of its execution (c. 62).[77] The date on

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and schismatics could not validly obtain a rescript because they were excommunicated. Before the sentence, they could not publicly and formally obtain ecclesiastical favours because they were not members of the Church.

In the revised Code, there does not seem to be anyone who is forbidden to request a rescript. See RISK, "Individual Administrative Acts," p. 57. However, c. 1331 §2, 3° forbids the one on whom excommunication is imposed or declared to benefit from any privileges already granted. Those who are merely suspended or interdicted do not seem to be prohibited from requesting rescripts. In a particular case, a legislator or an ecclesiastical judge could forbid them from doing so (cfr. c. 1315).

[73] A non-baptized person could request the dissolution of marriage in favour of the faith (c. 1143, §1). A baptized non-Catholic could petition for dissolution of non-consummated marriage (cc. 1671; 1697). A Catholic could request a dispensation from disparity of cult (c. 1086, §1).

[74] Cfr. MENDONÇA, "Singular Administrative Acts," p. 37. In matters concerning one's conscience, the request for rescript is normally presented to the Apostolic Penitentiary through the confessor. See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 71.

[75] For example, a *sanatio in radice* could be granted without the knowledge of one or both parties (c. 1164); a dispensation from a non-consummated marriage may be obtained even if one party is unwilling (c. 1142). When a parish priest delegates another priest to assist at a marriage, but the latter, being unaware of the delegation because he presumed to possess necessary faculties, assists at the marriage, that marriage is valid.

[76] For example, a religious must accept the indult of departure in order to be dispensed from vows and the obligations arising from profession (c. 692).

[77] Canon 1511 of *CCEO* provides norms for the efficacy of administrative acts. All these norms apply to rescripts, including an additional norm for their efficacy: The canon states: "An administrative act

the rescript, presumed to be the day of granting the favour, is significant in determining the time at which the petitioner can begin using the granted favour. In case of conflicting rescripts, the dates on them would resolve which of them is earlier in time. When the bishop attaches a condition to a rescript granted *in forma gratiosa*, it becomes effective only when that condition is fulfilled. The bishop can prescribe a date different from the date of its notification to the petitioner for its effectiveness. A rescript issued *in forma commissoria* takes effect at the time of its execution.[78]

Canon 65, §§2 and 3 sets forth a principle for the coherent functioning of the bishop and his vicar general and episcopal vicars in granting favours.[79] A vicar general or an episcopal vicar cannot grant a favour if it was denied by another vicar of the same bishop. A favour denied by a vicar cannot be granted by another vicar in spite of knowing the reasons from the former vicar for the denial. A favour granted by the bishop, previously denied by a vicar general or by an episcopal vicar, is invalid if the bishop was

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has effect from the moment it is intimated or, in the case of rescripts, at the moment the letter is given. However, if the application of the administrative act is entrusted to an executor, it has effect at the moment of execution."

[78] The rescript granting a dispensation from priestly celibacy seems to be of a different type. It seems to be issued *in forma gratiosa*. It is valid at the time of its issue in Rome, but it is effective only upon its notification to its priest-petitioner. See SCDF, Procedural Norms on Dispensation from Priestly Celibacy, 14 October 1980, in *AAS*, 72 (1980), pp. 1132-1137; English translation in *CLD*, 9, pp. 92-99.

[79] The principles for coherence in granting favours by Ordinaries are established in c. 65, §1. The Ordinary defined in this canon seems to include both local and personal Ordinaries. One's proper Ordinary is generally the local Ordinary, that is, the Ordinary of the place, except in the case of a person who belongs to a clerical religious institute of pontifical right or clerical society of apostolic life of pontifical right. In this case, one's major superior is his personal Ordinary. If a petitioner's proper Ordinary denies a favour, that person is not to request the same favour from another Ordinary, whether personal or local as the case may be, without mentioning the previous refusal. The second Ordinary is not to grant that favour unless he learns of the reasons for the refusal by the first Ordinary. However, the second Ordinary is not bound to accept the reasons of the first. If the favour is conceded without observing this principle, the concession would be illicit but valid.

not informed of the denial. A favour denied by the bishop cannot be obtained validly from his vicar general or episcopal vicar, even with the mention of its previous denial by the bishop. However, it can be granted with the consent of the bishop.[80]

If there is an error in the name of the person to whom the rescript issued by the bishop is directed, or in the name of the person's place of residence, or in the matter concerned, the rescript nevertheless remains valid. The bishop is to determine whether there is any such error in the rescript (c. 66). No intervention of the bishop is necessary if the error is so manifest that there is no reason for doubt. When a rescript concerns only the internal forum, the recipient can make the judgement as to whether there is a doubt. In the case of an unresolved doubt, the rescript would be considered invalid, and the bishop should be approached.[81]

It is possible that rescripts issued by the bishop concerning the same matter and sent to one or several persons are contradictory. Canon 67 envisages two such situations. First, if two rescripts pertaining to the same matter are contradictory, the particular

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[80] Canon 44 of *CIC 17* corresponds to c. 65 of *CIC 83* except that the former does not mention the episcopal vicar. The latter does not mention the Supreme Pontiff. Therefore, it implies that if he refuses a favour, no other authority below him can grant it without his consent. However, it seems he may grant a favour refused by other authorities without their consent. Canon 65 does not deal with the possibility of obtaining a favour from the second vicar with the consent of the first vicar who denied it.

Canon 1530 of *CCEO*, equivalent of c. 65 of *CIC 83*, seems to answer this doubt. The canon states: "§1. A favor denied by a higher authority cannot be validly granted by a lower authority, unless the higher authority has expressly consented. §2. A favor denied by one authority cannot be validly granted by another equally competent authority or a higher authority if no mention of the denial is made in the petition." The canon does not mention any hierarch [Ordinary] by name. It seems that a rescript denied by one vicar of a hierarch can be validly granted by another vicar of the same hierarch if the request for the rescript mentions that denial.

[81] See MENDONÇA, "Singular Administrative Acts," p. 41; RISK, "Individual Administrative Acts," p. 59.

prevails over the general in those matters that are specifically expressed.[82] The other features, which are not in conflict with one another, remain unaffected. In this case, the time of issue does not determine which one of them should prevail. If the particular rescript was issued before the general, the principle is held that a general law or provision does not derogate from the previous particular one, unless the general one expressly provides otherwise.

Second, if rescripts are equally general or particular, the one first in time prevails over the later.[83] However, the later one will prevail if it expressly mentions the earlier one, and if the recipient of the earlier one has not used the same out of malice or notable negligence. If the second rescript expressly mentions the first one, it would seem that the bishop was aware of differences and intended that the second one must prevail. The non-use of a rescript is considered malicious if its recipient does not use it in order to deceive another.[84] Notable negligence could imply indifference or a simple refusal to use the favour, resulting in its forfeiture. However, excusing causes and circumstances need to be considered. When determination of notable negligence is difficult, the matter should be

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[82] A general rescript contains a favour applicable to all cases of a given class or type. A particular rescript concerns only one or a few cases. See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 79.

[83] Whether a rescript is earlier or later is determined on the basis of the time of its issue, and not the time of its execution. This applies to rescripts issued both *in forma commissoria* and *in forma gratiosa*. In case of *in forma commissoria* rescripts, the recipient obtains the right to the favour even before its execution. He or she cannot be deprived of it. This applies even when a subsequent rescript is issued *in forma gratiosa*. If both are granted *in forma commissoria*, and the second is executed before the first, the second seems to prevail because the person concerned is already in possession of the favour granted. See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 80; see also RISK, "Individual Administrative Acts," p. 60.

[84] For example, intentional omission to present the rescript to the executor (c. 69), or to the proper Ordinary (c. 68). See CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 116.

left to the prudent judgement of the bishop.[85] In case of doubt about the validity of a rescript, recourse should be made to the bishop who issued it, because one who issues a rescript is also competent to determine its validity.

If a rescript issued by the Apostolic See expires, the diocesan bishop can, for a just reason, extend it but only once for a period not exceeding three months (c. 72).[86] The just cause could be broadly interpreted as the spiritual good of the petitioner or of others (c. 87, §1). When the extension expires, it cannot be repeated and, if necessary, a fresh rescript must be sought from the Holy See.[87] This competence belongs only to the diocesan bishop and not to local or personal Ordinaries (c.134, §1). However, it can be delegated to others (c. 137, §1).[88]

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[85] See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 80.

[86] Canon 72, being new in the Code, has its foundation in *m. p. Pastorale munus* of Paul VI which conceded faculties to the diocesan bishops. Its Faculty-I stated: "To extend for a just cause but not for a period exceeding a month, the lawful rescripts or indults which were granted by the Apostolic See and have expired without petition for their renewal having been made in due time to the same Apostolic See. The obligation remains, however, to have recourse to the Apostolic See for the favour or for the receipt of an answer if petition for renewal has already been sent in" (PAUL VI, *m. p. Pastorale munus*, 30 November 1963, in *AAS*, 56 [1964], p. 6; English translation in *CLD*, 6, p. 371).

A recipient of a rescript issued *in forma gratiosa* by the Apostolic See is to present it to his or her Ordinary under three situations: when the rescript itself prescribes it; when the subject of the rescript concerns public matter (e.g., granting faculties to a priest to confirm); when it is necessary to verify that conditions, if any, are fulfilled. This requirement is for the liceity of the grant, as a rescript is valid from the moment it is issued. Presentation to the Ordinary is, in fact, informing him that the favour has been granted. Nevertheless, this requisite could be prescribed for validity (c. 68).

[87] There are differing views on when the bishop can extend the rescript. Some say that he can extend it before the expiration of the original rescript. However, the extension would take effect only when the original rescript expires. See John P. MCINTYRE, "Rescripts," in *New Commentary*, p. 121. Others say that the extension can be granted only after the rescript expires. See MENDONÇA, "Singular Administrative Acts," p. 43. Some others say that the extension commences from the moment the bishop grants it, and not from the day of its expiration even if it is granted before the expiration of the original rescript. See CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 118.

[88] According to c. 142, §2, an act of delegated power placed inadvertently in the internal forum after the time limit of the delegation is valid.

A rescript issued *in forma commissoria* must be presented to the executor designated for its execution. It can be presented to the executor anytime provided the rescript itself establishes no time limit, and that there is no fraud or malice in delayed presentation (c. 69). When a time limit has been fixed for execution as an essential condition, the lapse of that time without the execution would disqualify the executor from executing it later. Even if the rescript itself is still valid, another mandate would be necessary for its execution. Fraud and malice refers to a voluntary delay in presenting the rescript for execution in order to avoid the consequences of its implementation. One may also delay execution in order that the reasons for its request, which are not true at its grant, may become true at the time of its execution. To determine whether the rescript thus delayed involved fraud or malice, it would be necessary to examine the nature of the subject matter, the distance the executor had to travel, and the quality of the person involved.[89] It seems that if fraud and malice in the delayed presentation is proved, the recipient could be deprived of its use. If it was already executed, it would be valid, unless a conditional clause was attached for its validity.

The voluntary executor can grant or deny a rescript according to his or her prudent judgement and conscience (c. 70; *CCEO* c. 1522, §2). Motives for denying the favour may often depend on detailed information gathered from collateral sources, but not found in the petition itself. This could reveal taints of obreption or subreption. The petitioner may have become so unworthy of the rescript requested that its grant might cause offence to others. However, the executor cannot grant or arbitrarily deny the

[89] See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 83.

favour, but rather he or she must make the decision based on conscientious judgement and examination of the truth of the petition. If the decision is to grant or deny the rescript, it must be granted or denied in its entirety - as an indivisible unit - unless the rescript provides otherwise.[90]

The recipient of a rescript has the right to use or not to use it if it has been issued for his or her own personal benefit. However, one must use a rescript if some canonical obligation requires it (c. 71).[91] In short, no one should be affected adversely by the non-use of a rescript.

A contrary law issued by the bishop or even by a higher authority cannot revoke a rescript unless the law expressly provides for it (c. 73).[92] The clause "anything to the contrary not withstanding" found in a law does not revoke a rescript. Any intention to revoke contrary rescripts must be expressly stated, such as "all contrary rescripts are hereby revoked," or "revoking any favours to the contrary." If a law does revoke contrary rescripts, the revocation takes effect only when the law takes force, that is, after the

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[90] See ABBO-HANNAN, *The Sacred Canons*, vol. I, pp. 85-86; RISK, "Individual Administrative Acts," p. 60; MENDONÇA, "Singular Administrative Acts," p. 42; MCINTYRE, "Rescripts," p. 121.

[91] Canon 69 of *CIC 17* applied the same norm to privileges only. Canon 71 of the revised Code applies it to all rescripts by placing the canon within the common norms governing rescripts.

[92] Canon 60 of *CIC 17* stated: "§1. A rescript revoked by special act of the superior, remains in effect until the revocation is made known to the one who obtained it. §2. No rescripts are revoked by a contrary law, unless the law itself expressly provides otherwise, or the law was made by the superior of the one who granted the rescript." The second part of the second paragraph has not been added to c. 73 of the new Code. Canon 73 concerns extrinsic revocation of a rescript. Intrinsic revocation occurs: when the conditions mentioned in a rescript are fulfilled; with the expiration of the determined time for which it was granted; when the person dies if it was personal rescript; when the recipient renounces it if it was granted for his or her benefit. See CAPPELLO, *Summa iuris canonici*, p. 128; ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 89.

expiry of the *vacatio legis*. The bishop or another legislator can, however, state otherwise.[93]

Although one can use in the internal forum a favour granted orally, the person is bound to prove the favour in the external forum whenever someone legitimately requests for it (c. 74).[94] An orally granted favour can be proved through witnesses who were present when it was conceded, through an authentic document made concerning it, on the word of the bishop who granted it, etc.[95] Favours concerning the internal sacramental forum are not subject to such methods of proving.[96]

3.2.1.4.1 Privileges

Canon 76, §1 defines a privilege as "a favor given through a particular act to the benefit of certain physical or juridic persons; it can be granted by the legislator as well as by an executive authority to whom the legislator has granted this power."[97] This

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[93] See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 90.

[94] *CCEO* c. 1527, §2 makes no reference to either internal or external forum. The canon simply states: "A person is bound to prove a favor granted orally, whenever someone legitimately requests it." 1917 Code did not deal with oral granting of rescripts. However, its c. 79 referred to oral granting of privileges: "Although a privilege obtained orally from the Holy See can be applied in the forum of conscience by the one asking for it, nevertheless, no one may use a privilege against another in the external forum unless its recipient can legitimately demonstrate that the privilege was granted to him or her."

[95] See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 109; Eduardus F. REGATILLO, *Institutiones iuris canonici*, Santander, Sal Terrae, 1941, vol. 1, p. 99.

[96] See RISK, "Individual Administrative Acts," p. 61.

[97] *CCEO*, in c. 1531 §1, states: "A privilege is a favour given through a special act to the benefit of certain physical or juridic persons; it can be granted by the legislator and by the one to whom the legislator has granted this power." Although this definition corresponds to the definition in *CIC 83*, *CCEO* allows the legislator to delegate the power to grant privileges to any person, even if that person does not possess executive power. Canon 63, §1 of *CIC 17* contained a broader concept of privilege when it stated: "Privileges can be acquired not only by direct grant of the competent authority and by communication, but also by legitimate custom and prescription."

definition has both generic and specific elements. Generically, a privilege is a favour granted through a particular act for the benefit of certain physical or juridic persons by a competent authority. Specifically, a privilege is a favour granted by a legislative authority, or by an executive authority to whom the legislator has granted this power.

In a diocese only the bishop can grant privileges. The vicars general and episcopal vicars can concede them only if the bishop confers this power on them.

A privilege can be either against the law (*contra legem*) or beside the law (*praeter legem*). A privilege against the law is one that is contrary to a universal or particular law. For example, a priest is granted permission to celebrate Mass using unfermented grape juice in place of the wine as required by c. 924, §3. A privilege beside the law is one that is beyond what the law concedes, while not contravening the law. For example, a faculty granted to canons of the chapter to wear a special choral habit.[98]

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[98] A privilege must be interpreted in accordance with the principles of c. 36, §1. Thus, in ordinary circumstances a privilege is interpreted in accordance with the proper meaning of words and the common manner of speaking. In case of doubt, a privilege is to be interpreted strictly in the instances identified by c. 36, §1. Otherwise, it is interpreted broadly. A privilege should neither be reduced nor extended to other cases, persons, things, circumstances, or places. A privilege in favour of a private party, but contrary to the law, must be interpreted strictly. However, even when a strict interpretation is required, a privilege must be interpreted in such a way that it remains a favour for the person or persons for whom it was granted (c. 77). See See MENDONÇA, "Singular Administrative Acts," p. 45; RISK, "Singular Administrative Acts," p. 62. RISK, here, further comments that a privilege which does not adversely affect other persons is to be interpreted broadly because there is nothing offensive or detrimental to them.

While c. 77 of *CIC 83* refers to c. 36, §1 on interpretation of administrative acts, *CCEO* c. 1512, §3, equivalent to c. 77, does not refer to c. 1512, §§1-2 which is equivalent to c. 36, §1. Since the norm on privileges (§3) follows the norms on interpreting administrative acts (§§1-2) the latter will also apply to the former.

The law presumes that a privilege is perpetual unless the contrary is proved (c. 78, §1. *CCEO* c. 1532, §1 does not contain "unless the contrary is proved"). However, a privilege can be temporary if the rescript expressly mentions this, or because of the cessation of the particular circumstances warranting its concession (e.g., the privilege was granted for a specific liturgical season, or upon the expiry of the number of cases for which it was granted). In fact, the interpretation of the perpetuity of a privilege depends upon the nature of the privilege itself whether personal, or real. In case of any proof contrary to the perpetual character, the presumption of the law ceases. In cases of doubt, however, the legal presumption prevails.

The immediate subject of a privilege can be a person or a thing. A personal privilege is granted directly and immediately to a person or group of persons. For example, provision to celebrate Mass outside a church on a habitual basis. A privilege granted to a community is generally considered to be personal. A real privilege is granted to a thing (e.g., to a chapter of canons in a cathedral, to an office, etc.). A real privilege could also be local, that is, granted to a place (e.g., to a shrine). In fact, real privileges are granted for the benefit of persons.

The object of a privilege can be favourable (non-burdensome) or odious (burdensome). The former confers a favour but does not affect the rights of others, does not cause inconvenience or damage to others. For example, the privilege of eating meat on days of abstinence contrary to c. 1251 in countries where the universal law is in force. The latter imposes a responsibility on other persons or places, or affects their rights. For example, a privilege of collecting alms within a certain area granted to a religious community.[99]

Although the authority to grant a privilege is the bishop himself (or other legislator), the concession of a privilege is an act of executive power, but reserved to the legislator. This is because in the Church a legislator also possesses executive power.[100] As the legislator in his diocese, the diocesan bishop can grant privileges even beyond the

[99] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 121.

[100] *CCEO*, in c. 1531 §1 permits its delegation by the legislator to anyone, not necessarily to an executive authority alone.

Since a privilege is an act of executive power, a question could be raised when an authority possessing merely executive power grants a privilege on delegation by the legislator: whether executive power can derogate from law in granting a privilege contrary to law? MCCORMACK and CHIAPPETTA are of the view that in a particular case an executive authority can derogate from law. See MCCORMACK, *The Term "Privilege"*, pp. 378-379; CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 121.

universal law, or either contrary to or exceeding the scope of the laws enacted by himself or his predecessor.[101] The diocesan bishop can delegate this power to his vicar general or episcopal vicars because both the vicars possess executive power.

A privilege can be revoked by the bishop as per the norms found in c. 47, provided there is a just and proportionate cause, and without prejudice to c. 81 (c. 79). The bishop must expressly state the revocation and formally notify its beneficiary.

A physical person who has received a privilege can renounce it. However, to be efficacious, the bishop must accept the renunciation (c. 80, §1; *CCEO* c. 1533, §1). The executor, if any, cannot accept the renunciation at the time of executing a rescript containing a privilege, unless the bishop has delegated him or her to do so. Nor can an executor accept such a renunciation later, since the mandate ceases with the execution. Thus, the renunciation of a privilege issued by the diocesan bishop can only be accepted by the bishop himself or by the Holy See, - not by his vicar general or episcopal vicar. An individual physical person can renounce a privilege granted exclusively for one's personal use (c. 80, §2; *CCEO* c. 1533, §2). This is so because such a privilege is

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[101] The Roman Pontiff can grant privileges contrary to and beyond not only the universal law but also the law of every subordinate legislator. He can grant any subordinate legislators and executive authorities the faculty to issue privileges both contrary to and beyond universal and particular laws. Alan MCCORMACK explains that since the law does not explicitly reserve to the supreme authority the competency of granting privileges, the diocesan bishop can grant privileges contrary to universal disciplinary laws by reason of his ordinary, proper and immediate power. See MCCORMACK, *The Term "Privilege,"* p. 378. John M. HUELS is of the view that the competent legislator to grant a privilege is the one to whose law the privilege relates, his successor, his delegate, or the competent higher legislator. This is especially the case when a privilege is *contra legem*. For privileges apart from the law, a legislator is competent within the limits of his pastoral charge in accordance with law. See John M. HUELS, "Privilege, Faculty, Indult, Derogation: Diverse Uses and Disputed Questions," p. 6 in the unpublished manuscript of the article to be published in *The Jurist*, 63 (2003), used with the author's kind permission. Although there are no instances of privileges reserved to the supreme legislator, the nature of a privilege (perpetuity, *contra legem*) seems to suggest that the diocesan bishop cannot grant privileges contrary to universal law.

expected to affect solely the one who receives it. If by accident other persons depend upon the use of a privilege, even a private person may be obliged in charity at least to postpone the renunciation. It must be noted that the non-use or contrary use of a privilege is not equivalent to its renunciation.

A juridic person cannot renounce its own privileges, if it harms the Church or other persons.[102] To renounce a privilege granted to a collegiate juridic person, a collegial act is required according to the norms stipulated in canon 119 (e.g., the vote of a chapter of canons). Furthermore, the constitutions of a juridic person (e.g., an institute of consecrated life) may determine the procedure to be followed in such cases (e.g., the vote of the Superior with the council or chapter). In the case of a non-collegiate juridic person, the consent of the Superior or administrator suffices for renunciation of a privilege, unless the statutes of that juridic entity determine otherwise. An individual person cannot renounce a privilege granted to a juridic person, a place, or to a thing (c. 80, §3; *CCEO* c. 1533, §3).

The cessation of a privilege depends upon its nature. The expiry of the authority of the bishop who granted a privilege does not cause the cessation of a privilege because the power that conceded the privilege is attached to the office, and not to the person. However, a contrary clause can provide otherwise (c. 81).[103] Such clause can not only

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[102] For example, a convent cannot renounce the privilege granted to it whereby its chapel is designated as an oratory for the good of the local faithful (as per c. 1223). To do so would mean that some faithful would be deprived of the opportunity of fulfilling their Sunday obligation.

[103] For example, "*ad beneplacitum nostrum*," "*durante pontificatum meo*," "*durante episcopatu meo*," "*quamdiu mihi placuerit*," "*donec voluero*," or some other equivalent expression. The clause "*ad beneplacitum nostrum*" is not similar to "*ad beneplacitum*," in its implication. The latter is equivalent to "*donec revocavero*" or "*donec voluero*" ("until I revoke" or "until I wish"). These last two expressions

reserve the right to revoke the privilege, but also to limit its duration, by attaching a time limit during which the bishop holds the office. In this latter case, the privilege does not cease by the resignation, transfer, deprivation, or death of the bishop.

A privilege, non-burdensome to others, does not cease by its non-use or contrary use. A privilege, burdensome to others, is lost if legitimate prescription takes place (c. 82).[104] A privilege is not used when a person omits to place acts in accordance with the privilege. For example, a priest chooses to celebrate the Eucharist in a church although he possesses a privilege granting him the freedom to celebrate it at his home. This does not cause the cessation of the privilege. Similarly when a priest chooses to celebrate the liturgy of the hours despite being in possession of a privilege which exempts him, his practice contrary to the privilege does not terminate it.

A privilege that does not cause a burden to others does not cease through its non-use or contrary use. This is because the recipient of such a privilege is not obliged to use it for his or her personal benefit.[106] A burdensome privilege can be lost by non-use or

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require a positive act of revocation, and if such an act is not placed effectively, the favour, faculty, or privilege thus granted, continues to exist even after the superior has ceased from office. See CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, pp. 125-126; also see ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 104. CHIAPPETTA further notes that the expression "ad beneplacitum" can refer to the Roman Pontiff (as "ad beneplacitum nostrum") and also to the Holy See (as "ad beneplacitum Sanctae Sedis"). In the first case, the privilege granted ceases with the pope's death. In the second, the privilege continues to exist until the Holy See revokes it. See CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, footnote 3, p. 126.

[104] The first part of *CCEO* c. 1534 is identical. In the second part, *CCEO* has an additional clause which provides for the loss of a burdensome privilege if "tacit renunciation takes place." Canon 76 of *CIC 17* also had a similar provision.

[105] See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 106; BESTE, *Introductio in Codicem*, p. 124.

[106] See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 106.

contrary use through lawful prescription.[107] For prescription to intervene, the recipient of the privilege must knowingly, spontaneously, and voluntarily fail to use it. Similarly, its contrary use must be deliberate, spontaneous and voluntary.[108]

A privilege granted for a certain number of cases, or for a specified period of time, ceases with the completion of those cases and with the expiry of that time respectively with due regard for c. 142, §2 (c. 83, §1).[109] Using a privilege beyond its limits is invalid. However, the principle of common error (c. 144) could apply in situations which involve the exercise of executive power. In such cases, the use of a temporary privilege is valid in the external forum even beyond the time for which it was granted, or even after its use beyond the specified number of cases. The use of a privilege in the external forum beyond a specified number of cases or period of time other than in cases of common error is always invalid and illicit.[110] One who receives a privilege which involves the exercise of delegated power in the internal forum for a certain period of

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[107] Canon 199, 2° provides that rights which can be acquired from an apostolic privilege alone are not subject to prescription. For a discussion of this point, see MCCORMACK, *The Term "Privilege,"* pp. 333-338.

[108] See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 107; REGATILLO, *Institutiones iuris canonici*, p. 98. *CCEO* allows for the cessation of burdensome privileges by tacit renunciation. Its c. 1534 states: "it is lost if [...] legitimate prescription or tacit renunciation takes place." This is contrary to the norm of the Latin canon on this point. Canon 76 of *CIC 17* had this provision. See CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, footnote 4, p. 126.

[109] *CCEO* c. 1532, §2, 3° is identical except that it does not refer to c. 992, §2 which is the equivalent of c. 142, §2 of *CIC 83*.

[110] See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 108.

time, but inadvertently places an act after the passage of that time, or beyond the number of cases for which it was granted, acts validly (c. 142, §2).[111]

A privilege ceases when the bishop judges that the circumstances of granting it are so changed in the course of time that the use of the privilege has become harmful or illicit (c. 83, §2; *CCEO* c. 1532, §2, 4°). A privilege becomes harmful if its use becomes detrimental to its recipient, to the public good, or to a third party. Its use is illicit when its exercise is contrary to justice or honesty. It would seem that for a privilege to cease, the change in circumstances should be both certain and permanent. A temporary change merely suspends a privilege. In this case, the bishop may, subsequently, reinstate the privilege.[112]

A personal privilege granted to a physical person follows its recipient everywhere so that it can be used in any place unless a territorial restriction is placed on it. It is, however, not transferable to family, friends, heirs, or any other person. Since a personal privilege has the person as its foundation, it is extinguished with that person's death (c. 78, §2; *CCEO* c. 1532, §2, 1°). It could also cease if the bishop revokes it. It does not cease if the person to whom the privilege has been granted becomes insane. The bishop can grant personal privileges to juridic persons whether collegiate (e.g., a religious

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[111] If it is a privilege granted through a rescript of the Apostolic See, in view of c. 72, the diocesan bishop can extend it once for a just cause, but not beyond three months. See MENDONÇA, "Singular Administrative Acts," p. 47; MCINTYRE, "Privileges," p. 125.

[112] See CAPPELLO, *Summa iuris canonici*, p. 141; BESTE, *Introductio in Codicem*, p. 125; CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 127. The canon does not explicitly state whether the competent authority causes the cessation of the privilege or it ceases *per se*. It seems the privilege expires *per se*, by the very nature of the circumstances which render its use harmful or illicit. Therefore, for the external juridic order, the competent authority merely declares the cessation of the privilege. This declaration implies that a privilege has actually become harmful or its use illicit. See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 107; also see CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 127.

community), or non-collegiate (e.g., a Catholic hospital). Such privileges follow the juridic person wherever it moves. They cease with the suppression of the juridic person by competent authority, or after the juridic person ceases to exist for a hundred year period, or when it ceases to exist by virtue of law itself. When a privilege is granted to a collegiate juridic person, its last surviving member can benefit from its privilege if, according to its statutes, the surviving member constitutes the "community of persons" (cfr. c. 120, §2).

A real privilege ceases with the complete destruction of the thing or place to which it is attached. However, if a place is restored within 50 years of its destruction, the privilege revives (c. 78, §3; *CCEO* c. 1532, §2, 2°; §3).[113] Although a thing can be destroyed in many ways, c. 78, §3 applies only to lawful destruction or extinction which could occur, for instance, by the decree of the bishop or another authority; when a bishop puts a sacred place to secular use in accordance with c. 1212, or when natural causes render a building unusable. When a thing or a place is destroyed by unjust means, the privileges attached to them do not cease, although they could be suspended. If the destruction of a thing or place is absolute with no hope of restoration, the privileges attached to them cease to exist.[114]

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[113] It is not necessary that rebuilding should be completed within fifty years. It is sufficient that building operation begins within that time. See REGATILLO, *Institutiones iuris canonici*, p. 98; RISK, "Individual Administrative Acts," p. 63.

[114] See ABBO-HANNAN, *The Sacred Canons*, vol. I, pp. 105-106.

Canon 84 deals with deprivation of a privilege when it is abused. An abuse is to turn something to a purpose other than that for which it was intended.[115] Abuse can occur by exceeding the intended limits in the grant; by making it an occasion of sin or a source of scandal; by acting contrary to its original purpose.[116] The abuse must be serious either because of the matter involved, or by reason of the length of time of abuse. If the abuse is caused by one who is subject to the diocesan bishop, he is to warn the abuser of the privilege. If this admonition is in vain, the bishop who granted the privilege is to deprive the person of it.[117] If the abused privilege was granted by the Apostolic See, the bishop is to notify the Holy See as soon as he is certain of the abuse. He cannot deprive the person of such a privilege, rather it is for the Holy See to decide on the matter.[118]

3.2.1.4.2 Dispensations

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[115] See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 108.

[116] See BESTE, *Introductio in Codicem*, p. 127; REGATILLO, *Institutiones iuris canonici*, p. 99.

[117] A privilege can also be revoked as an expiatory penalty for a crime (cc. 1336, §1, 2°; 1338, §1). A person on whom an excommunication is imposed or declared, is forbidden to benefit from privileges previously granted to him or her (cc. 1331, §2, 3°).

It should be noted that a privilege does not cease intrinsically by itself or *ipso iure* when it is abused. The cessation occurs through a declaration of the competent authority whether he be the author of the privilege or the hierarchical superior. Canon 84 does not identify the Ordinary who is to issue the warning. The number of warnings to be issued is also not specified. It appears that at least one warning would meet the requirement of the law. If the offender does not stop the abuse, the Ordinary who granted the privilege has the right and duty to issue the decree of privation (*privet*). See CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 127.

It seems the person whose privilege is deprived has the right of recourse against the action of the Ordinary.

[118] *CCEO* c. 1535 is identical to this canon except that the former canon uses "hierarch" and "higher authority," instead of "Ordinary" and "Apostolic See" respectively. Canon 78 of *CIC 17* did not explicitly state Ordinary's right to deprive the abuser of the privilege. The canon said: "Whoever abuses a power allowed to him by privilege deserves to be deprived of that privilege; the Ordinary shall not fail to notify the Holy See if one is gravely abusing a privilege granted by it."

Canon 85 defines a dispensation as "the relaxation of a merely ecclesiastical law in a particular case (*in casu particulari*) granted by those who possess executive power within the limits of their competence, as well as by those who have the power to dispense explicitly or implicitly either by law itself or by legitimate delegation."[119] The elements of this definition can be explained as follows:

A dispensation is a *relaxation* of a law. Although in a particular case the efficacy of law is suspended, it retains its stability and its force. The net effect of a dispensation from this point of view is negative because, while the obligation of the law disappears, no new norm of action replaces it.[120]

Only an *ecclesiastical law* (c. 11), that is, a law enacted by merely ecclesiastical authority, can be dispensed. Certain ecclesiastical laws cannot be dispensed (c. 86). Divine laws, whether natural or positive, cannot be dispensed. Since divine law is not subject to human law, it cannot be dispensed. Laws which define the essentially

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[119] *CCEO* c. 1536, §1 is equivalent to *CIC 83* cc. 85 and 90, §1. *CCEO* defines a dispensation as "the relaxation of a merely ecclesiastical law in a special case (*in casu speciali*), can be granted only for a just and reasonable cause, after taking into account the circumstances of the case and the gravity of the law from which dispensation is given; otherwise dispensation is illicit and, unless it is given by the legislator himself or by a higher authority, it is also invalid." *CIC 17* in c. 80 contained "special case" ("*casus specialis*").

[120] A dispensation is not a simple favour, *epikeia*, privilege, permission, abrogation, toleration or remission. A simple favour *(gratia)* is a transitory concession outside the law. A privilege is a perpetual favour either contrary to or outside the law. An *epikeia* is a private person excusing oneself from the law because of his or her judgment concerning the difficulties encountered in observing the law. Permission (*licentia*) consists of a faculty given according to the law and in some instances even presumed (e.g., cc. 283, §1; 886, §2; 911, §2; 969, §1). An abrogation causes the cessation of a law or its revocation and not merely the suspension of its juridic bond in a particular case. Toleration is an attitude of prudence by a superior who leaves the obligation of the law unaltered, but permits its transgression in order to avoid greater harm if it is particularly detrimental to the Church. A remission is a total or partial pardoning of a canonical penalty due to violation of a law (cc. 1354-1361). See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 111; REGATILLO, *Institutiones iuris canonici*, p. 100; CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 130.

constitutive elements of juridic institutes or acts are not subject to dispensations (c. 86).[121] A juridic institute is a juridic reality characterized by a set of norms.[122] A constitutive law establishes elements without which there cannot be a juridic institute established either by divine or ecclesiastical law. A juridic act is an act to which a law attaches juridic effects recognized in law (cc. 124-128).[123] The absence of any one of the essential elements of an institute or act defined by these laws would render them juridically non-existent.

A dispensation is issued *in a particular case*. Only certain persons, either physical or juridic, are relieved from the obligation of a law in a certain matter and in concrete circumstances. All others remain under the obligation of the law. A particular case may concern one action or repeated actions of the same nature placed by one or several persons. It may also pertain to an entire community for a certain period of time.[124]

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[121] The first part of *CCEO* c. 1537 is identical to *CIC 83* c. 86. In the second part, the canon further states: "nor are procedural and penal laws subject to dispensation." In *CIC 83*, this clause is contained in c. 87 in the context of the scope of a diocesan bishop's dispensing power. Canon 86 has its foundation in *m.p. De Episcoporum muneribus*, no. IV which stated: "According to canon 80 [of *CIC 17*] a dispensation means *a relaxation of a law in a special case*. But the faculty to dispense is exercised only as to *laws which command or forbid*, not as to constitutive laws" (PAUL VI, *m. p., De epsicoporum muneribus*, 15 June 1966, in *AAS*, 58 [1966], p. 469; English translation in *CLD*, 6, p. 396). This *m.p.* had excluded from the dispensing power of the bishops procedural and penal laws. These laws are enacted for the defense of rights. Therefore, dispensing from them does not seem to promote the spiritual good of the faithful. The same principle is reiterated in c. 87 of the revised Code. Moreover, *CCEO* seems to imply that these laws are not subject to dispensation any time, not even in urgent situations.

[122] For example, the institute of marriage, the clerical state, domicile, ecclesiastical office, parishes, religious institutes, canonical offices such as diocesan bishop, vicar general, etc.

[123] For example, marriage consent, baptism, religious profession, appointment to an office, an oath, a singular administrative act, a judicial sentence in a marriage nullity case, etc.

[124] For example, dispensation from cc. 1250-1251 on fast and/or abstinence may be granted for one day, for an entire lenten season to one person or several persons, families, a religious community, etc.

A competent executive authority grants a dispensation.[125] In a diocese, the diocesan bishop, vicars general, and episcopal vicars can dispense within the limits of their competence (cc. 134, §1; 368; 381, §2). Moreover, those to whom this power has been given explicitly or implicitly, either by the law itself or by lawful delegation, can also dispense (c. 85).[126]

With regard to the bishop's dispensing power, c. 87, §1 states "A diocesan bishop, whenever he judges that it contributes to their spiritual good, is able to dispense the faithful from universal and particular disciplinary laws issued for his territory or his subjects by the supreme authority of the Church. He is not able to dispense, however, from procedural or penal laws nor from those whose dispensation is specially reserved to the Apostolic See or some other authority."[127] Accordingly, excluded from the dispensing power of the diocesan bishop are procedural and penal laws, and laws whose dispensation is reserved to the Apostolic See or some other authority. Procedural laws concern the administration of justice and the defence of rights. Penal laws deal with the protection of

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[125] Canon 80 of the 1917 Code considered a dispensation as a legislative act. Therefore, it could be granted by a legislator, his successor, his superior and one who had been duly delegated to dispense. During the revision process, it was admitted that this was mainly due to an insufficient distinction between the three functions of the ecclesiastical power of governance. See *Communicationes,* 3 (1971), pp. 89-90.

[126] There are several instances in the Code that refer to either the explicit or implicit granting of dispensing power. See, for example, cc. 527, §2; 595, §2; 1047, §4; 1078, etc. In these cases, the norms of cc. 136 and 137 on persons subject to executive power and on its delegation must be observed.

The supreme legislator can dispense from any laws he has enacted or sanctioned. However, dispensation from a constitutive law would amount to a derogation from or even an abrogation of that law itself. This type of dispensation would eliminate an institute or an act itself. Therefore, the general principle of c. 86 would seem to apply also to the supreme legislator.

[127] *CCEO* c. 1538, §1 has identical principles, although with adaptations to the nature of the Eastern Churches: "An eparchial bishop, whenever he judges that it contributes to their spiritual good, is able to dispense in special cases the Christian faithful, over whom he exercises power according to the norm of law, from laws of the common law and laws of the particular law of his own Church *sui iuris*, unless a reservation has been made by the authority which issued the laws."

rights of greater importance to the Church or to the faithful (cc. 1317-1318). Matters reserved to the Holy See or to some other authority (e.g., the episcopal conference) indicate their particular importance to the life of the Church.[128]

The bishop can dispense from all disciplinary laws, both universal and particular, enacted by the supreme authority of the Church for the territory of a bishop or for his subjects. However, procedural and penal laws, and matters reserved to the Apostolic See are not subject to his dispensing power (c. 87, §1).[129] What about invalidating and disqualifying laws? The bishop can also dispense from them unless they concern constitutive, or reserved matters.[130]

Canon 87, §2 enables any Ordinary (c. 134, §1) to dispense from the laws mentioned in c. 87, §1 except from the law on clerical celibacy which is expressly reserved to the Roman Pontiff in accordance with c. 291. For this principle to be

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[128] For example, cc. 291; 1031, §4; 1047; 1078, §2, etc. Moreover, there are particular dispensations which directly concern matters of divine law (e.g., vows, oath, *ratum non-consummatum* marriage, privilege of the faith, etc.). Nevertheless, the Church claims power over them as given by Christ. See CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, pp. 130-131.

The authentic interpretation of PCCICAI on 1 August 1985 has excluded from the dispensing power of the bishop the requirement of canonical form for marriage between two Catholics outside the danger of death. See *AAS*, 77 (1985), p. 771; English translation in *Canon Law Annotated*, p. 1285. Again, on 3 September 1987, the same Council ruled that the diocesan bishop is not able to dispense from the prescript of canon 767, §1, which reserves the homily to priests and deacons. See *AAS*, 79 (1987), p. 1249; English translation in *Canon Law Annotated*, p. 1293. In both of these cases the dispensation is reserved to the Apostolic See.

[129] Canon 89 excludes parish priests, other presbyters (confessors, deans, rectors of churches, parochial vicars, religious superiors, etc.) and deacons (permanent and transitory) from the power of dispensing from universal and particular laws, unless this power has been expressly granted to them.

[130] See *Communicationes*, 5 (1973), p. 222; 12 (1980), p. 302; 18 (1986), p. 148.

John P. MCINTYRE is of the view that liturgical rubrics and other conditions can be dispensed to the extent that they belong to the Church's disciplinary law. Rubrics dealing with constitutive elements of the liturgy cannot be dispensed. See MCINTYRE, "Dispensations," p. 133. For more on this, see John M. HUELS, "Dispensation from Liturgical Laws," in *Roman Replies and CLSA Advisory Opinions* [=*RR*], 1992, pp. 52-53.

applicable three conditions must be simultaneously present. First, recourse to the Holy See must be difficult, but not impossible. "Difficult" implies that recourse to the Holy See by ordinary means is hindered. There is no obligation to use extraordinary means (e.g., telephone, telegraph, fax, etc.).[131] Second, there must be danger of grave harm in delay. The danger may be spiritual or material, but the danger does not necessarily need to be certain. It is adequate that, in the prudent judgment of the Ordinary, it be probable.[132] Third, the dispensation to be granted should be the one which the Holy See customarily grants under the same circumstances.[133] The Code specifies the cases reserved to the Holy See and makes provisions for their dispensation in case of necessity.[134] When these conditions are applicable, the bishop as the Ordinary of the diocese can dispense from these laws.

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[131] See PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF THE CODE, Response, 12 November 1922, in *AAS,* 14 (1922), p. 662; English translation in *CLD,* 1, p. 502. Such extraordinary means are rather disapproved by the Holy See because they are not sufficiently secret nor they are secure from eventual fraud. See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 115; CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 133.

Even though papal legates may have the necessary dispensing authority as part of their diplomatic faculties, the canon does not mention the necessity to approach them since they are not included in the definition of Apostolic See (c. 361). See MCINTYRE, "Dispensations," p. 132.

[132] See Francisco J. URRUTIA, *De normis generalibus: adnotationes in Codicem, Liber I,* Romae, Pontificia Universitas Gregoriana, 1983, p. 54.

[133] *CCEO* c. 1538, §2 contains similar principles as does *CIC 83* c. 87, §2. The former states: "If it is difficult to approach the authority to which the dispensation has been reserved and, at the same time, there is danger of grave harm in delay, every hierarch is able to dispense in special cases the Christian faithful over whom he exercises power according to the norm of law, provided that it concerns a dispensation which that authority grants under the same circumstances, with due regard for can. 396."

[134] Dispensations usually granted by the Holy See can be known from the law and practice of the Roman Curia. John P. MCINTYRE points out that the Holy See does not easily dispense from celibacy, solemn profession, apostasy. It apparently never dispenses from episcopal Orders, irregularity arising from abortion, and from the impediment of consanguinity in all degrees of the direct line. See MCINTYRE, "Dispensations," p. 132.

The faithful *(fideles)* are the subjects of dispensation (c. 87, §1). Although this term has a wide meaning in the Code, in the context of dispensations it refers to the faithful over whom the bishop exercises his authority. These include those who are subject to him by reason of domicile. The bishop can dispense his subjects[135] even when they are outside his territory. Travellers (*perigrini*) have the right to seek dispensations from the Ordinary of the place in which they are actually present (cc. 12-13) unless it is established otherwise (c. 91; *CCEO* c. 1539). Similarly, transients (*vagi*) can be dispensed by the local Ordinary or the parish priest of the place where the transient is actually residing (c. 107, §2). A dispensing authority can also dispense himself.[136]

Canon 88 allows a local Ordinary to dispense from four categories of laws whenever the spiritual good of the faithful requires it.[137] First, diocesan laws which are enacted for the diocese either by the diocesan bishop; second, laws passed by a provincial council (cc. 440, 446); third, laws passed by a plenary council (cc. 439, 441, 443-446); and fourth, laws passed by the conference of bishops (cc. 447-459).[138] Particular laws

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[135] The terms "faithful" (c. 87, §1) and "subjects" (c. 91) are to be understood in accordance with cc. 100; 102 and 107.

[136] It seems that from a strictly juridic viewpoint an ecclesiastical legislator is not bound by his own laws. Therefore, there is no need for him to dispense himself. However, because of the common good, for reason of good example to his subjects, and to avoid scandal, he is certainly bound to observe his own laws. The provision of self-dispensation applies when a person with executive power is bound by the laws from which he is competent to dispense. See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 116; CAPPELLO, *Summa iuris canonici*, p. 102; CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 136.

[137] The vicar general has the power to place all administrative acts except those reserved by the bishop to himself, and those which by law require bishop's special mandate. The episcopal vicar has the same power only for the determined part of the territory or the type of activity, or for the faithful of a determined rite or group for which he was appointed (c. 479). A dispensation granted by them contrary to these norms would be invalid.

[138] According to c. 82 of *CIC 17*, bishops and other local Ordinaries could dispense from diocesan laws and from laws of provincial and plenary councils in accord with c. 291, §2. They could not dispense

enacted by the supreme authority for countries or regions are also subject to his dispensing power (cc. 87, §1; 88).

A dispensation from an ecclesiastical law is to be granted for a reasonable and just cause after taking into account circumstances of the case and the gravity of the law from which dispensation is given (c. 90, §1).[139] Although the Code does not explicitly state what constitutes a just and reasonable cause, cc. 87, §1 and 88 cite the spiritual good of the faithful, and the good of the faithful as the basis for a dispensation.[140] Moreover, according to c. 90, §1, a dispensation granted by the bishop or his superior without considering the above requirements is illicit. Any other authority granting a dispensation without taking into account the same conditions does so invalidly. The motivating reason

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from laws specially handed down by the Roman Pontiff for a particular territory, except in cases for which they had been either explicitly or implicitly given such power or recourse to the Holy See was difficult. The distinction between laws made for the diocese by the diocesan bishop and by the supreme authority of the Church is not found in c. 88 of the revised Code.

[139] *CCEO* c. 1536, §1 has the same principles. However, §2 mentions spiritual good of the faithful as a just and reasonable cause.

The motivating cause must be objectively true and free from subreption or obreption (c. 63). The Code elsewhere also uses expressions equivalent to "just and reasonable cause." For example, "just cause" in cc. 527, §2; 1142; 1196; 1203; 1245; "serious cause" in c. 1114, §2; "serious difficulty" in c. 1127, §2.

A dispensation granted to a diocese, a monastery, a parish, a religious house, etc., dispenses all persons in them even though only some of them had reason for requiring it, or even if some of them were not interested in obtaining it. See CAPPELLO, *Summa iuris canonici*, p. 106; CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 136.

[140] *CIC 17* c. 84, §1 stated: "Ecclesiastical law is not to be dispensed except for just and reasonable cause, taking into consideration the importance of the law from which dispensation is sought; in other cases, dispensations given by an inferior are illicit and invalid." During the revision process, it was stated that the legislator is considered to have granted the dispensing power to other authorities under the condition that they would exercise it reasonably and for a just cause. See *Communicationes,* 19 (1987), p. 82. In this regard c. 80 of the new Code has two additional clauses: "after taking into account the circumstances of the case," and "unless it is given by the legislator himself or his superior." It would seem that even the supreme legislator himself cannot lawfully dispense from laws enacted by him without a just and reasonable cause.

The just and reasonable cause must be sufficient in a concrete case. It does not mean that a cause must render the observance of a law particularly oppressive or absolutely impossible. In that case, the juridic bond of the law ceases by itself and one can use the principle of epikeia without obtaining a dispensation. See CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 135.

and circumstances of a case are placed together in c. 90, §1 because a motivating reason for a dispensation exists not in the abstract, but only in the specific circumstances of a case. This requires the bishop granting a dispensation to see that a dispensation is proportionate to the importance of the law that is dispensed. The gravity of any law depends upon how it affects the common good which it is intended to promote. "A relatively minor law requires a lesser cause."[141] The relative importance of laws can be determined from a proper understanding of different kinds of laws and the matter they deal with.[142]

When there is a doubt about the adequacy of the cause, a dispensation granted is licit and valid (c. 90, §2; *CCEO* c. 1536, §3). The doubt must be positive and objective.[143] This provision in law precludes any anxiety or scruples concerning the concession of a dispensation in a doubtful situation.[144] When the doubt concerning the sufficiency of a reason is subsequently discovered to be unfounded, a distinction should be made between a dispensation granted for one act only and one granted for repeated acts. The first is valid and remains such. Subsequent acts remain valid only until the doubt has ceased after which, all acts are invalid because the requirement of c. 90, §2 would not be met.[145]

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[141] MCINTYRE, "Dispensations," p. 134.

[142] For example, dispensing from the law governing the form of marriage (c. 1127, §2) is more serious than dispensing from the law on fast and abstinence (c. 1245).

[143] See RISK, "Individual Administrative Acts," p. 67.

[144] Doubt about the adequacy of a cause also implies doubt about the existence of the cause. In the discussion of the *coetus*, it was suggested that doubt concerning the existence of the cause be reduced to the doubt concerning the sufficiency of the cause, and doubt concerning existence of the cause be mentioned in the canon. The suggestion was rejected. See *Communicationes*, 19 (1987), pp. 82-83.

[145] See CHIAPPETTA, *Il Codice di diritto canonico*, vol. I, p. 135.

The principle of strict interpretation in accordance with c. 36, §1 applies not only to the dispensation but also to the dispensing power itself (c. 92; *CCEO* c. 1512, §4). Consequently, a dispensation is subject to strict interpretation: if it relates to litigation; if it restricts the acquired rights of others; and if it is contrary to a law which benefits a private person.[146] A strict interpretation excludes the extension of a dispensation to cases which have similar or even heavier reasons. It respects the meaning of the words of the dispensation, but never goes contrary to the intention of the bishop granting it. However, an interpretation should not be so strict that a dispensation appears useless.[147]

The dispensing power delegated for a specific case is also subject to strict interpretation. It is to be restricted either by reason of the object which is to be dispensed (e.g., a marriage impediment), or by reason of the person or persons dispensed (e.g., a specific family). This principle does not apply to ordinary and habitual dispensing power, or to that delegated for all cases (*ad universitatem casuum*). In these cases it is subject to broad interpretation (c. 138) because that power is regarded as a favourable grant, and favours are to be interpreted broadly.[148]

A dispensation granted for one act ceases with its completion. A dispensation granted for successive application ceases in the same way as does a privilege (c. 93)[149]:

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[146] Therefore, a dispensation granted for the good of a community is subject to broad interpretation. See ibid., p. 137.

[147] See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 118; CAPPELLO, *Summa iuris canonici*, p. 107.

[148] See BESTE, *Introductio in Codicem*, p. 132; CAPPELLO, *Summa iuris canonici*, p. 107.

[149] *CCEO* c. 1513, §4 states: "A dispensation which has successive application ceases also by the certain and total cessation of the motivating cause."

the bishop revokes it; the recipient renounces it and the bishop accepts it; the time of grant expires or the number of cases is completed; the recipient of a personal dispensation dies; the circumstances change in such a way that the dispensation turns prejudicial to the rights of others or when its use becomes illicit in the judgment of the bishop. Moreover, a dispensation ceases with the cessation of its motivating reason.[150] The cessation, however, should be certain and not doubtful, as well as total and not simply partial. That means a dispensation does not cease when a subsidiary cause (one which merely adds to the motivating cause) ceases, or at the partial or doubtful cessation of the motivating cause.[151] It does not cease when the authority of the bishop who grants it expires, unless it was given *ad beneplacitum nostrum* (c. 81), or by its non-use or contrary use (c. 82).

3.2.1.4.3 Permissions (*licentiae*)

Permission is a new category mentioned among rescripts in the 1983 Code. The Code neither states specifically that a permission is a rescript[152] nor does it define a

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[150] A dispensation granted for a single case remains valid from its concession till it is effected even if its motivating cause ceases completely after conceding it. This is because a dispensation relaxes a law. The same law cannot oblige again in the same case. See ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 119; CAPPELLO, *Summa iuris canonici*, p. 108. It is disputed whether the same principle is also applicable to a vow or an oath. CAPPELLO, here, argues that it is applicable because once the legal bond is relaxed, it does not revive by itself.

[151] See CAPPELLO, *Summa iuris canonici*, p. 108; ABBO-HANNAN, *The Sacred Canons*, vol. I, p. 119.

[152] The juridic nature of permission as a rescript in *CIC 83* can be deduced from the fact that *CCEO* c. 1510, §2,3° places permission among types of rescripts. This canon states that rescripts grant a privilege, a dispensation, a permission (*licentia*) or another favour. The text of the earlier draft of Book I on rescripts of *CIC 83* was closer to c. 1510, §2,3° of *CCEO*. See *Communicationes*, 22 (1990), p. 304.

CCEO is substantially identical to 1983 Code in its references to *permissio* and *licentia* (e.g., cc. 257, §1; 258; 1510, §2, 3°). At times in *CCEO* more specific terms are used to suggest the nature of an administrative act envisaged. For example, the 1983 Code, in c. 488 refers to the consent ("*consensu*") of the bishop, or of the moderator of the curia and the chancellor. The parallel c. 258 of *CCEO* uses "*licentia*"

permission.[153] Canon 59, §2 makes the norms on rescripts applicable also for the granting of permissions, whether oral or in writing.[154] The same is true for the other favours granted orally unless it is otherwise evident. In addition to the norms on rescripts, the common norms on singular administrative acts (cc. 35-39; 46-47) would also apply to *licentiae*.[155] Although c. 59, §2 mentions only *licentia*, the Code mentions its equivalents elsewhere.[156]

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instead of *consensus*. Similarly, in the place of expression "judgement of the local Ordinary" (*iudicio* [...] *loci Ordinarii*) in c. 827, §3 of the 1983 Code, its corresponding c. 659 of *CCEO* uses the expression "ecclesiastical permission" (*licentia ecclesiastica*).

The 1917 Code did not mention "permissions" among rescripts. Canon 36, §2, in the context of rescripts, referred only to favours and dispensations. Nevertheless, permissions, as a species of singular administrative acts existed in the same Code (e.g., cc. 495, §§1-2; 497, §§1-2; 1105; 1402, §1).

[153] Canonical doctrine defines *licentia* differently. John M. HUELS defines *licentia* as "an authorization or permission that enables a person lawfully to perform an act either in the name of the Church, or in one's own name." Some say that it enables its recipient to exercise a pre-existing power or right. *Licentia* merely removes a legal obstacle to exercise this power or right. Some are of the view that *licentia* itself is a faculty, while others note that *licentia* makes it possible to exercise a faculty already possessed. For a concise presentation of these views, see HUELS, "Permissions, Authorizations and Faculties in Canon Law," in *StC*, 36 (2002), pp. 34-36; HUELS's definition is found on p. 44; see also MCCORMACK, *The Term "Privilege,"* p. 236.

[154] Canon 1527, §1 of *CCEO* states: "The canons established for rescripts are valid also for the oral granting of favors unless it is otherwise clearly evident" [Quae in canonibus de rescriptis statuuntur, de concessionibus gratiarum vivae vocis oraculo quoque valent nisi aliud manifesto constat]. According to this canon, the norms on rescripts would apply to all oral granting of favours including *licentia*, unless it is otherwise clearly evident.

The CLSA and CLSGBI translations of this canon differ. The former states, "[...] are valid also for the oral granting of a permission or favors unless it is otherwise evident." The latter renders it "[...] apply also to the granting of permission and to the granting of favours by word of mouth." The Latin original reads : "Quae de rescriptis statuuntur praescripta, etiam de licentiae concessione necnon de concessionibus gratiarum vivae vocis oraculo valent, nisi aliud constet." The CLSGBI version seems to correspond to the sense of *CCEO* cc. 1510, §2 and 1527, §1.

[155] If a *licentia* is issued without requiring the intervention of an executor, the norms found in cc. 40-45 on the execution of administrative acts would not apply. See HUELS, "Permissions, Authorizations, Faculties," pp. 49-50.

[156] For example, *permissio* in c. 1131; *concessio* in cc. 967, §2; 1169, §1; *assensus* in c. 437, §2; *consensus* in c. 609, §1; *admissio* in c. 1034, §2; *approbatio* in c. 827, §2, etc. For more examples, see OCHOA, *Index verborum iuris canonici*. These terms, in fact, indicate that they are rescripts.

Licentiae are issued by the one who has executive power in favour of individual persons whether physical or juridic. In a diocese, the bishop, vicar general and episcopal vicars can issue *licentiae* within the limits of their competence. They are always individual administrative acts, that is, a general *licentia* for all cases of a category is not granted. They are required mostly for liceity of the act but sometimes also for validity.

Licentiae serve their recipients in different ways. Some jurisdictional *licentiae* allow placing juridic acts and other acts of administration in the name of the Church.[157] They are granted for performing ministerial acts of the sanctifying function which do not require executive power.[158] The one who receives them already possesses the power of Order required for performing the acts. Therefore, they merely authorize the performance of the acts in the name of the Church, but do not concede jurisdiction (non-jurisdictional). However, the act itself of granting non-jurisdictional *licentiae* by the competent authority is an exercise of executive power.[159] Some *licentiae* allow repeated acts of the same kind.[160] Some can be issued habitually or for a single act.[161] Lastly, they are also granted for acts performed in one's own name.[162]

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[157] For example, cc. 638, §3; 1189; 1223; 1265, §1; 1291; 1304, §1, etc.

[158] For example, cc. 561; 765; 862; 930, §1; 1115; 1124, etc.

[159] For example, alienation of goods as per c. 1292, §1 done with the necessary permission is not an act of executive power. However, the granting of the permission by the diocesan bishop is clearly an exercise of executive power.

[160] For example, cc. 561; 934, §1,2°; 1228.

[161] For example, cc. 765; 862; 911, §2.

[162] For example, cc. 271; 283, §1; 671; 824-832; 1692, §2. See HUELS, "Permissions, Authorizations, Faculties," pp. 36-40.

3.2.1.4.4 Faculties

Faculties are not explicitly mentioned among rescripts. However, they seem to be implied under "other favour" which is a species of rescripts (c. 59). There is no definition of faculty in the Code.[163] As in the case of *licentia*, the Code uses "faculty" (*facultas*) in various ways.[164] A faculty can be issued for specific ministerial acts (e.g., preaching, hearing confessions, assisting at marriages), or in a general manner for all ministerial acts connected with an individual office.[165] A faculty may be required to place a juridic act.[166] In such a case, these faculties do not seem to confer executive power, therefore, they can simply be called authorizations. However, there are instances in which faculties bestow executive power.[167] The habitual faculties mentioned in cc. 132 and 479, §3 seem to

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[163] John M. HUELS defines a faculty as "an ecclesiastical power or authorization necessary for performing lawfully an act of ministry or administration in the name of the Church" (HUELS, "Permissions, Authorizations, Faculties," p. 29).

[164] The 1917 Code employed the term *faculty* in various contexts. Faculty could mean delegation of executive power, permission to act licitly, a right granted to an entire class of persons, an authorization or the delegation of jurisdiction, etc. For example, according to c. 66, §1, habitual faculties granted in perpetuity or for a definite number of cases could be considered privileges beyond the law (*privileges praeter ius*). Cardinals enjoyed faculties beyond the other privileges enumerated in the Code (c. 239, §1). A privilege of a portable altar encompassed the faculty of celebrating Mass everywhere in a decent and upright place (c. 822, §3). When the local Ordinary could not be contacted the pastor enjoyed the faculty of dispensing (c. 1044). The right (*facultas*) of the parties to reject a witness ceased although the right (*ius*) to object to the manner of examination or to the testimonies remained (c. 1783, 1°-2°). See also cc. 131, §3; 239, §1, 1°; 256, §1; 782; 785,§2; 806; 1402, §1; 1403, §1; 1405, §1.

The use of the term *faculty* in *CCEO* is similar to that in the 1983 Code. For example, see *CCEO* cc. 248, §2 (canons in parentheses are corresponding canons from *CIC 83*), (c. 479); 982 (c. 132); 994 (c. 144, §1); 995 (cc. 144, §2; 596, §3); 1430, §1 (c. 1338); 640, §2 (c. 809). Certain canons of *CCEO* which mention faculties have no parallel canons in *CIC 83*. For example, *CCEO* cc. 320, §2; 833, §1.

[165] For example, faculties of a chaplain as found in c. 566, §1.

[166] For example, cc. 1281, §1; 1482, §1.

[167] For example, cc. 508, §1; 1357 on the faculty to remit censures.

confer faculties for acts of executive power as well as for non-jurisdictional acts.[168] A faculty may be necessary solely for the liceity of an act. It can, however, affect both the liceity and the validity of an act if the law so stipulates.[169]

Normally, the diocesan bishop grants habitual faculties through the *pagellae* to his priests, deacons, the officials of the diocesan curia, and even sometimes to certain lay ministers, such as the person who cooperates in the pastoral care of a parish without a parish priest (c. 517, §2).

The norms on singular administrative acts apply to faculties as well. As in the case of *licentiae*, only cc. 35-39 and 46-47 apply.[170] Faculties granted for non-jurisdictional acts seem to correspond to the species of *licentiae*, because both authorize the lawful performance of an act in the name of the Church. They are subject to the same norms as *licentiae*, including those on rescripts except cc. 63-65.[171] It is to be noted,

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[168] The habitual faculties issued by the Apostolic See also have these categories. For example, the faculties granted to papal legates by CEP in 1999 conceded the executive power of governance for various acts, and non-jurisdictional faculties, which included such things as the imparting of papal blessings. See HUELS, "Permissions, Authorizations, Faculties," pp. 27-28; J. García MARTÍN, "Facultades concedidas a los legados pontificios por a Congregación para la Evangelización de los Pueblos," in *CpR*, 82 (2001), pp. 317-343.

Other less common uses of *faculty* in the Code are in cc. 695, §2; 697, 2°; 1569, §1; 1659, §1; 1720; 1271; 1300; 667, §4; 779; 1482, §1; 809-820.

[169] See HUELS, "Permissions, Authorizations, Faculties," pp. 29, 31.

[170] Canons 40-45 will not apply if faculties are granted directly to their recipient by the competent authority, without the intervention of an executor.

[171] Canons 63-65 would apply to *licentiae* that are granted for one's own benefit at the request of a petitioner. Therefore, these canons do not apply to faculties, because they are granted for the common good of the faithful or a juridic person, but not for the benefit of an individual who requests them. Canon 67 is applicable to all faculties and *licentiae*. However, in practice this canon may not need to be applied because the situation addressed by this canon rarely occurs. If it does, it can be quickly resolved today with the means of communication. Canons 68-70 which concern the rescripts issued *in forma commissoria* would apply if faculties and *licentiae* are granted in this way. Cfr. HUELS, "Permissions, Authorizations, Faculties," footnote 63, p. 51. For more on the norms on rescripts applicable to faculties, see ibid., pp. 50-52.

however, that habitual faculties are subject to broad interpretation, and in accordance with c. 132, §1, they are subject to the norms of cc. 137-144 on delegated power.

3.2.1.4.5 Indults

The term *indult* is found less frequently in the Code than are the terms *licentia* and *faculty*.[172] The Code provides for only two indults that can be issued by the diocesan bishop. Both cases refer to religious institutes of diocesan right. In the first case, it is for the diocesan bishop to grant an indult of exclaustration for a period exceeding three years (c. 686, §1). In the second case, the bishop can concede an indult of departure from an institute if the member departing is assigned to a house in his diocese (c. 691, §2).

An indult seems to be a favour authorizing its recipient to act in some way which the law either forbids outright or allows it provided an indult is obtained from the competent authority.[173] In fact, the juridic character of an indult seems to be similar to that

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[172] There are 22 such references in the Code. See OCHOA, *Index verborum iuris canonici*, p. 223. Most of the indults mentioned in the Code concern religious institutes and societies of apostolic life. They are issued by the Apostolic See or the supreme moderators of religious institutes or societies of apostolic life.

The 1917 Code used the term *indult* in various senses. An indult could mean authorization or permission (cc. 821, §3; 913, 1°; 1195; 1265, §2; 1403), a single dispensation or a temporary privilege (cc. 821, §2; 823, §3; 826, §2; 721-722; etc.), permanent dispensation (cc. 139, §2; 409; 415, §1; 422, §1; 642, §1; 811, §2; 1168, §3 etc.), delegated jurisdiction (cc. 276; 1040; 1057; 1283, §1; etc.). There were also canons which related indults to faculties and privileges. For example, c. 822, §2 stated that the privilege of a portable altar could be granted by an indult of the Apostolic See. The faculty to administer confirmation could be granted to a priest by apostolic indult (cc. 781, §1; 782, §§2, 4). The same faculty was referred to as local apostolic privilege in cc. 784 and 785, §2.

CCEO has 13 references to indults in 8 canons. This is fewer than in the 1983 Code. For example, there are no corresponding canons in *CCEO* for the *CIC 83* cc. 726, §2; 727; 728; 743; 745, in which *indult* is mentioned. In general, the concept of indults in *CIC 83* corresponds to that in the oriental Code. See *CCEO* cc. 489; 492; 493, §1; 494, §1; 496, §2; 546, §2; 548; 549.

[173] See MCCORMACK, *The Term "Privilege,"* p. 234.

of a *licentia*. Therefore, the principles applicable to granting a *licentia* are also applicable to conceding an indult.[174]

In the practice of the Roman Curia, however, the term *indult* is used for a large spectrum of favours[175]: a temporary or permanent privilege for the benefit of a physical or juridic person;[176] a habitual faculty for the benefit of the faithful;[177] a dispensation;[178] and also a permission.[179] The Code too has similar references to indults.[180] It appears that in the absence of certainty of the juridic identity of a favour, the term *indult* is used in a generic sense for any favour granted to a physical or juridic person, or for a faculty or favour conceded for the benefit of the faithful.

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[174] Cfr. HUELS, "Privilege, Faculty, Indult, Derogation," p. 31.

[175] See ibid., pp. 31-33.

[176] For example, an indult from SCC granting assignment of stole fees and Mass offerings to the parish or institution where the sacraments are celebrated rather than to the priests. See SCC, Reply, 29 April 1981, in *RR*, (1984), pp. 1-2.

[177] For example, an indult of SCCE granting the power to Ordinaries of the USA to permit their priests to celebrate three Masses on Saturday under specified conditions. See SCCE, Declaration, Prot. N. 688/63, 24 July 1969, in *CLD*, 7, p, 616.

[178] For example, an indult from CICLSAL granting a dispensation from c. 684, §2. See CICLSAL, Reply [n. d.], in *RR*, (1994), p. 11.

[179] For example, an indult from the CDF to use the grape juice instead of wine as Mass. It is also called permission. See CDF, Reply, 8 June 1987, in *RR*, (1987), pp. 1-2.

[180] Canons 320, §2 and 1019, §2 seem to suggest a privilege rather than an indult. Canon 320, §2 concerns the suppression of associations of the faithful by the diocesan bishop, established by members of religious institutes with an apostolic indult and the consent of the diocesan bishop. In fact, c. 312, §1, 3° states that the diocesan bishop's right of establishing diocesan public associations of the faithful can be reserved to another authority by apostolic privilege. Canon 1019, §2 revokes any indult granted to superiors of any institute or society allowing them to issue dimissorial letters. Only major superiors of clerical religious institutes or of clerical societies of apostolic life of pontifical right, can issue dimissorial letters for their subjects (c. 1019, §1).

CONCLUSION

The power of governance in the Church is a means for providing effective care of the faithful. Acts of executive power attend to the concrete needs of day-to-day pastoral care, pertinent both to those who exercise executive authority and to their subjects. The importance of executive power in the pastoral ministry in a particular Church can be seen in the way the Code allows different persons possessing executive power, whether ordinary or delegated, to respond to the pastoral needs of the faithful. This is quite different from the way the legislative or judicial power is exercised in the Church.

The Church's mission is to provide for the spiritual welfare of everyone. The ecclesial legal system provides not only for the common good, but also for the good of an individual person either physical or juridic. General executory decrees, issued for the entire community, determine specific ways of observing the law which aims at achieving the good of the community. Instructions, on the contrary, are destined only to the executors of law directing its proper and just application. Both these general administrative acts may concern universal and particular laws. Except for a few regulations, the Code does not prescribe extensive norms for the issuance of general administrative acts as it does for the issuance of singular administrative acts. The Code leaves the manner of executing a law to the discretion of its executors. Thus, the norms on execution of a law could vary from one particular Church to another.

The Code protects the rights of the executive authority and of the recipients of singular administrative acts by providing extensive norms. While common norms on singular administrative acts apply to all acts, there are common norms applicable to

singular decrees and singular precepts, and to rescripts. Moreover, there are specific norms applicable to different types of rescripts. In accordance with these norms, the bishop can issue singular administrative acts to foster the spiritual good of individual persons, either physical or juridic. This may require the bishop: to issue a decision or provide for a situation through a singular decree; to impose an obligation or prohibit certain action through singular precepts; to grant favours through rescripts which could be privileges, dispensations, permissions, and other favours. Although the Code does not specify these "other favours," faculties and indults seem to be implied in them.

Permissions, faculties, and indults are presented in the Code as distinct juridic acts granting favours. However, the differences among them are not always clear. Permissions grant not only authorizations for ministerial and jurisdictional acts, but also confer executive power on their recipients. This study has shown that the same is true also of faculties. With regard to indults, the Code has only two explicit references to the bishop granting them. However, in the practice of the Holy See, the term *indult* seems to be a generic expression for different favours. Since many other favours conceded by the bishop also correspond to the favours (indults) granted by the higher authorities in the Church, those other favours can also be called indults.

The exercise of executive power by the bishop is an important aspect of his shepherding ministry which entails the teaching, sanctifying and ruling functions. In fact the exercise of these threefold functions is largely regulated by the power of governance, especially by executive power. In the next chapter we will examine those functions and identify the acts of executive power related to them.

CHAPTER FOUR

EXECUTIVE POWER OF THE DIOCESAN BISHOP

INTRODUCTION

In chapter two we formulated a definition of executive power as "that aspect or part of the power of governance, that is, the power of jurisdiction, which enables the one who possesses it to execute ecclesiastical laws through administrative acts of a general or singular nature in accord with the norms of law."[1] That this power is possessed by the diocesan bishop is beyond question. But what types of laws is a bishop competent to execute? In fact, there are in the Church laws which originate from different sources. Besides universal laws emanating from the Supreme Pontiff, which are contained in the Codes of Canon Law binding Latin and Eastern Churches respectively, and other legislative documents, there are particular laws enacted by the episcopal conferences (c. 455), provincial and plenary councils (cc. 439-440; 445), and those promulgated by the diocesan bishop for the particular church. The bishop's competence to execute laws will be determined by the nature of each type of law. Thus, for example, the bishop's competence to execute universal laws is determined by those laws.

Moreover, not all laws, whether universal or particular, are addressed to every member of the Church, because there are certain categories of laws which bind only particular groups of people in the Church, for example, members of religious institutes or of societies of apostolic life, or members of a particular Church *sui iuris*, etc. It is

[1] See above, p. 111.

important that a bishop recognizes this aspect of ecclesiastical laws when executing them because his competence is determined also by this factor.

As discussed in the preceding chapters, a bishop receives, by virtue of his consecration, the *tria munera*, the three functions of teaching, sanctifying and ruling. This is in fact the realm of the bishop's executive power which enables him to effectively carry out his pastoral ministry. The 1983 Code provides the bishop with laws vis-à-vis the three functions (*tria munera*) which he can execute within the parameters of his competence.

The competence of the diocesan bishop in this area of his ruling function is identified in the Code under different titles. Because in a diocese there are, besides the bishop, other office bearers who are endowed with executive power, the Code mentions them as competent to place certain acts of executive power. Thus, for example, it speaks of "Ordinary" and "local Ordinary" (cfr. c. 134) as having executive power. A vicar general and an episcopal vicar are Ordinaries, but they are local Ordinaries. A major superior of a clerical religious institute of pontifical right is an Ordinary, but he is only a personal Ordinary. Within the confines of his competence, a bishop by law itself is an Ordinary as well as a local Ordinary. Therefore, unless the law clearly states otherwise, when a canon mentions Ordinary or local Ordinary, the diocesan bishop is also implied in it.

The principal objective of chapter four is to survey the entire 1983 Code and determine the instances where the diocesan bishop is empowered to execute universal laws of the Church in different areas of his episcopal ministry. This would include all

instances in the Code where mention is made of the diocesan bishop, Ordinary or local Ordinary as being competent to place a particular administrative act. It is beyond the scope of this study to examine and analyze particular laws which the bishop might be competent to execute. Therefore, our inquiry concerning the executive power of the diocesan bishop will be restricted strictly to those instances where the canons of the 1983 Code either explicitly or implicitly refer to it.

4.1 GENERAL PRINCIPLES

In addition to the general principles that govern the exercise of executive power, which we have already discussed, there are specific principles to guide the exercise of executive power in a diocese. The diocesan bishop exercises his executive power either personally, or through vicars general or episcopal vicars, according to the norm of law (c. 391, §2). In this regard, three scenarios seem possible. First, there are instances exclusively within the competence of the diocesan bishop (c. 134, §3). In these cases, canons attribute a particular act to the diocesan bishop alone. The vicar general and episcopal vicars are excluded from such cases unless they have received a special mandate from the bishop. The bishop can also reserve certain cases to himself (c. 479). Moreover, there are canons which assign executive power to the bishop, without mentioning the diocesan bishop.[2] However, from the context they seem to refer to the diocesan bishop.

[2] See, for example, cc. 688, §2; 693; 700; 701; 1743.

Second, there are acts which can be placed by the vicar general or the episcopal vicar only if the bishop grants them a special mandate. Otherwise they are incompetent to act in those cases. If the bishop concedes it to them, they would then be acting with delegated executive power.[3]

Third, there are acts of executive power which the vicar general and episcopal vicars are competent by law to place. The vicar general has the power over the whole diocese except in those cases discussed above. The episcopal vicar has the power of a vicar general, but only over the specific part of the territory, the type of affairs, or the faithful of a specific rite or group for which he has been appointed, excepting the cases removed from his competence.Within the limits of their competence, the habitual faculties granted by the Apostolic See to the bishop and the execution of rescripts also pertain to a vicar general and an episcopal vicar, unless it has been expressly provided otherwise, or unless the execution was entrusted to the diocesan bishop on the basis of his personal qualifications. Such exclusion should be clearly stated in the rescript and is not to be presumed (cc. 43; 479).

The power of the vicar general and the episcopal vicar is ordinary and vicarious. Therefore, they exercise it in the name of the bishop. This implies that they should not act contrary to the intention and mind of the diocesan bishop. They must report to the bishop

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[3] Whether the power granted by such mandates is ordinary or delegated is debated. CAPPELLO and MAROTO say that the mandate grants ordinary power conditioned upon the consent of the bishop. CHELODI, and VERMEERSCH-CREUSEN say that the special mandate is really an act of delegation. This issue is significant because the delegation and subdelegation of that power will depend upon its nature. See Albert E. VERBRUGGHE, "The Figure of the Episcopal Vicar for Religious in the New Code of Canon Law," Part I, in *CpR*, 65 (1984), pp. 238-239. We consider it as delegated power simply because it is not attached by law to the office of the vicar general or episcopal vicar.

on the more important matters they have dealt or will deal with (c. 480). Their power ceases at the vacancy of the See, or when the bishop is suspended. However, if they were bishops, either auxiliaries or coadjutor, they retain the power they held as vicars. Moreover, the power of the vicar general and episcopal vicar ceases at the expiration of their term in office, by resignation, and by removal made known to them by the bishop (c. 481).

4.2 THE DIOCESAN BISHOP'S EXECUTIVE POWER IN THE TEACHING FUNCTION

Canon 386 highlights in a nutshell the bishop's teaching function. Book III of the Code is, in fact, an elaboration of the teaching function of the diocesan bishop. After the nine introductory canons, which emphasize the role of the Supreme Pontiff and of the college of bishops in the teaching function, the five titles on the ministry of the divine word, missionary activity, Catholic education, social communications media, and the profession of faith seem to follow the order of their significance in the mission of the Church.

Canon 763 confers on all bishops the right to preach the Word of God everywhere including the churches and oratories of religious institutes of pontifical right. However, the diocesan bishop can expressly prohibit ("*expresse renuerit*")[4] another bishop from

[4] "Prohibit" in this canon implies a singular precept. The Code uses various terms to suggest singular precepts. For instance, "impose," "inflict," "levy" ("*imponere*," "*irrogandam*," in cc. 264, §1; 686, §3; 1263; 1718, §1, 1°; 1337, §2), "forbid," "prohibit" ("*prohiberi*," "*renuerit*," "*vetare potest*," in cc. 679; 763; 886, §1; 1038; 1077,§1; 1722), "demand," "order" ("*exigendi*," "*debet exigere*," "*iubere*," in cc. 805; 858; 1302, §2), "restrict" ("*restricta*," in c. 764), "coerce" ("*coerceri*," in c. 1320), "punish" ("*puniri*," in c. 1488) suggest that the administrative acts implied are precepts. *CCEO* also uses similar words. See, for example, cc. 415, §4; 490; 610, §§1-3; 636, §2; 757; 794, §1; 1012; 1446, §2; 1469, §1. It must be noted

doing so in his diocese, but only in particular cases; he cannot impose a general prohibition.

In accordance with c. 764, but without prejudice to c. 765, presbyters and deacons possess the faculty to preach everywhere with the presumed or the express permission of the rector of a church according to the particular law of a diocese. However, the competent Ordinary can restrict ("*restricta*") or remove ("*sublata*") this faculty.[5]

In accordance with the prescripts of the episcopal conference, lay persons can be permitted ("*admitti possunt*") to preach in a church or oratory if it is necessary in certain circumstances, or if it is advantageous in particular cases, but without prejudice to c. 767, §1 (c. 766).[6]

It is the diocesan bishop's task to promote, regulate and co-ordinate missionary initiatives in mission territories. If the members of religious institutes are engaged in

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that c. 1342, §2 (*CCEO* c. 1402, §2) does not allow extra-judicial imposition of perpetual penalties, and also other penalties if the law which established them forbids such application. In this chapter these terms indicate singular precepts unless indicated otherwise. The canons cited in footnotes for words suggesting administrative acts include different grammatical constructions of those words. For example, "*imponere*" can be found as "*imponi*" in c. 686, §3, "*imponendi*" in c. 1263, "*imponatur*" in c. 1340, §2, etc.

[5] While "*restricta*" refers to a singular precept, "*sublata*" suggests a singular decree. Besides "*sublata*" for removal, the Code also uses "*amovendi*," "*removere*," "*expungi*" (c. 1488; *CCEO* cc. 636, §2; 1146, §1). Generally, these terms imply singular decrees unless specified otherwise. In *CCEO*, e.g., see cc. 636, §2; 1146, §1, etc.

[6] "*Admitti possunt*" here seems to be a *licentia*. Canon 766 does not identify the authority to grant this permission. The diocesan bishop is competent to grant it. The norms laid down by the bishop could determine the copetence of other authorities (e.g., vicar general, episcopal vical, parish priests, etc.) to grant this permission. *CCEO* c. 610, §4, the parallel of *CIC 83* c. 766, requires mandate for the laity to preach.

missionary activities, he is to ensure that there are proper agreements with the moderators of those institutes (c. 790).[7]

Canon 791, 2°-4° requires that: a priest be designated ("*deputetur*")[8] to promote the missionary initiatives, especially the Pontifical Missionary Works; an annual day for missions be celebrated; and suitable contributions for missions from dioceses be sent to the Holy See every year.[9]

According to c. 802, the bishop is to take care that schools for Catholic education are established ("*condantur*"). He is to provide for the establishment ("*condantur*")[10] of professional and technical schools, and other schools required by special needs. For

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[7] Although this agreement does not correspond to any specific act of executive power, particular clauses in it could comprise of, for example, permissions, privileges, dispensations, etc. The same applies to the agreement envisaged in c. 681, §2.

The principles and norms concerning the relations between the local Ordinaries and missionary institutes are found in SCEP or FOR THE PROPAGATION OF THE FAITH, Instruction, *Relationes in territoriis*, 24 February 1969, *AAS*, 61 (1969), pp. 281-287; English translation in *CLD*, 7, pp. 845-851.

[8] The terms "depute," "designate" ("*designetur*," "*deputetur*," e.g., cc. 239, §§1, 2; 502; 510, §2; 539; 791; 861, §2) mean that appointments are to be made through singular decrees for the purposes stipulated in the canons. There is no uniformity in the Code in the use of terms to suggest appointments. For example, the terms "appoint" ("*nominare*," "*constituat*," e.g., cc. 406, §2; 483, §1; 497, 3°; 502; 508, §2; 517, §2; 544; 557, §1), "confer," ("*conferre*," e.g., c. 509, §1), "give" ("*dari*," e.g., c. 482, §2), "assign" ("*assignatione*," e.g., c. 1746) imply issuance of singular decrees of appointments. In this chapter, these terms indicate singular decrees unless specified otherwise. *CCEO* has similar usage of these terms. See, for example, cc. 252; 253, §1; 266, 3°; 271, §4; 305; 942.

[9] The celebration of the annual day and the manner of contributing seems to require the issuance of general executory decrees because it appears that the entire diocesan community needs to be involved in the celebration and contribution.

Canon 791 does not mention the authority competent to issue these acts. However, PCCICAI, *Fontium annotatione et indice*, p. 576, places this canon under the title "diocesan bishop." Accordingly, only the bishop seems to be competent to place these acts, unless he delegates others.

[10] Besides "establish" ("*condantur*"), the Code also uses "constitute" ("*constituatur*," e.g., cc. 492; 495, §1; 501, §§2, 3; 511; 1274, §3), "erect" ("*erigere*," e.g., cc. 234, §1; 301, §§1, 2; 579; 609, §1; 813) to denote establishing the canonical organs mentioned in those canons. The administrative acts implied by all these terms are singular decrees unless suggested otherwise. For similar usage of these terms in *CCEO*, see cc. 263,§1; 264; 270; 435,§1; 506, §1; 1021, §3, etc.

religious institutes to establish schools in a diocese, the consent ("*consentiente*")[11] of the bishop is required (c. 801). According to c. 803, §3, no school is to bear the name "Catholic" without the consent ("*consensu*") of the competent ecclesiastical authority. Furthermore, according to c. 804, §1, it is for the bishop to regulate ("*ordinare*") and watch over ("*invigilare*")[12] the Catholic religious instruction and education in any schools provided through the various instruments of social communication so that it corresponds to the general norms issued by the episcopal conference.

According to c. 805, the local Ordinary can appoint or approve ("*approbandi*")[13] teachers of religion. If it is required, he can remove ("*amovendi*") them or demand ("*exigendi*") their removal (c. 805).[14]

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[11] The term "consent" ("*consentiente*") in the canon means permission (*licentia, permissio*) of the bishop. *Consensus* does not always indicate permissions in the Code. However, when the term is attributed to an ecclesiastical authority, it generally refers to its express or presumed permissions. For instance, cc. 312, §2; 390; 609, §1; 733, §1; 764; 1003, §2; 1215, §3. "Consent" in this chapter signifies permission, to which norms on rescripts apply, unless indicated otherwise. Moreover, the terms "faculty" ("*facultatem*") in c. 1281, §1 and "reserved" ("*reservatur*") in c. 686, §3, also suggest permissions. The use of this term is similar in *CCEO*. For more on the term *consensus* in the Code, see John M. HUELS, "Determining the Correct Canonical Rules for Ambiguous Administrative Acts," pp. 44-45 (unpublished manuscript of the article to be published in the forthcoming issue of *StC*, 37 (2003), used here with the author's permission).

[12] The term "*ordinare*" seems to imply the issuance of general executory decrees, or instructions if they are directed to the heads of the schools. "Watching over" or "to be vigilant" ("*invigilare*") does not directly suggest any exercise of executive power.

[13] The terms "approve" or "approval" ("*approbandi*," "*probata*") occur frequently in the Code. In a few canons they refer to permission. For example, cc. 824, §1; 825, §1; 826, §2; 827, §§, 2, 4; 829. In some other canons these terms refer to a higher authority approving some act, document, or other matter that has first been accomplished or enacted at a lower level. For instance, cc. 243; 505; 630, §3; 1231. In these latter cases, approval indicates a singular decree. Cfr. HUELS, "Determining the Correct Canonical Rules," pp. 49-50. In either case, the denial of permission or approval is a singular decree. *CCEO* generally has similar use of these words, e.g., cc. 203, §2; 337, §3; 657, §2. Moreover, in c. 662, §1, it seems to equate approval with permission when it states "ecclesiastical permission or approval to publish books" ("*approbatio vel licentia*"). Canon 661, § 1 is explicit when it states "ecclesiastical permission expressed only with the word *imprimatur*" ("*licentia ecclesiastica*").

[14] Generally, "removal" ("*amovendi*," "*removeri*") by a competent authority in the Code is a singular decree; "*exigendi*" in this canon is a singular precept.

Canon 813 obliges the diocesan bishop to establish a special parish, or at least to appoint priests on a stable basis for the pastoral care of the students in Catholic universities and ecclesiastical universities (c. 813).

For the republication of the liturgical books or to publish their translations in full or in part, the attestation ("*attestatione*")[15] of the Ordinary of the place of publication must establish that the publications correspond to an approved edition.[16] To publish prayer books for the public or the private use of the faithful, the Ordinary's permission ("*licentia*")[17] is required (c. 826, §§2-3). For the publication and translations of catechisms and other writings pertaining to catechetical formation, the local Ordinary's approval ("*approbatione*") is required (c. 827, §1). Similarly, for the republication of decrees or acts of the Ordinary of the diocese, his permission is required and the conditions he lays down must be observed (c. 828).

The local Ordinary can appoint competent persons to judge books. If the censors find a book favourable, the Ordinary, according to his own prudent judgement ("*prudenti*

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[15] This is the sole canon in the Code in which "*attestatione*" is found. Although the juridic nature of this term is unclear, implicitly it seems to be a permission that authorizes the publication or the republication of the translated liturgical books. It could also be a decree that confirms that the republications correspond to the approved edition.

[16] Detailed regulations on this are found in SCR, Decree, *Cum nostra aetate*, 27 January 1966, in *AAS*, 58 (1966), pp. 169-171; English translation in *CLD*, 6, pp. 811-814. Also to be noted are: SCDW, Circular Letter, *Dum toto terrarum*, 25 October 1973, in *AAS*, 66 (1974), pp.98-99; English translation in *CLD*, 8, pp. 67-69; SCDF, Declaration, *Instauratio liturgica*, 25 January 1974, *AAS*, 66 (1974), p. 661; English translation in *CLD*, 6, pp. 72-73; CDWDS, Instruction, *Liturgiam authenticam*, 28 March 2001, in *AAS*, 93 (2001), pp. 685-726; English translation in *Origins*, 31 (24 May 2001), pp. 17, 19-32.

[17] The terms "permit" or "permission" usually indicate *licentia* or *permissio*. The denial of a *licentia* or *permissio* is a singular decree. In *CCEO*, *permittere* is equivalent to *licentia* in eight canons. See HUELS, "Determinig the Correct Canonical Rules," p. 43.

iudicio"),[18] is to permit it to be published with his own name, date and place of the permission. Canon 830, §§1, 3 requires the Ordinary to give reasons to the author if he does not permit the publication of the book.[19] Moreover, clerics and members of religious institutes are not to write for newspapers, magazines, or periodicals, which attack openly Catholic doctrine or good morals, without the permission of the local Ordinary (c. 831, §1).

4.3 THE DIOCESAN BISHOP'S EXECUTIVE POWER IN THE SANCTIFYING FUNCTION

Book IV of the Code, which deals with matters pertaining to the sanctifying function, has three parts. The first six introductory canons are doctrinal and normative. They concern the liturgy, the roles of ordained ministers and the faithful in the liturgical life of the Church. The other three deal with the nature of liturgical celebrations and the

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[18] "Judgement" ("*iudicium*") itself does not suggest any juridic act in the Code. It is a reference to the discretion or the judgement of the competent authority before he issues an act. The act implied or that follows "*iudicium*" could be enacting a law, issuing a decree, granting a dispensation, permission, or a denial of a permission, etc. The specific nature of an administrative act that follows depends upon particular canons. *CCEO* has similar usage of the term. For instance, cc. 664, §3; 384, §2; 876, §§1, 2. See HUELS, "Determinig the Correct Canonical Rules," pp. 46-47.

[19] The local Ordinary competent to permit or approve the publication of books is the proper local Ordinary of the author or the Ordinary of the place where the books are published (c. 824, §1). This permission (c. 830, §3) must be printed in the book, with the name of the person granting it, the date and the place where it was granted. See PCCICAI, Authentic Interpretation, 29 April 1987, in *AAS*, 79 (1987), p. 1249; English translation in *Canon Law Annotated*, p. 1293.

The competence to examine already published books belongs to the doctrinal commission established by the episcopal conference in accordance with the SCDF, Instruction, *Litteris apostolicis*, 23 February 1967, in *Leges Ecclesiae* [=*LE*], 3, no. 3535, cols. 5109-5110; English translation in *CLD*, 6, pp. 815-817.

For a document from CDF on Regulations for Doctrinal Examination, 29 June 1997, see *ORE*, (3 September 1997) p. 2; see also Georges COTTIER, "Theological Observations on the New 'Regulations' of the Congregation for the Doctrine of the Faith," in *ORE*, (22 September 1997), p. 4; Velasio DE PAOLIS, "Canonical Observations on the New 'Regulations' of the Congregation for the Doctrine of the Faith," in *ORE*, (22 October 1997) pp. 9-10.

authority competent to regulate the liturgy. The seven titles of the first part correspond to the seven sacraments. Five titles of the second part concern other acts of divine worship. The third part, in its two titles, speaks of sacred places and times.[20]

The diocesan bishop has all the power including legislative power for regulating the liturgical life of the particular Church except those matters that are reserved to some other authority (cc. 381, §1; 838, §4). His executive power is described in terms of moderating, directing, promoting and guarding the entire liturgical life in his particular Church according to the norms of law (cc. 835, §1; 838, §1).

4.3.1 The Sacraments

Canon 858, §2 prescribes that each parish must have a baptismal font. The local Ordinary may permit or order ("*potest...iubere*")[21] that a baptismal font be placed in another church or oratory within the parish for the convenience of the faithful, after consulting the local parish priest (c. 858, §2). For a grave reason, he may also permit baptism to be conferred in private houses (c. 860, §1). Although the ordinary minister of baptism is a bishop, a presbyter or a deacon, the local Ordinary can depute

[20] The Code does not contain all liturgical laws of the Latin Church. They are also found in the official Roman liturgical books either in their *praenotanda* or in the rubrical directives (cc. 2; 846, §1); in other related juridic documents such as apostolic constitutions, letters, instructions, etc. Particular liturgical laws are found in the liturgical books of different nations and regions, decrees and statutes of dioceses. See Frederick R. MCMANUS, "The Sanctifying Function of the Church," in *New Commentary*, p. 997.

[21] "*Potest...iubere*" could be a singular decree because the local Ordinary makes provision for baptism. It could be a precept if placing of the baptismal font is placed as an obligation on the parish priest.

("*deputatus*")[22] a catechist or some other person to baptize lawfully if the ordinary minister is absent or impeded (c. 861, §2).

A bishop is the ordinary minister of confirmation. However, a presbyter can administer confirmation with the faculty granted ("*facultate...concessione*")[23] by the diocesan bishop. The bishop's mandate ("*mandati*")[24] given to a presbyter to baptize one who is no longer an infant or to admit a person already baptized into full communion with the Catholic Church carries with it the faculty to administer confirmation (cc. 882; 883, 1°-2°). If necessary, the bishop can grant the faculty of confirming to one or several presbyters (c. 884, §1).

The Ordinary of the diocese can expressly prohibit ("*prohibito*"= singular precept) his faithful from receiving the sacrament of confirmation from a bishop of another diocese (c. 886, §1). To administer confirmation licitly in another diocese, a

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[22] Since according to c. 862 no one can ("*nemini licet*") baptize in another's territory not even his own subjects, the term "*deputatus*" in c. 861, §2 seems to be equivalent to permission. It could also mean delegation or granting of faculty. Moreover, the local Ordinary can also make the provision mentioned in the canon through a singular decree. *CCEO* c. 677, §2, which is the parallel of c. 861, §1 of *CIC 83*, does not have this provision of deputing for baptism.

[23] "Grant" ("*concessio*") implies both jurisdictional and non-jurisdictional matters. It is frequently used in the Code. Often it implies implicitly or explicitly the grant of a favour-dispensation, permission, sanation, indult, etc. The term is also used to suggest the grant of ministerial faculties, delegated power, and other matters. The specific nature of an administrative act suggested by "*concessio*" is to be determined in the context of the individual canons. See HUELS, "Determining the Correct Canonical Rules," p. 48. For the similar use of this word in *CCEO*, see, e.g., cc. 858; 876, §§1, 3; 877.

[24] "*Mandati*," which is different from the faculty to confirm, seems to be a permission granted to the presbyter to baptize those who are mentioned in the canon. The Code does not seem to refer to the faculty to baptize.

As already seen, faculties to administer confirmation, for hearing confession, and for assisting at marriage do not involve power of governance. The provision of c. 144, §2 applies to cc. 882; 883; 966; 1111, §1, on those faculties. However, granting them involves exercise of executive power by the competent authority. Since it makes provisions for the faithful by granting these faculties, the acts implied seem to be singular decrees. The same applies to delegating faculties and power.

bishop needs at least the reasonably presumed permission of the diocesan bishop unless the recipients of the sacrament are his own subjects (c. 886, § 2).

A priest may not celebrate the Eucharist more than once a day except in cases permitted by law to celebrate or concelebrate more than once a day. In case of a shortage of priests, the local Ordinary may permit ("*concedere potest*") priests to celebrate twice a day and even three times on Sundays and holidays of obligation if pastoral needs require it (c. 905).[25]

With the local Ordinary's permission, a sick or aged priest can celebrate the Eucharist sitting before the people (c. 930, §1). Furthermore, with the local Ordinary's express permission, a priest can celebrate the Eucharist in the place of worship of any Church or ecclesial community not in full communion with the Catholic Church for a just reason and so long as there is no scandal (c. 933).

The blessed Eucharist is reserved in the cathedral church, parish churches, the bishop's chapel and in churches or oratories of religious institutes and societies of

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[25] General Instruction on Roman Missal, in no. 158, permits a priest to celebrate or concelebrate more than once a day on the following occasions: Holy Thursday at the Chrism Mass and at the evening Mass of the Lord's Supper, Easter vigil and the second Mass of Easter, three Masses of Christmas at their proper times, concelebration with the bishop or his delegate at a synod, pastoral visitation, on the occasion of a meeting of priests or gathering of religious and another Mass for the benefit of the people. The permission, thus granted, is only for a second Mass, not for a third one. See SCDW, Reply, 31 January 1973, in *LE*, 5, no. 4168, col. 6454. On other days the local Ordinary can allow priests to celebrate twice on weekday and thrice on Sundays and holy days of obligation for the good of the people. However, he cannot give a general permission than is permitted in the canon without the approval of the Holy See. See *Communicationes*, 15 (1983), p. 192.

The number of Masses a priest can celebrate on All Souls' Day seemed ambiguous because c. 806, §1 of *CIC 17* permitted three, but *CIC 83* does not have that provision. The revised General Instruction on the Roman Missal, in no. 204, allows three Masses on the day when it states, "as long as celebrations occur at different times and regulations which have been established regarding the application of second and third Masses are observed." See CDWDS, Institutio generalis missalis romani 2000, Latin original in *Missale Romanum*, Editio typica tertia, Typis Vaticanis, Città del Vaticano, Libreria editrice Vaticana, A.D. 2002, pp. 55-56; English language study translation by the Secretariat for the Liturgy of the National Conference of Catholic Bishops, Washington, DC, 2000, p. 35.

apostolic life. With the local Ordinary's permission, it can be reserved in other churches, oratories and chapels (c. 934, §1, 1°-2°).[26] Moreover, the Ordinary can permit ("*potest...permittere*") the Eucharist to be reserved in another oratory of a house of a religious institute or another house of piety, in addition to reserving it in its church or principal oratory (c. 936). In special circumstances, the local Ordinary can designate ("*deputatus*") a person other than an acolyte, or an extraordinary minister of Holy Communion for the exposition and reposition alone of the blessed Eucharist without the benediction. However, the prescripts ("*praescriptis*")[27] of the diocesan bishop must be observed (c. 943).

According to c. 951, §1, a priest who celebrates several Masses on the same day can apply each to the intention for which the offering was given. However, except on Christmas, he can keep the offering for only one Mass, and transfer the others to the purposes prescribed ("*fines...praescriptos*") by the Ordinary, having allowed some recompense by reason of an extrinsic title.[28] Canon 956 requires each and every administrator of pious causes or those obliged in any way to see to the celebration of Masses, whether clerics or laity, to hand over to their Ordinaries those Mass obligations

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[26] A proposal to limit the power of the local Ordinary to judge the sufficiency of reasons for granting this permission was rejected during the revision process. See *Communicationes*, 15 (1983), p. 198.

[27] As in c. 861, §1, implication of "*deputatus*" in this canon is unclear. It could mean appointing, delegating, granting a faculty, or permission. There is no parallel in *CCEO* to *CIC 83* c. 943. "*Praescriptis*," however, seems to refer to liturgical norms issued by the bishop on the matter.

[28] The Ordinary mentioned in this canon is the proper Ordinary of the celebrant. In the case of a parish priest or a parochial vicar, the Ordinary is the Ordinary of the place. See PCCICAI, Authentic Interpretation, 6 August 1987, in *AAS*, 79 (1987) p. 1132; English translation in *Canon Law Annotated*, p. 1295.

which have not been satisfied within a year. The Ordinaries define the method ("*modum...definiendum*") of transferring such Mass obligations (c. 956).[29]

In a grave necessity, general absolution can be imparted without prior individual confession provided the conditions prescribed in c. 961, §1, 2° are verified. It is for the diocesan bishop to judge ("*iudicium ferre*") whether the conditions required by paragraph 1, 2° are present. He can determine ("*determinare potest*")[30] the cases of such necessity with due regard for the criteria agreed upon with the other members of the episcopal conference (c. 961, §2).

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[29] The "purposes prescribed" ("*fines...praescriptos*") in c. 951, §1 and "method [to be] defined" ("*modum...definiendum*") in c. 956 seem to lay down obligations on persons specified in those canons. If so, the juridic acts implied therein could be precepts. It is also possible that the competent authority issues necessary instructions to the administrators of pious causes.

[30] Like "*iudicium*," "*determinare potest*" also does not suggest any specific juridic act in the Code. The act of the competent authority depends upon the determination he arrives at. The acts thus issued could be laws, decrees, or rescripts, etc.

Thomas J. GREEN is of the view that the nature of the act implied in c. 961, §2 is unclear. According to him, the first clause of the canon on the bishop's judgement is administrative. The second clause on determining the cases of necessity is legislative. See Thomas J. GREEN "The Church's Sanctifying Mission: Some Aspects of the Normative Role of the Diocesan Bishop," in *StC*, 25 (1991), p. 263. While the first clause implies a singular decree, the bishop could implement the second clause through a general executory decree.

For the norms on general absolution, see SCDF, Normae pastorales circa absolutionem sacramentalem generali modo impertiendam, *Sacramentum paenitentiae*, 16 June 1972, in *AAS*, 64 (1972), pp. 510-514; English translation in *CLD*, 7, pp. 667-673. Misinterpretation of these norms caused further clarifications. References to these clarifications are found in JOHN PAUL II, Apostolic Exhortation *Reconciliatio et paenitentia*, 2 December 1984, in *AAS*, 77 (1985), art. 33, pp. 185-275; English translation in MILLER, *Post-Synodal Exhortations*, p. 325. For the latest document from the Holy See on the celebration of the sacrament of reconciliation, see JOHN PAUL II, Apostolic Letter issued motu proprio, *Misericordia Dei*, 7 April 2002, in *AAS*, 94 (2002), pp. 452-459; English translation in *Canon Law Society of Australia & New Zealand Newsletter*, No. 1 (2002), pp. 17-24.

Canon 967, §1 confers on all bishops the faculty to hear confessions everywhere in the Church unless a particular diocesan bishop denies ("*renuerit*") another bishop from using it in his diocese.[31]

The local Ordinary has the faculty to hear confessions within his jurisdiction (c. 968, §1). Canon 969, §1 makes him the only competent authority in a diocese to confer ("*conferat*") this faculty upon any presbyter to hear the confessions of any of the faithful. It can be granted ("*concedi potest*")[32] for a definite or indefinite period of time (c. 972). He cannot grant it habitually to a presbyter not incardinated in the diocese without first consulting that presbyter's own Ordinary even if the concerned presbyter has domicile or quasi-domicile within his jurisdiction (c. 971).[33]

If the local Ordinary, who grants the faculty to hear confessions to a presbyter incardinated or having a domicile in his diocese, revokes ("*revocata*") it, the faculty is

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[31] "*Renuerit*" in this canon could mean a singular precept because a diocesan bishop seems to forbid another bishop from using his faculty to hear confessions in the former's territory.

The Code is silent as to whether the diocesan bishop can grant indulgences. However, the Apostolic Penitentiary allows the diocesan bishop to impart a pontifical blessing with a plenary indulgence three times a year. See APOSTOLIC PENITENTIARY, Decree, *Diversis ex locis*, 14 December 1985, in *AAS*, 78 (1986), pp. 293-294; English translation in *CLD*, 11, pp. 246-247. For earlier documents on indulgences, see PAUL VI, Apostolic Constitution, *Indulgentiarum doctrina*, 1 January 1967, in *AAS*, 59 (1967), pp. 5-24; English translation in *CLD*, 6, pp. 570-575; SACRED APOSTOLIC PENITENTIARY, *Enchiridion indulgentiarum*, 29 June 1968, in *AAS*, 60 (1968), pp. 413-419; English translation in *CLD*, 7, pp. 675-681.

[32] "*Conferat*" and "*concedi potest*" are used interchangeably in these canons. Both refer to granting or delegating ministerial faculties.

[33] Granting a faculty for a definite or indefinite period of time seems to be somewhat different from the habitual faculty to hear confessions mentioned in cc. 967, §2 and 973. The grant of the faculty for an extended period of time, but still limited or definite, may be considered a habitual faculty, just as a faculty granted for an indefinite or unlimited period. An indefinite faculty, for example, is conceded to a priest who is incardinated in the diocese of the local Ordinary who grants it. If a religious priest is ministering in a diocese, he might be granted the faculty for as long as he resides in that diocese. If the faculty is given to a priest on probation, or for the duration of a retreat it is for a definite period of time. See Frederick R. MCMANUS, "The Sacrament of Penance," in *New Commentary*, p. 1158; John MCAREAVEY, "The Sanctifying Office of the Church," in *Letter & Spirit*, p. 532.

lost everywhere.[34] If the faculty is revoked by another local Ordinary, the presbyter concerned loses it only in the territory of the revoking local Ordinary. Whenever a presbyter's faculty is revoked, the local Ordinary who revokes must inform ("*certiorem reddat*")[35] the proper Ordinary or the Superior of the presbyter in question (c. 974, §§2-3).

It is the diocesan bishop who issues dimissorial letters to those who will minister in his diocese as deacons or priests.[36] Dimissorial letters can be limited[37] or can be revoked ("*revocari*") by the bishop granting them or by his successor (cc. 1015, §1; 1023). A diocesan bishop is to ordain his own subjects unless he is impeded from doing so for a just reason (c. 1015, §2). However, he cannot confer orders outside his own jurisdiction without the permission of the bishop of that jurisdiction (c. 1017).[38] The bishop cannot forbid ("*prohiberi non potest*") a deacon, who refuses to be promoted to

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[34] "Revoking" ("*revocari*," "*revocata*") in the Code generally indicates that the competent authority issues a singular decree to that effect. In this canon, revocation by the local Ordinary who granted the faculty is a singular decree because it is his decision. The revocation by another local Ordinary is a precept because he forbids the presbyter concerned to hear confessions in his territory.

[35] "*Certiorem reddat*" is not an administrative act, rather notifying about an administrative act, that is, the decree revoking the faculty (precept).

[36] A dimissorial letter is a singular decree because it gives a decision that a particular candidate will be ordained. If the bishop refuses to issue or withholds the dimissorial letter, the juridic acts implied are also singular decrees.

[37] For example, granting them for a specified time, place, a specific ordaining bishop, subjecting the candidates to a further proof of fitness. See Donal KELLY, "Orders," in *Letter & Spirit*, p. 554.

[38] The validity of ordinations unlawfully conferred by various "*episcopi vagantes*" is not recognised by the Holy See. See SCDF, Decree, *Exc.mus et Rev.mus Dominus*, 17 September 1976, in *AAS*, 68 (1976), p. 623; English translation in *CLD*, 8, pp. 1216-1217.

This permission required for a bishop to ordain in another diocese is different from dimissorial letters. An ordination without such permission affects its liceity, but not its validity. See *Communicationes*, 15 (1983), p. 217. Similarly, a bishop of the Latin rite cannot ordain a candidate of an oriental rite although he is a subject of Latin jurisdiction. If he ordains him without an indult from the Holy See, the ordination is valid, but illicit. See c. 1015, §2.

the presbyterate, from exercising the order received unless he has a canonical impediment, or if there is some other grave reason in the judgement of the diocesan bishop (c. 1038). In other words, if there is such a reason, the bishop can forbid him from exercising the order received. In accordance with c. 1030, the bishop can forbid ("*interdicere potest*")[39] admission to the presbyterate to his deacon only for a canonical cause, even if occult and without prejudice to recourse according to the norm of law.

Canon 1039 requires the candidate for sacred orders to make a retreat for at least five days before his ordination. The Ordinary is to determine ("*determinatis*")[40] the place and the manner of the retreat, and then ensure that the retreat has been duly made (1039).

One who suffers from insanity or from some other psychological infirmity mentioned in c. 1041, 1°, is incapable of fulfilling priestly ministry. He is irregular for the exercise of orders already received till the Ordinary consults an expert and permits the exercise of the concerned order (c. 1044, §2, 2°). While c. 1047, §§1-3 enumerates irregularities and impediments reserved to the Apostolic See, paragraph 4 of the same

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[39] While "*prohiberi potest*" seems to be a precept, "*interdicere potest*" seems to be a singular decree.

For the diocesan clergy, the authority to receive the recourse from such a deacon is CFC, and CICLSAL for those who are subject to it. If required, further recourse could be had to the Apostolic Signatura against the decision of the concerned dicastery. According to José Maria G. DEL VALLE, "Orders," in *Canon Law Annotated*, p. 644, CEP is also competent to receive such recourse according to its territorial competence. However, rights and obligations of clergy are not among the competence of CEP. Cfr. JOHN PAUL II, *Pastor bonus*, 85-89; 95, §1; 108, §1, in *AAS*, 80 (1988), pp. 881-883, 884, 887; English translation in *CLSA Translation*, pp. 714-718. The precise meaning of "canonical cause" in c. 1030 is not clear from the canon. Therefore, it might give rise to abusive interpretation. The expression "an occult" canonical cause in the canon can further complicate the matter because those who have the knowledge of the reasons for not promoting the deacon to the presbyterate might be obliged to protect his good name. See Robert J. GEISINGER, "Orders," in *New Commentary*, p. 1208.

[40] The term "*determinatis*" seems to imply that a singular decree is to be issued. It could also be a precept if the retreat is prescribed as an obligation.

canon allows the Ordinary to dispense from the irregularities and impediments not reserved to the Holy See.[41]

The local Ordinary's permission is required to assist at the marriages of the following: a marriage of a *vagus*; a marriage not recognised by civil law or not celebrated according to civil law; marriage of a person who is bound by natural obligations to another party or children arising from a previous union; one who has notoriously rejected the Catholic faith; a person under censure; a minor whose parents are unaware of the marriage or are reasonably opposed to it; and a marriage to be entered into by proxy in accordance with c. 1105. The local Ordinary is not to grant permission to assist at the marriage of one who has notoriously rejected the Catholic faith, unless the norms of c. 1125 are observed with the necessary adaptation (c. 1071).[42]

For a grave reason and while that reason persists the local Ordinary in a specific case can forbid ("*vetare potest*"= singular precept) for a time the marriage of his own subject wherever he or she is residing, or of any person actually present in his territory. A marriage celebrated in violation of this prohibition is unlawful (c. 1077, §1). No nullifying clause can be attached to a prohibition, as only the supreme authority is competent to do so (c. 1077, §2).

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[41] The canon does not specify which Ordinary is competent to dispense. Since other canons on dimissorial letters, testimonials of fitness of candidates and approval for ordination place the proper Ordinary in the central role, the Ordinary to deal with the irregularity and impediments of a candidate is also his proper Ordinary. See GEISINGER, "Orders," p. 1227.

[42] To determine when the rejection of faith becomes notorious, cfr. JOHN PAUL II, Apostolic Exhortation, *Familiaris consortio*, 21 November 1981, in *AAS*, 74 (1982), no. 68, pp. 163-165; English translation in FLANNERY II, pp. 872-874.

The local Ordinary can dispense his own subjects wherever they are residing from all ecclesiastical impediments not reserved to the Apostolic See. He may also dispense those who are actually in his territory (c. 1078, §1). In danger of death, the local Ordinary can dispense from the form to be observed for the marriage celebration, and from every ecclesiastical impediment, whether public or occult, except for the impediment of presbyterate (c. 1079, §1). Canon 1080, §1 authorises the local Ordinary to dispense also from all impediments except sacred orders and public perpetual vow of chastity in a religious institute of pontifical right when an impediment is discovered after everything has been prepared for the wedding, and its delay until a dispensation could be obtained from the competent authority would cause grave harm.

A marriage subject to a condition concerning the future cannot be contracted validly. However, with the written permission of the local Ordinary, a condition concerning the past or present can be attached licitly. The validity of the marriage depends on whether that which is subject of the condition exists or not (c. 1102, §3).

The validity of a proxy marriage depends upon the validity of the mandate. To be valid, the proxy mandate should be signed by the mandator and by the parish priest or the local Ordinary of the place in which the mandate was given.[43] The local Ordinary can also delegate ("*delegato*") another priest to sign the mandate (c. 1105, §2).

The parish priest or the local Ordinary can delegate ("*delegato*") the faculty, including the general faculty to assist at marriages within his territory, to priests and

[43] If the local Ordinary delegates the signing of the mandate, it would be an exercise of his executive power. The nature of his act of signing the mandate, without which the mandate would be invalid, seems to be granting the permission for the proxy marriage. Canon 1071, §1, 7° seems to suggest the same. This permission is quite different from the nature of the mandator's signature, or act of signing.

deacons (c. 1108, §1). However, the delegation must be given expressly to a particular person. While a general delegation must be given in writing, special delegation must be granted to a certain person for a specific marriage (cc. 1111).[44]

In case there is a lack of priests and deacons, the diocesan bishop can delegate lay persons to assist at marriages with the prior favourable vote of the episcopal conference and after he has obtained the permission of the Holy See (c. 1112, §1).[45]

The place of marriage is the parish church of domicile, quasi-domicile, or a month's residence of either of the contracting parties. In the case of *vagi*, it is the parish of their actual residence. With the permission of the proper Ordinary or the proper parish priest, marriages can be celebrated in other places (c. 1115). Although a marriage between Catholics, or between a Catholic and a baptized non-Catholic, is to be celebrated in the parish church, with the permission of the local Ordinary or of the parish priest it can be celebrated in another church or oratory. However, the local Ordinary can permit a marriage in another suitable place (c. 1118).

The express permission of the competent authority is required for a marriage between two baptized persons one of whom is a baptized Catholic, or received into the Catholic Church after baptism and has not defected from it by a formal act and the other

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[44] Express delegation can be explicit ("I delegate you") or implicit ("Here are the keys to open the church for the wedding") but never tacit or presumed. See John P. BEAL, "The Form of the Celebration of Marriage," in *New Commentary*, p. 1331.

[45] The duration of the shortage of priests referred to in the canon could be that priests and deacons are not available for a very long time, or for some length of time. In view of c. 1116, §1, 2°, lay persons can be delegated if the non-availability of priests and deacons lasts for a month. See Donal KELLY, "Marriage," in *Letter & Spirit*, pp. 625-626. Furthermore, the absence of priests can also be interpreted as the absence of suitable or qualified priests or deacons. The Holy See has permitted lay persons to assist at the marriages of immigrants and refugees who do not speak the local language. See SCSDW, Reply, 20 January 1983, *CLD*, 10, pp. 178-181.

belonging to a Church or ecclesial community not in full communion with the Catholic Church (c. 1124).[46] The local Ordinary can grant this permission if there is a just and reasonable cause and if the parties fulfill the conditions stipulated in c. 1125, 1°-3°. If there are difficulties in observing the canonical form in a mixed marriage, the local Ordinary of the Catholic party can dispense from the canonical form in individual cases after consulting the Ordinary of the place of the celebration of the marriage. However, for its validity, there must be some form of public celebration. This applies also to disparity of cult cases (cc. 1127, §2; 1129).[47] Only for a grave and urgent reason, the local Ordinary can permit the secret celebration of marriage (c. 1130).[48]

In virtue of the Pauline privilege, a marriage between two non-baptized persons can be dissolved in favour of faith of the spouse who receives baptism and contracts a new marriage, provided that the non-baptized spouse departs (c. 1143, §1).[49] For the baptized person to contract a new marriage, after baptism the non-baptized person must be interrogated whether he or she wishes to receive baptism, and to cohabit peacefully with the baptized party without affront to the Creator. For a grave reason, the local

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[46] The canon does not specify the competent authority. In view of c. 1125, the local Ordinary seems to be the competent authority. For a list of Churches or ecclesial communities not in full communion with the Catholic Church, see Rafael Navarro VALLS, "Marriage," in *Canon Law Annotated*, p. 712.

[47] Although the local Ordinary of the Catholic party can dispense from the canonical form, it is prudent for him to consult in advance the Ordinary of the place where the marriage will be celebrated to ensure that no scandal will be caused by such a marriage and any other obstacles avoided. See ibid., p. 714.

[48] It is not clear which Ordinary is competent to permit the marriage. It could be the Ordinary of the place of domicile or quasi domicile of either party, or the local Ordinary of the place of marriage. See KELLY, "Marriage," p. 638.

[49] The first marriage is *ipso facto* dissolved by the subsequent marriage in favour of faith. The local Ordinary's role is merely to verify that the required conditions are met. See Javier HERVADA, "The Separation of the Spouses," in *Canon Law Annotated*, p. 720; John P. BEAL, "The Separation of Spouses," in *New Commentary*, pp. 1365-1366.

Ordinary can permit the interrogation to be done before the baptism. He can also dispense from the interrogation whether before or after the baptism if it cannot be made, or if made it would be useless (c. 1144, §2). A period of time must be allowed for the non-baptized person to reply to the interrogation with advice that silence beyond the stipulated period would be considered as a negative response (c. 1145).[50] If the convert had several unbaptized spouses, he or she can retain one of them, dismissing the others. It is for the local Ordinary to ensure that adequate and just provision is made in christian charity and natural equity for the needs of the first spouse and others dismissed, considering the moral, social and economic conditions of places and of persons concerned (c. 1148, §3).[51] For grave reasons, the local Ordinary can permit ("*concedere potest*")[52] the baptized person who uses the Pauline privilege to marry a non-Catholic person whether baptized or non-baptized (c. 1147).

If either of the spouses causes grave mental or physical danger to the other spouse or to the children, or makes common life unduly difficult, he or she can leave the other spouse by [singular] decree of the local Ordinary, but without affecting the marriage bond (c. 1153).

Canon 1165, §2 provides the bishop with competence to grant radical sanation to marriages in individual cases even if there were a number of reasons for its invalidity.

[50] Canon 1144, §1 prescribes the interrogation for the validity of the new marriage to be contracted.

[51] It is not the local Ordinary's personal responsibility to provide for the first and the other dismissed wives. He is to merely ensure that adequate provision is made for them. See *Communicationes*, 10 (1978), p. 115. One of the possibilities for the local Ordinary is to oblige the former husband to adequately support his former wives. The local Ordinary, in this case, might need to issue a precept.

[52] "*Concedere potest*" in this canon appears to be a permission.

However, for the retroactive validation of a mixed marriage, the conditions of c. 1125 must be fulfilled. The bishop cannot grant it if the impediment to be dispensed from is reserved to the Apostolic See as per c. 1078, §2, or if the impediment was of natural law or of the divine positive law which ceased after the celebration of the marriage.[53]

4.3.2 Other Acts of Divine Worship

A cleric with the requisite power is the minister of sacramentals. In accordance with the liturgical books and subject to the judgement of the local Ordinary, certain lay people who possess the appropriate qualities can administer certain sacramentals (c. 1168).[54]

According to c. 1169, §1, those marked with the episcopal character and presbyters permitted by law or legitimate grant ("*legitima concessione*")[55] can perform consecrations and dedications validly. But c. 1206 reserves the dedication of any place in the diocese to the diocesan bishop. However, he can entrust ("*committere*") it to any

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[53] Granting a sanation could be categorised under "other favour," therefore, a rescript. Refusal to grant it would be a singular decree. According to c. 1161, §1, sanation involves a dispensation from an impediment if there is one, and from the canonical form if it was not observed, and the retroactivity of canonical effects. §2 of the same canon makes it explicit that validation is a favour (*gratia*). However, retroactive validation does not imply two separate acts, that is, a dispensation and the retroactivity or the referral back of the canonical effects. It is a single act of recognition. In other words, when retroactive validation is granted, it implies that the required dispensation is granted. See Javier HERVADA, "The Validation of Marriage," in *Canon Law Annotated*, p. 730. It must be noted that a dispensation from consanguinity in the direct line or in the second degree of the collateral line is never granted (c. 1078, §3). Therefore, sanation cannot be granted.

[54] The "judgement" ("*iudicio*") of the local Ordinary can suggest issuing a singular decree, or permission. The canon does not refer to any faculty or power to be delegated to lay persons.

[55] "Legitimate grant" here could be a delegation or permission.

bishop or, to a presbyter in exceptional cases.[56] The blessing of churches is reserved to the diocesan bishop, but he can delegate ("*delegare*") a priest for this purpose (c. 1207).

No one can exorcise without the special and express permission of the local Ordinary which can be granted only to a presbyter who has piety, knowledge, prudence and integrity of life (c. 1172).[57]

It is for the local Ordinary to permit ecclesiastical funerals for children who die before baptism but whose parents had intended to have them baptized. Similarly, he can also permit Church funerals to persons belonging to a non-Catholic Church or ecclesial community, if their own minister is not available, provided it is not contrary to the wishes of the deceased (c. 1183).

With the Ordinary's written permission, precious images needing repair can be restored. Such images could be distinguished by reason of age, art or veneration. The Ordinary is to seek the advice of experts before granting this permission (c. 1189).

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[56] The Code makes a distinction between consecration and dedication. Persons and things are consecrated to God, and places are dedicated. See *Communicationes*, 12 (1980), p. 325. While consecration, dedication and blessing are acts of the power of Order, the bishop's executive power is involved only in entrusting ("*committere*") and delegating ("*delegare*") the same acts to other bishops or presbyters. Since c. 1207 speaks of the Ordinary delegating (*delegare*) another priest for blessing sacred places, and the diocesan bishop delegating another priest for blessing of churches, "*committere*" seems to be equivalent to delegating. In fact, c. 1169, §1 mentions presbyters being permitted (*permittitur*) by law to perform consecrations and dedications validly. Although this "*permittitur*" is not *licentia*, it suggests that the nature of delegation here could be a permission.

[57] If the episcopal conference requests and receives the approval from the Holy See, an office of exorcist can be established. The priest occupying that office would be given the general faculty to perform exorcisms. See PAUL VI, Apostolic Letter Issued *m. p.*, *Ministeria quaedam*, 15 August 1972, in *AAS*, 64 (1972), pp. 529-534; English translation in *CLD*, 7, pp. 690-695. On certain abuses in exorcism, see CDF, Letter, *Inde ab aliquot annis*, 29 September 1985, in *AAS*, 77 (1985), pp. 1169-1170; English translation in *CLD*, 11, pp. 276-277. For the recently revised rite of exorcism, see CDWDS, *Rituale romanum de exorcismis et supplicationibus quibusdam*, 22 November 1998, Editio typica, Typis Vaticanis, 1999.

The local Ordinary and the parish priest are competent to dispense their own subjects and *peregrini* from private vows for a just cause, provided that acquired rights of others are not injured. Those who are delegated by the local Ordinary are also able to dispense from these vows (c. 1196, 1°, 3°). Likewise, the faculty to commute ("*commutari*") a private vow to something less good belongs to the local Ordinary or his delegate (c. 1197).[58]

The blessing of sacred places other than churches belongs to the Ordinary who can delegate another priest for the purpose (c. 1207). However, in individual cases the Ordinary can permit the use of a sacred place for other purposes provided those are not contrary to the sacred character of the place (c. 1210).[59] If a sacred place is desecrated by acts scandalous and gravely injurious to the faithful, the local Ordinary is to determine whether these acts are serious indeed and contrary to the sacred character of the place (c. 1211).[60] Furthermore, c. 1212 allows the Ordinary to turn over permanently a sacred place for profane usage by a [singular] decree.[61]

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[58] Canon 1197 explicitly attributes this commutation to those who have the power of dispensing in accordance with c. 1196. Therefore, the act of commutation is a rescript with the nature of a dispensation. In addition, the Code uses other terms such as "change" ("*mutet*," e.g., c. 1718, §§1-3), "reduce," "moderate," "commute" ("*reductio*," "*moderatio*," "*commutatio*," e.g., cc. 1308, §3; 1310, §1), "diminish" ("*imminuere*," e.g., c. 1310, §2) to suggest similar favours granted. Therefore, norms on rescripts would apply to them. *CCEO* cc. 1052, §§1-2; 1054, §§1-2.

[59] On concerts in churches, see CDW, Letter, 5 November 1987, in *Notitiae*, 24 (1988), pp. 3-10; English translation in *Origins*, 17 (1988), pp. 468-470. This letter requires the Ordinary's permission for a concert in a church, but it does not distinguish between sacred and secular music.

[60] If the local Ordinary determines that the place is unsuitable for worship, he is to issue a singular decree.

[61] A sacred place loses its dedication or blessing by destruction due to war, arson, vandalism, natural disasters etc. Deterioration of a place that was regularly used, now requiring temporary repairs would not result in loss of dedication or blessing. If the restoration includes a new altar, a new dedication is required. When giving over a sacred place permanently for secular usage, the local Ordinary must issue a

The diocesan bishop's express written consent is required to build a church. The bishop is not to give this without consulting first the council of priests and the rectors of neighbouring churches.[62] Although religious institutes have the bishop's permission to establish a new house in the diocese, they need his permission to build a church in a specific and determined place (c. 1215, §3). If a church cannot be used in any way for divine worship, and there is no possibility of repairing it, the diocesan bishop can relegate ("*redigi potest*") it to profane but not sordid use.[63] In addition, if other grave causes suggest that a church no longer be used for divine worship, the diocesan bishop can relegate it to profane but not sordid use.[64] However, he can act in this matter only after hearing the presbyteral council, and with the consent ("*consensu*")[65] of those who legitimately claim rights for themselves in the church. It is also the bishop's responsibility to ensure that no detriment is caused to the good of souls thereby (c. 1222).

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decree directed to the person responsible for the place stating that the particular place is no longer sacred. Though a sacred place loses its sacred character by permanent secular use, this is not a reason to omit a decree, so that no uncertainty remains about the status of the place, and the possibility of recourse is provided. See John M. HUELS, "Sacred Places and Times," in *New Commentary*, p. 1428.

[62] *Rector* in the canon refers to the parish priests, religious superior, chaplain, or anyone in charge of neighbouring churches, not just rectors in the sense of c. 556. The neighbouring churches are only those in the sense of c. 1214, not oratories, shrines, or private chapels. See HUELS, "Sacred Places and Times," p. 1429.

[63] "Relegate" ("*redigi potest*") in this canon suggests the need for issuing a singular decree.

[64] In view of c. 1212, the administrative act that the bishop is to issue is a singular decree because it would be a decision that determines the status of the related church.

It would not be proper to use a church for purposes too far removed from the dignity of a sacred place, for example, a restaurant, cinema, market, etc. Such a church could be used as a storehouse for religious objects, a museum of sacred art, the meeting place for a religious fraternity. See José Tomás Martín DE AGAR, "The Other Acts of Divine Worship," in *Canon Law Annotated*, p. 758. A note from the translator of the commentary further observes that some uses of a church can always be improper in certain socio-cultural circumstances, though the level of impropriety can vary.

[65] "*Consensu*" in this canon does not mean *licentia.*

With the permission ("*licentia*") of the Ordinary, a place for divine worship can be designated ("*destinatus*") as an oratory for divine worship for the convenience of some community or group of the faithful. However, this permission is to be given only after the place destined for the oratory is examined either by the Ordinary himself or by his delegate. Once permitted ("*data autem licentia*"), the oratory cannot be put to secular use without the authority ("*auctoritate*") of the same Ordinary (cc. 1223-1224). In an oratory lawfully designated ("*constitutis*"), all sacred celebrations may be performed.[66] In addition to the universal or particular liturgical laws, the local Ordinary, through his prescript ("*praescripto*"), can also exclude ("*excipiantur*") a particular celebration from being held in an oratory (c. 1225).[67]

A private chapel is a place designated ("*destinatus*") by the permission of the local Ordinary for the convenience of one or more individuals (c. 1226). To celebrate Mass and other sacred functions in a private chapel, the local Ordinary's further permission is required (c. 1228).[68]

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[66] The "*licentia*" of the Ordinary and "*destinatus*" seem to be two different acts, the latter being an act of the competent superior. This is also the case in c. 1226. While "*licentia*" and "*auctoritate*" are equivalent, "*destinatus*" and "*constitutis*" are also interchangeable.

The community or group of the faithful need not be juridic persons. They can be religious communities, schools, hospitals, ships, military camps, recreation centres, shopping centres, and even locations along highways, train and bus stations, and airports. For reserving the Eucharist in the oratory, a further permission of the local Ordinary is required. See Raymond BROWNE, "Sacred Places and Times," in *Letter & Spirit*, p. 690; HUELS, "Sacred Places and Times," p. 1434.

[67] "*Praescripto*" could refer to liturgical norms issued through a general executory decree. However, "*excipiantur*" could also mean a precept if it is issued to a single oratory.

[68] While granting this permission the local Ordinary could lay down appropriate conditions regarding the frequency of days on which Mass could be celebrated, the type of liturgical celebrations permitted, etc. A separate permission of the local Ordinary is required for reserving the Eucharist (c. 934, §1, 2°). This does not apply to the bishop who can establish his own private chapel with the same rights as those of an oratory (c. 1227).

The local Ordinary, according to c. 1230, approves ("*approbante*") a church, or another sacred place, frequented by the faithful with special devotion, as a shrine. In the case of a diocesan shrine, c. 1232 allows the local Ordinary to approve ("*approbanda*") its statutes which determine its purpose, the authority of the rector, the ownership and the administration of its property (c. 1232).[69]

4.4 THE DIOCESAN BISHOP'S EXECUTIVE POWER IN THE RULING FUNCTION

The Code does not treat the governing or ruling function in a separate book unlike the teaching and sanctifying functions. In fact, cc. 129-144 of the Book I deal with the principles which concern the power of governance. It is not possible to have such a separate book because the ruling function relates to various aspects of ecclesial life. Therefore, canons related to the ruling function are found throughout the Code.[70] In this section, we will try to identify the executive power of the bishop in his ruling function as found in the Code.

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[69] Approval of a church or sacred place mentioned in c. 1230 appears to be a singular decree. If privileges are granted to shrines, the competent authority would have to issue separate acts. Canon 1232, however, refers to approval of the statutes of a diocesan shrine. It is also a decree.

Shrines, which are also titled as minor basilicas, are subject to CDWDS, Decree, *Domus Ecclesiae*, 9 November 1989, in *Notitiae*, 26 (1990), pp. 13-17.

[70] During the revision process, a suggestion to have a separate book on *munus regendi* was rejected because the canons on governing cannot be contained in any one book of the Code. See Thomas J. GREEN, "Persons and Structures in the Church: Reflections on Selected Issues in Book II," in *The Jurist,* 45 (1985) p. 34; Bertram F. GRIFFIN, "Threefold *Munera* of Christ and the Church," in Edward G. PFNAUSCH (ed.), *Code, Community, Ministry*, Second Revised Edition, Washington, DC, CLSA, 1992, p. 17.

4.4.1 Parochial Matters

Canon 374, §1 requires every diocese to be divided into distinct parts or parishes. Canon 515, §2 makes only the diocesan bishop competent to erect, suppress ("*suppremat*"), or notably alter ("*notabiliter innovetur*") parishes after consulting the presbyteral council.[71] If a community cannot be established as a parish or quasi-parish, the bishop must provide ("*prospiciat*" = singular decree) for the pastoral care of those faithful in another way (c. 516, §2).[72]

If the bishop decides to entrust the participation in the exercise of pastoral care of a parish to a deacon, or to a lay person, or to a community of persons due to a lack of

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[71] The terms "suppress" ("*supprimat*"), "alter" ("*innovet*"), "provide for" ("*prospiciat*") generally denote singular decrees. *CCEO* c. 280, §1 corresponds to *CIC 83* in the use of these words. However, the former uses "*immutare*" for "*innovet.*"

Altering a parish implies a number of possibilities: uniting two or more parishes, dividing one into two or more parishes, changing a territorial parish into a personal or vice versa, modifying boundaries, etc. See John A. RENKEN, "Parishes, Pastors, and Parochial Vicars," in *New Commentary*, p. 678. *Ecclesiae imago*, no. 178, pp. 175-176, had suggested establishment of a diocesan commission for the creation of new parishes to function in collaboration with the presbyteral council and other concerned commissions. See *Directory*, pp. 91-92.

On some canonical issues related to closing of parishes, see SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Definitive Decree, 4 May 1996, Prot. N. 25500 CA, in *Forum*, 7/2 (1996), pp. 347-357; ID., Definitive Sentence, 4 May 1996, in *Forum*, 7/2 (1996), pp. 359-371; Franz DANEELS, "The Suppression of Parishes and the Reduction of a Church to Profane Use in the Light of the Jurisprudence of the Apostolic Signatura," in *Forum*, 8/2 (1997), pp. 287-293; James H. PROVOST, "Some Canonical Considerations on Closing Parishes," in *The Jurist*, 53 (1993), pp. 362-370; Thomas J. PAPROCKI, "Parish Closings and Administrative Recourse to the Apostolic See: Recent Experiences of the Archdiocese of Chicago," in *The Jurist*, 55 (1995), pp. 875-896; James A. CORIDEN, "The Vindication of Parish Rights," in *The Jurist*, 54 (1994), pp. 32-34.

[72] An example of such pastoral care is specified in c. 813 for university students. Others could include the staff and the sick in a hospital, travellers and the employees in an airport, seamen while in a port, members of distinct ethnic and linguistic groups etc. See Gordon READ, "Particular Churches and Their Groupings," in *Letter & Spirit*, p. 286. Views on the essentials of a parish differ. For a summary of these, see RENKEN, "Parishes, Pastors, and Parochial Vicars," footnote 18, pp. 676-677.

priests, the bishop must appoint a priest to direct the pastoral care. He should be provided ("*instructus*") with the powers and faculties of a parish priest (c. 517, §2).[73]

Although a juridic person cannot be appointed as parish priest, the bishop can entrust ("*committere*") a parish to a clerical religious institute or a clerical society of apostolic life with the consent of its competent superior. In fact, the bishop can erect a parish using a church of the institute or society. However, only one priest must be the parish priest. If the pastoral care is entrusted to several priests *in solidum*, one of them must be the moderator who directs the joint action and answers to the bishop. This arrangement could be perpetual or temporary (cc. 520, §1; 517, §1).[74]

The diocesan bishop is to appoint parish priests for an indefinite period of time. However, if a decree of the conference of bishops so permits, they can be appointed for a specific period of time (c. 522).[75] This provision applies also to priests to whom a parish is entrusted *in solidum* according to c. 517, §1 (c. 542, 2°).

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[73] This canon does not say that this priest is to be appointed parish priest, yet he would be provided ("*instructus*"; *CCEO*, in c. 287, §2 does not use this term, rather has a different clause) with powers and faculties of a parish priest. They seem to be habitual faculties. The deacon or layperson or a community of persons participating in the pastoral care are not accorded any title. *Ecclesiae de mysterio* specifically directs that appropriate titles are to be given to lay persons who serve in the Church. In referring to c. 517, §2, it ruled out for them titles such as "pastor," "coordinator," "moderator," "community leader" or other similar ones which could confuse their role with that of the parish priest. It explains that the participation in the pastoral care by lay persons, provided for in the canon, is an extraordinary form of collaboration to be used only when there is a lack of priests. See *Ecclesiae de mysterio*, in *AAS*, 89 (1997), art. 1.3, 4.1, pp. 860-861; English translation in *ORE*, Special Insert (19 November 1997), p. IV. A title proposed is "parish life collaborator" as it reflects the theme of *Ecclesiae de mysterio* itself. See RENKEN, "Parishes, Pastors, and Parochial Vicars," footnote 72, p. 686.

[74] Although "*committere*" in c. 520, §1 seems to indicate a singular decree, in fact, the bishop, in virtue of c. 520, §2 is to draw up a broader bilateral agreement with the competent superior of the religious institute or society. This contract must define, among other things, the work to be accomplished, the persons to be assigned to the parish, and the financial arrangements.

[75] It is interesting that the norms of all the eight episcopal conferences (Australia, Canada, Interterritorial Bishops' Conference of Gambia, Liberia and Sierra Leone, India, Ireland, Nigeria,

It is for the diocesan bishop to appoint parish priests by free conferral in accordance with c. 157 unless someone has the right of presentation or election (c. 523).[76] Thus, if a candidate is presented according to such a right or elected, the diocesan bishop installs or confirms him, as the case may be, as the parish priest.[77] For the appointment of a religious member as a parish priest, the prescriptions of c. 682, §1 apply.

When a person has been promoted to carry out the pastoral care of a parish, the local Ordinary is to prescribe ("*praefiniat*") the time within which the possession of the parish must be taken. It is for the local Ordinary, or a priest delegated by him to place a parish priest in possession of the parish. The manner of taking possession of the parish depends on particular law or legitimate custom. For a just cause, the local Ordinary can dispense from this method. If the possession of the parish does not take place within the prescribed time, the local Ordinary can declare ("*declarare potest*") the parish vacant unless there was a just impediment (c. 527, §§2-3).[78]

The parish priest is obliged to reside in a rectory near the church. In particular cases the local Ordinary can permit him, for a just cause, to reside elsewhere especially in

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Philippines, USA) reported in *Canon Law Annotated*, pp. 1310, 1321, 1346, 1355, 1358, 1375, 1396, 1417 allow for a determined period of term, mostly 6 years.

[76] The local Ordinary of a diocese can appoint parish priests if he has received a special mandate from his diocesan bishop (c. 134, §3). Canon 157 leaves open other possibilities and procedures for providing for an office in accordance with law. For example, see cc. 523 and 682, §1; 497,1°.

[77] "To install" (*instituere*) and "to confirm" (*confirmare*) suggest that the competent authority is to issue singular decrees to that effect. For the norms on presentation and election, see cc. 158-179. Refusal or denial to install or confirm would be a singular decree. Against the refusal to install or confirm the one legitimately presented or elected, that person could have recourse to the competent ecclesiastical authority. See RENKEN, "Parishes, Pastors, and Parochial Vicars," footnote 118, p. 694; Juan CALVO, "Parishes, Priests and Assistant Priests," in *Canon Law Annotated*, p. 385.

[78] While "prescribe" ("*praefiniat*") here implies a singular precept, "declare" ("*declarare*") signifies a singular decree. For instance, in cc. 1707, §1; 1751, §2, declaration implies a singular decree.

a house shared by several presbyters. In this case parochial functions must be properly and suitably provided for (c. 533, §1).

The parish priest ceases from office when the bishop removes (cc. 1740-1747) or transfers him (cc. 1748-1752), or accepts his resignation (cc. 187-189).[79] A parish priest who belongs to a religious institute or a society of apostolic life can be removed in accordance with c. 682, §2 (c. 538, §§1-2).

Parishes are not to be joined to a chapter of canons. The bishop is to separate ("*separentur*") from the chapter those parishes which are united to it. If a church is parochial and capitular at the same time, the bishop must designate ("*designetur*") a parish priest whether from among the members of the chapter or not.[80] If this parish priest is a member of the chapter of canons, the bishop is to see to it that pastoral needs of the parish are provided for and that they do not conflict with the functions proper to the chapter (c. 510, §§1, 2).

The bishop is to designate ("*deputetur*") a priest as parochial administrator as soon as possible when a parish becomes vacant or if a parish priest is prevented from exercising his pastoral function. This can occur due to captivity, exile or banishment, incapacity or ill health (c. 539). In the case of a parish entrusted *in solidum* (c. 517, §1) for pastoral care, it does not become vacant when a priest from the group or its moderator

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[79] In the Code, "transfer" ("*translatione*," "*transferatur*"), "removal" ("*amotione*"), and "accepting" ("*acceptata*") a resignation, "suspending" ("*suspendi*") suggest that the competent authority needs to issue singular decrees on the matter.

[80] "*Separentur*" and "*designetur*" in this canon are suggestive of singular decrees.

ceases from office, or when one of them becomes incapable of pastoral function. However, the diocesan bishop is to appoint another moderator (c. 544).

The diocesan bishop freely appoints parochial vicars (c. 547). A parochial vicar is to reside in the parish. If he has been appointed for several parishes, he is to reside in one of them. For a just reason the local Ordinary may permit him to reside elsewhere, especially in a house shared by several presbyters as long as this is not detrimental to his pastoral functions (c. 550, §1).

The bishop can remove a parochial vicar for a just cause without prejudice to the norms of c. 682, §2 (c. 552). Since the procedure for the removal of parish priests does not apply to parochial vicars, and since the Code does not have a removal procedure for parochial vicars, the norms of cc. 192-195 on removal from office are applicable to them.[81]

The diocesan bishop is to appoint vicars forane after consulting the priests who exercise ministry in the related vicariate (c. 553, §2). He is to select a priest whom he judges suitable after considering the circumstances of place and time. The appointment is made for a period determined by particular law (c. 554, §§1-2).[82] The diocesan bishop can determine the manner of parish visitations to be carried out by a vicar forane (c. 555,

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[81] See Thomas J. PAPROCKI, "The Method of Proceeding in Administrative Recourse and in the Removal or Transfer of Pastors," in *New Commentary*, p. 1838.

[82] The particular law can determine other ways of naming a vicar forane; for example, priests of the vicariate select a priest to be appointed by the bishop, or an election process involving lay persons to elect a priest. See Bertram F. GRIFFIN, "Vicars Forane," in *New Commentary*, p. 730. Some criteria to judge the suitability to be a vicar forane are in *Ecclesiae imago*, no. 187, pp. 182-184; *Directory*, pp. 95-96.

§4).[83] For a just cause, the diocesan bishop can freely remove a vicar forane from office in accord with his own prudent judgement (c. 554, §3).[84]

The diocesan bishop freely appoints the rector of a church. If someone else has a legitimate right of electing the candidate, the bishop confirms the elected; if presented, the bishop installs him. In a church that belongs to a clerical religious institute of pontifical right, the superior presents the candidate whom the bishop appoints as the rector. In a church that is connected to a seminary or another college governed by clerics, the rector of that seminary or college is also the rector of that church. However, the bishop can determine otherwise (c. 557) through a singular decree.

If the local Ordinary finds it opportune, he can order ("*praecipere*"= singular precept) a rector to celebrate particular functions, even parochial ones, in his church.[85] He can also order the rector to make the church available to other groups of the faithful for conducting liturgical celebrations (c. 560).

For a just reason and according to his own prudent judgement, the local Ordinary can remove a rector of a church from office. This applies regardless of whether he was

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[83] The bishop can issue an instruction regarding the visitations and on issues involved in it. Since the visitation concerns also the faithful in the diocese, it seems possible that he can also issue a general executory decree.

The issues involved can include the frequency of visits, pastoral issues to be discussed, and the manner of reporting to the bishop. The visitation could relate at least to common pastoral activities, life-style and ministerial duties of the clergy, and liturgical and temporal administration. See Bertram F. GRIFFIN, "Rectors of Churches and Chaplains," in *New Commentary*, p. 733.

[84] Generally, to remove someone from an office before the expiration of the specified term of office a grave reason is required (e.g., c. 193, §2). For the removal of a vicar forane only a just cause suffices which could be failure to fulfil the functions attached to the office, or assigning him duties incompatible with his office. See GRIFFIN, "Vicars Forane," p. 731.

[85] The local Ordinary's act of ordering could be a precept, obliging the rector to carry out certain celebrations, or it could be a singular decree to provide for the liturgical needs of the faithful.

elected or presented by others to the office. However, this will not affect the provision of c. 682, §2 on removing members of religious institutes from an office (c. 563).[86]

The local Ordinary appoints a chaplain unless the law provides otherwise or someone legitimately has special rights. If a chaplain is presented or elected, the local Ordinary installs the one presented, or confirms the one elected (c. 565).[87]

A cleric is to reside in his diocese even if he does not hold a residential office. He should not be absent from his diocese for a notable time determined by particular law and without at least the presumed permission of the Ordinary (c. 283, §1). Moreover, he needs the permission of his Ordinary to undertake the management of goods belonging to lay persons or secular offices entailing an obligation of rendering accounts (c. 285, §4).

The permission of the legitimate ecclesiastical authority is required for clerics to conduct business or trade either personally or through others, whether for their own advantage or for that of others (c. 286).[88] Clerics and candidates for sacred Orders must

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[86] Appointing a rector is the prerogative of the bishop, but the local Ordinary can remove him from the office for a just cause (c. 563).

[87] Since the superior of a house of a lay religious institute has the right to propose a specific priest to be the chaplain after consulting the community, the local Ordinary cannot appoint a chaplain without prior consultation (c. 567, §1). Those who can present a chaplain, for example, are the administrator of a hospital, the principal of a school, a religious superior if it is specified in law, etc. Military chaplains are governed by special laws in accordance with special agreements with the Holy See. See GRIFFIN, "Rectors and Chaplains," in *New Commentary*, pp. 737-738; see also c. 317, §§1-2; 569.

[88] The ecclesiastical authority competent to grant this permission is not specified in the canon. In the context of cc. 672 and 1392, the local Ordinary would be competent to grant the permission to a diocesan cleric.

The prohibited business referred to in c. 286 seems to be the one transacted on a more or less habitual basis. An isolated act would not violate the law. Canon 1042, 2° lists this type of business as an impediment to receive Orders. For a list of some types of business enterprises a cleric may be involved in and those prohibited to him, see Aidan MCGRATH, "Christ's Faithful," in *Letter & Spirit*, p. 164; John E. LYNCH, "The Obligations and Rights of Clerics," in *New Commentary*, pp. 378-379.

obtain the permission of their Ordinary if they volunteer for military service.[89] They are to use the exemptions from functions and civil offices foreign to the clerical state which laws and customs grant in their favour. However, the Ordinary can decide ("*decreverit*") otherwise in particular cases (c. 289).[90]

4.4.2 Diocesan Matters

The Code attributes vast executive power to the diocesan bishop in matters concerning the diocesan synod, in the provision for offices of the diocesan curia, in the establishment of various councils, the incardination and excardination of priests, the seminary, the chapter of canons, the canon penitentiary and associations of the faithful.

4.4.2.1 The Diocesan Synod

Only the diocesan bishop, after consulting the presbyteral council, convokes ("*convocat*") a diocesan synod when circumstances so determine[91] and presides over it. If the bishop has the care of several dioceses, he can convoke one synod for all the dioceses

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[89] Being a military chaplain is different from serving in the regular armed forces. The former refers to the pastoral care of the military personnel, not the actual military service. See MCGRATH, "Christ's Faithful," pp. 165-166. For the pastoral care of the military personnel, see JOHN PAUL II, Apostolic Constitution, *Spirituali militum curae*, 21 April 1986, in *AAS*, 78 (1986), pp. 481-486; English translation in *Canon Law Annotated*, pp. 1157-1165.

[90] The term "*decreverit*" in the canon could also mean a precept. Since c. 289, §2 urges the clerics to use exemptions in their favour, the Ordinary's determining otherwise could be to oblige a cleric to undertake certain civil functions.

[91] During the revision process, a proposal to fix the frequency of synods once every 20 years was rejected, leaving it to the bishop's decision. See *Communicationes*, 12 (1980), p. 315; 14 (1982), p. 210.

"Convoking" implies the issuance of a singular decree. The convocation of the synod must be done by issuing a decree. See *In constitutione apostolica*, in *AAS*, 89 (1997), pp. 713-714; English translation in *Origins*, 27 (23 October 1997), p. 326.

under his care. Although the bishop presides over the synod, he can delegate a vicar general or episcopal vicar to preside over its individual sessions (cc. 461; 462).

Those whom the bishop must call ("*vocandi*") to the diocesan synod include: the coadjutor and auxiliary bishops; vicars general; episcopal vicars; judicial vicars; canons of the cathedral chapter; presbyteral council; lay members of the faithful, even religious elected by the pastoral council in a manner and number according to the norms laid down by the bishop, or in the manner determined by the bishop if the pastoral council does not exist;[92] the rector of the major seminary; vicars forane; one presbyter from every vicariate, elected by all those who have the care of souls; and some superiors of religious institutes and societies of apostolic life[93] which have a house in the diocese. These are elected in the manner determined by the bishop (c. 463, §1).[94]

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[92] The lay persons selected by pastoral council need not be its own members. If they are outside the pastoral council, the qualities expected of them should be the same as those for the pastoral council members. Lay members of the faithful should be in a canonically regular situation in order to take part in the synod. See *In constitutione apostolica*, in *AAS*, 89 (1997), p. 711; English translation in *Origins*, 27 (23 October 1997), p. 326.

[93] Clerical members of institutes of consecrated life or societies of apostolic life do not seem to be included under this category. They may be included among other types of mandatory members or as designated by the bishop. See Barbara A. CUSACK, "The Internal Ordering of Particular Churches," in *New Commentary*, p. 617.

[94] The diocesan bishop can invite ("*vocari...possunt*"; *CCEO* c. 238, §2 has "*potest...invitare*") other clerics, members of the institutes of consecrated life, or lay members of the faithful. Moreover, if the bishop considers opportune, he can also invite as observers other ministers or members of Churches or ecclesial communities which are not in full communion with the Catholic Church (c. 463, §§2-3). Those who are summoned to the synod cannot appoint proxies to represent them because of the personal nature of their status as members of the synod except in the case of priests elected from vicariates according to c. 463, §1, 8°. See *Communicationes*, 12 (1980), p. 317.

Canon 463 differentiates between those whom the bishop must call for the synod and those whom he can call. "*Vocandi*" (*CCEO* c. 238, §1 has "*convocandi*") used to refer to those whom the bishop must call seems to imply an administrative act. Since, according to the same canon, they are obliged to participate in the synod, the administrative act implied could be singular precept.

A synod is to be distinguished from a diocesan assembly, a caution set forth by *In constitutione apostolica*, in *AAS*, 89 (1997), p. 707; English translation in *Origins*, 27 (23 October 1997), p. 324. Gordon

In accordance with c. 468, the diocesan bishop is competent to suspend ("*suspendere*"), or dissolve ("*dissolvere*"), a diocesan synod according to his prudent judgement. When an episcopal See becomes vacant or impeded, a diocesan synod is interrupted by the law itself.[95] The succeeding bishop can decide whether to continue ("*continuari decreverit*") the synod or to declare it terminated ("*extinctam declaraverit*").[96]

4.4.2.2 Curial Appointments

The diocesan bishop provides for the ecclesiastical offices in his diocese, in writing, by free conferral unless the law expressly provides otherwise (cc. 156-157).[97] It is for him to appoint persons to offices of the diocesan curia (c. 470).

The diocesan bishop determines the manner in which those appointed to offices in the diocesan curia are to fulfill their function and also the manner of observing secrecy although the law itself so provides in certain situations (c. 471).[98]

READ is of the view that in a small diocese, it would not be against the law for the bishop to invite all the faithful for the synod if it is practical. See READ, "Particular Churches," p. 259.

[95] The See becomes vacant upon the bishop's death, his transfer, resignation accepted by the pope, and privation made known to him (c. 416). A See becomes impeded when the bishop is unable to continue his pastoral function and is unable to communicate with his people even by a letter due to captivity, banishment, exile, or incapacity (c. 412).

[96] The terms "*suspendere*," "*dissolvere*," "*continuari decreverit*," and "*extinctam declaraverit*" suggest issuing singular decrees.

If the new bishop decides to resume the synod, he is free to alter its agenda and its membership. See CUSACK, "The Internal Ordering of Churches," p. 622. He would have to issue new decree(s) to that effect.

[97] Some of the exceptions to this general law are cc. 494, §1; 523; 565; 682; 805; 830.

The diocesan bishop is to appoint a vicar general. If the size of the diocese, the number of the faithful in the diocese and other pastoral reasons require it, he can appoint more than one vicar general. If a vicar general is absent or legitimately impeded, the bishop can appoint another to take his place (cc. 475; 477). If the diocese has a coadjutor bishop or an auxiliary bishop with special faculties specified in c. 403, §2, they must be appointed vicars general and entrusted ("*committat*") in preference to others with those things which by law require a special mandate.[99] Without prejudice to this provision and unless the apostolic letter provides otherwise, the diocesan bishop must appoint his auxiliary or auxiliaries as vicars general or at least episcopal vicars. Their episcopal ministry will depend on the authority of the diocesan bishop or coadjutor bishop or auxiliary with special faculties as the case may be (c. 406). Furthermore, if the governance of the diocese requires it, the diocesan bishop can appoint one or more episcopal vicars for a determined time (c. 476). If an episcopal vicar is absent or legitimately impeded, the bishop can appoint another to replace him. Just as the bishop freely appoints vicars general and episcopal vicars, he can also freely remove them from office without prejudice to c. 406. In other words, the diocesan bishop cannot remove from office of vicars general and episcopal vicars those bishops who are also coadjutor, auxiliary with special faculties, and auxilies (cc. 476; 477).

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[98] For example, c. 500, §3: only the bishop is to publish things established in accord with the norm of §2; Canon 1455: judge's obligation to maintain secrecy. The bishop's determination on the matter can take the form of either singular decrees or singular precepts.

[99] "*Committat*" in this canon is equivalent to the diocesan bishop delegating those things which the law allows by his special mandate.

The diocesan bishop can exercise his judicial power personally or through others (c. 1419, §1). For this purpose, he is to appoint a judicial vicar and judges with ordinary vicarious power to judge.[100] The judicial vicar can be given ("*dari possunt*") associate judicial vicars. All the judges, who are to be clerics, are appointed for a determined period of time (cc. 1420, §§1, 3; 1421; 1422). However, provided the episcopal conference allows, lay judges can be appointed to the tribunal. However, a collegiate tribunal can consist of only one lay judge along with other clerical judges (c. 1421, §2). During the vacancy of the See, all the judges remain in office. The diocesan administrator cannot remove them. However, they need confirmation from the new diocesan bishop to continue in office (cc. 1420, §5; 1422).[101]

Provided the episcopal conference permits, the bishop can entrust ("*committat*") cases to a single clerical judge. However, he can entrust ("*committere potest*") more difficult cases or those of major importance to the college of judges consisting of three or five judges. The judicial vicar assigns the judges in order by turn unless the bishop establishes ("*statuerit*") otherwise in individual cases (c. 1425, §§2-3).[102]

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[100] Although the judicial vicar has ordinary power, he is neither a local Ordinary nor is a member of the episcopal council (c. 473, §4).

[101] Several diocesan bishops can establish, with the approval of the Apostolic See (c. 1445, §3, 3°), a single first instance tribunal for their dioceses either for all cases or for certain types of cases. In such a circumstance the concerned group of bishops or one of them designated by the group has the power a diocesan bishop has in his tribunal (c. 1423). This principle applies also to the second instance regional tribunal (c. 1439, §3).

[102] The terms "*committere potest*" and "*committat*" suggest that the administrative acts implied are singular decrees through which the bishop constitutes a tribunal. Although the term "*statuerit*" seems to resemble statutes, it seems to refer to a singular decree because the provision of "*statuerit*" refers to individual cases. Statutes, on the contrary, are of general nature issued for the aggregates of persons or things (c. 94, §1).

The diocesan bishop can approve ("*potest ...approbare*" = singular decree) clerics or lay persons as auditors to instruct cases. The persons so approved are to be outstanding for their good character, prudence, and doctrine (c. 1428, §2).[103]

For contentious cases which endanger the public good, and for penal cases, the diocesan bishop is to appoint a promoter of justice (cc. 1430; 1431, §1; 1435). Furthermore, he appoints a defender of the bond for cases concerning the nullity of sacred ordination and the nullity or dissolution of marriages (c. 1432; 1435). The same person can hold the offices of promoter of justice and defender of the bond, though not in the same case. Both can be removed by the bishop for a just reason (c. 1436).

While it is for the bishop himself to coordinate the pastoral ministry of the vicars general and episcopal vicars, he can appoint a priest as the moderator of the curia, who under the authority of the bishop, coordinates administrative affairs and ensures that the members of the curia properly fulfill the office entrusted to them. In fact, unless local circumstances suggest otherwise, the bishop can appoint one of his vicars general as the moderator of the curia. Moreover, the bishop can also establish ("*constituere*") an episcopal council consisting of the vicars general and episcopal vicars to foster pastoral action in a more stable manner (c. 473).[104]

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[103] During the revision process, a proposal to suppress the office of auditor was not accepted. The office is open to clerics or lay persons. See *Communicationes*, 10 (1978), pp. 232, 236.

[104] The canon seems to distinguish the action of the vicars as pastoral, and of other curial officials as administrative. The moderator of the curia seems to deal only with administrative activities. However, there could be situations in which both are interrelated and indistinguishable. Vicars may have "administrative" functions which may come under the purview of the moderator. See CUSACK, "The Internal Ordering of Churches," p. 626. In the light of our discussion on the pastoral nature of the bishop's function, such a distinction cannot be strictly maintained.

Canon 482, §§1-2 requires that the diocesan bishop appoint a chancellor for the curia. If necessary, a vice-chancellor can also be appointed ("*dari potest*"). Other notaries can be appointed to authenticate any acts, or only judicial acts, or the acts of a certain case or affair only (c. 483, §1).[105] The diocesan bishop can freely remove the chancellor and other notaries from office (c. 485).[106] Either the bishop, or both the moderator of the curia and the chancellor together can permit someone to enter the diocesan archives (c. 487, §1), but no one can remove documents from the archive except for a brief time, and only with the consent of those who can permit their access (c. 488).[107]

4.4.2.3 Constitution of Councils, Chapter of Canons and Canon Penitentiary

The bishop is to establish a presbyteral council in his diocese. The newly appointed diocesan bishop is to establish the council within a year after taking canonical possession of the diocese.[108] In addition to those who are members of the council in accord with c. 497, 1°-2°, the bishop can freely appoint others to the council (cc. 495, §1;

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[105] Canon 483, §2 implies that chancellors could be clerics or lay persons.
The requirement of the signature of the chancellor on the documents of the diocesan curia is to guarantee their authenticity, not their validity. See *Communicationes*, 5 (1973), p 226.

[106] The term of office of chancellor and notaries is not specified in the related canons. The norms of cc. 192-195 will have to be observed in their removal.

[107] It is not specified what this "brief time" is. It is to be determined by local policy and custom. See CUSACK, "The Internal Ordering of Churches," p. 642.

[108] Canon 496 authorizes the bishop to approve the statutes of the presbyteral council, having considered the norms laid down by the episcopal conference. The nature of the statutes could be legislative if they are promulgated in virtue of legislative power, or administrative if issued through the exercise of executive power (cfr. c. 94, §3). The approval of the bishop, however, is a singular decree. Canon 496 presents a problem. It states that the bishop approves the statutes rather than enacts them. But the council seems to come into existence only with the approval of the statutes. Therefore, it is not clear who drafts the statutes. *CCEO* c. 265 (parallel of *CIC 83* c. 496) states that presbyteral council must have its own statutes, approved by the eparchial bishop. In practice, it would seem appropriate to conclude that the bishop himself or his delegate drafts them.

497, 3°; 501, §2).[109] It is only for the bishop to convoke the presbyteral council and preside over it. He determines the questions to be dealt with, and receives proposals from its members (c. 500, §1). He can dissolve it if it does not fulfill its function or abuses it,[110] but only after consulting the metropolitan. If the bishop concerned is a metropolitan himself, he has to consult the suffragan bishop senior in promotion. A new council must be constituted within a year (c. 501, §3).

From the presbyteral council, the bishop must appoint six to twelve members as the college of consultors for a five-year term. The college continues to function under the presidency of the bishop until a new college is established regardless of the lapse of its five-year term (c. 502, §§1-2).[111]

Provided the circumstances suggest it, the bishop may constitute a pastoral council in his diocese for a period of time according to the prescripts of the statutes issued by the bishop (cc. 511; 513, §1). The members of the pastoral council must be Christian faithful who are in full communion with the Catholic Church. They are

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[109] While making appointments, the bishop must observe the requirement of 1° (half the members to be elected). See CUSACK, "The Internal Ordering of Churches," p. 656. The principal purpose of the bishop making appointments to the presbyteral council is to ensure its representative character. See SCC, Circular Letter, *Presbyteri sacra ordinatione*, 11 April 1970, in *AAS*, 62 (1970), pp. 459-465; English translation in *CLD*, 7, pp. 383-390.

[110] It is not specified what the dereliction of duty by the council is. Some examples can be obstinate refusal to assemble when the bishop convenes it, interfering in the matters which are not its concern, discussing matters which the bishop did not place on the agenda, failure to address issues of major importance which the bishop presented to it, etc. It is also not specified who fulfils the council's functions when it is dissolved. On the basis of c. 501, §2, it can be presumed that the college of consultors fulfils them just as it does at the vacancy of the See. See CUSACK, "The Internal Ordering of Churches," pp. 660-661; see also READ, "Particular Churches," in *Letter & Spirit*, p. 278.

[111] A member of the college of consultors continues to be so in spite of ceasing to be a member of the presbyteral council. If a consultor ceases from office, the bishop is obliged to appoint a new member only if the minimum number of consultors required is lacking. See PCCICAI, Authentic interpretations [2], 7 August 1984, in *AAS*, 76 (1984), p. 747; English translation in *Canon Law Annotated*, p. 1289.

designated ("*designetur*") in a manner determined ("*modo* [...] *determinato*" = law or general executory decree) by the diocesan bishop from among the clerics, members of institutes of consecrated life, and especially laity (c. 512, §1).[112] It is the bishop's prerogative to convoke the pastoral council according to the needs of the apostolate in the diocese and preside over it (c. 514, §1).[113]

Canon 492 obliges the diocesan bishop to establish a finance council and preside over it personally or through a delegate. The bishop should appoint to the finance council at least three members of the Christian faithful who are experts in financial matters and civil law and are outstanding in integrity. The term of office of the members is five years, renewable for another term. The bishop's relatives up to the fourth degree of consanguinity or affinity cannot be the members of the finance council (c. 492).[114]

After hearing the college of consultors and the finance council, the bishop is to appoint a finance officer who is truly expert in financial affairs and absolutely distinguished for honesty. The term of appointment for the finance officer is five years, renewable once. He or she cannot be removed from office except for a grave cause to be

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[112] The designation of the membership of the pastoral council could be effected through a singular decree or it could be implied in the statutes. "*Modo* [...] *determinato*" could refer to particular law, or general executory decree. For an important post conciliar document on pastoral councils, see SCC, Circular Letter, *Omnes christifideles*, 25 January 1973, in *LE*, 5, no. 4166, cols. 6444-6449; English translation in *CLD*, 8, pp. 280-288.

[113] The frequency of meetings of the pastoral council would depend upon the pastoral needs of the diocese as determined by the bishop. However, c. 514, §2 of the canon requires that the council should meet at least once a year.

[114] Canon 492 is silent whether the finance council continues to exist while the See is vacant. The council seems to exist because c. 423, §2 states that if the finance officer is elected as the diocesan administrator, the finance council is to elect another temporary finance officer.

assessed by the bishop, and after hearing the college of consultors and the finance council (c. 494, §§1-2).

A cathedral or collegiate chapter must have its own statutes drawn up through a legitimate capitular act. The diocesan bishop is to approve those statutes which cannot be changed or abrogated without his approval (c. 505).[115]

The canon penitentiary of a cathedral church and of a collegiate church has the ordinary faculty for functions assigned to him in law. If there is no chapter, the diocesan bishop is to appoint a priest to fulfill the same function (c. 508).[116]

After consulting the chapter of canons, the diocesan bishop confers ("*conferre*" = singular decree) each and every canonry both in a cathedral church and in a collegiate church. The bishop is to confer canonries only upon priests outstanding in doctrine and integrity of life. It is for the bishop himself to confirm the person elected by the chapter to preside over it (c. 509, §1).[117]

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[115] Unlike the case of the presbyteral council (c. 496), the chapter itself draws up its statutes and the bishop approves them. The same norm applies for their change or abrogation.

[116] Canon 132 mentions habitual faculties, but not ordinary faculties. The ordinary faculty mentioned in c. 508, §1 would appear to correspond to habitual faculty. See Juan I. ARRIETA, "The Internal Ordering of Particular Churches," in *Canon Law Annotated*, p. 372. This faculty is used to absolve in the sacramental forum from all undeclared *latae sententiae* censures not reserved to the Apostolic See. Although it is an ordinary faculty, it cannot be delegated

If a priest is designated to fulfill the function of canon penitentiary, it cannot be the auxiliary bishop since he already would have the faculty for the sacramental forum, nor any of the vicars general or episcopal vicars since they have the faculty for the external or internal, non-sacramental forum (c. 1355, §2). Moreover, instead of appointing a priest to fulfil this function, the bishop could delegate all priests to remit in the external forum undeclared, and unreserved *latae sententiae* censures on the basis of c. 1355, §2. See John A. ALESANDRO, "Chapters of Canons," in *CLSA Commentary*, p. 409.

[117] "*Conferre*" in this canon signifies that the bishop appoints canons through singular decrees.

The election of the president of a chapter of canons is not mandatory. See PCLTI, Authentic Interpretation, 4 December 1989, in *AAS*, 81 (1989), p. 991; English translation in *Canon Law Annotated*, p. 1289. Thus, the bishop can appoint a president. However, if the statutes call for an election, the bishop is

4.4.2.4 Seminary and Clerical Matters

The bishop is to preserve the minor seminary if it exists in his diocese. If it does not already exist, he is to erect ("*erectioni*" = singular decree) one if he judges it expedient (c. 234, §1). Similarly, if it is possible and expedient, there should be a major seminary in every diocese (c. 237, §1).[118] The bishop is competent to approve the statutes of the seminary (c. 243).

The diocesan bishop is to appoint a rector, vice-rector if necessary, a finance officer, as well as teachers in various disciplines if the students pursue their studies in the seminary itself. He is also to appoint at least one spiritual director or designate other priests for this purpose (c. 239, §§1-2). Teachers are to be appointed in philosophical, theological, and juridic disciplines. Being outstanding in virtue, they must have a doctorate or licentiate from a university or faculty recognized by the Holy See. Moreover, teachers are to be appointed in sacred scripture, dogmatic theology, moral theology, liturgy, philosophy, canon law, ecclesiastical history and other disciplines. If a teacher is gravely deficient, the bishop is to remove such a person (c. 253).

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to confirm the election. If the statutes provide another way of providing for the office of the president, they must be observed.

[118] It is for the diocesan bishop to establish the diocesan major seminary. If a diocese does not have its own major seminary, the candidates are to be sent to the seminary of another diocese. The approval of the Apostolic See is needed for both the establishment of an inter-diocesan seminary and its statutes (c. 237). The competent authority of the Holy See to grant such approvals is CCE. See JOHN PAUL II, *Pastor bonus*, no. 113, §3, in *AAS*, 80 (1988), p. 888; English translation in *CLSA Translation*, p. 719.

It is the diocesan bishop who admits ("*admittantur*") candidates to the seminary.[119] He must consider their human, moral, spiritual, and intellectual qualities, physical and psychic health, correct intention of the candidates. He is to admit only those whom he judges to be qualified to dedicate themselves permanently to the sacred ministries (c. 241, §1).[120]

The formation of the aspirants to the priesthood, according to c. 235, can be imparted in two ways. They could receive it in a major seminary itself. They could also legitimately reside outside the seminary. The bishop should entrust ("*commendentur*") the latter to a devout and suitable priest who must be watchful so that they are carefully formed in the spiritual life and in discipline.[121]

Every cleric must be incardinated in a diocese, personal prelature, or institute of consecrated life or society od apostlic life endowed with this faculty (c. 265). It is for the diocesan bishop to incardinate a cleric in his diocese by the conferral of the diaconate on him (c. 266, §1). One is to be incardinated for the needs or advantage of the diocese

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[119] "*Admittantur*" in this canon implies a singular decree. However, the term in the Code also has different usages, for instance, the same term in cc. 1065, §1; 1210, and "*admitti*" in c. 766 seems to mean permission. *CCEO* usage of the term is identical, e.g., c. 703, §1 is a permission. See HUELS, "Determining the Correct Canonical Rules," p. 44.

[120] A man whose marriage has been declared null by an ecclesiastical tribunal is canonically free and eligible to enter a seminary and be ordained unless it is contrary to the conditions laid down in the sentence. Special care is to be taken in the case of a marriage declared null on the ground of "psychological incompetence." See SCCE, Private Letter, 8 July 1983, in *CLD*, 10, pp. 204-205.

[121] It is unclear whether "*commendentur*" in this canon suggests a singular administrative act. There is no juridic act implied in any of the 25 other canons (See OCHOA, *Index verborum iuris canonici*, p. 86) in which "*commendo*" is mentioned. Nevertheless, considering the importance of the formation of the candidates, it seems appropriate to make the provision desired by c. 235, §2 through a singular decree. *CCEO* does not have this provision.

without prejudice to the law on the decent support of clerics.[122] If a cleric, who was already incardinated in a diocese, desires to be incardinated in another diocese, he should have obtained a legitimate excardination.[123] Appropriate testimonials from the excardinating bishop, if necessary even under secrecy, are necessary concerning the life, behaviour, and studies of the cleric who must declare in writing to the incardinating bishop that he wishes to dedicate himself to the service of his new diocese according to the norm of law (c. 269).

On the basis of c. 267, the diocesan bishop grants incardination and excardination to clerics who request it.[124] The letter of excardination granted to a cleric does not take effect until he obtains a letter of incardination from a bishop who receives him in his diocese. In other words, the juridic effect of incardination and excardination is simultaneous so that a cleric is never detached from a diocese.[125]

If a cleric has legitimately moved from his diocese to another, after five years he is incardinated in the latter by law itself. This provision applies only when the cleric has

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[122] Incardination seems to be a singular decree. Canon 269 prescribes the conditions which are to be met to incardinate a cleric in a diocese.

[123] A letter of excardination, in fact, does not exacardinate its recipient. It merely authorises him to seek incardination in another diocese or religious institute and allows the incardinating Ordinary to receive him. In this sense, a letter of excardination is a permission. See HUELS, "Determining the Correct Canonical Rules," pp. 7-8.

[124] The bishop cannot deny excardination except for evident grave causes. A cleric, who thinks that he has been wrongly denied excardination, can make recourse against the bishop's decision (c. 270). This indicates that there should not be too many restrictions on excardinating for the good of the Church and of the clergy. See Tomás R. PÉREZ, "Sacred Ministers or Clerics," in *Canon Law Annotated*, pp. 226-227.

[125] See Francis J. SCHNEIDER, "The Enrollment, or Incardination, of Clerics," in *New Commentary*, p. 332. Here, SCHNEIDER observes that both the letters of excardination and incardination are addressed to the cleric himself and not to the other bishop. The receiving bishop should not issue a letter of incardination unless he has been assured by the excardinating bishop that a letter of excardination is issued.

made known his desire in writing to his own bishop and the receiving bishop, and neither of them has opposed it in writing ("*contrariam scripto mentem*") to the cleric within four months of receiving the cleric's letter (c. 268, §1).[126]

A cleric can also move temporarily to another diocese. The bishop is not to deny permission to a cleric who considers moving to a region which faces a grave lack of clergy. He can grant this permission for a predetermined time, renewable several times. The bishop who permits this movement must determine the rights and duties of these clerics through a written agreement with the receiving bishop.[127] If there is a just reason, the former can recall his cleric at any time. However, the agreement entered into with the receiving bishop and natural equity are to be observed. After observing these conditions

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[126] Written opposition issued by either of the diocesan bishops to the cleric is a decision. Therefore, it is a singular decree.

In addition to what is stated in the canon, the Apostolic Signatura observed that the cleric can make known his desire to both the bishops at the same time or at different times. The cleric does not have to discharge any pastoral function in the receiving bishop's diocese. The law requires only *commoratio*, not only *physical* but *formal* residence. In other words, the cleric must be residing in the new diocese with the consent of both the bishops, and should not be interrupted by the prohibition of either of the bishops or for any other reason. See SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, Definitive Sentence, 27 June 1978, Prot. n. 9375/77 C.A., in *Communicationes*, 10 (1978), pp. 152-158; English translation in *CLD*, 9, pp. 52-60; ID., Definitive Sentence, 24 June 1995, in *Forum* 6/2 (1995), pp. 117-122; Frans DANEELS, "The Removal or Transfer of a Pastor in the Light of the Jurisprudence of the Apostolic Signatura," in *Forum*, 8/2 (1997), pp. 295-301.

[127] Such an agreement was required by SCC, Directive Norms for the Cooperation Among the Local Churches and for a Better Distribution of Clergy, *Postquam apostoli*, 25 March 1980, in *AAS*, 72 (1980), pp. 343-364; English translation in *CLD*, 9, pp. 760-787. This was followed by establishing a permanent commission. See SECRETARIAT OF STATE, Rescript, On Constituting Permanent Interdicasterial Commission for Equitable Distribution of Priests, 13 July 1991, in *AAS*, 83 (1991), p. 767; English translation in *ORE*, (22 July 1991), p. 12. See also CEP, Instruction on Sending Abroad and Sojourn of Diocesan Priests from Mission Territories, 25 April 2001, in *AAS*, 93 (2001), pp. 641-647; English translation of the Italian original in *Canon Law Society of Great Britain & Ireland Newsletter* [=*CLSGBIN*], no. 126, (June 2001), pp. 22-29.

and for a just cause, the receiving bishop may also deny ("*denegare*" = singular decree) the same cleric permission for further residence in his territory (c. 271).[128]

4.4.2.5 Associations of the Faithful

Within his diocese, it is for the diocesan bishop to erect public associations of the Christian faithful to teach doctrine in the name of the Church, promote public worship, or for other purposes which are reserved to the bishop. If the bishop judges it appropriate he can also erect public associations of the Christian faithful to pursue directly or indirectly other spiritual purposes which are not sufficiently pursued by private persons (c. 301, §§1-2).[129] Moreover, the bishop approves the statutes of each public association as well as any subsequent revision or change (c. 314). When an association is erected in virtue of apostolic privilege the bishop's written consent to validly establish it or its branch in his diocese is required (c. 312, §2).

Canon 317, §§1-2 presents three possibilities for appointing a moderator for a public association. If a candidate is elected, the bishop confirms him or her; if presented, the bishop installs the candidate; and the bishop can appoint one in his own right. He also appoints a chaplain or an ecclesiastical assistant to that association after consulting its major officials. However, the statutes of a public association can provide otherwise for the appointment of both the moderator and the chaplain. These provisions apply also to

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[128] The just cause to terminate the agreement by the receiving bishop could be ineffective ministry, problems with adjustment, or personal difficulties. See SCHNEIDER, "Incardination of Clerics," p. 341.

[129] The authority competent to erect public associations in a diocese is not specified in this canon. Canon 312, §1, 3° identifies it as the diocesan bishop.

associations erected by members of religious institutes outside their own churches or houses established in virtue of apostolic privilege. Canon 318, §1 allows the bishop to delegate a trustee to direct the association for a time in his name in special circumstances and where grave reasons require it.

The bishop is competent to remove the moderator for a just cause after consulting the moderator himself and the major officials of the association, according to the statutes. The bishop can remove a chaplain according to the norm of cc. 192-195 (c. 318, §2).

The diocesan bishop can suppress an association he has erected. He can also suppress an association erected with his consent by the members of religious institutes through apostolic indult. The law requires the bishop to hear its moderator and other major officials of such association before its suppression (c. 320, §§2-3).[130]

A private association of the Christian faithful acquires juridic personality by a formal decree of the diocesan bishop. However, its statutes need to be approved by the bishop prior to granting the juridic personality. The bishop's approval does not change the private nature of the association (c. 322, §§1-2). A private association can freely choose its spiritual advisor. If it is opportune it can choose one from among the priests

[130] *CIC 17* (cc. 684-699) did not differentiate between a public and a private association. In the suppression of an association erected according to *CIC 17*, it must be determined whether that association is public or private according to *CIC 83*. For more on this, see Roch PAGÉ, "Associations of the Faithful in the Church," in *The Jurist*, 47 (1987), pp. 165-203; ID., "La Signature apostolique et la suppression du statut canonique de l'Armée de Marie," in *StC*, 25 (1991), pp. 403-415. The possibility of recourse against suppression is not mentioned in c. 320. Nevertheless, cc. 1732-1739 on recourse apply in the case of suppression.

legitimately exercising their ministry in the diocese. Nevertheless, the priest needs confirmation (= singular decree) from the local Ordinary (c. 324, §2).[131]

Canon 326, §1 empowers the diocesan bishop to suppress a private association if there are determined causes. Among the possible causes for such suppression are its activity causing grave harm to ecclesiastical doctrine or discipline, and scandal to the faithful.[132]

4.4.3 Temporal Goods

The diocesan bishop can levy upon the public juridic persons subject to his governance an ordinary tax, moderate and proportionate to their income, for the needs of the diocese. In a case of grave necessity, he can also impose an extraordinary and moderate tax on other physical and juridic persons subject to his authority (c. 1263). According to c. 264, §1, the bishop could impose a tax on every ecclesiastical juridic person in the diocese to provide for the needs of the seminary.[133]

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[131] This is the only instance related to diocesan matters as discussed above in which the local Ordinary exercises executive power. This confirmation is required for the priest, and not for the association's choice of its spiritual advisor. See *Communicationes*, 12 (1980), p. 120.

[132] According to c. 322, §2, no private association of the faithful can acquire juridic personality unless the competent ecclesiastical authority (c. 312, §1) approves its statutes.

It seems to be implied that if the bishop did not approve the statutes of a private association, he cannot suppress it. Nevertheless, he can prohibit it from operating in or from churches within his territory. See MCGRATH, "Christ's Faithful," p. 187.

[133] Imposing taxes as per both these canons could refer to general decrees. If tax is imposed on a few specific juridic persons, the acts could be singular precepts. If the imposition of taxes is considered as making a provision, then the administrative acts implied could be interpreted as singular decrees.

According to c. 1263, before imposing taxes in either of the cases, the bishop must consult the finance council and the presbyteral council. Levying taxes should not be contrary to particular laws and customs which may, in fact, give the bishop greater rights (c. 1263). The public juridic persons subject to the bishop's authority do not include external schools of religious institutes of pontifical right. See PCLTI, Authentic Interpretation, 10 August 1989, in *AAS*, 81 (1989), p. 991; English translation in *Canon Law*

All private juridic and physical persons, except mendicant religious, need the written permission of their proper Ordinary and the local Ordinary to make a collection for any pious purpose or for an ecclesiastical institute (c. 1265, §1). For a specified purpose, which could be parochial, diocesan, national or universal, the local Ordinary can order ("*praecipere*") the taking up of a special collection, to be made in all churches and oratories open to Christ's faithful including those of religious institutes (c. 1266).[134]

The offerings made to a public juridic person cannot be refused except for a just reason. In matters of greater importance the Ordinary's permission is required for the refusal. Furthermore, without prejudice to the provisions of c. 1295, his permission is also needed to accept offerings to which some qualifying obligations or conditions are attached (c. 1267, §2).[135]

There is to be an institute in the diocese to collect goods or offerings in order to provide for the clerics as per the norms of c. 281, unless another provision is made for this purpose. If it is necessary, the bishop is to establish a common fund through which he

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Annotated, p. 1297. In accordance with c. 264, §2, those who depend on alms for their support, those who have a college of students or teachers to promote the common good of the Church, are exempted from the tax.

[134] Only the bishop can impose a tax on juridic persons subject to his governance after the consultations required by c. 1263. However, the local Ordinary can order a special collection. No consultation whatsoever is required in this case.

The nature of "*praecipere*" in this canon cannot be legislative because it can be ordered by a local Ordinary. He can implement the norm of this canon through a general executory decree since the norm applies to all the churches and oratories open to the faithful in the diocese in the diocese.

[135] Canon 1295 requires the observance of cc. 1291-1294 on alienation and on transactions that jeopardise the patrimonial conditions of a juridic person. Since matters of greater importance are not specified in c. 1267, §2, they are to be determined by the statutes of the juridic person. These matters may also depend upon the particular circumstances. See Robert T. KENNEDY, "The Temporal Goods of the Church," in *New Commentary*, pp. 1469-1470.

can fulfill the obligations towards other persons who serve the Church and meet the various needs of the diocese (c. 1274, §§1, 3).

The Ordinary must be vigilant over the administration of all goods belonging to the public juridic persons subject to him, without prejudice to the greater rights he may have in them (c. 1276, §1). If a public juridic person does not have an administrator appointed by law, or by the charter of foundation or its statutes, the Ordinary to whom it is subject is to appoint a suitable person as administrator for a three year term. The Ordinary can re-appoint ("*iterum*") the same person (c. 1279, §2).[136] The bishop can delegate the functions mentioned in cc. 1276, §1 and 1279, §2 to the financial officer (c. 1278).

The Ordinary is to take care of the entire matter of the administration of ecclesiastical goods by issuing special instructions (c. 34) within the limits of universal and particular law. In carrying this out, he is to take into consideration the rights of those concerned, as well as legitimate customs and circumstances (c. 1276, §2).

For an administrator of a juridic person to act validly beyond the limits and manner of ordinary administration, the written faculty ("*facultatem*" = *licentia*) from the Ordinary is required without prejudice to the provisions of its statutes (c. 1281, §1). The statutes of public juridic persons are to determine which acts of administration are beyond the limits of ordinary administration. If the statutes are silent on this matter, it is

[136] The term "*iterum*" is also used in c. 917 in which it means "a second time." See PCCICAI, Authentic Interpretation, 7 August 1984, in *AAS*, 76 (1984), p. 746; English translation in *Canon Law Annotated*, pp. 1293, 1295. However, in c. 1279, §2 it seems to suggest that the Ordinary can reappoint the same person as administrator more than a second time.

up to the diocesan bishop to determine ("*determinare*") the criterion for the persons subject to him (c. 1281, §2).[137]

The written permission ("*licentiam*") of the proper Ordinary is required for an administrator of a public juridic person to begin or contest litigation in a civil forum in its name (c. 1288).[138]

Because the Ordinary is the executor of all pious dispositions whether made at the time of death or while living, he can and must ensure that the pious dispositions are fulfilled (c. 1301, §§1-2).[139] When goods are received in trust for pious causes, the Ordinary must demand ("*debet exigere*") that the goods be safely preserved, and be vigilant that the pious dispositions are executed as per c. 1301 (c. 1302, §2).[140]

The written permission of the Ordinary is required for a juridic person to accept validly a pious foundation. The Ordinary is not to grant this permission unless he has

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[137] The canon does not ask the bishop to direct the public juridic persons to rectify the lacuna in their statutes. His determining the criterion seem to require him to issue general or singular decree to that effect.

[138] In view of "*licentiam*" of c. 1288, "*facultatem*" in c. 1281, §1 also, in fact, is a permission. In fact, *CCEO* c. 1024, §1, which is the equivalent of *CIC 83* c. 1281, §1 uses "written consent" ("*consensu...scripto*") instead.

The earlier draft of c. 1281, §1 required the permission also of the Ordinary of the place in which the litigation would proceed. It was dropped from the final text of the canon. See *Communicationes*, 5 (1973), p. 99; 12 (1980), p. 421.

[139] The Ordinary is not primarily responsible for implementing the terms of a pious will. It belongs to the other executors. See *Communicationes*, 12 (1980), p. 429. He must ensure that no abuses creep into the execution of a pious will. If there is no executor named in a will, or if an executor is negligent, the Ordinary is responsible to implement the terms of a pious will personally or through a delegate. In this sense, the role of the Ordinary does not depend upon the will of the faithful who made it, but upon the nature of the hierarchical structure of the Church. See KENNEDY, "The Temporal Goods," p. 1513.

[140] "*Debet exigere*" appears to mean that the Ordinary is to issue a precept.

If the goods given in trust to a member of a religious institute or society of apostolic life are destined for a particular place, for a diocese or their inhabitants, or for pious causes, the local Ordinary must ensure that the requirements of c. 1302, §2 are fulfilled (c. 1302, §3).

lawfully established that the juridic person can fulfil the new obligations as well as those already undertaken. Moreover, the Ordinary has to be vigilant that the revenue fully corresponds to the obligations laid down while taking into account the customs of the region or place (c. 1304, §1).[141] In order that the money or the value of the movable goods assigned as an endowment are safeguarded, they must be put immediately in a safe place approved by the Ordinary. This investment is to be made cautiously and usefully for the good of the foundation according to the prudent judgement ("*prudens...iudicium*") of the Ordinary after he has consulted those concerned and his own finance council (c. 1305).[142]

In the cases of foundation Masses, whether founded independently in legacies or in another way, the bishop can reduce ("*reducendi*") the Mass obligations to the level of the offering legitimately established in the diocese. He can do so because of the diminution of income and while this situation lasts, but only if there is no one who has an obligation to increase the offering and if no one can actually be made to do so. Moreover, the bishop can reduce the Mass obligations or Mass legacies which bind an ecclesiastical institute. He can do this if the revenue becomes insufficient to achieve the proper purpose of the institute in a fitting manner (c. 1308, §§3-4). For a suitable reason, the bishop can

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[141] This is one of the few canons which require the Ordinary's permission for validity. Others include cc. 638, §3; 1190, §2; 1291; 1292, §2. Otherwise, permission is normally required for liceity. The Ordinary mentioned here is to be determined as per c. 1302, §3. Moreover, c. 1304, §1 does not describe whether the juridic person is private or public, nor does it say whether the foundation is autonomous or non-autonomous. From c. 1303, §1, 1°-2° it is clear that only a public juridic person can accept a non-autonomous foundation. An autonomous foundation is a juridic person in its own right; therefore, another juridic person cannot accept it. See KENNEDY, "The Temporal Goods," p. 1517.

[142] "*Prudens iudicium*" could result in the Ordinary issuing a singular decree, or a permission. The canon relates to non-autonomous foundations, since an autonomous foundation, as a private juridic person, has its own autonomy. See ibid., pp. 1518-1519.

transfer ("*transferendi*") the Mass obligations to days, churches or altars other than those determined in the foundation (c. 1309).[143]

The Ordinary can reduce, moderate, or commute the intentions of the faithful in pious cases only for a just and necessary reason, if the founder has expressly conceded this power to him.[144] If the reduced income, or any other reason, which arises without fault of the administrators, makes it impossible to carry out the obligations, the Ordinary can diminish these obligations in an equitable manner (c. 1310, §§1-2).[145]

4.4.4 Administrative Recourse and Removal or Transfer of Parish Priests

When a person considers that a decree is injurious to him or her, it is desirable to avoid contention between that person and the author of the decree through mutual consultation and an equitable solution. The assistance of a third person can be used to mediate and study the matter. For this purpose, the episcopal conference can prescribe in

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[143] Both "*reducendi*" in c. 1308 and "*transferendi*" c. 1309 seem to denote rescripts because they grant favours by reducing the Mass obligations, and by transferring them to other days and churches.

The Ordinary can reduce Mass obligations on the ground of reduced income, if the document of the foundation provide so expressly. If there is a fitting reason, the Ordinary can transfer the Mass obligations to days, churches or altars other than those determined in the foundation (cc. 1308, §2; 1309).

[144] As explained earlier, "reduce," "moderate," "commute" are rescripts. Reduction implies lessening the number of obligations. Moderation means changing a secondary or ancillary aspect of an obligation (e.g., c. 1309). Commutation refers to substituting the pious cause provided in the pious will with a different one. See KENNEDY, "The Temporal Goods," p. 1524.

The term "founder" in c. 1310 is not to be restricted only to pious foundations unless the text or context of the canon suggests so, for example, as in c. 1303, §2. The term has several other connotations in the Code (e.g., the founders of institutes of consecrated life in cc. 576, 578, 588, §§2-3; the founder of public juridic persons in cc. 121, 122, 123, 1284, §2, 3°-4°). Therefore, "founder" in c. 1310 could refer to the wills of the faithful for pious causes. See ibid., footnote 244, p. 1524.

[145] Before doing this, he must consult those concerned and his finance council, and respect the intention of the founder in the best way possible (c. 1310, §2). There is no mention here of the need for the founder to concede to the Ordinary the power to diminish the obligations.

each diocese the establishment of a permanent office or council to seek and suggest equitable solutions in accord with the norms laid down by the conference. If the conference does not prescribe this, the diocesan bishop, on his own, can establish this office or council (c. 1733).

If the bishop receives a petition seeking the revocation or emendation of a decree issued by him, he has to issue within thirty days of receiving the petition a new [singular] decree either emending or revoking the earlier decree, or rejecting the petition (c. 1735). This petition also implies that the recipient of the earlier decree requests the suspension of its execution (c. 1734, §1). If recourse is made to the bishop against a decree of an authority subject to him, the bishop can not only confirm the decree or declare it invalid but also can rescind or revoke it or, if it seems more expedient to him, emend, replace, or modify it (c. 1739).[146] According to c. 1738, the bishop, if he considers it necessary, can ex officio appoint a legal representative for the party which has recourse to him against a decree of an authority subject to him. However, the bishop can order ("*iubere*" = singular decree or precept) the party making the recourse to be present in person in order to be questioned.

The diocesan bishop can remove a parish priest if his ministry in the parish becomes harmful or at least ineffective due to some reason even though it is not because of his serious fault (c. 1740).[147] Having observed the requirements of cc. 1742, §1 and 1744, the bishop is to issue a [singular] decree of removal (c. 1744, §2).[148]

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[146] All the actions of the bishop implied here seem to be singular decrees.

[147] The procedure for removal of parish priest (cc. 1740-1752) applies only to the removal of parish priests who are diocesan clergy. It does not concern parochial vicars or priests assigned to other

The Code envisages the possibility that the parish priest could reject the provision of cc. 1742, §1 and 1744, or reject the reasons presented for his resignation and present his own reasons. If the bishop finds these reasons insufficient, he must invite the parish priest to organize them in a written report after inspecting the acts and to offer any proofs to the contrary. The bishop must also consider the matter with two parish priests mentioned in c. 1742, §1. If they are not available, others can be designated. Finally, the bishop must decide whether to remove the parish priest or not and promptly issue a decree on the matter (c. 1745).

The diocesan bishop can assign ("*assignatione*") the removed parish priest to some other office if he is suitable as per c. 149. Should he be unsuitable for an office, the bishop is to provide a pension according to the case and circumstances in question (cc. 1746; 195; 1350). If the parish priest is sick, and cannot be transferred elsewhere without inconvenience, the bishop should leave ("*relinquat*") him the use, even exclusive use, of

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types of ministry such as hospital chaplains, rectors of churches. See *Communicationes*, 15 (1984), p. 90. For their removal, provisions for transfer or removal from ecclesiastical office (cc. 192-195) apply.

Before removing a parish priest, the bishop has to follow certain formalities which do not involve any exercise of power, yet they are prerequisites for the removal. If, after an investigation carried out by the bishop, there is evidence of harm and ineffectiveness in the ministry of the parish priest, the bishop must discuss the matter with the two parish priests selected from the group established for this purpose by the presbyteral council. If the bishop decides that the parish priest must be removed, he must explain the cause and arguments for it and then paternally persuade the parish priest to resign within fifteen days (c. 1742, §1). If the parish priest does not reply to the bishop's invitation to resign within prescribed period of time, the bishop must repeat the invitation to resign and extend the useful time for him to respond. He must ensure that: the parish priest has received the second invitation to resign but did not respond without being prevented by an impediment; the parish priest again refuses to resign without giving any reason (c. 1744).

[148] If the parish priest belongs to a religious institute or a society of apostolic life, the bishop can remove him with prior notice given to the concerned superior. The bishop does not need the consent of the superior of the institute or the society (cc. 682, §2; 738, §2).

the rectory while the necessity lasts.[149] While a recourse against a decree of removal is pending, the bishop cannot appoint a new parish priest; rather he is to appoint a parochial administrator until the recourse is resolved (c. 1747, §§2-3).

Canons 1748-1752 provide norms on transfer of unwilling parish priests. If the bishop has followed the norms of cc. 1748-1750, and if the parish priest persists in his refusal to accept the transfer, and if the bishop decides for the transfer, he must issue a decree of transfer, stating that the parish will be vacant after the lapse of a set time. If no further action follows after the lapse of this time, the bishop should declare ("*declaret*") the parish vacant.[150] The provisions of c. 1747 on removal of parish priests are applicable also to the cases of transfer while observing canonical equity and keeping in mind the salvation of souls (cc. 1751-1752).

4.4.5 Institutes of Consecrated Life and Societies of Apostolic Life

In his diocese, the bishop can erect ("*erigere*" = singular decree) institutes of consecrated life or societies of apostolic life by formal decree after consulting the Apostolic See (cc. 579; 732).[151] The bishop of the principal house approves the

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[149] "*Relinquat*" (*CCEO* c. 1396, §2) implies that the bishop issues a singular decree to the effect intended by the canon.

[150] The decree of transfer is a singular decree. Another opinion is that it is also a precept in the sense that it orders the priest to take possession of his new office. See Eduardo LABANDEIRA, "The Manner of Procedure in Administrative Recourse and in the Removal or Transfer of Parish Priests," in *Canon Law Annotated*, p. 1080. "*Declaret*" in this canon would mean the bishop issues a singular decree.

[151] Consultation with the Apostolic See is for the validity of the act of erecting an institute. Whether the bishop is bound to follow the advice of the Apostolic See is unclear. One opinion holds that the bishop is not bound by the advice. See Tomás R. PEREZ, "Institutes of Consecrated Life and Societies of Apostolic Life," in *Canon Law Annotated*, p. 413. However, it is the competence of CICLSAL to pass judgement on the suitability of the erection of the institutes by the diocesan bishop. See JOHN PAUL II,

constitutions and any legitimate changes except those which the Apostolic See reserves to itself.[152] In particular cases, a diocesan bishop can grant a dispensation from the constitutions. These provisions also apply to societies of apostolic life (cc. 595; 732).

With the previous written consent (= *licentia*) of the diocesan bishop, a house of the institute can be erected in accordance with its constitution (c. 609, §1). This consent of the bishop carries with it the right for the religious to lead a life proper to the institute; to carry out their proper works subject to the law and any conditions attached to the consent of the bishop. The consent given to erect a house of a clerical institute implies having a church but without prejudice to c. 1215, §3 (on the need of the bishop's permission to build a church in a particular site) and performing sacred ministries after fulfilling the requirements of law (c. 611). Furthermore, the bishop's consent (= *licentia*) is necessary to convert a religious house to apostolic works other than those for which it was established. If a change concerns only the internal governance and discipline of the house, the consent of the bishop is not needed (c. 612).[153]

Pastor bonus, in *AAS*, 80 (1988), no.106, p. 887; English translation in *CLSA Translation*, p. 718. Later, Pope John Paul II found it appropriate to set up a Commission to deal with questions relating to new forms of consecrated life. See JOHN PAUL II, Post-Synodal Apostolic Exhortation, *Vita consecrata*, 25 March 1996, in *AAS*, 88 (1996), nos. 12, 62, p. 385, 435-437; English translation, Post-Synodal Apostolic Exhortation, *Vita consecrata* of the Holy Father John Paul II, Vatican City, Libreria editrice Vaticana, 1996, pp. 16-17, 110-111.

[152] The bishop also deals with the affairs affecting the whole institute if they do not pertain to the institute's internal governance. However, if the institute has spread to other dioceses, then the bishop of the main house must consult the bishops of those dioceses (cc. 595, §1; 732).

[153] Using the house for a different apostolate than for which it was established is equivalent to erecting a new house. Therefore, it requires bishop's permission. In the case of monasteries of nuns using their house for a different apostolate, the permission of the Apostolic See does not seem necessary since the canon does not specify it. See PÉREZ, "Institutes of Consecrated Life," p. 427. Canon 497, §4 of *CIC 17* specifically said so.

The ordinary confessors in monasteries of cloistered nuns, in houses of formation, and in large lay communities are to be approved by the local Ordinary after consulting the community (c. 630, §3). This applies also to the houses of a society of apostolic life according to the nature of each society (c. 734).

The competent authority of a society of apostolic life must obtain the diocesan bishop's previous written consent (= *licentia*) to erect a house and a local community of the society in his diocese. This consent implies the right to have at least an oratory to celebrate and preserve the Eucharist (c. 733).[154]

Canon 667, §4 authorises the diocesan bishop to enter the cloister of monasteries of nuns in his diocese for a just cause. With the consent of the superior and for a grave cause, the bishop can permit others to be admitted to the cloister and permit the nuns to leave it in case of necessity and for a period of time.

The bishop can prohibit a member of a religious institute or a society of apostolic life from residing in his diocese. However, he can act in this manner only for a very grave cause,[155] and only if the major superior of that member has been negligent in remedying the matter in spite of being informed ("*monitus*") of the situation.[156] The bishop is to refer the matter immediately to the Holy See (cc. 679; 738, §2).

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[154] The bishop must be consulted to suppress the same house (c. 733, §1).

[155] The very grave reason seems to be some action related to matters in which religious are subject to bishop's authority, or violation of ecclesial or civil law causing public scandal. See Rose M. MCDERMOTT, "The Apostolate of Institutes," in *New Commentary*, p. 847.

[156] "*Monitus*," like "*certiorem reddat*" in c. 974, §3, does not seem to be an administrative act. Its purpose is to inform the religious superior.

With regard to the works entrusted by the diocesan bishop to religious institutes and societies, a written agreement between him and the competent superior of the institute is to be drawn up in order to determine matters pertaining to the work to be accomplished, members to be involved and economic matters (cc. 681; 738, §2).[157]

The diocesan bishop can appoint members of a religious institute or a society of apostolic life to ecclesiastical offices in his diocese, with the consent of the competent superior. They can be appointed on their being presented. The bishop can also remove them from office at his discretion with prior notification ("*monito*") to their superiors. Similarly, superiors can remove their members from office after duly informing the bishop. Neither the bishop nor the superiors require the consent of the other (cc. 682; 738, §2).

When the bishop discovers that there are abuses in public worship, in the care of souls and in the apostolic works either spiritual or temporal undertaken by the religious or society of apostolic life, he should warn ("*monito*") the competent superior.[158] If the

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[157] The agreement mentioned in the c. 681, §2 could comprise of provisions, obligations (precepts), permissions, privileges, etc. According to MCDERMOTT, "The Apostolate of Institutes," p. 848, it may deal with responsibilities, compensation, health benefits, insurance, transportation, housing, provision for retreats, vacations, sick leave, etc. For a detailed study on this, see Stephen E. KAIN, *Written Agreements Between Bishops and Religious for Entrusted Diocesan Works*, Canon Law Studies No. 550, Washington, DC, The Catholic University of America, 1996.

[158] Abuses may relate to the ministry of the Word, the teaching of doctrine, the celebration of the sacraments and sacramentals, the administration of temporal goods, and conformity with the provisions of civil law. The bishop can even impose penalties (c. 1320). See MCDERMOTT, "The Apostolate of Institutes," p. 850.

superior does not resolve the problem, the bishop can make provision on his own authority (cc. 683, §2; 738, §2).[159]

The supreme moderator of a religious institute of diocesan right, with the consent of the council, can grant an indult of exclaustration to a perpetually professed member for up to three years. The extension of such an indult or to grant one for more than three years is reserved ("*reservatur*") to the diocesan bishop.[160] He can impose ("*imponi*" = singular precept) exclaustration, with equity and charity, on a member of an institute of diocesan right, if for grave causes the supreme moderator, with the consent of the council, petitions the diocesan bishop for it. When a cleric, who belongs to a religious institute, receives an indult of exclaustration, his supreme moderator is to obtain the prior consent of the Ordinary of the place in which that cleric is to reside (c. 686, §§1, 3).[161] Similarly, when a cleric, who belongs to a society of apostolic life, receives an indult to live outside the society, his supreme moderator must have the consent of the Ordinary of the place where he is to reside (c. 745).

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[159] Canon 683, §2 does not state the nature of the provisions the bishop may make. In virtue of c. 1320, they may imply imposing even penalties for serious abuses, or imposing other obligations through precepts. Cfr. Ibid., p. 850. According to c. 678, §1, the religious are subject to the power of the diocesan bishop in the care of souls, the public exercise of divine worship, and other works of the apostolate. In fact, CD 35, 2-4 gives a list of the activities of religious, even of the exempt religious, which are subject to the bishop. See *AAS*, 58 (1966), pp. 691-692. English translation in FLANNERY I, pp. 307-308.

[160] The extension of the indult reserved to the bishop seems to indicate that the existing indult can be extended with bishop's permission.

[161] It is not specified which diocesan bishop is competent to impose the exclaustration. It seems reasonable to suggest that it would be the bishop within whose jurisdiction the particular member was living at the time of the petition. See Sharon L. HOLLAND, "Departure from an Institute," in *New Commentary*, p. 856.

A member of an institute of diocesan right, who asks to leave the institute for grave cause, can obtain an indult of departure from the supreme moderator with the consent of the council. Such an indult has to be confirmed by the diocesan bishop of the house to which the particular member was assigned. This applies also to the indult in favour of a departing member of an autonomous monastery mentioned in c. 615. However, for a perpetually professed member of an institute of diocesan right, the diocesan bishop of the house to which the religious was assigned also can grant an indult of departure (cc. 688, §2; 691, §2).[162] An indult of departure to a religious cleric is granted only if a diocesan bishop incardinates him in his diocese, or receives him experimentally. If he has been received ("*recipiat*") experimentally, he is incardinated in the diocese by the law itself after five years unless the bishop refuses ("*recusaverit*") him (c. 693).[163]

A decree of dismissal of a member of an institute of diocesan right needs to be confirmed by the bishop of the diocese where the house to which the religious has been attached is situated.[164] If the dismissed religious is a cleric, he cannot exercise sacred

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[162] The "also" (*etiam Episcopus diocesis*) in c. 691, §2 could suggest that the bishop of the main house of the institute too is competent to grant the indult of departure. See ibid., p. 862.

[163] Both "*recipiat*" and "*recusaverit*" ("refusal," rejection," "denial") imply singular decrees. Canon 265 does not leave any room for an acephalous cleric. It might seem that the Code is silent on the status of a religious cleric who leaves his institute through an indult and a bishop receives him on probation, but eventually the bishop refuses to incardinate him. In fact, when a bishop receives a religious priest on a probationary basis, a special indult *ad experimentum* is granted to the priest. If the bishop subsequently refuses to incardinate him, he must return to his institute or society. See CDWDS, Rescript, April 1999 [n. d.], in *RR*, (1999), pp. 7-9.

[164] The decree of dismissal must state the right of the dismissed to make recourse to the competent authority within ten useful days (c. 1734, §2) after receiving the notification of the confirmed decree (c. 700). The decree is to be notified to the member after the Holy See confirms it. The competent authority to receive the suspensive recourse against the decree of dismissal is CICLSAL. See PCCICAI, Authentic Interpretations [2], 4 December 1986, in *AAS*, 78 (1986), p. 1323; English translation in *Canon Law*

orders until he finds a bishop who receives him into the diocese after an appropriate probation according to the norms of c. 693 or at least permits ("*permittat*") him to exercise sacred orders in his diocese (c. 701).

For a valid alienation and for any other transaction, which could harm the patrimonial condition of an autonomous monastery mentioned in c. 615 and of an institute of diocesan right, the written consent ("*consensus*") of the local Ordinary is needed. This is required in addition to the written permission ("*licentia*") of the competent superior, given with the consent of the council (c. 638, §§3-4).[165]

4.4.6 Procedural Matters

A judge should not hear a case in which his personal interest may be involved.[166] If he does not refrain from hearing such a case, a party in that case is free to object to the judge. If such an objection is raised against the judicial vicar, the bishop deals ("*videt*") with the matter (c. 1449, §§1-2).[167]

Annotated, p. 1291. In the case of an unsuccessful recourse to CICLSAL, the dismissed religious can have contentious recourse to the Apostolic Signatura (cc. 1734-1739). However, the diocesan bishop would be the first avenue of recourse for diocesan institutes. See Sharon L. HOLLAND, "Dismissal of Members," in *New Commentary*, pp. 870-871.

[165] Although "*licentia*" is attributed to the superior, "*consensus*" of the local Ordinary is also equivalent to *licentia*. A suggestion to consider the amount determined by episcopal conferences of bishops as a basis for the alienation of goods of religious institutes was not accepted during the revision process. See *Communicationes*, 12 (1980), p. 180.

[166] The following circumstances exclude a judge from hearing a case: consanguinity or affinity in any degree of the direct line and up to the fourth degree of collateral line; guardianship or tutelage; close acquaintance or marked hostility; and possible financial profit or loss (c. 1448).

[167] "*Videt*" (*CCEO* c. 1107, §3 has "*videat*") could mean either a singular decree or a precept, depending upon the nature of the bishop's determination.

A judge can gather evidence outside his own territory after hearing the parties. However, he must have the permission ("*licentia*") of the bishop of the diocese to which he goes and collect the evidence in a place designated ("*designata*") by the same bishop (c. 1469, §2).[168]

A party in a case can freely appoint an advocate and procurator for him or herself. An advocate, who must have a doctorate in canon law or be an expert, should be approved ("*approbatus*") by the diocesan bishop. Moreover, he or she should be a Catholic, although the diocesan bishop can permit ("*permittat*") otherwise (c. 1483).[169]

Procurators and advocates are forbidden to influence a suit. They are not to accept bribes, seek immoderate payment, bargain with the successful party for a share of the matter in dispute. Any agreement thus made is invalid. In addition to being fined by the judge, the bishop can suspend ("*suspendi*") advocates from office. If it is not a first offence, the bishop can remove ("*expungi potest*") them from the register of advocates. They can be punished ("*puniri possunt*") in the same way if, in deceit of laws, they withdraw cases from competent tribunals to secure more favourable judgements from other tribunals (c. 1488).[170]

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[168] The designation of the place by the bishop need not be a separate administrative act. The "*licentia*" of the same bishop could specify it.

[169] "*Approbatus*" seems to be *licentia* since the same canon allows the bishop to permit otherwise. A person living in an irregular marital union may not be admitted as an advocate in a marriage nullity case before a diocesan tribunal. The bishop can also remove a person, who is in an irregular marital status, from the list of advocates approved for his tribunal. See SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, Private Reply, Prot. N. 24339/93 V. T. , 12 July 1993, in *Periodica*, 82 (1993), pp. 699-700. For an analysis of this reply, see Raymond L. BURKE, "Commentarius," in *Periodica*, 82 (1993), pp. 701-708.

[170] While the terms "*suspendi*," and "*expungi*," refer to singular decrees, "*puniri*" refers to a penal precept. More likely, it refers to the decree imposing the penalty.

It is the bishop's task to execute the judgement given at the first instance either personally or through another, unless particular law provides otherwise. If he refuses or neglects to do so, it devolves upon the authority to which the appeal tribunal is subject as per c. 1439, §3, at the request of an interested party or ex officio (c. 1653, §§1-2).[171]

After the appellate tribunal confirms the first instance sentence, which declared a marriage null, the parties to that marriage are free to contract a new marriage. However, the new marriage can take place only if: the confirmation of the first sentence is communicated to them; no prohibition is appended to the decision; and the local Ordinary has not prohibited them from doing so (c. 1684, §1).

Unless lawfully provided otherwise in particular places, baptized spouses can be separated by a [singular] decree of the diocesan bishop, or by the sentence of a judge.[172] If the ecclesiastical decision does not produce civil effects, the bishop of the diocese in which the spouses live can permit them to approach the civil courts if it is foreseen that the civil judgement will not be contrary to divine law (c. 1692, §§1-2).[173]

The diocesan bishop of the place of domicile or quasi domicile of the petitioner is competent to accept ("*accipiendum*") a petition seeking a dispensation from a non-consummated marriage. If the petition is well founded, the bishop must arrange ("*disponere debet*") for the instruction of the process (c. 1699, §1). He may also entrust

[171] The execution of a sentence of the tribunal is a singular decree. The local Ordinary or his delegate can execute it with a mandate from the bishop in accordance with cc. 40-45 and 1654. See Craig A. COX., "The Execution of the Sentence," in *New Commentary*, p. 1751.

[172] While the decree of the bishop is an administrative act, a judgement is a judicial act. Unlike the separation mentioned c. 1153, c. 1692 refers to the permanent separation of the spouses.

[173] While issuing the decree of separation, the bishop must provide for the adequate support and education of the children (c. 1154).

("*committat*") the matter to a suitable priest, yet without prejudice to c. 1681 which refers to suspending a case for nullity and instructing it for dispensation *super rato* (c. 1700, §1).[174] If the petition is not well founded, the bishop can reject ("*reicit*") it against which the petitioner can have recourse to the Apostolic See (c. 1699, §3).

When an ecclesiastical or a civil document cannot be produced to prove the death of a spouse, the other spouse is not free from the bond of marriage until the diocesan bishop issues a declaration ("*declarationem*" = singular decree) of presumed death. He can issue this declaration only if he has reached moral certainty concerning the death of the spouse (c. 1707, §§1-2).[175]

When the Ordinary receives apparently truthful information about an offence, he undertakes an enquiry (c. 1717, §1).[176] Having assembled the facts, he determines by a decree whether to initiate a judicial process to inflict ("*irrogandam*") or declare ("*declarandam*") a penalty. If the law does not forbid the administrative process, the bishop can pursue the matter by means of an extra-judicial decree. After determining the

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[174] The terms "*accipiendum*," "*disponere debet*," and "*committat*" imply issuance of singular decrees.

[175] The intervention of the defender of the bond is not required in declaring the presumed death of a spouse. See *Communicationes*, 11 (1979), p. 282. The bishop arrives at moral certainty through his own investigation, the deposition of witnesses, condition of health, moral character of the missing spouse, respectable rumour of death or other evidence. Mere absence of the spouse, however long, is not a sufficient reason for this declaration. See Peter J. JUGIS, "Process in the Presumed Death of a Spouse," in *New Commentary*, p. 1799. For a document on this matter, see SACRED CONGREGATION OF THE HOLY OFFICE, Instruction, *Matrimonii vinculo*, 13 May 1868, in *AAS*, 2 (1910), pp. 199-203; English translation in William H. WOESTMAN, *Special Marriage Cases*, Ottawa, Saint Paul University, Faculty of Canon Law, 1994, pp. 141-144.

[176] The manner of conducting the preliminary investigation is not specified. Fernando LOZA, "The Penal Process," in *Canon Law Annotated*, p. 1060, suggests, *mutatis mutandis*, application of cc. 1526-1586.

way of proceeding, should the Ordinary receive new facts, he must revoke ("*revocet*") or change ("*mutet*") the previous decree that determined the procedure (c. 1718, §§1-3).[177]

If the Ordinary decides to proceed with an extra-judicial decree, he has to inform ("*significat*") the accused of the allegation and of the evidence. The accused should be given an opportunity for defence unless the accused fails to appear in response to the lawful summons. The Ordinary is to accurately weigh all the evidence and arguments with two assessors. When the certainty of the offence is established and if the criminal action is not extinguished, the Ordinary is to issue a [singular] decree as per cc. 1342-1350, giving ("*expositis*") at least a summary of reasons in law and in fact (c. 1720).[178]

If the Ordinary decrees ("*decreverit*") the initiation of a judicial penal process, he is to pass the acts of the investigation to the promoter of justice who will present a petition of accusation to the judge as per cc. 1504 and 1505 (c. 1721, §1). After the beginning of the process, and at any stage of its proceeding, the Ordinary can cite ("*citato*") the accused to appear before him, and he can prohibit ("*interdicere*") that person from exercising the sacred ministry or from holding an ecclesiastical office or position. He may also impose ("*imponere*") or forbid ("*prohibere*") residence in a certain place or territory, or even prohibit public participation in the Eucharist.[179] The Ordinary

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[177] Both "*revocet*" and "*mutet*" suggest singular decrees from the Ordinary.

[178] Like "*significat*," "*expositis*" is not an administrative act. The latter does not seem to be a separate document, as it is a part of the singular decree.

Canon 1362 determines time limits for the extinction of criminal actions. When a particular offence is extinguished, the Ordinary cannot initiate a penal judicial process or issue an extra judicial decree to impose or declare a penalty. Recourse against a penal decree is possible according to the norms of cc. 1732-1739. See Thomas J. GREEN, "The Penal Process," in *New Commentary*, p. 1811.

[179] The restrictions imposed as per c. 1722 are not penal, rather they are precautionary, to be invoked only for the reasons cited in the canon. See LOZA, "The Penal Process," p. 1063. Although during

must consult the promoter of justice before doing this in order to prevent scandal, protect the freedom of the witnesses and to safeguard the course of justice (c. 1722). During the process, the Ordinary, who initiated the process, can direct ("*mandante*") or permit ("*consentiente*")[180] the promoter of justice to renounce the trial at any stage. The renunciation is valid only if the accused accepts it, unless he or she was declared absent from the trial (c. 1724).

4.4.7 Penal Matters

Penalties can be imposed by a judicial or an administrative procedure. The Ordinary is to take care ("*curet*") to initiate a judicial or an administrative procedure in order to impose or declare penalties only when he perceives that fraternal correction, reproof, and pastoral methods would not sufficiently repair the scandal and restore justice, or reform the offender (c. 1341). When just causes preclude a judicial process, a penalty can be imposed or declared through extra-judicial decree. If the Ordinary initiates an administrative procedure to impose or to declare a penalty, he is to issue an extra-judicial decree to that effect (c. 1342, §1).

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the judicial process, the acts of the bishop, that is, "*citato*," "*interdicere*," "*imponere*," "*prohibere*," which are precepts, do not seem to be part of the judicial process. Whether recourse against such acts is possible is debated. GREEN, in "The Penal Process," pp. 1812-1813, thinks that it is possible, although with non-suspensive effect. LOZA, in "The Penal Process," p. 1063, is of the view that it is not possible.

On the one hand, it would appear that the purposes for those acts laid down by the canon, especially protecting the freedom of witnesses and guarding the course of justice, seem to exclude any recourse if it hinders the trial. On other hand, a recourse with non-suspensive effect does not seem to obstruct the trial. Therefore, a recourse seems possible.

[180] "*Mandante*" is a precept and "*consentiente*" is permission.

The local Ordinary can coerce ("*coerceri*")[181] religious with penalties in all matters in which they are subject to him (c. 1320). When the penalty for a cleric is an order imposing ("*irrogetur*") residence in a certain place or territory, the consent of the Ordinary of that place is required unless that place is a house established for penance or rehabilitation of clerics including those from outside the diocese (c. 1337, §2).

The Ordinary, who, by a decree personally or through another imposed ("*irrogata*") or declared ("*declarata*") a penalty established by law, can remit ("*remittere*")[182] it if it is not reserved to the Apostolic See. After the Ordinary imposed or declared a penalty, if the offender starts residing in another Ordinary's territory, the latter can remit that penalty after consulting the former, unless it is impossible because of extraordinary circumstances. It is not required that the Ordinary consulted should consent to the remission.[183] A *latae sententiae* penalty established by law, but not declared and not reserved to the Apostolic See, can be remitted by the Ordinary for his subjects, or for those who are present in his territory, or for those who committed the offence in his territory (c. 1355).[184]

The Ordinary of the place where the offender actually resides can remit a *ferendae* or a *latae sententiae* penalty established in a precept not issued by the Apostolic

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[181] "*Coerceri*" seems to suggest a singular precept. Canon 679 too has similar connotation.

[182] "*Remittere*" is a rescript because it grants a favour to its recipient by mitigating the penalty.

[183] See *Communicationes*, 16 (1984), p. 45.

[184] Since remission of penalty here belongs to ordinary executive power, it can be delegated in accordance with c. 137, §1. Canon 1355, §2 extends this competence also to any bishop in sacramental confession. Such a bishop, however, cannot delegate this power.

See. If this penalty was imposed or declared, the Ordinary who initiated the trial or decreed it either personally or through another, can remit it (c. 1356, §1, 1°-2°).

CONCLUSION

As we have discussed earlier, the diocesan bishop's pastoral function (*pastorale munus*) comprises of *tria munera*, that is, the teaching, sanctifying, and the ruling functions. Each of these functions has its own individual tasks some of which require power of governance to carry them out and some of them do not. This chapter has been an attempt to identify the tasks of the bishop which require him to exercise his executive power.

As the pastor of the diocese, the bishop exercises his executive power in all diocesan matters of governance except in cases reserved to another authority. However, in accordance with the principle of subsidiarity, the Code also concedes ordinary vicarious power to the vicars general and episcopal vicars to place administrative acts in accordance with law. The directive principles set forth by the Code ensure the coherent exercise of executive power and the valid placing of its acts.

In this regard, it is worth noting that the Code allows the vicars general and episcopal vicars considerable executive power in teaching and sanctifying functions. However, in the ruling function, especially in the diocesan matters as we have classified them in this chapter, the Code reserves most of the matters to the exclusive competence of the diocesan bishop, of course, with the possibility of delegation in accordance with law.

The Code has numerous instances of the bishop issuing administrative acts, whether general or singular. It is interesting to note that it seems to envisage numerous singular administrative acts in the exercise of the bishop's executive power. Generally, the Code does not identify the nature of an administrative act involved in a case. Frequently, it uses different words, which, however, suggest the same administrative act. At times, the nature of an act becomes clear because of some clear terms used in other canons related to the same matter. In many cases, the nature of an administrative act to be issued is left to the discretion of the bishop. An act thus issued could be a singular decree, rescript, another favour, or even a legislative decree. Some terms indicate not only the possibility of issuing an administrative act, but also the likelihood of issuing a legislative act, whether a law itself or a general decree of legislative nature. Thus, for instance, it appears that permissions mentioned in cc. 1168 and 1183 could also be granted through legislative decrees. Therefore, the nature of an administrative act is to be assessed according to the nature of the specific case and particular situations. It is also the bishop's responsibility to make clear the nature of a general act when he issues it.

Frequently, the Code explicitly names the administrative acts involved. For instance, all dispensations granted by competent authorities are rescripts. Similarly, in granting permissions by competent authorities, norms on rescripts need to be observed. Furthermore, in a few instances, the terms used in canons indicate the nature of administrative acts implied. For instance, "formal decree" in c. 579; "decree of removal" in c. 1744, §2; "decree on the matter" in c. 1745; "extra-judicial decree" in c. 1342, §1; "special instructions" in c. 1276, §2, etc. In a few more instances, the terms used in the

canons implicitly indicate the nature of an administrative act. For instance, "*decreverit*" in cc. 289, §2 and 1721, §2, "*decrevit*" in c. 468 indicate that the acts involved are either decrees or precepts.

The diocesan bishop has enormous executive power in the governance of his diocese. Often, its exercise is left to his judgement and discretion. The pastoral nature of his function demands that he exercise it with prudence, justice and equity so that the pastoral welfare of the faithful may be effectively served.

GENERAL CONCLUSION

The very nature of the shepherding ministry of a diocesan bishop demands that he be endowed with the power that is necessary to order the life of his particular church in order to accomplish its saving mission. In an ecclesiological sense, this would constitute the function of ruling. This concept of the ruling function is more comprehensive than the purely juridic notion of the power of governance or jurisdiction, which, according to canonical doctrine, has three distinct parts, namely legislative, judicial and executive. The principal object of our present study has been the nature and scope of only one aspect of this power, namely the executive power of the diocesan bishop. The theological and juridical analysis of the different concepts and principles related to this topic has enabled us to draw some important theoretical and practical conclusions.

First, from a theoretical point of view, the nature and scope of the power of governance in the Church have always remained open to development. There has never been a definitive and indisputable official statement concerning those issues. This situation has been particularly true in regard to the nature and scope of episcopal powers. Until the Second Vatican Council, the bishop's power was subordinated to that of the supreme pontiff. Although the pre-Second Vatican magisterial teaching and the 1917 Code taught that the bishops are the successors of the apostles and ordinary and immediate pastors of the communities entrusted to their pastoral care, the bishop's power of governance remained subordinated to the papal supreme power. The immediate source of episcopal jurisdictional powers and faculties was the papal concession.

Second, the Second Vatican Council identified episcopal consecration as the direct and immediate source of the episcopal power. That is to say, the Council taught that it is through episcopal consecration that a bishop receives one sacred power. The bishop's authority is divinely conferred just as that of the supreme pontiff. The pope's role in this process consists in merely assigning a bishop to a particular church, although as the supreme authority in the Church he has the competence to restrict the bishop's powers for very serious reasons. Therefore, by virtue of his consecration the bishop has all the power he needs to shepherd the people entrusted to his care. He is the head of a particular church just as the pope is the head of the universal Church. The powers possessed by both heads are immediate, proper and ordinary. This essentially encapsulates the doctrine of the Council on this matter.

Third, the Council also made it abundantly clear that the power of the bishop is not dissociated from that of the college of bishops and of the supreme pontiff; rather it is a sharing in the same episcopal power. For this reason, a bishop legitimately exercises his shepherding ministry only when he is in communion with the college of bishops whose head is the supreme pontiff. This principle of collegiality unites every bishop with the universal Church and, consequently, every bishop is urged to foster in himself a genuine concern for the good of the universal Church.

Fourth, just as the principle of collegiality urges the bishop to have a true solicitude for the good of the universal Church, the principle of subsidiarity obliges him to share his responsibilities, including his power of governance, with his collaborators in ministry. This implies that he shares his power with his subordinates and allows them to

fulfill their functions in accord with the principle of subsidiarity. As a consequence, he uses wisely the institutes and offices provided by law to assist him in his shepherding ministry. The present law makes provision for the appointment of vicars general and episcopal vicars who can share closely in his responsibilities and render his pastoral ministry more efficacious. For this same purpose, the law also allows the bishop to use the institute of delegation through which he can share his powers and responsibilities with other members of the Christian faithful according to the norms of law.

Fifth, the notion of the ecclesiastical power of governance is akin to that found in civil society. In modern democratic societies, the power of governance is divided into legislative, executive and judicial, and they are exercised by three distinct organs or persons independently of each other. This is based on the theory of separation of powers, which is designed as a mechanism for mutual control and to protect the rights and freedoms of citizens. The demarcation between the three powers in a civil society is clear. In such a system, executive power has a distinct and definitive meaning, that is, the execution of laws is distinct from the enactment of laws which is done by the legislative branch, and from the application of law through judicial decisions which is done solely by the judiciary. This separation of powers is not admissible in the Church's legal system because of its very nature. The totality of the governing power rests with the supreme pontiff at the level of the universal Church and with the bishop at the level of the particular church.

Sixth, in contrast to the clarity in the distinction and separation of powers in a secular system of governance, the distinction among the three aspects of the governance

within the Church remained conceptually and practically undifferentiated until the promulgation of the 1917 Code of Canon Law. It was in this Code that an explicit distinction was made in the power of governance. The Code distinguished within the same power of governance three aspects: legislative, coercive and judicial. Even then certain functions of the bishop in the 1917 Code did not fit neatly into any particular category. Those functions or acts were executive in nature. The adoption of the term "coercive" in the Code was not due to any uncertainty over the Church's possession of executive power, rather it was to emphasize the coercive aspect of the executive power since the necessity or relevance of coercive power was being questioned during the years preceding the codification of laws in the Church. After the 1917 Code was promulgated, canonists found the need to introduce the expression "executive power" to identify more appropriately the third aspect of the power of governance. The Second Vatican Council intentionally chose to use the term "moderate" in the place of "coercive" while explaining the threefold aspects of the ruling function of the bishop. Although the term "administrative" was considered by the Code Commission during the revision process, the promulgated text of 1983 Code identifies "executive power" as the source of "administrative acts," whether general or singular in nature. The term "executive" instead of "administrative" or "coercive" seems to better express the power it qualifies. Therefore, since the administrative power mentioned in the present Code is synonymous with executive power, the Code admits of only three aspects of the power of governance.

Seventh, although the totality of the power of governance in a particular church rests with the diocesan bishop, the Code provides ample scope for the bishop to share this

power with others, through offices and delegation. Thus the Code has provisions for offices of vicars general and episcopal vicars with ordinary vicarious power of governance within the realm of their competence. The bishop can further share his power with them through delegation in accordance with the norms of law. In the same way the bishop can also share his executive power with those who have the *habilitas* to participate (cooperate) in his power also in accord with the law.

Eighth, the shepherding ministry of the diocesan bishop consists of teaching, sanctifying and ruling functions. Each of these functions has its own individual tasks or acts. Not all these individual functions or acts presuppose power of governance. However, most tasks which presuppose the power of governance pertain to the bishop's executive power. For example, the sanctifying function includes baptizing, confirming, imparting blessings, etc., which are acts of the power of Order. But these acts need to be regulated for their proper celebration, and this in turn would involve exercise of the power of governance, especially executive power. For example, the permission for a presbyter to baptize one who is no longer infant, permission or authorization to celebrate the Eucharist more than once a day in situations not allowed by law, etc. are acts of executive power. Similarly, in the teaching function, the appointment or dismissal of teachers of religion in schools in his diocese would be acts of executive power, always of course carried out in accord with the norms of law.

Ninth, administrative acts, general or singular in nature, are issued in virtue of executive power. These acts are intended for the good of the community bound by the law or for the good of individual Christian faithful. There are different kinds of

administrative acts and those who are empowered to issue them ought to know their nature and the important juridical principles governing them. The Code itself classifies those acts and provides guidelines for identifying their nature and proper issuance. The nature of each act is to be determined from an analysis of the context and of its subject matter.

Tenth, the scope of the bishop's executive power in respect to his subjects, because of its deeply pastoral nature, extends beyond the territorial boundaries of his diocese. This means that the bishop can exercise his executive power in relation to his subjects not only when they are within the territory of his diocese but also when they or he himself are outside the territory. In other words, the exercise of his executive power is not constrained by territorial limits when it concerns the pastoral well-being of his subjects. Of course this is to be done in accord with the norms of law.

Eleventh, the scope of the bishop's executive power in the Code is quite vast. In fact it can impact all three *munera* (functions) of the bishop. The Code assigns a pre-eminent role to the diocesan bishop in the governance of the particular church at all levels. This is quite evident in the reservation of most acts of ruling power to the diocesan bishop, with the exception of a determined number of instances in which it can be exercised by his vicars. But the legislator makes provision for a number of administrative acts to be issued by vicars general and episcopal vicars in respect to teaching and sanctifying functions. This way the bishop's pre-eminent shepherding role in the diocese is upheld while leaving ample scope for implementing the principle of subsidiarity in his pastoral ministry.

Twelfth, the Code offers several principles to guide the legitimate exercise of executive power of governance. These principles concern the validity or liceity of the acts placed in virtue of executive power. They determine the manner of possessing executive power. Executive power obtained through office or delegation may be restricted to a specific matter, to certain number or kinds of cases, to a particular group of faithful, to a certain territory, etc. Regardless of the scope of one's competence in respect to executive power, all administrative acts which flow from it are juridic acts. Therefore, they are governed by the principles which regulate the placement of juridic acts. Failure to observe those principles can render administrative acts either invalid or illicit with serious legal consequences. Any arbitrary use of power would naturally cause not only controversy in the public arena but also could prove detrimental to the spiritual welfare of the faithful and to the good of the community and of the Church.

Finally, all functions of the diocesan bishop as shepherd of the people entrusted to this care are pastoral in nature. In fact, his entire episcopal ministry is one pastoral function (*pastorale munus*) that cannot be neatly packaged into different segments. Any attempt to divide his ministry into separate pastoral and non-pastoral departments would be not only counter-productive but also would weaken the very concept of his shepherding function itself. It has been clearly noted in magisterial documents that the term "pastoral" comprises both doctrinal and practical aspects. Any acts of executive power issued contrary to doctrine of the Church would not be pastoral and would not serve the spiritual good of the faithful. Those who possess executive power in the Church, particularly the diocesan bishop, are obliged to ensure that its exercise conforms

to the Church's teaching on it. In other words, the exercise of executive power by the bishop should foster the Church's salvific mission. His entire episcopal ministry should be guided by this principle. As Henri De Lubac wisely observes, without a genuine appreciation of the pastoral nature of his shepherding ministry, all his efforts in promoting the salvation of souls may become "legalism in governance, academicism in teaching and superstition in worship."[1]

The concept of function (*munus*) is much broader than that of power (*potestas*). Therefore, the governance of a diocese is not merely a matter of exercising power. It is important to note that the Second Vatican Council, before stating its teaching on the governing power of the diocesan bishop, exhorts him to minister to his people by personal example, exhortation and counsels. This is also true in the case of any office holder in the Church. The goal of the bishop's teaching, sanctifying and ruling functions is education in faith, true worship of God, and leadership of the community of faithful he guides toward the attainment of their eternal salvation. Ultimately, this is also the purpose of the exercise of executive power in the Church.

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