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LAY RELIGIOUS BROTHERS AS SUPERIORS IN CLERICAL RELIGIOUS INSTITUTES OF PONTIFICAL RIGHT

Abstract. Having analysed the historical debates concerning the nature of the power enjoyed by all superiors in religious institutes described in can. 596 § 1, this article, which is a continuation of the first one, explores the modern post 1983 Code debated on the nature of this power and the question of lay religious superiors in clerical institutes of pontifical right and how they exercise their powers. The article begins by analysing the post-Vatican Developments in religious life and governance of clerical religious institutes of pontifical right where religious are members too. It analyses the new developments highlighted by the decree *instituta clericalia*, and the beautiful developments introduced by Pope Francis in the derogation of the provisions of can. 588 § 2 of the 1983 Code, by opening up the space for brothers to be elected and be appointed as superiors in these institutes at all levels of governance. It ends by giving a critical analysis into the nature of power enjoyed by these religious brothers promoted to the office of superiors in these institutes, together with the upcoming questions of juridical nature which concern their acts of administration and the power with which they produce these singular acts of administrative nature.

Keywords: *Munus regendi*; *Potestas regiminis*; Administrative acts; Religious brothers; Clerical institutes of pontifical right; Holy See; *Lacuna*

INTRODUCTION

In the 1917 Code, the legislator defined a clerical institute as that which had majority of members as priests, otherwise it was lay (can. 488, 4°). This definition laid only a quantitative distinction between the two types of institutes with no further elaboration, though this does not imply that this criterion did not embrace other grounds upon which many other qualifications could be based. Instead, can. 588 § 2 of the 1983 Code defines a clerical institute as "that which by reason of the end or purpose intended by the founder or by reason of lawful tradition, is under the governance of clerics, implies the exercise of sacred orders, and is

recognized as such by the authority of the Church." Therefore, the governance of these institutes is under clerics, and to achieve its end or purpose it requires the exercise of sacred orders. Can. 274 § 1 also asserts that only those in clerical state can assume the offices which require the exercise of orders or power of jurisdiction and can. 150 which prescribes that only those in the order of priesthood can be validly granted offices carrying with them the full care of souls. Therefore, ordinarily lay brothers in clerical institutes may not be elected or appointed to the office of superiors at whichever level unless the Holy See itself dispenses these laws.

The Code also acknowledges in a special way that in clerical religious institutes of pontifical right the superiors enjoy ecclesiastical power of governance (can. 596 § 2). On top of this, major superiors of these clerical institutes of Pontifical right are also Ordinaries (can. 134 § 1). As ordinaries, by law, they enjoy the ordinary power to dispense from universal laws in extraordinary cases (can. 87 § 2), they can dispense from irregularities and impediments for admission to holy orders or exercise of orders already received (can. 1047 § 4); authorize their members to assume secular offices (can. 285 § 4); can receive offerings of binated Masses by their priests (can. 951 § 1) except those celebrated by the parish priests and the assistant parish priests;[1] has the faculty to bless sacred places except churches (can. 1207); exercise vigilance and emanation of instructions on administration of temporal goods (can. 1276); has the faculty to establish penalties and to enforce them (cann. 1319; 1341) and can as well remit them (can. 1355); can initiate a judicial process (can. 1717); can write dimissorial letters for the candidates to ordination (can. 1019), and even listen to confessions of his subjects (can. 968 § 2). A number of these functions involve the exercise of the power of orders, others require the exercise of the power of jurisdiction in addition to the exercise of the power of orders, a reality that makes it so difficult for lay Brothers in these institutes to occupy these posts because they actually do not enjoy the power of orders.

The praxis of the Holy See has demonstrated that in certain circumstances of need, the Holy See can grant a dispensation from these provisions and allow lay religious brothers to be elevated to the offices of superiors in these institutes. The late development being the special faculty granted to the Dicastery of Institutes of Consecrated Life and Societies of Apostolic life to handle this matter. In all these, the doctrine has always maintained that a lay brother elevated to the office of a superior properly enjoys the *munus regendi.*[2] He enjoys the public power

[1] Cf. Pontificia Commissio Codici Iuris Canonici Authentice Interpretando, *Responsiones ad proposita dubia*, 23.04.1987, n. II, *AAS* 79 (1987), p. 1132.

[2] Cf. A. D'Auria, *I laici nel munus regendi*, [in:] *I laici nella ministerialità della Chiesa*, ed. Gruppo Italiano Docenti di Diritto Canonico, Milano 2000, p. 148-151.

indicated in can. 596 § 1, a power distinct from the *potestas regiminis* indicated in canon 596 § 2.

1. CAN. 596 § 1 OF THE 1983 CODE AND POST-CODE DEBATES ON THE NATURE OF POWER ENJOYED BY ALL SUPERIORS

Can. 596 § 1 of the 1983 Code does not name this power, but applies some norms which govern the exercise of the executive power of governance to the exercise of this power (can. 596 § 3). Application of these norms to the exercise of this power concerns only its exercise of but does not imply that this power is an executive power of governance as some authors like Iannone have claimed.[3]

A look at the formulation of can. 596 § 1 reveals the fact that this canon addresses an unnamed power which is distinct from the dominative power contained in can. 501 § 3 of the 1917 Code, yet it replaces it in the current canonical system. This power, as it is expressed, is not a power of jurisdiction, hence the Code distinguishes it from the power of governance granted only to the clerical religious institutes of pontifical right. This is clearly seen by the connector *insuper* which expresses that the power of jurisdiction is added on top of this unnamed public power for a certain category of religious superiors. This has provoked the doctrine to come up with various models to resolve this question and to explain the real nature of this power.

1.1. That it is a Power of Jurisdiction Limited to Executive Function

Some scholars argue that this unnamed power is a power of jurisdiction limited to executive functions alone. For them, in the Church, there is only one public power of governance. For this reason, the power named in can. 596 § 1 and that in § 2 are part and parcel of the same power of governance, but that in § 1 is quantitatively lesser in functions. Applying the principles of can. 129 § 2, they hold that Superiors enjoying this common power participate in the *potestas regiminis* (power of governance) but within the limits defined by the universal law and proper law. This being the case, there is no substantial or qualitative difference between the two powers. The difference between the two powers named in § 1 and § 2 of can 596 is not qualitative, but quantitative, in that this power common to all superiors is limited to the exercise of executive functions of governance only while the *potestas regiminis* (power of governance)

[3] Cf. F. Iannone, *Potestà del Capitolo generale*, "Commentarium pro Religiosis" (1987), no. 68, p. 244.

in can. 596 § 2 of the same canon has both legislative, executive, and judicial functions. They conclude that the common public power in can. 596 § 1 is therefore an executive power of governance, and it is exercised almost entirely in the external forum alone.[4] They justify this position by highlighting occasions when superiors are allowed to perform functions of executive nature including erecting houses and provinces, admitting candidates to novitiate and to profession among many others.

However much convincing this position may sound, it does not actually correspond to the description of the nature of this power as described in the art. 13 of *mutuae relationes*[5] of 1978, which underlines the fact that there exists only a similarity between the two powers, but not congruency, hence despite the similarity in functions, the two powers remain distinct from each other not only quantitatively but also substantially. Second, from the beginning and during the revision of the Code for the Eastern Churches, the distinction between the two powers had always been upheld clearly. The commission always retained the distinction between the power of governance and public ecclesiastical power or public dominative power whenever addressing the matters concerning their exercise. Therefore, it is so difficult to understand the logic employed by these authors in claiming the substantial equality between the two powers to an extent of claiming that this power of Superiors is truly an executive power of governance.

[4] Among the proponents of this position, we have: J.L. Gutierréz, *Dalla Potestà dominativa alla giurisdizione,* "Ephemerides Iuris Canonici" (1983-1984), no. 39-40, p. 102-103; Iannone, *Potestà del Capitolo generale*, p. 223, 244, 229; Sabbarese, *La questione della autorità nelle nuove forme di vita consacrata*, p. 398; A. Gutierréz, *Canones circa instituta vitae consacratae et Societatis vitae apostolicae vagantes extra partem earum propriam*, "Commentarium pro Religiosis" (1983), no. 64, p. 90; A. Boni, *Gli istituti religiosi e la potestà di governo (can. 607/596)*, Roma 1989, p. 499; F. Iannone, *Potestà del Capitolo generale*, p. 223-244; A. Gutieréz, *Potestas dominativa*, [in:] *Dizionario degli istituti di perfezione diretto*, vol. 7, ed. G. Rocca, Roma 1984, p. 149-150; A. Gutierréz, *El nuevo Código de derecho canónico, y el derecho interno de los institutos de vida consagrada*, "Informationes SCRIS" (1983), no. 9, p. 104-106, 244; J. Martín García, *La potestad de los Superiores religiosos de los institutos religiosos laicales de derecho pontificio*, "Commentarium pro Religiosis" (2004), no. 85, p. 74-75; J. Martín García, *Actos administrativos singulares de los institutos religiosos laicales de derecho pontificio*, "Commentarium pro Religiosis" 84 (2003), no. 84, p. 112-134; J. Torres, *Gli IVC e le SVA. Commentario esegetico alla parte del libro II del CIC (can. 573-576)*, "Comentarium pro Religiosis" (2011), no. 92, p. 94-95.

[5] Congregatio pro Religiosis et Institutis Saecularibus – Congregatio pro Episcopis, Notae directivae *Mutuae relationes*, 14.05.1978, n. 13, *AAS* 70 (1978), p. 481.

1.2. That it is not a Species of Potestas Regiminis

Another group of Authors hold that there is a substantial difference between the power of governance granted to superiors and chapters of religious institutes of pontifical right from the common public power addressed in can. 596 § 1. Arguing from the point of view of sacramental origin of both powers, they argue that the power of governance (jurisdiction) traces its origin from the sacrament of holy orders hence linked to ministerial priesthood, while the common power of all superiors traces its origin from the sacrament of baptism hence linked to common priesthood. For them, given the substantial difference between the two powers, the power enjoyed by superiors in can. 596 § 1 of the 1983 Code is not a power of jurisdiction. If the legislator intended that the common power be an executive power of jurisdiction, he could not have used in the second paragraph the phrase *insuper*, implying that the power of governance is added on top of the common power enjoyed by superiors and chapters of all religious institutes.[6] This substantial difference is re-established by the instruction *mutuae relationes* of 1978, which ascertains the similarity between these powers but not congruency.

A critique to this position can be based on three questions. First, this position seems to link exclusively the reception of power of governance to the power of orders as if it is a definitive position, yet we know clearly that this is still a highly debatable question among both theologians and canonists, with no definitive solution. The exclusion of possibility of Superiors who are lay participating in the power of governance is not yet well defined. In fact, this exclusive claim is contradicted by the very legislator himself in the 1983 Code in can. 1421 on the question of lay judges as well as lay financial administrators who enjoy the judicial and executive power of governance respectively. Secondly, though this school of thought excludes any possibility of this power being an executive power of governance, their explanation of the powers enjoyed by the finance administrators of religious institutes as executive power of governance[7] raises many questions and employs a contradictory logic in their proposed arguments. How possible is it that a financial administrator in a religious institute would exercise the power of jurisdiction, while the superior of the same institute to whom

[6] This position is embraced by authors like, P.G. Marcuzzi, *Natura della potestà degli istituti di vita consacrata*, "Monitor Ecclesiaticus" (1985), no. 110, p. 103-115; P.G. Marcuzzi, *Considerazioni sulla natura della potestà degli istituti di vita consacrata*, "Salesianum" (1984), no. 46, p. 773-786; A. D'Auria, *I laici nel munus docendi*, [in:] *I laici nella ministerialità della Chiesa*, ed. Gruppo Italiano Docenti di Diritto Canonico, Milano 2000, p. 135-160; V. De Paolis, *La vita consacrata nella Chiesa*, ed. V. Mosca, Venezia 2010, p. 238-239.

[7] Cf. D'Auria, *I laici nel munus docendi*, p. 152-155.

the administrator is subject to lacks such power. Finally, they do not explain why the power of jurisdiction is given only to superiors of clerical institutes of pontifical rights but not to superiors of clerical institutes of diocesan right, yet all of them are clerical institutes.

1.3. Intermediate Position

A third model proposed by some recent German scholars holds that within the public ecclesiastical power, there is a distinction between the power of governance in the wide sense and the power of governance in the strict sense.[8] For them, the power of governance refers to any form of public ecclesiastical power by which one governs the religious institute as a public juridical person. This is precisely the category in which the power common to all Superiors falls. The power of governance in strict sense, however, refers to the ecclesiastical power of governance as it is presented in can. 274 § 1 and 596 § 2. Religious Superiors, therefore, do not enjoy the power of governance in the strict sense of the term, yet this is the power requested for in order to produce singular administrative acts which are subject as well to recourse. To justify this position, they argue that any public power transmitted to the Church by Christ is a power of governance. The Church, however, retains the authority to determine how this power is exercised within the Church by its various organs. The basis of distinction therefore, between the power of governance in a wide sense and that in strict sense is not sacred orders, but the decision of the supreme legislator, at least implicitly, who has the authority to make the universal laws for the whole Church.

1.4. That it is a Charismatic Power

Other scholars argue that this power is a charismatic power. This position is famous with Beyer, who seeing that religious Superiors enjoy neither dominative power nor power of jurisdiction, maintains that this power is a charismatic power of governance, because of the charismatic and pneumatological origin of

[8] This position is embraced by P. Erdo, *Questiones quaedam de provisione officiorum in Ecclesia*, "Periodica" (1988), no. 77, p. 374-375, note 30-31. In this note, he uses the term *potestas regiminis* in strict sense as referring to the *potestas regiminis* in full sense and contradicts it with the *alae formae potestatis publicae.* See also T. Rincon, *Commentary on can. 596*, [in:] *Código de derecho canónico*, eds. P. Lombardia, J.I. Arrieta, Pamplona 2007, p. 436; U. Rhode, *Attività Amministrativa senza Potestà di Governo*, "Periodica" (2017), no. 106, p. 383.

consecrated life, and the fact that consecrated life does not belong to the hierarchical structure of the Church.[9]

2. PROVISIONS OF VATICAN II AND THE DECREE "CLERICALIA INSTITUTA"

Vatican II Council called upon clerical institutes having lay Brothers among their members, to open up opportunities and space for their involvement and more active participation in the life and works of the institute, and to grant them equal rights and obligations within the institute, besides those derived from sacred orders (*PC*, 15). A similar call was made by St. John Paul II in his post-synodal exhortation *Vita consecrata* concerning mixed institutes.[10] To implement the call of Vatican II, St. Paul VI, in the motu proprio *Ecclesiae Sanctae* II, art. 27, urged the General Chapters of clerical institutes to incorporate brothers into the active life of the institute and proposed two specific areas of such involvement: First, granting them the right to vote in elections (active voice) at all levels of governance, and to be involved actively in the life of the community; Second, that they be eligible for some offices in order to allow the clerics to carry out in a better way the ministries which are proper to their status.

In the decree *Instituta clericalia* of 27th November 1969 of the Congregation for the Religious and Secular Institutes, the possible roles and duties which could be assumed by religious Brothers in clerical institutes of pontifical right were defined and promulgated. First, that they can assume only those functions and offices which are purely administrative such as finance and administration, and being directors of institutions. These functions and offices can be held by them because they are not directly associated with the priestly ministry. Second, that they could exercise active and passive voice in Chapters at any level depending on the nature of the things and prevailing conditions or at the prescription of the chapter itself. Third. That they could be allowed to elect and be elected as members of the council, at all levels of governance in these institutes. Fourth, that they were not to be granted or be elected as Superiors of or vicars at any level of governance within the organisation of the institute, be it at general, provincial, or

[9] J. Beyer, *De Institutorum vitae consecratae novo iure*, "Periodica" (1974), no. 63, p. 188; J. Beyer, *De Institutorum vitae consecratae novo iure*, "Periodica" (1975), no. 64, p. 380.

[10] Ioannes Paulus II, Adhortatio Apostolica *Vita consecrata*, 25.03.1996, n. 61, *AAS* 88 (1996), p. 401.

local level.[11] However, these provisions did not derogate any privilege granted to any institute regarding these matters.

By virtue of this decree, the lay brothers were excluded from functions which entail the exercise of orders, because they are not in sacred orders. They were also excluded from being superiors or vicars because these offices include the exercise of power of orders as well as the power of governance. They were not however, excluded from the exercise of power of governance in chapters. They were permitted to be part of chapters with active and passive voice. They were also allowed to be members of the council, and this way, in one way or another they participated and cooperated in the exercise of the power of governance proper to the chapter in a collegial form. I agree with Gutierrez when he says that gathered together as a *collegium*, all chapter members participate in the power of governance exercised by the chapter over the institute.[12]

In 1974, after their convention of 16-20th June, the Conference of Major Superiors of Men in USA presented an official request to the Holy See to revoke the fourth article of the decree *Instituta clericali*, so that lay Brothers could be elected or be appointed to the office of Superiors and vicars in these institutes.[13] The response from the Congregation for Religious and Secular Institutes was negative. In the same year, the Franciscan Capuchins in the USA presented a petition to the Congregation asking for a dispensation from the same article 4 of the same decree, so that a certain religious brother elected would assume the office of the vicar of the convent of St. Bonaventure. In this case, a dispensation was granted, and a brother was allowed to occupy the post. In the grant, the Congregation said:

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[11] Cf. Sacra Congregatio pro Religiosis et Institutis Saecularibus, Decretum 27.11.1969, *AAS* 61 (1961), p. 739-740.

[12] A. Gutiérrez, *Participatio laicorum in regimine religionis clericalis*, "Commentarium pro Religiosis" (1970), no. 51, p. 108. He argues as follows: "Collegium est […] novum subiectum attributionis, distinctum a singulis sodalibus et ab omnium summa mere collectiva; unde principia iuris romani communiter recepta: *si quid universitati debetur, singulis non debetur: nec quod debet universitas singuli debent* (Ulp. 1, 7, par. 2, D. quod cuiucumque, 3, 4). Et similiter, quod collegio competit, singulis non competit […]. Non possumus arguere ex incapacitate laicorum obtinendi iurisdictionem uti singuli, ad eorum incapacitatem eam obtinendi in collegio: quia iurisdictio collegii non est summa potestatis quam singuli habeant." See also P. Palazzini, *La vocazione religiosa del fratello negli istituti clericali*, "Vita Consacrata" (1992), no. 28, p. 842-853.

[13] The position paper and the request for the derogation of the art. 4 of the decree *Instituta clericalia*, is contained in Conference of Major Superior of Men in USA, *Position paper 16-20 June 1974*, "Origins" (1975), no. 5, p. 693-700. Part of the report on this request is found, [in:] *Canon Law Digest*, vol. 7, 342.

> The Sacred Congregation for Religious and secular institutes, having studied the reasons which all together singular in this case, and having heard the voice of the Minister General of the Order, now grants the dispensation asked so that brother N… can fulfil the office of the local vicar Superior in the community of St. Bonaventure in Detroit, excluding whatever power connected with the clerical state and observing whatever else in the law has to be observed.[14]

From this, we get an indication that the Holy See in certain circumstances can partially dispense from the provisions of can. 588 § 2 and 274 § 1 of the 1983 Code. With that dispensation a religious brother becomes a superior in a clerical religious institute. However, he may not place those acts which demand the exercise of the power of orders, but he can place only those administrative acts which are proper to the public power enjoyed by all religious superiors in can. 596 § 1.

Despite the various requests from various corners and institutes for the derogation of the provision of art. 4 of the decree *Instituta clericalia*, the Holy See has had a firm stand on this issue and has granted dispensation from this provision in exceedingly rare cases. However, the praxis of the Holy See demonstrated that this dispensation was granted only for local Superiors and their Vicars. In this case, if it happens, they assume the public power described in can. 596 § 1 and performs functions attached to that office which can be fulfilled by virtue of that power. They do not assume the power of governance described in can. 596 § 2, nor the functions proper to the power of orders.[15]

3. INTERVENTION OF POPE FRANCIS

Pope Francis has granted special faculty to the Dicastery for the Institutes of Consecrated Life and Societies of Apostolic Life to give place to religious brothers in clerical institutes of pontifical right to assume the offices of the superiors at all levels. According to the rescript of 18th May 2022 this Dicastery has been granted the faculty to authorize the nomination of professed religious brothers to be nominated by the supreme moderator as local superiors after obtaining the consent of his council, and for the office of major superior after obtaining the written permission from the same dicastery. For the office of supreme moderator, and in those institutes where major superiors are designated through

[14] Congregation for Religious and Secular Institutes, Rescript *Brother as Local Vicar Superior* (private), 12.11.1974, Prot. N. 6088/74, [in:] *Canon Law Digest*, vol. 7, 343.

[15] Cf. De Paolis, *La vita consacrata*, p. 242; D'Auria, *I laici nel munus regendi*, p. 151.

election, the dicastery can permit religious brothers to be elected as supreme moderators or major superiors of these institutes according to the provisions of the constitutions of the Institute after obtaining a written permission from this Dicastery, together with its confirmation.[16]

After the granting of this faculty, various questions arise. First, what is the nature of the power enjoyed by the religious brother raised to these offices of superior? Do they enjoy only the public ecclesiastical power common to all superiors, described in can. 596 § 1, or do they exercise the power of jurisdiction described in can. 596 § 2 by virtue of being superiors of clerical institutes of pontifical right? If by any case, they enjoy the ordinary executive power entrusted to superiors of clerical institutes of pontifical right do they become ordinaries in the sense of can. 134 § 1? Can they fulfil the functions enlisted in cann. 968 § 2 and 969 § 2? These questions arising from the grant of the Holy Father to the clerical religious institutes of pontifical right can help us to have a better grasp of the nature of the power stated in can. 591 § 1.

By nature, religious institutes are neither clerical nor lay, therefore, all superiors enjoy the common public power described in can. 596 § 1 of the 1983 Code. The *potestas regiminis* (power of governance) granted to some institutes by the universal legislator is an added power to the common power possessed by all Superiors. On this basis, no religious institute or superior can claim the right over this power unless it is granted to them by the universal legislator himself. Therefore, a religious Brother granted the office of a superior at whichever level within the clerical institute of pontifical right enjoys the common power described in can. 596 § 1 by law. He does not to enjoy the *potestas regiminis* (power of governance) in can. 596 § 2, unless in the decree of concession the Holy See expressly confers to him this *potestas regiminis.* It all depends on the will of the universal legislator. The mind of the legislator has been expressed already in the various canons of the Code[17] and in some specific cases, he may express a contrary will in the decree of approval or in the grant of a privilege.

Even though the praxis of the Holy See before the grant of the faculty by Pope Francis shows that the Holy See usually granted a dispensation to brothers to occupy the post of local superiors and vicar of local Superiors, it did not imply that the Holy See could not dispense the brothers to occupy the post of a provincial Superior or his vicar, or the post of vicar general of the whole institute when there was need in extreme cases. The Holy See can do so if there is a pressing grave need for it. In fact, with the rescript of Pope Francis, these brothers can

[16] Francis, Rescript *Il Santo Padre*, derogating canon 588 § 2 CIC, 18.05.2022, "Communicationes" (2022), no. 54, p. 194-195.

[17] CIC/83, cann. 588 § 2; 129 § 1; 274.

be appointed or be elected to the office of major superiors within the institute, because to be a major superior it is sufficient that one enjoys the common public power in can. 596 § 1, but he cannot be an Ordinary. However, for technical and juridical reasons, he may not exercise all the functions proper to the office he acquires. As some authors have argued, lay religious brothers in such positions will readily perform all the functions that can be carried out by virtue of public power in can. 596 § 1, but they cannot perform those functions appertaining to *potestas regiminis* and those proper to the power of sacred orders.[18]

Following the praxis of the Holy See in cases of mixed institutes and other clerical institutes, if a brother is dispensed and allowed to take over the office of the major superior, all the functions proper to *potestas regiminis* and those associated to the power of orders will not be fulfilled by him. The Holy See itself, as the competent ecclesiastical authority who approved the constitutions of the institute, may demand that there be chosen a cleric vicar[19] who accomplishes all the functions attached to that office which are performed by virtue of *potestas ordines* (power of orders) and *potestas regiminis* (power of governance). This priest can be any member of the Institute who is not the vicar of the superior by office. In other cases, however, The Holy See may opt to grant to superior who is a religious brother, some executive power of governance. This can only be by delegation or by means of privilege. Given that the public power of can. 596 § 1 is sufficient for one to place various singular acts of administrative nature, then a religious brother who becomes a superior in clerical institute of pontifical right, will be able to place various singular and general acts of administration attached to the very office he is occupying by the concession of the very constitutions of the institute.

4. RELIGIOUS BROTHER-SUPERIOR PRODUCING SINGULAR ADMINISTRATIVE ACTS

According to can. 35 of the 1983 Code, singular administrative acts can be produced only by executive power of governance. The requirement of executive power is not just a requisite for producing singular administrative acts, but also an indispensable condition without which no singular administrative act can be produced, because they are not emanated in the name of the Church by executive

[18] D'Auria, *I laici nel munus regendi*, p. 151 says: "Qualora un laico sia chiamato ad una funzione di governo in un istituto di vita consacrata, mai ed in nessun caso questi potrà avvalersi di quella potestà di giurisdizione riservata comunque a soggetti in *sacris*."

[19] Cf. Sabbarese, *La questione della autorità nelle nuove forme di vita consacrata*, p. 395.

power, neither are they acts of legislative nature or judicial nature, therefore, are not administrative acts.[20]

According to can. 596 § 2 of the new Code, superiors and chapters of clerical institutes of pontifical right enjoy ecclesiastical power of governance. This power is divided into legislative, executive, and judicial power (can. 135 § 1). Superiors and chapters may enjoy all the three powers of the power of governance. However, others enjoy only legislative power or judicial power, but generally they all enjoy the executive power of governance. However, generally, the general chapters enjoy the legislative power, but may as well have also judicial power. Superiors may enjoy all the three powers if the proper law says so. However, the local superiors enjoy only the executive power.[21] Therefore, superiors of these clerical religious institutes of pontifical right can produce singular administrative acts. They can grant for instance, a dispensation from law or even a precept. These dispensations and precepts granted by the local superior of clerical religious institute of pontifical right automatically falls within the confines of singular administrative acts.

Superiors of all other institutes who enjoy only the public ecclesiastical power in can. 596 § 1, including lay brothers made superiors in clerical religious institutes of pontifical right, do not enjoy the *potestas regiminis* as such, hence they do not enjoy the executive power. We have clearly underlined that for a religious superior to produce any singular administrative act, he needs to enjoy the executive power of governance. These superiors enjoy only the public ecclesiastical power in can. 596 § 1. Since this is not an executive power of governance, then a question arises as to whether the acts of administration they produce qualify to be singular administrative acts, or they are just singular acts of prudent administration. If the principles laid down by can. 35 of the new Code are something to go by, then singular acts emanated by these superiors may not qualify as singular administrative acts.

This invites more questions concerning the nature of singular acts of administrative nature produced by virtue of public power in can. 596 § 1. Is there any way in which these acts can be qualified as singular administrative acts? Secondly, if they are not singular administrative acts yet they produce the same juridical effects upon their recipients similar to those acts produced by virtue of

[20] J. Miras, *Singular administrative acts (cann. 35-58): Commentary on can. 35*, [in:] *Exegetical commentary on the Code of canon law*, vol. 1, eds. A. Marzoa, J. Miras, R. Rodríguez-Ocaña, Chicago 2004, p. 473; U. Rhode, *Attività amministrativa senza potestà di governo*, p. 361-365; L. Chiappetta, *Il Codice di diritto canonico. Commento giuridico-pastorale*, vol. 1, Napoli 1988, p. 790.

[21] V. De Paolis, *La vita consacrata,* p. 247.

the executive power, which procedure should the competent superior employ in placing such acts? The 1983 Code provides no procedural laws for emanating singular acts of governance of administrative nature produced by virtue of this power. This is a legislative *lacuna* that ought to be filled.

Acts emanated by public power in can. 596 § 1 may also injure the rights of the persons involved or interests and rights of third parties. How can one place an administrative recourse against these acts, when the law places no procedural laws to govern the recourse made against acts produced by virtue of this power whenever they injure the rights or interests of the involved persons? Is there any option or procedure for placing the recourse against them, given that they are not singular administrative acts as per the definition of cann. 35 and 1732 of the 1983 Code? The new Code actually leaves behind a number of *lacunae* in relation to the exercise of this power. *Lacunae* which may as well be costly to the pursuit of other fundamental rights of the religious who may be affected by these singular acts produced by their superiors.

Since the Code does not provide the norms for the production of these singular acts of administrative nature produced by virtue of public ecclesiastical power in can. 596 § 1, the doctrine has tried to supply for the *lacuna* in various ways. However, the doctrine, approaching the matter from different points of view, provides us with a variety of options, some of which are not compatible.

Some scholars simplify this matter by claiming that the power of superiors in can. 596, is executive power of governance, hence no need to have endless debates on this matter.[22] For them, all singular acts of administrative nature produced by these superiors are singular administrative acts, and the procedural laws laid down by the new Code for producing the singular administrative acts (cann. 35-93) apply equally to them.

I am of the opinion that an express affirmation that this public power of superiors (can. 596 § 1) is an executive power of governance is not in line with the mind of the Fathers of the Revision Commissions for the 1983 Code and 1990 CCEO. For the revision commissions of both codes, the public ecclesiastical power enjoyed by all superiors is not an executive power of governance, because it does not make part of power of governance.[23] Even though there exists some similarity in functions, the two remain distinct powers. If there is a reason as to why these provisions are to be applied to them, it will be strictly on the ground of similarity or juridical analogy in the exercise of both powers because the two

[22] F. Iannone, *Potestà del capitolo generale,* "Commentarium pro Religiosis" (1987), no. 68, p. 229.

[23] Cf. "Communicationes" (1987), no. 17, p. 47; (1987), no.19, pp. 202-206, 216-2017, 218-220; (1990), no. 23, p. 273, 304; (1991), no. 23, p. 28; "Nuntia" (1983), no. 16, p. 64, can. 76.

are not identical but similar in exercise (*Mutuae relationes*, n. 13). In fact, the critique given by Rhode to such a position is just,[24] because such a position may seem to simplify the matter and provide an easy supply for the *lacuna*, however, it may easily cover up the possibility of appreciating the doctrinal problems left behind by this law and its lack of clarity.

Another group of scholars deny the possibility that this power (in can. 596 § 1) could be an executive power of governance. A section of them argues that, since the possession of executive power is a fundamental requisite for the production of singular administrative acts, superiors who act by virtue of this power are not capable of producing singular administrative acts, unless they receive an executive power by delegation, they cannot produce any singular administrative acts.[25] Consequently, there is no need of applying any procedural norms prescribed by the Code for the production of singular administrative acts to these mere acts of administration produced without the use of *potestas regiminis*.

The question posed to them is, assuming that it remains the way they claim, it implies that these superiors cannot produce singular administrative acts, yet in praxis we see them producing singular acts of administrative nature such as dispensations, precepts, decrees, each of which has the same juridical effect as that produced by the authorities enjoying the executive ecclesiastical power of governance. With what power do they produce these acts and with which procedure do they follow to produce them? This group does not respond to this question neither does it attempt to provide any solution to the *lacuna*. In fact, as Egaña puts it, this position gives a very superficial approach to the question at hand.[26] It does not give a comprehensive consideration into the contrast that exists between the praxis and the theoretical suggestions of the doctrine.

The second section of this group instead, provide a possible means of filling this *lacuna*. For them, even though religious superiors enjoying only the public

[24] U. Rhode, *Attività amministrativa senza potestà di governo*, "Periodica" (2017), no. 106, p. 385.

[25] This position is held by a number of scholars such as, T. Ayman, *Der verwaltungsakt für Einzelfälle,* St. Ottilien, 1997, pp. 25; 80-81; 202-203; H. Socha, "Commentary on can. 35," in *Münsterische komentar,* n. 10 December 2013; U. Rhode, *Attività amministrativa senza potestà di governo*, p. 359-403; J. Miras, *Commentary on can. 35*, [in:] *Exegetical commentary on the Code of canon law*, vol. 1, A. Marzoa, J. Miras, R. Rodríguez-Ocaña (eds.) Chicago 2004, p. 473, art. 3. He argues that "Juridical acts carried out by virtue of public power that is not executive are also not administrative acts […]. In the life of the Church there are also acts of governance that do not properly originate in ecclesiastical power; this occurs in the case of the institutes of consecrated life, whose Superiors do not possess such power (cf. c. 596 § 1)."

[26] See F.J. Egaña, *I canoni 1732 ss. relativi al ricorso contro i decreti aministrativi, si applicano anche ai decreti dei Superiori religiosi? E se si, in che misura?*, "Vita Consacrata" (1992), no. 25, p. 381-382.

ecclesiastical power in can. 596 § 1 do not enjoy the executive power of governance, these superiors by virtue of the public ecclesiastical power which they enjoy, exercise governance over the religious communities under their authority. This public ecclesiastical power is equated to the executive power of governance.[27] Therefore, by virtue of this power, they emanate singular administrative acts in the true sense of the word. In emanating these acts, they follow the procedural norms established by the Code in cann. 35-93 for producing singular administrative acts, as well as the norms established by the Code for seeking administrative recourse against these singular acts of administrative nature produced by these superiors.

With such an argument, it is hard to understand why such scholars do not find it easy to accept that the power of superiors described in can. 596 § 1 is a form of executive power, when actually in applying these norms to fill the *lacuna* they directly imply a quasi-identity of these two powers. It raises the question of the defining limits and boarders between the executive power of governance and this public power enjoyed by all superiors. According to the presentation of these scholars, it seems that at a certain point these two powers merge and their differences disappear, such that the difference remains only nominal and at the level of academic debate.

Other scholars provide for this *lacuna* by arguing that besides the norms set down in the constitutions of the individual institutes on emanation of these singular acts of governance, the canons established by the code in cann. 35-93 on the emanation of the singular administrative acts may be applied by analogy when these superiors are emanating these singular acts of administrative nature. This occurs only within limits permitted by the Code itself.[28] Others argue that in the Code itself, besides the procedural norms for the emanation of the singular administrative acts, there are some other special procedural norms provided for emanating some specific acts of governance. These acts are produced irrespective of the type of power possessed by the author of the act. This is the case for instance in cases of the provision for the ecclesiastical office as well as dismissal of the religious from the institute. Now, in cases where these singular acts of administrative nature are truly lacking and the proper law has not provided for this *lacuna*, the norms established in the Code in cann. 35-93 for emanating singular

[27] See V. De Paolis, *I Ricorsi Amministrativi presso gli Istituti Religiosi*, "Informationes SCRIS" (1992), no. 18, p. 225; Egaña, *I canoni 1732 ss. relativi al ricorso*, p. 382.

[28] Cf. Miras, *Commentary on can. 35*, p. 473, art. 3: "In our opinion, besides the specific norms established by the constitutions the norms set forth by the CIC regarding singular administrative acts can also be applied, in fact, to those acts – *congrua congruis referendo* – as long as one applies the norms on the executive power to the power of these Superiors, even though it is not executive power (can. 596 § 3)."

administrative acts should be applied by analogy only to cater for the *lacuna* not filled by the proper law.[29]

The jurisprudence of the Apostolic Signatura and the doctrine developed around this jurisprudence of the Apostolic Signatura have as well supplied for this *lacuna* in an exceptional way. Following the uncertainties surrounding this lack of clarity and the *lacuna* left by the Code on the nature and procedural norms to be applied in the production of these singular acts of governance, the jurisprudence has elaborated some acts placed by the religious superiors by virtue of this public power as singular administrative acts. That implies that the procedural norms established by the Code for the production of singular administrative acts must be followed in producing these acts. The basic argument is that the common norms for producing the singular administrative acts are contained in cann. 35-93 of the 1983 Code. However, other acts spread throughout the Code are singular administrative acts and this procedure must be followed in producing them. Among them we have admission to novitiate (cann. 641-645); transfer of a religious to another religious institute (cann. 654-685); incorporation into a religious institute (686-693).[30] In this category of incorporation, we have exclaustration and dismissals, admissions to and negation of admission to renewal or taking perpetual profession, indult of departure; then we have the granting or denial of active or passive voice. Amidst all these, also falls the question of dispensation which is already provided for by the Code. That is, as a singular administrative act, the power to grant a dispensation is received through the concession by law or by delegation.

CONCLUSION

The exact nature of the public ecclesiastical power common to all superiors and the nature of singular acts of administration produced by superiors by virtue of this power still remain a question of debate in doctrine. From this presentation, it is clear that the nature of public power enjoyed by religious superiors over their members defined in can. 596 § 1, is not yet well defined. The Doctrine has made various attempts to identify the real nature of this power, and to comprehend the distinction between this power and the ecclesiastical power

[29] Cf. Rhode, *Attività amministrativa senza potestà di governo*, p. 385-391.

[30] For more information on this see Z. Grocholewski, *De ordinatione ac ponere munere tribunalium in Ecclesia ratione quoque habita iustitiae administrativa*, "Ephemerides Iuris Canonicum" (1992), no. 18, p. 67; P.J. Torres, *La dispensa dei voti*, "Informationes SCRIS" (1992), no. 18, p. 229-248; P. Montini, *De recursibus hierarchicis*, Roma 2018, p. 10-11.

of jurisdiction, but a conclusive answer has not been obtained. The distinction emphasized by can. 596 § 1 and § 2 between the public ecclesiastical power common to all superiors and the ecclesiastical power of governance enjoyed by religious superiors of clerical institutes of pontifical right leaves everyone wondering about the exact nature of this power, given that it is also part of the public ecclesiastical power. The key to the solution to this doctrinal debate lies with the Holy See itself. Only the Holy See can bring this debate to an end by providing a clear definition and nature of this power, otherwise, the doctrinal debates will remain active and divided on this, matter. As to whether it is part of the *potestas regiminis* or whether in the church there are two different kinds of public ecclesiastical powers for governing the people of God. But so far, it is not part of *potestas regiminis*.

The intervention of Pope Francis in the question of lay brothers becoming superiors in clerical institutes of Pontifical right has been a response to a reality that was long overdue. The derogation of the provisions of art. 4 of *Instituta Clericalia* and can. 588 § 2 of the 1983 Code has not given any clarity on the nature of this power. Neither has it clarified whether these brothers in these positions enjoy the ecclesiastical power of jurisdiction or not. The debate remains active.

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BRAT ZAKONNY JAKO PRZEŁOŻONY W KLERYCKIM INSTYTUCIE ZAKONNYM NA PRAWIE PAPIESKIM

Streszczenie

Analizując historyczne debaty dotyczące charakteru władzy sprawowanej przez wszystkich przełożonych w instytutach zakonnych, opisanej w kan. 596 § 1, niniejszy artykuł, stanowiący kontynuację pierwszego, bada współczesne debaty po Kodeksie Prawa Kanonicznego z 1983 roku na temat natury tej władzy oraz kwestii świeckich przełożonych zakonnych w kleryckich instytutach na prawie papieskim i sposobu, w jaki sprawują oni swoje kompetencje. Artykuł rozpoczyna się analizą rozwoju życia zakonnego i zarządzania kleryckimi instytutami zakonnymi na prawie papieskim po Soborze Watykańskim II, gdzie członkami są również zakonnicy. Przedstawia nowe zmiany wprowadzone przez dekret *Instituta clericalia* oraz znaczące reformy wprowadzone przez papieża Franciszka, polegające na derogacji przepisów kan. 588 § 2 Kodeksu z 1983 roku, co otworzyło możliwość wybierania i mianowania braci zakonnych na przełożonych we wszystkich szczeblach zarządzania tymi instytutami. Artykuł kończy się krytyczną analizą charakteru władzy przysługującej tym braciom zakonnym, którzy zostali wyniesieni do urzędu przełożonych w tych instytutach, oraz pojawiających się kwestii natury prawnej dotyczących ich aktów administracyjnych i zakresu władzy, w ramach której podejmują oni decyzje o charakterze administracyjnym.

Słowa kluczowe: *Munus regendi*; *Potestas regiminis*; akty administracyjne; bracia zakonni; kleryckie instytuty zakonne na prawie papieskim; Stolica Apostolska; luka prawna