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JOHN OKELLO OGUTU
Tangaza University College
jokello184@gmail.com
ORCID: https://orcid.org/0009-0007-7110-9950

THE UNRESOLVED DOCTRINAL DEBATE ON THE NATURE OF POWER ENJOYED BY ALL RELIGIOUS SUPERIORS IN CAN. 596 § 1 CIC 83

Abstract. In the Church there is only one power of governance. However, all religious superiors exercise some kind of authority over their own subjects, a power that seem to be distinct from the ecclesiastical power of governance indicated in can. 596 § 1 CIC 83 but one that is not named. Questions arise of whether or not this power is an extension of the ecclesiastical power of governance. While the 1917 Code called this power "dominative power", the 1983 Code does not name it. Over a long period of time there have been several doctrinal debates concerning the true nature of power enjoyed by the superiors in the institute. This article is a historical exposition of the doctrinal debates surrounding this great quest of scholars in their effort to understand the true nature of this power until the period of the revision of the 1983 Code and the CCEO.

Keywords: public ecclesiastical power; *potestas regiminis*; dominative power; power of jurisdiction

INTRODUCTION

Power exercised in every organized society must correspond to the nature of that society. In the Church, religious institutes are public juridical persons, therefore the authority exercised over their members by their superiors is public ecclesiastical power. This power was called "dominative power" by the 1917 Code (can. 501 § 1) and understood as private power. The 1983 Code, instead, does not name this power, but it is understood to be public ecclesiastical power.

This power is distinguished from the ecclesiastical power of governance by both the 1917 Code in can. 501 § 1 and the 1983 Code in can. 596 § 2. On

top of this power, the legislator grants to clerical religious institutes of pontifical right the ecclesiastical power of governance for both internal and external forum. Since this power is distinguished by the ecclesiastical power of governance enjoyed by some superiors, we are curious to know the true nature of this power. In this article, therefore, we shall explore the scholarly legal debates that have been staged at various moments in the legal history as scholars continue their efforts to understand the nature of this unnamed power enjoyed by superiors, and to help us better understand the nature of the power enjoyed by a religious brother made a superior in a clerical religious institute of pontifical right by virtue of the faculty granted by Pope Francis to the Dicastery for Institutes of Consecrated Life and Societies of Apostolic Life on May 18, 2022, that will be discussed in another article of mine that will follow.

1. THE ESSENCE OF POWERS OF SUPERIORS

The nature of ecclesiastical public power enjoyed by all superiors (can. 596 § 1) is still not clear. The only indication we have in the 1983 Code is that this power is distinct from the power of governance. However, it is not clear whether this power is an extension of power of governance, or it is a different kind of power in the Church, even though both are public ecclesiastical powers. History has shown that at certain moments some lay superiors exercised a degree of power of jurisdiction over their institutes and subjects.

The very origin of the debate concerning the nature of power enjoyed by all superiors stems from three historical factors. The first is the clericalization of monasteries which culminated in the eleventh century. Many monasteries that were initially lay had their members ordained, but from the sixth century the Holy See began granting the privilege of exemption to individual monasteries and later on to entire institutes, of which some institutes were placed under the jurisdiction of the Holy See while others were granted the power of jurisdiction by the Holy See itself. In the eleventh century, the Holy See stopped granting the power of jurisdiction to lay abbots and demanded that all abbots of exempt institutes be ordained bishops before they are granted the power of jurisdiction over their subjects (cf. X. 1, 14, 15).

The second factor is the gradual development in the internal legislations of monasteries, orders and congregations concerning the exercise of power and the authority of superiors over their subjects. From the beginning of monastic life, the power enjoyed by the abbots over their subjects was referred to simply

as power (*potestas* or *auctoritas*), underlining the fact that the abbot enjoys a general power over the monks, which he exercised in the name of God. In the Rule to the Virgins (*Regula ad virgines*) by Caesarius Arles, the power exercised by an abbess was for ensuring the observance of the rule by the nuns, a function concretized in correcting, consoling, and caring for the sick.[1] In his Rule of the Master (*Regula magistri*) and Saint Benedict's Rule for Monks (*Regula monachorum*), to this power was also attached the teaching function, which slowly encompassed also the role of spiritual direction.[2] In the seventh century, Waldensis and Donatus in their Rule to the Monastery (*Regula cuiusdam Patris ad Virgines*), combining elements of the Benedictine Rule and those of Columbani, attached to the power of the abbess functions similar to those of their male counterparts: teaching, correcting nuns and being their spiritual guide. In this way the abbess had to hear the confessions of the nuns three times a day and even give penances.[3] This role was delegable to a prioress (*priora*) or any other senior nun. However, it is not clear whether this was actually a sacramental confession or another kind confession not known to us today.

The third factor, which seems to be even more determinant and pronounced in this debate, is the emergence of mixed institutes from the fourteenth century, and the powers exercised by abbesses over the clerics and lay brothers and sisters. In such an institute the abbess exercised authority over male and female monasteries which were comprised of priests, deacons, and lay brothers. She also exercised some jurisdiction over the parishes attached to these monasteries and those parishes which depended for the pastoral care on the monasteries. This saw abbesses exercise jurisdiction even over secular clerics.

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[1] See S. CAESARII ARELATENSIS EPISCOPOS, *Regula ad Virgines*, [in:] L. HOLSTEN, M. BROCKIE, *Codex Regularum Monasticarum et Canonicarum Quas SS. Patres Monachis, Canonicis Et Virginibus, Sanctimonialibus Servandas Praescipserunt*, vol. 1, sumptibus Ignatii Adami et Francisci Antonii bibliopolarum, Augustae Vindelicorum 1759, nos. 27, 42, p. 357, 360.

[2] See *Regula Magistri*, [in:] L. HOLSTEN, M. BROCKIE, *Codex Regularum Monasticarum et Canonicarum […]*, vol. 1, chap. 2, p. 233-234. See also S. BENEDICTUS, *Regula Monachorum*, [in:] L. HOLSTEN, M. BROCKIE, *Codex Regularum Monasticarum et Canonicarum […]*, vol. 1, chap. 2, p. 116-117.

[3] Cf. *Regula cuiusdam Patris ad Virgines*, chaps. 1, 6-7, [in:] L. HOLSTEN, M. BROCKIE, *Codex Regularum Monasticarum et Canonicarum […]*, vol. 1, p. 394, 397-398; see also G. LESAGE, G. ROCCA, *Superiori*, [in:] *Dizionario degli istituti di perfezione*, ed. Giancarlo Rocca, vol. 7, Roma 1984, p. 719-720; A. DE VOGÜE, "Superiori," [in:] *Dizionario degli istituti di perfezione*, ed. Giancarlo Rocca, vol. 7, Roma 1984, p. 734; M. M. SCHAUMBER, *The Evolution of the Power of Jurisdiction of the Lay Religious Superior in the Ecclesiastical Documents of the Twentieth Century*, doctoral thesis, Roma 2003, 34.

This authority exercised by abbesses has been recognized by the scholars as true power of jurisdiction. Three communities can be traced in which this kind of power was exercised by abbesses over monks and nuns. One is the order of St Bridgit in the fourteenth century, in which the monastery of nuns and that of monks (i.e. priests, deacons and brothers) were under the governance of the abbess, including all the communities linked to these two monasteries.[4] The rule of this order permitted solely the abbess to dispense monks from the provisions of fasting prescribed both in the universal law and in the rule and statutes of the order.

The Abbess of Fontevrault, in France, also exercised jurisdiction over both monks and nuns of her double monastery as studies have demonstrated.[5] In Italy, there was the case of the Abbess of Conversano at Puglia, who exercised a quasi-episcopal authority over the clergy until 1810, when Pius VII abolished the privileges enjoyed by this community. It is noted that the Abbess of Conversano conferred even minor orders on those under her authority through the vicar and exercised full authority over the monks and over the secular clergy who were within the territory under her jurisdiction.[6] The same was seen in Spain with the Abbess of Huelgas. She is said to have exercised civil jurisdiction over sixty-four villages with a quasi-episcopal authority over the churches and towns within her jurisdiction. She conferred benefices, authorized preaching, judged matrimonial cases as well as penal disputes and granted faculties to confessors. This jurisdiction is said to have been obtained from the customs of the order. This jurisdiction had been granted and confirmed by the Holy See, especially Pope Urbanus VII who confirmed it, but it was later suspended by Pope Pius IX in 1873.[7]

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[4] See M. DE FÜRSTENBERG, *Exempla iurisdictionis mulierum in Germania septentrione orientali*, "Periodica" (1984), no. 73, p. 89-111; *Regula Sancti Salvatoris sive Constitutiones S. Brigittae Viduae*, chap. 8, *De ieiunis*, [in:] L. HOLSTEN, M. BROCKIE, *Codex Regularum Monasticum et Canonicarum […]*, vol. 3, p. 109.

[5] See S. TUNC, *Les Femmes au Pouvoir. Deux Abbesses de Fontevraud aux XII et XVII siècles*, Paris, 1993; S. TUNC, *Láutorité dúne abbesse de Fontevraud au 17e siècle: Gabrielle de Rochechouart de Mortemart (1607-1704)*, Louvain 1992; M. DE FÜRSTENBERG, *Exempla iurisdictionis mulierum in Germania septentrione orientali*, p. 89-111.

[6] Cf. M. T. GUERRA MEDICI, *Origini storiche e fondamenti giuridici della giurisdizione della badessa di Conversano*, "Commentarium pro Religiosis" (1994), no. 75, p. 309-358; L. SABBARESE, *La Questione della Autorità nelle nuove orme di Vita Consacrata*, "Periodica" (2011), no. 97, p. 389.

[7] Cf. J. ESCRIVÁ DE BALAGUER, *La Abadesa de las Huelgas. Estudio Teológico-Jurídico*, Madrid 1944; CONVEGNO DI STUDIO SULLE ABBAZIE NULIUS (29-31 OTTOBRE 1982), *Le Abbazie Nullius: Giurisdizione Spirituale e Feudale nelle Comunità Femminili fino a Pio IX*, ed. Francesca Marangeli, Schena 1984.

These three factors together laid the groundwork for the debate on the nature of the power enjoyed by the superiors, and the possibility of the lay superiors to enjoy the ecclesiastical power of jurisdiction over their subjects, a debate that is active up to date. In fact, the exercise of jurisdiction in the Church was not limited only to abbesses. On various occasions, the power of jurisdiction was exercised by various lay abbots. They exercised jurisdiction even over the clerics and bishops who belonged to their monasteries. The best example of this can be drawn from the tradition of Hibernia where an abbot had jurisdiction even over the bishops in their monasteries.[8]

2. PRE- AND POST-TRIDENTINE DOCTRINAL DEBATE

Before and after the Council of Trent the doctrine debated on whether the power enjoyed by religious superiors was the power of jurisdiction or not. There has been a thorough scholars inquiry into the source and origin of these two powers (power of jurisdiction and power of superiors). The origin of this debate goes back to some affirmations of the Roman pontiffs in the thirteenth century. In 1210, Pope Innocent III, in a decree addressed to some nuns who exercised the function of preaching, blessing their subjects and listening to confessions (ministry of the keys), described this reality as absurd. He then emanated a decree by which he barred abbesses from preaching in public, blessing and listening to confessions (cf. X. 5, 33, 10). In 1222, on the other hand, Pope Honorius III, in his decree to the Abbess of Bobbio described the power she enjoyed over the clergy as the power of jurisdiction even though it is not clear to what kind of jurisdiction he referred to. The Holy Father went ahead and enforced the commands of the abbess with ecclesiastical censures for those who disobeyed them (cf. X. 1, 23, 10). From these two affirmations sprang the debate.

An analysis of the pre-Tridentine and post-Tridentine doctrinal debates indicate that scholars were divided along two lines. The first group consisted of scholars like Hostiensis, Vazquez, Geminian, Navarrus (1493–1586), Sandews (1444–1503), Laymann (1574–1635), and Petra (1662–1747). They understood the power of jurisdiction in a wider sense. For them, all forms of power for governing groups within the Church is the power of jurisdiction.

[8] See COETUS STUDIORUM RECOGNOSCENDIS NORMIS GENERALIBUS CODICIS, *Sessio IV (diebus 19-23 februarii 1968 habita), question utrum laicis conferri possit potestas regiminis*, "Communicationes" (1987), no. 19, p. 88-90.

They argued that power enjoyed by church superiors, including that of female superiors is the power of jurisdiction, because they it to receive the vows of their members and for administration. Religious superiors, therefore, can exercise in one way or another the power of jurisdiction or governance over their subjects.[9] In fact, Buoix argued openly that neither nature nor the scripture, nor natural law imposes any prohibition against women exercising the power of governance,[10] for this reason the prohibitions laid down to bar women from exercising the power of jurisdiction are not prohibitions grounded in natural law; rather, they are derived from ecclesiastical law.

On the other hand, scholars such as Suarez (1546–1617), Pirhing (1616–1679), Reiffenstuel (+1763) and Ferraris proposed a strict meaning of jurisdiction and argued that lay superiors including abbesses do not enjoy the power of jurisdiction, but they can execute the jurisdictional acts of the Roman pontiff or bishops. In fact, while rejecting the wide interpretation of jurisdiction, Suarez, for the first time, named the power enjoyed by religious superiors as "dominative power" to distinguish it from the power of jurisdiction in the strict sense. For him, this power does not originate from the vow of obedience placed on the religious, but rather from a self-donation of the religious which he makes at the moment of profession assuming a form of a quasi-contract (agreement). With this power, the superior commands the religious and controls their activities in a way that is in accordance with the rule. For him, dominative power arises from the free will of the subjects.[11]

Following Suarez, all scholars accepted the distinction between these two powers, but in their commentaries, they did not agree on the origin and scope of exercise of this dominative power. Some others argued that this power originates purely from the vow of obedience which creates a form of quasi-contract; others held that this power originates from the social structure of the institute that pre-dates the profession of the vows. So, it originates from the positive act of the authority who constitutes the institute as a society.

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[9] See F. SUAREZ, *Operis de religione, pars secunda quae est de statu religionis*, tractatus 8, book 1, chap. 2, no. 2; tractatus 7, book 1, chap. 13, no. 3; tractatus 7, book 1, chap. 13, no. 3; V. PETRA, *Commentaria ad Constitutiones Apostolicas*, vol. 3, Venetiis: Tipographia Balleoniana, 1741, p. 199, n. 9; F. SCHMALZGRUEBER, *Ius eccclesiasticum universum brevi methodo ad discentium utilitatem explicatum, seu, lucubrationes canonicae in quinque libros decretalium Gregorii IX. Pontificis Maximi*, lib. 5, tom. 3, Roma: ex Typographia Rev. Cam. Apostolicae, 1844, part 1, title 7, no. 11.

[10] Cf. D. BUOIX, *Tractatus de Iure Regularium*, vol. 2, Parigi-Bruxels 1867, p. 424.

[11] Cf. F. SUAREZ, *De obligationibus religiosorum*, tractatus 7, book 2, chap. 13, no. 11; tractatus 8, book 2, chap. 11, nos. 6-7.

3. DOMINATIVE POWER IN 1917 CODE AND THE POST-CODE DEBATE

The 1917 Code distinguished between two types of powers exercised in religious institutes. Can. 501 § 1 stated: "Superiors and Chapters, according to the norm of Constitutions and common law, have dominative power over subjects; in clerical exempt religious [institutes], they have ecclesiastical jurisdiction both for the internal forum and for the external." Unfortunately, while this code legislated sufficiently for the power of jurisdiction, there was no legislation on the exercise of dominative power. This provoked scholars to work out a way to address the lacuna concerning the exercise of this power. The doctrine was divided into two positions.

The first group of scholars like Michiel and Fransen erroneously holding that this power was a private power, created a radical dichotomy between power of jurisdiction and dominative power. They held that the power of jurisdiction was public power of ruling others or rather of governing the baptized persons towards achieving eternal salvation. It was transmitted to the superiors through canonical mission. Dominative power instead, was obtained by virtue of religious profession. Second, the power of jurisdiction is exercised in perfect society because it is oriented towards achieving the common good. The perfect societies in this case included the universal Church, and other constitutive organs of the universal Church, that is, the diocese and its legal equivalents as well as the exempt clerical religious institutes. Dominative power, instead, is enjoyed by imperfect societies, because it is a power which seeks the private good not the public good. Consequently, acts placed through the power of jurisdiction are public acts meant to achieve the common good, while those acts placed by an authority with dominative power, including precepts, are private acts that seek to achieve private good.[12] Therefore, since non-exempt religious institutes are imperfect communities, they enjoy dominative power which is private power and pursue ends that are not identical with the common good. The second wing of the doctrine, championed by Larraona, held that dominative power was a public ecclesiastical power. They advanced their arguments for this position from two angles. The first angle was intended to find out how the canons concerning the exercise of power of jurisdiction could be applied to the exercise of dominative power. Here we see

[12] See G. MICHIELS, *Normae generales iuris canonici: commentaries libri 1 Codicis iuris canonici*, Paris 1949, p. 164; G. FRANSEN, *Jurisdiction et Pouvoir Legislatif*, [in:] PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Acta conventus internationalis canonistarum: Romae diebus 20-25 maii 1968 celebrati*, Vatican 1970, p. 217.

the first initiative laid by Maroto and supported by Conte a Coronata and Goyeneche,[13] who in order to fill the gap left by the code, suggested that the codified norms governing the exercise of ordinary delegated power (*De potestate ordinaria delegata)* be applied to the exercise of dominative power. Vermeersch who first opposed this view, later embraced it and proposed that these principles be applied not directly but by analogy. Instead Creusen proposed the direct application of can. 20 CIC 17 on *common error* to dominative power in order to supply for this *lacuna legis*.[14]

The second and profound approach was employed by Cardinal Larraona, who demonstrated that dominative is public ecclesiastical power. He argued that since religious institutes are public juridical persons, they seek the public good of the society, for this reason the power exercised in them is necessarily a public power because the power enjoyed by a society corresponds to its nature. Further, non-exempt religious institutes just like exempt religious institutes, are public juridical persons, their members embrace a public state of life established by the Church and live under the authority of the Superiors, both are subject to external competent ecclesiastical authority, and they both incardinate clerics and profess obedience. On this ground, even though superiors of non-exempt institutes do not enjoy legislative and judicial power, they emanate precepts, realize certain administrative processes, impose sanctions, remedies, and penances upon their members. They can erect religious houses and suppress them. From this he concluded that this dominative power is the power of jurisdiction yet incomplete (*iurisdictio inchoata*), a power equivalent to the executive or administrative power of jurisdiction hence *public dominative power.*[15]

The authentic interpretation of the Holy See in 1952 canonized the interpretation of the second group of the doctrine by accepting that the provisions of cann. 197, 199, 206-209 CIC 17 on power of jurisdiction should be applied equally to dominative power.[16] This was further cemented by legislation for

[13] Cf. F. MAROTO, *Institutiones iuris canonici ad normam novi Codicis*, 3rd ed., Madrid 1918, p. 823-824; M. DA CORONATA, *Institutiones Iuris Canonici, ad usum utriusque cleri at scholarum*, vol. 1, Torino 1950, no. 275, p. 314.

[14] See I. CREUSEN, *Pouvoir dominative et erreur commune*, [in:] *Acta Congressus Iuridici Internationalis*, vol. 4, Roma 1937, p. 181-192.

[15] A. LARRAONA, *De Potestate Dominativa Publica in Iure Canonico*, [in:] *Acta Congressus Iuridici Internationalis*, vol. 4, Roma 1937, nos. 3, 23-24, pp. 150, 169-170. This position was criticized severely by Kindt who favoured the private nature of dominative power. See G. KINDT, *De Potestate Dominativae in Religione*, Bruges 1945.

[16] PONTIFICIA COMMISSIO AD CODICIS CANONES AUTHENTICAE INTERPRETANDOS, *Responsa ad dubia, IV – de applicatione praescriptorum can. 197, 199, 206-209 potestati dominativae*, "AAS" 44 (1952), p. 497.

the Oriental Orthodox Churches in the Apostolic Constitution *Cleri sanctitati*, which called this power *public ecclesiastical power*, and the affirmation of Pope Pius XII in the audience of 11th February 1958 that this power originates from ecclesiastical authority.[17] The Church having established the public and ecclesiastical nature of this power, the next question was, how many kinds of public ecclesiastical powers do we have in the Church? If it is one, then could dominative power be part of it?

4. ARGUMENTS USED DURING THE REVISION OF THE 1983 AND 1990 CODES

The inquiry into the nature of power wielded by superiors was discussed at length during the revision of both codes. An analysis of the discussions of the study Commissions entrusted with this duty may shed light into the nature of this power.

4.1 Coetus De Normis Generalibus

Even though the question on the power of superiors emerged almost in all sessions, we take a look at some sessions of the Coetus de Normis Generalibus, specifically on their discussions on precepts, and some sessions of Coetus de Perfectionis on governance in institutes of consecrated life.

The 1917 Code required that before dismissing someone from the institute, superiors is to write to the concerned religious at least two singular precepts. In the first session of the Coetus de normis generalibus (November 13–17, 1967), a question was raised concerning the nature of singular precepts emanated by superiors who do not enjoy the power of governance. One consultant suggested that singular precepts drawn by religious superiors for the whole institute, province, community or singular individuals, be considered as singular administrative acts.[18] Unfortunately the matter was not discussed during that session. In the fifth session (September 29 to October 4, 1969), the same concern was raised again. This time, it was acknowledged that all religious

[17] Pius XII, Motu proprio *Postquam Apostolicis*, 9 February 1952, can. 26, "AAS" 44 (1952), p. 74; Pius XII, Motu proprio *Cleri Sanctitati*, 2 June 1957, can. 153, "AAS" 49 (1957), p. 476; Pius XII, *Allocutio a moderatoribus generalibus religiosorum ordinum ac sodalitatum in Urbe existantibus*, 11 February 1958, "AAS" 50 (1958), p. 153-161.

[18] Coetus Studiorum Recognoscendis Normis Generalibus Codicis, *Sessio II (diebus 13 et 17 novembris a. 1967 habita)*, "Communicationes" (1985), no. 17, p. 47.

superiors of the institute have power to establish binding norms which in themselves are not laws. However, since precepts are produced by virtue of executive power, the secretary of the Coetus reminded the members that singular precepts can only be established by *potestas regiminis* (power of governance) in the external forum but not by *potestas dominativa* (dominative power). However, another consultant accepting the argument that singular administrative precepts are produced by virtue of *potestas regiminis*, insisted that in religious institutes, superiors even those who do not enjoy the ecclesiastical power of governance precepts for the professed members, two times before they are dismissed. Two proposals were tabled: first, that a clear distinction be made between precepts produced by virtue of *potestas regiminis* and those produced by *potestas dominativa*.[19] Second, that the section of the code on general norms be reserved only for singular administrative precepts, then those produced by virtue of dominative power and judicial power be transferred to other sections of the code.

In the discussions that followed more deliberations were made. There was one proposal from a consultant that since precepts can only be produced by *potestas regiminis,* the phrase *potestas regiminis* be replaced with *publica potestas ecclesiastica* (public ecclesiastical power). This suggestion was rejected because even the power enjoyed by superiors of non-exempt institutes is public ecclesiastical power.[20] Further, it was clarified that superiors enjoying this public power exercise public power whenever they govern the institutes. They place public juridical acts and precepts not by *potestas regiminis* but by virtue of this public power, yet these singular precepts which they establish by virtue of this power affects equally the rights and obligations of those to whom they are given. The final form of the canon on the precepts established by religious superiors was approved in the 11th session of the Coetus de Personis of March 12–16, 1973.[21]

In the twelfth session of the Coetus de personis (October 22–26, 1973), the secretary argued that if dominative power is public power, then it is executive power. For him today all the moderators of the religious institutes enjoy the

[19] Cf. COETUS STUDIORUM RECOGNOSCENDIS NORMIS GENERALIBUS CODICIS, *Sessio V (diebus 29 septembris – 4 octobris 1969 habita*), "Communicationes" (1987), no. 19, p. 202-205, 206.

[20] See "Communicationes" (1987), no. 19, p. 216.

[21] See COETUS STUDII DE PERSONIS PHYSICIS ET IURIDICIS (OLIM DE PERSONIS PHYSICIS ET MORALIBUS), *Sessio XI (diebus 12 – 16 martii 1973)*, can. 4, "Communicationes" (1990), no. 22, p. 273.

executive power which is equated with the power of jurisdiction.[22] Immediately a proposal was made that the canon be transferred from the section on general norms to the section on religious life. In the 13th session of the combined commissions of general norms and the Coetus de Personis (May 13–17, 1974), this canon disappeared.[23] Unfortunately, even the coetus dealing with religious institutes never discussed it.

The discussion by the Coetus de Normis Generalibus makes it clear that the convened fathers regarded this power public ecclesiastical power but distinct from the ecclesiastical power of governance. It is not an executive power of governance though very close to it. By virtue of this power the superiors can emanate singular precepts, but these precepts, due to lack of executive power, are not singular administrative acts even though they produce the same juridical effects as the precepts produced by virtue of executive power. We acknowledge that there was also an underlying perception that this public power of superiors is equivalent to executive power, but not identical to it.

4.2 Coetus de Institutis Perfectionis

An extensive discussion on the power of superiors was conducted by *Coetus de Institutis Perfectionis*. In session 5 of this coetus, held between December 9–14, 1968, various relevant points were underlined. First, that all chapters and superiors enjoy dominative power over the members, while clerical institutes of pontifical right exercise both the dominative power and the power of governance which they have both in the internal and external forum.[24] This power of jurisdiction is exercised only within the internal regime of the institute. Second, that the power of governance which is extended to the clerical institutes of pontifical right be enjoyed by all superiors of the institute the general, provincial and local superiors. Third, since all major superiors of clerical institutes of pontifical right are ordinaries by virtue of this power, the name *potestas dominativa publica* (public dominative power) should be suppressed. They also discussed the possibility of extending the power of jurisdiction to the laity including women.

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[22] Coetus Studii de Personis Physicis et Iuridicis (olim De Personis Physicis et Moralibus), *Sessio XII (diebus 22 – 26 octobris 1973 habita)*, can. 18, "Communicationes" (1990), no. 22, p. 303-304.

[23] Cf. Coetus Studii de Personis Physicis et Iuridicis (olim de Personis Physicis et Moralibus), *Sessio XIII (diebus 13 – 17 maii a 1974 habita)*, "Communicationes" (1991), no. 23, p. 28.

[24] Cf. Coetus Studii de Institutis Perfectionis, *Sessio V (dd. 9-14 decembris 1968 habita)*, can. 1 (*5 in Relatione*, "Communicationes" (1993), no. 25, p. 260-261.

In the seventh session (September 29 to October 4, 1969), considering itself incapable of solving the question of the power enjoyed by all superiors, the coetus remained at the level of affirming that actually superiors enjoy public power by virtue of which they direct the whole institute along the way of perfection.[25] The same was seen in the fourth session of the Coetus Studii de Institutis Vitae Consacratae per Perfectionem Consiliorum Evangelicorum, in which it was underlined that the power enjoyed by all superiors, both lay and cleric, is public ecclesiastical power which derives from ecclesiastical power itself. This power is not based on friendship or private business or dominative power. However, the commission felt that it was not competent to take any decisive decision on this matter.[26]

This power was addressed in can. 523 of the 1980 Schema Codicis. In the *relatio* by the central committee, it was made clear that the term *insuper*, describing the power of governance as added to that proper to all superiors, does not negate the possibility of other superiors having the other power. It also clarified that the power enjoyed by all the religious superiors in their institutes is not *potestas regiminis* but public ecclesiastical power.[27] With this the canon was broken down into three paragraphs as we have it today in can. 596 of the new code.

From the discussions of this commission the commission members of the revision commission understood this power to be public ecclesiastical power, but distinct from the ecclesiastical power of governance.

4.3 CCEO REVISION COMMISSION

The same orientation can be seen in the CCEO revision commission. Up to 1980, the Schema had still regarded the power of superiors as dominative power. The commission, therefore, drew a clear-cut distinction between public power exercised by all religious superiors and the ecclesiastical power of governance granted to some clerical institutes. It maintained that religious superiors and synaxes (chapters) always enjoy the dominative power unless they are granted the executive power of governance under specific circumstances; otherwise, they do not enjoy the executive power of governance. To perform

[25] Cf. COETUS STUDII DE INSTITUTIS PERFECTIONIS, *Sessio VII (dd. 29 septembris – 4 octobris 1969 habita)*, "Communicationes" (1994), no. 26, p. 37, discussions on cann. 1-3.

[26] Cf. COETUS STUDII DE INSTITUTIS VITAE CONSACRATAE PER PERFECTIONEM CONSILIORUM EVANGELICORUM, *Sessio IV (dd. 23-28 aprilis 1979 habita)*, "Communicationes" (1979), no. 11, p. 307.

[27] See PONTIFICIA COMMISSIO CODICI IURIS CANONICI RICOGNOSCENDO, *Relatio complectens*, 140, can. 523.

any act requiring the use of executive power, such as granting dimissorial letters, one needed to enjoy the power of governance as is the case with the superiors of monasteries who enjoy *potestas regiminis.*

As regards the erection of houses and provinces, the commission opined that religious superiors of monasteries enjoying *potestas dominativae* alone do not enjoy the *potestas regiminis exsecutiva* (executive power of governance). Therefore, they cannot erect a house or any other public juridical persons. When they do, juridical personality is granted to these juridical persons by the operation of law.[28] Can. 29 of the 1980 Schema equally retained that superiors and synaxes of monasteries enjoy the dominative power, while the superiors of monasteries *sui iuris* enjoy the executive power of governance. [29]

In the successive discussions, the name "dominative power" was dropped and the term *potestas religiosa publica* was adopted instead, because the power enjoyed by superiors is public ecclesiastical power. For superiors of religious orders and congregations, on top of the dominative power, they also enjoy the ecclesiastical power of governance. *Potestas regiminis* was therefore, reserved to the clerical orders and congregations of pontifical right.[30] The new canon 93 now held that superiors of clerical orders and congregations enjoy executive power of governance. [31]

In the analysis of can. 77 of the Schema canonum de normis generalibus et bonis Ecclesiae temporalibus it was underlined that superiors who enjoy *potestas religiosa publica* do not enjoy in any way *potestas regiminis exsecutiva.*[32] This was emphasized again in the *relatio* of 1990.[33] In the last modifications before the promulgation of this code for Eastern Churches, the predicate *potestas religiosa publica* was removed and can. 441 1° CCEO on powers of superiors was promulgated without any qualification. Despite this, there remained another canon on judicial matters in which the code underlined that superiors of some religious institutes enjoy *potestas regiminis* while others do not.

[28] Cf. can. 13 bis, "Nuntia" (1983), no. 16, p. 21.
[29] See can. 29, "Nuntia" (1980), no. 11, p. 24.
[30] See cann. 93, "Nuntia" (1980), no. 11, p. 39; "Nuntia" (1980), no. 11, p. 77.
[31] See can. 93, "Nuntia" (1983), no. 16, p. 76.
[32] See can. 77, "Nuntia" (1984), no. 18, p. 47.
[33] See cann. 441 and 995, "Nuntia" (1990), no. 31, p. 40 and 44.

> Can. 1069 § 1. Controversies between physical or juridical persons of the same institute of consecrated life, in which superiors are endowed with the power of governance, except secular institutes, are to be decided before the judge or tribunal determined in the typicon or statutes of the institute.
>
> § 2. Except in the case of secular institutes, if the controversy arises between physical or juridical persons of different institutes of consecrated life, or even of the same institute of eparchial right or of another, in which the superiors are not endowed with the power of governance, or between a member or a juridical person of an institute of consecrated life and any other physical or juridical person, the eparchial tribunal judges in the first grade of trial.

With this analysis, it is equally clear that in the Eastern Code too, the power enjoyed by superiors is understood as public ecclesiastical power. It is however, understood to differ from the ecclesiastical power of governance which is granted to some religious institutes by the general law.

CONCLUSION

The debate on the nature of power enjoyed by all superiors defined in can. 591 § 1 is not over yet. From the very beginning, this power has been distinguished from the power of jurisdiction, yet its real identity remains unclear. We have seen that at a certain moment some scholars wanted to identify it with the power of jurisdiction understood in a wide sense, but this position was abandoned when the term dominative power was created to distinguish it from power of jurisdiction. Equally, when part of the doctrine identified this dominative power as private, the position was quickly corrected by scholars and the Holy See that this was public ecclesiastical power. The study commissions that directed the revision of the two codes understood that this power was public ecclesiastical power but totally distinct from the power of jurisdiction. This still leaves the debate open to more reflection. In the midst of this doctrinal uncertainty, it is a high time that the Holy See intervened and brought this debate to an end. For now it is not the power of governance but a power whose true nature is not known.

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NIEROZSTRZYGNIĘTA DEBATA DOKTRYNALNA NAD NATURĄ WŁADZY WSZYSTKICH PRZEŁOŻONYCH ZAKONNYCH NA PRZYKŁADZIE KAN. 596 § 1 KPK

STRESZCZENIE

W Kościele istnieje tylko jeden rodzaj władzy rządzenia, choć wszyscy przełożeni zakonni sprawują jakąś władzę wobec osób im podległych, a ta wydaje się różnić od kościelnej władzy rządzenia, o której mowa w kan. 596 § 1 KPK. Pojawiają się zatem pytania, czy taka władza jest przedłużeniem kościelnej władzy rządzenia. O ile Kodeks prawa kanonicznego z 1917 roku określił ją mianem "władzy zwierzchniej" (*potestas dominativa*), w KPK nie jest ona nazwana. Przez długi czas debaty doktrynalne dotyczyły prawdziwej natury władzy sprawowanej przez przełożonych instytutów zakonnych. W niniejszym artykule autor przedstawia historyczny zarys takich debat, w trakcie których znamienici uczeni pragnęli zgłębić naturę takiej władzy, aż do promulgacji Kodeksu prawa kanonicznego z 1983 roku i Kodeksu kanonów Kościołów wschodnich.

Słowa kluczowe: publiczna władza kościelna; władza rządzenia; władza zwierzchnia; władza jurysdykcji