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EFFICACY OF DISPENSATIONS GRANTED WITHOUT A JUST CAUSE AND UNDER THE INFLUENCE OF ERROR, DECEIT AND FORCE

Abstract. Dispensation is one of the fundamental institutions which are typical of ecclesiastical law. It has been ordered and disciplined with much precision by the canonical doctrine, grown within the canonical system, and is ever modified and perfected by canonical legislations. Canon 85 of the 1983 Code defines this institution as a singular administrative act, granted by those enjoying executive power, whose main objective is to mitigate the vigor of a merely ecclesiastical law in a particular case for the spiritual benefit of the faithful. It is not an instrument of administering justice but an instrument of prudent administration. At times, there can be abuse of this canonical institution by the competent authorities themselves, or by the subjects requesting dispensation. This article, in order to help the people of God and the competent ecclesiastical authorities to appreciate the value of the canonical institution of dispensation within the canonical system, sets out to defend the need of a just cause, and to caution the Christian faithful from seeking dispensations on the basis of deceit, force or under the influence of grave fear.

Keywords: arbitrariness; competent authority; obreption; subreption; sufficiency of a cause.

INTRODUCTION

In canon law, all provisions are geared towards the salvation of the souls. All canonical institutions are provided to aid the achievement of this supreme end. Among these canonical institutions is the one of dispensation, which intends to relax the obligation of the law for the spiritual good of the person whenever the observance of that law proves to be burdensome to him such that it hinders him from pursuing the ultimate good of salvation of souls. For this reason, under administrative law it is prohibited to perform a function of administrative power arbitrarily.

Dispensation is a singular administrative act. It is the relaxation of the merely ecclesiastical law by a competent authority who has the executive power, whether ordinary or delegated (can. 85). Divine laws and civil laws that have been canonized are not subject to dispensing powers of ecclesiastical authorities. Only merely ecclesiastical laws can be dispensed. However, among the merely ecclesiastical laws, essentially constitutive laws are not subject to dispensation at all (can. 86). The 1987 Code grants the ordinary dispensing powers over universal laws to the Holy See and to ordinaries. While the Holy See can dispense from universal merely ecclesiastical laws, the diocesan bishops enjoy the ordinary power to dispense from the disciplinary laws in ordinary circumstances besides the procedural laws, penal laws and other laws whose dispensation is reserved to the Holy See or some other authority (can. 87 § 1). All ordinaries, of which major superiors of clerical institutes of pontifical right and those clerical societies of apostolic life of pontifical right are included, can dispense from merely ecclesiastical laws in cases of need as it is highlighted by can. 87, § 2. For local ordinaries, they enjoy ordinary power to dispense as well from particular laws including diocesan laws and laws, provincial council made by episcopal conferences (can. 87). In all other remaining cases, one may obtain this power through delegation by law or by competent authority (*ab hominem*).

Dispensation of merely ecclesiastical law can be granted by those who enjoy the executive power of governance, only when such a relaxation contributes to the spiritual good of the faithful (cann. 87 § 1 and 88). To do away with arbitrariness in this context, the law demands that dispensation be granted only when there is a just and reasonable cause. It also demands that the administrative act not be vitiated by vices such as physical force, error, fear and deceit. This article, therefore, sets out to highlight the necessity of a just cause in granting dispensations and the effect of deceit, error and physical force on the efficacy of a dispensation granted by a competent authority.

1. NOTION OF JUST AND REASONABLE CAUSE

The question of “cause” in administrative law has always been a subject of debate. Some scholars go as far as dismissing the necessity of talking about it when addressing administrative acts.¹ In the Code, “cause” is ad-

¹ Cf. E. LABANDEIRA, *Trattato di diritto amministrativo canonico*, Milano: Giuffrè, 1994, p. 370-379.

dressed from two perspectives. First, it is addressed as the finality, the end, or the objective, which an administrative act intends to achieve after it has been emanated. As a general principle, the ultimate cause for all ecclesiastical laws is the salvation of souls (1752). However, within this wider umbrella of final cause, each administrative act also has a specific finality to achieve.² For instance, the finality of dispensation is the spiritual good of the faithful, and this has been described in several occasions as a just and reasonable cause for dispensation.³ Second, “cause” is also understood to mean the motive, the concrete reason that moves the competent superior to emanate an administrative act. It is that cause or motive which moves the will of the competent ecclesiastical authority into action, that is, into an immediate response within the concrete particular situation. It refers, therefore, to the reasons that originate from the concrete circumstances of the petitioner of the dispensation that move the will of the competent authority to grant a dispensation in a particular case. This is the “cause” being addressed in this article.

Dispensation is the relaxation of the obligation of the law in particular case. In order to justify such a relaxation of the obligation of the general norm in particular case, justice demands that there be a just and reasonable cause to justify relaxation. It is contrary to the principle of legality for a superior or any competent ecclesiastical authority to dispense from a law arbitrarily. In fact, as a principle, any singular administrative act placed without a just and reasonable cause is placed arbitrarily even in cases where the law permits the superior to place an act *ad nutum superioris*, such as the removal from an ecclesiastical office. Any dispensation granted by the superior arbitrarily could amount to abuse of authority and this makes it subject to administrative recourse.⁴

² For instance, for incardination and transfer of parish priests the law establishes the cause or finality as *utilitas vel necessitas ecclesiae* (can. 269, 1° and 1748); public juridic persons are established for works of *bonum publicum* (can. 116 § 1); vigilance of the ordinary over private associations is to ensure that their apostolate is geared towards *bonum commune* (can. 323 § 2).

³ Cf. can. 87 § 1 and 88 CIC 1983; can. 1536 § 2 CCEO; F.J. URRUTIA, *Les normes générales. Commentaire des canons 1-203*, Paris: Tardy, 1994, nn. 505, 506, p. 159-160; VATICAN II, Decretum de pastorali Episcoporum munere in Ecclesia *Christus Dominus*, 28 Oct. 1965, n. 8(b), *AAS* (1966), no. 58, p. 676; PAUL VI, Motu proprio *De Episcoporum muneribus*, 15 June 1966, *AAS* (1966), no. 58, p. 469, art. 8.

⁴ Cf. F. SUAREZ, *Operis de religione*, tomus quartus et ultimus, *continens tractatus tres*, IIX. *De obligationibus religiosorum ex regula, praelatione et subiectione regulari provenientibus*, IX. *De varietate religionum*, X. *De religione Societatis Iesu in particulari: quibus totum opus completur, et absoluitur, sumptibus Iacobi Cardon et Petri Cauellat, Lugduni, 1625, tractatus VIII, Lib. VI, cap. XVIII, n. 42.*

According to the deliberations of the fathers of the Council of Trent, in order to grant a dispensation of any law there must be a just and reasonable cause⁵ so that unnecessary and arbitrary relaxations of the law is avoided and also in order to promote the observance of the law in cases where there is no just reason to warrant the relaxation of the law. It said:

Sicuti publice expedit, legis vinculum quandocumque relaxare, ut plenius, eventibus casibus et necessitatibus pro communi utilitate satisfiat: sic frequentius legem solvere, exemploque potius, quam certo personarum rerumque delectu, petentibus indulgere, nihil aliud est, quam unicuique ad leges transgrediendas aditum aperire. Quapropter sciant universi, sacratissimos canones exacte ab omnibus et, quoad eius fieri poterit, indistincte observandos. Quodsi urgens iustaque ratio et maior quandoque utilitas postulaverit, cum aliquibus dispensandum esse; id, causa cognita ac summa maturitate, atque gratis, a quibuscumque, ad quos dispensatio pertinebit, erit praestandum; aliterque facta dispensatio surreptitia censeatur.⁶

In other words, for a competent authority to dispense from a law there must be an urgent and just reason (*urgens iustaque ratio*). The dispensation should aim at achieving a greater good and there should be a cognition of the

⁵ Historical research carried out by various scholars shows that before the 9th century to dispense from a law it was required that there be a *causa utilitatis vel boni communis*. From 10th to 11th centuries, *utilitas vel necessitas communis ecclesiae*, and it was necessary that this cause be *rationabilis*. With the decretalists they admit both the cause as *bonum commune et bonum privatum* and that this cause ought to be *iusta, magna, certa* among many other qualities. Finally, the doctrine settled for the fact that the cause must be just and reasonable to warrant a licit dispensation, and if the dispenser is not a legislator, it is necessary for validity. See V. DEL GIUDICE, *Privilegio, dispensa ed epicheia nel diritto canonico*, Perugia: G. Guerra, 1926, p. 13-20; J. BRYN, *De dispensatione in iure canonico praesertim apud Decretistas et Decretalistas usque ad medium saeculum decimum quartum*, Typografia Polyglotta, Brugge: C. Bayaert, 1925, p. 2; S. KUBIC, *Invalidity of Dispensation According to Canon 84, § 1: A Historical Synopsis and Commentary*, dissertation, Catholic University of America, Washington: Catholic University of America Press, 1953, p. 25-49.

⁶ COUNCIL OF TRENT, Sessio 25, *de reformatione*, cap. XVIII: "Just as public good requires that the fetters of law be at times relaxed in order that cases and necessities which arise may be met more fully for the common good, so to dispense too frequently from the law and to yield to petitioners by reason of precedent rather than through a certain discrimination of persons and things is nothing else than to open the way for each one to transgress the laws. Wherefore, be it known to all that the most sacred canons are to be observed accurately by all and, so far as it is possible, without distinction. But if an urgent and just reason and at times a greater good should require that one or another be dispensed, this is to be granted after the matter has been investigated and after the most mature deliberation and gratis by those to whom that dispensation pertains, and dispensation granted otherwise shall be regarded as surreptitious."

cause (*causa cognita*). Then, there is a need for doing a mature deliberation by taking into consideration the situation of the person and circumstances around him, and that the dispensation should be gratuitous (*gratis*).

Both the 1917 and 1983 Codes underline the fact that a dispensation can only be granted when there is a just and reasonable cause (can. 84 § 1 CIC/17; can. 90 § 1 CIC/83). To ascertain whether the cause presented is just and reasonable the competent authority must make a concrete evaluation of each case taken individually.⁷ A reasonable cause permits the competent authority to strike a balance between the obligation of the law which promotes the spiritual good of the community and of the individuals, as well as the spiritual good of the faithful in particular circumstances in cases where the law would tend to be too rigorous and even harmful to them.

The sufficiency of a cause is considered in relation to its contribution to the common good of the society and to the good of individuals. This way, a cause is considered to be just when it does not harm the juridical good being protected by the law, be it the good of the society (common good) or individual good (the rights of singular persons). It is considered reasonable if it creates a harmony between the reason for which the dispensation is being granted and the rationality of the law itself. Hence, a balance must be obtained between the circumstances of the case and the gravity of the law to be dispensed.⁸ Therefore, the competent authority must simultaneously evaluate the circumstances of the case, and the importance of the law to be dispensed within the canonical system, in order to determine the rationality and justice of the cause for the dispensation.

The necessity of making an evaluation of the peculiar exceptional circumstances of the case stems from the fact that each case is presumed to be unique and unrepeatable. A thorough examination of these circumstances is necessary in order to justify the need to relax a law for a person in particular case. Actually, this provision of can. 90 § 1 of the 1983 Code was not in can. 84 § 1 of the 1917 Code but was introduced into this canon during the revision process, and the example of circumstances cited were the danger of

⁷ In fact, the law, at various occasions demands that the cause for dispensation be either just and reasonable (can. 90 § 1); in other cases, it demands only for a just cause (cann. 527 § 2, 1142, 1196, 1245); in other cases, it demands a grave cause (can. 1144 § 2); in others it addresses only grave difficulty (can. 1127 § 2).

⁸ Cf. F.J. URRUTIA, *Les normes générales*, n. 505, p. 159; E. BAURA, *La dispensa dalla legge*, Milano: Giuffrè, 1997, p. 265.

scandal and aversion of discipline.⁹ The truth remains that there are so many circumstances that may condition the evaluation of the sufficiency of the cause. These circumstances may be determined by the internal and external circumstances of the person, of the place, of the period of time, of the environment in which someone finds himself. Hence, the competent authority must always evaluate these circumstances in person.

The second factor is the gravity of the law to be dispensed. Gravity of the law in this case refers to the importance of the law within the canonical juridical order. A cause is therefore considered to be sufficient for granting a dispensation when it is proportionate to the law or the obliging norm which is to be dispensed. In other words, a grave law requires a grave cause, a light law requires a light cause.¹⁰

The law requests that dispensation be granted whenever there exists a just and reasonable cause. This presupposes that one finds himself in a situation and circumstances where he is actually obliged by the law and is requesting that the law be relaxed in cases where actually he ought to remain under the obligation of the law if the dispensation is not granted. However, there comes a case where one finds himself in a circumstance or in a situation of grave necessity in which the observance of the law is absolutely impossible or where the observance of the law will bring grave harm and damage to oneself or to the system. In such a case, the obligation of the law ceases by itself in cases of grave necessity, and so the law loses force. In such cases of grave necessity, no law is binding, hence no need to ask for dispensation.

Doctrine classifies causes for dispensation into impulsive (accessory) and motivating (principal or final cause).¹¹ A motivating or final cause is a cause that induces the dispensing authority and sufficiently moves his will to grant a dispensation. Such a cause may be constituted by one or more circumstances which, upon the exercise of prudent discretion of the competent authority, provide a sufficient ground for granting the dispensation. The doctrine has always referred to such causes as “canonical causes”, because at times they

⁹ See STUDY COMMISSION FOR THE GENERAL NORMS, *Sessione IV (19-23 ianuarii 1969)*, “Communications” 19 (1987), p. 82.

¹⁰ Cf. COLLEGIUM SALMANTICENSIS, *Ff. discolceatorum B. Mariae*, tom. 3, Cap. V, *De dispensatione legis*, Punct. V, n. 74, 95.

¹¹ See A. REIFFENSTUEL, *Ius canonicum universum...*, Roma, 1831, Lib. I, tit. 3, n. 183; S. KUBIC, *Invalidity of Dispensation*, p. 53-54; E. BAURA, *La dispensa dalla legge canonica*, p. 262-264; J. MIRAS, J. CANOSA, E. BAURA, *Compendio di diritto amministrativo canonico*, 2nd ed., Roma: Università della Santa Croce, 2007, p. 291; P. MAROTO, *Institutiones iuris canonici*, vol. 1, n. 306 (a), p. 300; P. GASPARRI, *Tractatus Canonicus de matrimonio*, vol. 1, Typis Polyglottis Vaticanis, 1932, p. 238.

can be identified from what the law itself mentions or from what the praxis of the curia mentions.¹² An *impulsive or accessory cause*, on the other hand, is a secondary cause which of itself is not sufficient for obtaining a dispensation but helps to influence the dispensing authority to grant it.¹³

2. DISPENSING WITH OR WITHOUT CAUSE

Canon 90 of the 1983 Code lays down the general principle on the necessity of just cause for dispensation. It says:

Can. 90 § 1. A dispensation from an ecclesiastical law is not to be given without a just and reasonable cause, taking into account the circumstances of the case and the importance of the law from which the dispensation is given; otherwise, the dispensation is unlawful and, unless given by the legislator or his Superior, it is also invalid.

§ 2. A dispensation given in doubt about the sufficiency of cause is valid and lawful.

From this canon, four principles can be drawn.

Principle 1: Any dispensation granted without a just and reasonable cause is illicit.

In administrative law, the exercise of executive function does not accept arbitrariness. Therefore, to dispense a law is to perform an administrative function, even if a legislative authority grants the dispensation. Any competent authority who dispenses from a law must observe the prescriptions of

¹² Sometimes the law or the praxis of the Roman Curia may as well determine both the motivating and impulsive causes. Therefore, it is not automatic that only the motivating causes will be contained in the law.

¹³ The doctrine also distinguished between intrinsic and extrinsic cause. Intrinsic causes referred to the difficulties, which ought to be confronted while observing the law in a particular case, for instance, the difficulty for a priest to recite the divine office because of sickness. Extrinsic causes referred to the good, which one obtains, or the evil that one evades when a dispensation is granted in that particular case, a cause, which was evaluated in terms of merit of the person *vis-a-vis* the good of the Church. See P. CORRADO, *Praxis dispensationum*, Lib. I, cap. I, col. 15; P. MAROTO, *Institutiones iuris canonici*, n. 306 (a), p. 300; F.M. CAPPELLO, *Summa iuris canonici in usum scholarum concinnata*, 4th ed., vol. 1, Roma: Gregoriana, 1945, n. 133 (6), p. 105; P. M. CONTE A CORONATA, *Institutiones iuris canonici*, vol. 1, n. 114, p. 111; E. LABANDEIRA, *Trattato di diritto amministrativo*, p. 358.

the law and proceed according to the prescriptions of the law, whether it is the legislator or an authority below the legislator. As a general principle, any dispensations from a law require that there be a sufficient cause to warrant it. Hence, dispensation from a law or a norm granted without a just cause is illicit. According to the recent doctrine, the obligation for a just cause ensures that competent authorities do not relax the obligation of the law arbitrarily, which would be contrary to canonical equity and amount to abuse of authority.¹⁴

Principle 2: A dispensation granted without a just and reasonable cause by a competent authority who is not the legislator of the law, or his superior is illicit and invalid.

Second, dispensation granted by a competent authority other than the legislator of the law, without a just and reasonable cause is both illicit and invalid. The competent ecclesiastical authority other than the legislator in this context refers to any authority who is neither the legislator, nor his successor, nor the hierarchical superior of the legislator, who has the power to dispense either by law or by delegation. These authorities cannot dispense validly from a law without a just and reasonable cause because they are not the makers of the law (*conditor legis*).

The legislator has all the authority to dispense from his own laws, because the binding force of that law emanates from his will. As a legislator, he also enjoys executive power over his own law. The subordinate dispensing agent (other authorities lower than the legislator of the law) can act only by virtue of the delegation by the superior, or by the vicarious ordinary power. In other words, he acts in the name of another. This faculty of dispensing from a law is granted either directly or indirectly by the legislator. Should the subordinate dispensing agent use this faculty and grant a dispensation without a cause, his action would definitely be an abuse of his powers because he will have exceeded the mandate of his delegation. Consequently his acts will be invalid. It would be entirely irrational to perform unreasonable acts; and yet that is exactly what would occur should a subordinate dispens-

¹⁴ See F.J. URRUTIA, *De normis generalibus*, p. 56; J. GARCÍA MARTÍN, *Gli atti amministrativi nel Codice di diritto canonico*, Venezia: Marcianum Press, 2018, p. 900; P. MAROTO, *Institutiones iuris canonici*, n. 306 (a), p. 300; F.J. URRUTIA, *Les normes générales*, n. 507, p. 160; S. KUBIC, *Invalidity of Dispensation*, p. 79; B. GANGOITI, *Potestad de dispensar de los superiores mayores en las leyes communes y en el derecho proprio del instituto*, "Informationes SCRIS" (1989), no. 15, p. 107.

ing agent have the faculty to grant dispensations without cause. The superior legislator does not grant powers to dispense from his laws indiscriminately or grant dispensations rashly and unjustly.

Since the subordinate dispensing agent acquires the power to dispense a law either *a iure* or *ab hominem*, it is necessary that this power be exercised within the limits defined in the mandate of delegation. An authority who dispenses without a just and reasonable cause is presumed to have exceeded the mandate of his delegated power, hence acts contrary to the will of the legislator. Consequently, such a dispensation is unjust and null. Nullity arises due to the lack of proper power by the competent authority because of acting beyond the mandate.¹⁵

Principle 3: Dispensation granted by the legislator and his successor in office without a just and reasonable cause is valid but illicit.

The law distinguishes between a dispensation granted by the legislator from his own law and that granted by other authorities lower than the legislator. A dispensation granted by the legislator from his own law without a cause is illicit but valid, hence it is efficacious because it produces fully the intended juridical effects.¹⁶

We have to clarify the meaning of the term legislator in this context. According to Cabrerros de Anta, the legislator, in this context refers to any ecclesiastical authority with legislative power within the ecclesiastical juridical system in contrast to the inferior authority, which refers to the authority who does not enjoy at all the legislative power.¹⁷ If we embrace this interpretation, it would imply that any legislative authority, for instance the General Chapter of a clerical institute of pontifical right can dispense from the laws of any legislator, for instance from the provisions of the Code or of any pontifical law without a just cause. This will be absurd. The truth is the term 'legislator' as used in this context refers to the person occupying the office of the legislator of the very law, which is to be dispensed. This is actually

¹⁵ Cf. F. SUAREZ, *De legibus*, Lib. VI, cap. XIX, n. 1, p. 425; S. KUBIC, *Invalidity of Dispensation*, p. 79; see also B. GANGOITI, *Potestad de dispensar de los superiores mayores*, p. 108-109.

¹⁶ See STUDY COMMISSION FOR THE GENERAL NORMS, Session 5 (29 September – 4 October 1969), *Textus canonum "de dispensationibus" iam approbatus*, "Communicationes" (1987), no. 19, can. 6 (84) § 1, p. 193.

¹⁷ Cf. M. CABREROS DE ANTA, "Facultades y privilegios," in M. CABREROS DE ANTA, A. ALONSO LOBO, S. ALONSO MORAN, *Comentarios al Código de derecho canonico con el texto legal latino y castellano*, BAC, Madrid 1963-1964, p. 314.

the meaning intended by the legislator as it was discussed during the revision process.¹⁸ Such that when we talk of universal law, the legislator is the Roman Pontiff. Others like the diocesan bishops, the Roman Curia, and others, are executors. When we talk of a diocesan law, then we refer to the diocesan bishop who has promulgated that law as the legislator (*conditor legis*); when we talk of internal laws of the institute (besides the constitutions and fundamental laws), the legislator is the General Chapter.¹⁹

The same applies to the term the successor of the *conditor legis* in the office. According to the golden rule of law, *is qui in iure succedit alterius, eo iure ille uti debet* (VI^o, Reg. iuris 46). The successor in office of the *conditor iuris* also succeeds his powers because these powers are invested in the office, both legislative and executive, as well as authority over the law, which have been made by virtue of this office. Hence, him too, can dispense from the laws of his successor without a just and reasonable cause, and the dispensation remains valid though illicit.

Authors disagree on the reason why a dispensation granted by the competent executive authority, who is not the legislator, without a just and reasonable cause is sanctioned by nullity (invalidity) and illegitimacy, hence inefficacious, while that granted by the legislator is sanctioned only by illegitimacy, yet it remains valid and efficacious. If in both cases the dispensation is granted by an executive authority, why should the exercise of executive power by one authority be invalid and another valid under the same circumstances? The explanation adopted by the legal sources to justify this position is that which the voluntarists have proposed, yet the rationalists desist from it.

This principle is justified by the legal voluntarists, championed and promoted by the arguments of Suarez that the binding force of the law derives from the will of the legislator (*voluntas legislatoris*). Since the law depends on his will, the same legislator may decide to abrogate, derogate, or even dispense from his own law.²⁰ This implies that if the will of the legislator ceases, the obligation of observing the law ceases too. Therefore, even though illicit, dispensing from a law without cause remains valid because of his prevailing will. This argument had been proposed by decretalists begin-

¹⁸ This is the intended meaning of the legislator as we can see in the revision process, where the legislator in this case refers to *ipse legislator*, and not just any legislator. Cf. "Communications" (1987), no. 19, p. 193, can 6 (84) § 1.

¹⁹ See E. BAURA, *La dispensa dalla legge*, p. 266; B. GANGOITI, *Potestad de dispensar de los superiores mayores*, p. 108.

²⁰ Cf. F. SUAREZ, *Tractatus de legibus*, Lib. VI, cap. I, n. 2, 369; Lib. VI, cap. XIX, nn. 6-7, 426; Lib. VI, cap. XIX, n. 8, p. 427.

ning with Huggucio,²¹ and then taken over by Raymond of Pennafort,²² then added weight by Pope Innocent IV²³ and Hostiensis,²⁴ then polished by Abbas Panormitanus,²⁵ and perfected by Suarez.

The rationalists, arguing from the Thomistic point of view that the binding force of law depends on its rationality (*rationis ordinatio*), see in this principle a contradiction of the very basic requirement of administrative law according to which administrative function should not be arbitrary. That is, if dispensation is an administrative function, then even the legislator dispenses by executive authority. To accept the fact that dispensation granted by a lower authority with a just cause conforms to the intention of the legislator, yet at the same time permitting the fact that the legislator can grant a dispensation without a just cause is contradictory. Therefore, they retain that – contrary to this principle that “dispensation by the legislator without a just cause is illicit but valid” – they hold that dispensation granted by the legislator without a just cause is illicit and invalid because it is granted arbitrarily hence contrary to canonical equity. For them, such dispensation, even if it is considered to be legally valid, it is not morally valid, hence it is not to be morally enjoyed by the dispensed subject if he knows that there was no just cause for its concession.²⁶

Contrary to the rationalistic argument we accept that a dispensation granted without cause is illicit and illegitimate because it runs contrary to the provisions of canon law as well as natural law. It harms distributive justice,

²¹ See C.R. BILLUART, *Cursus theologie iusta mentem divi Thomae*, vol. 4, Paris: ex typographia Pii Instituti d. Barnabae, 1904, p. 524; J. BRYNS, *De dispensatione in iure canonico*, p. 119, footnote 3. Huggucio, in his treatise on papal dispensations, becomes pioneer of this argument firmly holding that the Roman Pontiff could dispense from universal laws even without a just cause because he is the author of the law. From this, the decretalists agreed that if a dispensation is granted by any authority lower than the author of the law, the dispensation will be both invalid and illegitimate.

²² See R. PENNAFORT, *Summa de poenitentia et matrimonio*, Lib. III, tit. XXIX, § 2, *De dispensationibus*. He argued that if a bishop dispenses from a law without a just and reasonable cause, he is to be punished and dethroned.

²³ X. 3, 35, 6.

²⁴ See HOSTIENSIS, *Commentarium in quinque decretalium libros*, c. 6, X, *De statu monachorum*, III, 35, n. 29.

²⁵ See A. PANORMITANUS, *Commentaria in quinque decretalium libros*, super c. 6, X, *De statu monachorum*, III, 35, n. 17. Whenever there is no cause, one is not dispensing but dissipating.

²⁶ See P. LOMBARDIA, *Legge, consuetudine ed atti amministrativi in Il nuovo Codice di diritto canonico*, ed. S. FERRARI, Bologna: Società editrice il Mulino, 1983, p. 100; F.J. URRUTIA, *Les normes générales*, n. 508, p. 160; E. BAURA, *La dispensa dalla legge canonica*, p. 267-270.

hence it is morally illegitimate and as most classic authors held,²⁷ it is a cause of grave sin, besides the scandal or any other harm, which it may provoke. However, in cases where the legislator uses the executive power to dispense from his own law, the cause is not a requisite *ad validitatem* as defined by can. 124 § 1, instead it is meant to guarantee juridical security and to avoid moral doubt to those to whom the dispensation has been granted.

While the principle established by the Code remains and is to be followed to the letter, this doctrinal debate remains alive, because there are still a number of self-contradictory principles within the system especially on this affirmation in relation to other principles of administrative law, especially the principle of arbitrariness. Even though this principle guarantees the juridical security for the dispensed subjects as Labandeira affirms,²⁸ it ought not to obscure the principle of arbitrariness in performing administrative functions. Such a large dispensing faculty granted to the legislator could be a source and cause of a sack of arbitrary decisions, massive abuse in administration, compromise, inequality, and favoritism. One wonders if actually in this case a recourse placed against a dispensation granted by the legislator without a cause can stand a chance of being revoked or nullified.

Principle 4: The Superior of the “conditor legis” dispenses from the law validly but illicitly without a just and reasonable cause

The superior to the legislator by jurisdiction, and whose jurisdiction extends over the same subjects, may equally dispense from the laws of the lower legislator without cause.²⁹ In this context, the term ‘superior’ refers to him who holds an office endowed with the responsibility of making and safeguarding the law that is higher than that of the *conditor legis* or his successor in office.³⁰ In this case, he does not remove the will of the legislator but rather relaxes only the binding force of the law in particular case, by vir-

²⁷ See F. SUAREZ, *Tractatus de legibus*, Lib. VI, cap. VIII, n. 8. See also E. LABANDEIRA, *Trattato di diritto amministrativo canonico*, p. 361; M. BLANCO, *Consideraciones sobre el “ius singular” y el acto administrativo*, “*Ius canonicum*” 29 (1989), p. 672.

²⁸ Cf. E. LABANDEIRA, *Trattato di diritto amministrativo canonico*, p. 361.

²⁹ See F. SUAREZ, *Tractatus de legibus*, Lib. VI, cap. XIX, n. 20, p. 429-430.

³⁰ This conclusion we draw from the Suarezian understanding of the legislator in the context of granting authentic interpretation, in which he understood the legislator as one who is endowed with the office of producing and administering the law. Within this office, then, the *conditor legis*, his successor in office and the hierarchical superior of the *conditor legis* all fall under the category of legislators. In this case, therefore, we are referring to this hierarchical superior of the *conditor legis*. See also F. SUAREZ, *Tractatus de legibus*, Lib. VI, cap. I, n. 2, p. 369-370.

tue of his higher jurisdiction. This hierarchical superior to the *conditor legis* is an administrative authority and he governs *in actu* over the same matter of dispensation for subjects under his jurisdiction, on matters handled by the *conditor legis*. His functions on this matter are the same as those of the *conditor legis* but in a hierarchically superior grade.³¹

Applying this to religious institutes and the powers to dispense from the provisions of the *ius proprium*, we can say, within the institute, the legislative body is the General Chapter while it is in session. The Chapter enjoys all the advantages attributed to the legislator in can. 90. It can dispense any member from the provision of complementary codes without cause, and the dispensation will be valid though illicit. In this case, the Holy See, being of superior jurisdiction to the General Chapter, can as well dispense the members of the institute, individually or as a whole from the provisions of the constitutions as well as other provisions of the proper law without cause and the dispensation will be valid though illicit. Major superiors and local superiors are not legislators. In cases where they are granted the power to dispense from the provisions of the constitutions, they cannot dispense when there is no just and reasonable cause. There must be a reasonable cause to justify the relaxation of the binding norm otherwise, their dispensations are invalid, and as such, a recourse can be sought against the dispensation.

3. DOUBT OF SUFFICIENCY OF CAUSE

The question of doubt concerning the sufficient just cause for granting a dispensation has always been a central question for the doctrine. The classical doctrine attempted to examine the sufficiency of the cause by classifying the efficiency of the causes into three categories. First, a cause may be sufficient in itself to excuse from the observance of the law. This corresponds to a case of necessity, in which there is no need for a dispensation but an application of the principle of *epikeia*, because in cases of grave necessity no law obliges. For instance, priests have an obligation to recite the Divine Office, however, a critically sick priest in an ICU cannot recite the Divine Office because of his condition. In this case, this law is ineffective. If by any case, there exists doubt over the existence of that grave necessity or excuse, one cannot act by himself contrary to the law, instead, he must ask for the dis-

³¹ Cf. J. MIRAS, *Commentary on can. 1739 in Exegetical commentary*, vol. 4/II, Montréal: Wilson & Lafleur, 2004, p. 2091-2097.

dispensation from the observance of that law from the competent superior. Second, a cause may be sufficient enough not only to excuse from observance of a law, but to call for the removal or change of a law (derogation or abrogation of a law). Thirds, a cause may equally be sufficient,³² not to call for a removal or change of a law but be a sufficient ground for granting dispensation from a law.

The doubt concerning the sufficiency of a just and reasonable cause for dispensation manifest itself in two ways: doubt concerning the *sufficiency of a cause* and doubt concerning the *existence of a cause*. These two doubts are different, and they address different subject matters. When we address the doubt concerning the *sufficiency of a cause*, it is a doubt that presupposes the existence of the cause such that the doubt arises only whether the cause which exists is a sufficient motivating cause for granting the dispensation from that particular law whose dispensation is being sorted. Ideally speaking, a doubt of sufficiency of just cause refers to a positive doubt of a fact, hence the provision of can. 14 of the 1983 Code would apply, that is, that in cases of doubt of fact, an ordinary, whether a religious ordinary or local ordinary, can dispense from that law, even from reserved laws, provided the reserving authority is accustomed to granting the dispensation. Such a dispensation granted by the ordinary will be valid and lawful.

Can. 90 § 2 addressing the question of doubt of sufficient cause,³³ adds an additional element to this, that not only will the ordinaries dispense in case of doubt of sufficiency of a law, but also any other authority granted this power by law or by delegation, dispenses a law validly and licitly in such cases. That is, cases where the doubt concerns only the sufficiency of the cause, any competent superior can grant a dispensation and this dispensation will be valid and licit. The reason being that when the cause is proportional to the law that is to be dispensed, and when the superior has the power to

³² See COLLEGIUM SALMANTICENSIS, *Ff. discalceatorum B. Mariae de Monte Carmeli*, tom. 3, Cap. V, *De dispensatione*, Punct. V, n. 73, p. 94-95; F. SUAREZ, *De obligationibus religiosorum*, tractatus VIII, Lib. VI, cap. XVIII, n. 14, p. 423.

³³ Can. 90 § 2 of 1983 Code says: "A dispensation given in doubt about the sufficiency of its reason is valid and lawful." This canon replaced can. 84 § 2 CIC/17, which addressed the same question and stated that "Dispensatio in dubio de sufficientia causae licite petitur et potest licite et valide concedi." This canon of the former Code talked both about granting of the dispensation as well as the request for the dispensation, implying that the doubt concerning sufficiency of cause could be raised by the petitioner or the dispensing authority. During the revision of the Code, the doubt on the part of the petitioner was suppressed because it concerned much moral liceity, yet the law is more concerned with the juridical liceity. See "Communicationes" 19 (1987), p. 191.

dispense, if he dispenses from the law while this doubt persists, the dispensation granted will be effective because this is not a doubt of law, but a doubt of fact, and the law itself already permits that.

Doubt on the *existence of a cause* is a doubt on the very existence of a cause. It reflects a doubt on the existence of a motivating cause, in which case there is a lack of proper object of judgment or discernment (that is, a cause or motive) unless the existence is first established. In fact, the classical pre-1917 Code doctrine referred to this as “doubt on substance of cause” (*de causa secundum substantiam*).³⁴ Ideally speaking, this kind of doubt is a doubt concerning the existence of a cause, hence the norms of can. 90 § 1 ought to apply. That is, a distinction has to be drawn between the legislator and other lower competent authorities. The legislator can validly dispense from a law or a norm when there arises a doubt of cause concerning the substance of the law. In this case, the dispensation will be illicit but valid, because an obligation of the law ought not to be relaxed when the cause is uncertain. However, since the legislator has the power to dispense validly from his laws even without a cause, he can dispense from a law when the existence of a cause is dubious. It all depends on his conscience and the prudent discretion in this case.³⁵ For other authorities lower than the legislator it has to be clear that this is not a doubt of fact, but a doubt of the existence of the cause, which is an essential requirement for them to dispense from a law. Therefore, in cases of doubt of existence of a cause they cannot validly dispense from the law because a dispensation granted without a cause is null.

4. DISPENSATION GRANTED UNDER THE INFLUENCE OF FORCE, FEAR, AND DECEIT

Dispensation is a singular administrative act granted in the form of a rescript. As an administrative act, it is a juridic act placed freely and voluntarily by a competent ecclesiastical authority and it produces a determinate juridic effect recognized by the law.³⁶ Being an administrative act it is a hu-

³⁴ During the revision process, attempts to make “doubt of existence of a cause” part of the current can. 90 § 2 were all rejected by the study commission. Cf. “Communicationes” 19 (1987), p. 83 and 190.

³⁵ See COLLEGII SALMANTICENSIS, *Ff. discolceatorum B. Mariae de Monte Carmeli*, tom. 3, Cap. V, *De dispensatione*, Punct. V, n. 77, p. 95; S. KUBIC, *Invalidity of dispensation according to can. 84 § 1*, p. 88-90.

³⁶ See O. ROBLEDA, *De conceptu actus iuridici*, “Periodica” (1962), no. 51, p. 413; V. DE PAOLIS, *La vita consacrata nella Chiesa*, Venezia: Marcianum Press, 2010, p. 453.

man act. As a human act, dispensation requires the action of both the intellect and the will on the side of him who is granting it. The essential interplay between the cognitive, evaluative, and volitive functions form the essential axis for placing a truly human act. This is because one cannot will what he does not understand and he cannot evaluate what he does not know.

The epistemological analysis of the process of placing human acts and decision making emphasize that the human intellect has the speculative intellect which processes the abstract concept, and the practical intellect, which is composed of the critical faculty, hence it evaluates, weighs the available options, judges and eventually chooses among the available objects. Then there is the internal and external freedom (voluntariness), which manifests itself in the freedom from impulses, the capacity for self-determination, and freedom from force and fear. A compromise of any of these elements results to certain juridical consequences on the placed act, hence for a valid dispensation as a juridic act, all these three elements must be present.

To dispense is to place a juridic act. In order to hold a person responsible for the juridic act placed, it is necessary that at the moment in which the person places the act the person be in the right possession of the intellect and free will. The law points out a number of vices that may influence the validity of a juridic act: force (external physical coercion); grave fear (moral coercion); deceit; ignorance and error. While physical force and fear directly affect the will, deceit, ignorance, and error affect the intellect (knowledge).

4.1 PHYSICAL FORCE (*VIS*)

Physical force (*vis*), also called in the roman and canonical tradition *vis absoluta* (absolute force), *vis impulsiva* (impulsive force),³⁷ *vis ablativa* (ablative force), *coactio absoluta* (absolute coercion),³⁸ *vis extrinseca* (extrinsic force),³⁹ *vis physica* (physical force), has received a classical legal definition

³⁷ See E. VOLTERRA, *Istituzioni di diritto romano*, Roma: Edizioni Ricerche, 1983, p. 183.

³⁸ See G. DOSSETTI, *La violenza nel matrimonio in diritto canonico*, Milano: Giuffrè, 1948, p. 70-74; A. STANKIEWICZ, *I vizi della volontà: La violenza (can. 125, §§ 1-2 CIC) e la 'condicio sine qua non' (can. 126 CIC) in L'atto giuridico nel diritto canonico*, ed. Simonetta Di Carlo et al., Città del Vaticano: Libreria editrice Vaticana, 2002, p. 193.

³⁹ See G. DOSSETTI, *La violenza nel matrimonio in diritto canonico*, p. 87; L. CHIAPPETTA, *Il Codice di diritto canonico. Commento giuridico-pastorale*, vol. 1, Bologna: EDB, 1988, p. 160; A. D'AURIA, *Il timore grave nell'attuale legislazione canonica*, seconda edizione, Roma: Urbaniana University Press, 2020, p. 15; L. SABBARESE, *Il matrimonio canonico*, p. 279.

in the works of Ulpian,⁴⁰ and of St. Thomas Aquinas.⁴¹ From these, authors have created their own definitions of this vice.

Generally, *vis* refers to the force exerted from outside the person, that is a force exterior to his executive faculty, which overpowers the resistance of the person hence forcing him to place an act materially, mechanically and involuntarily. The juridical effect of juridic acts placed under the influence of this vice is stated in can. 125 § 1 CIC/83, which says that an act performed as a result of force imposed from outside on a person who was quite unable to resist it, is regarded as not having taken place.

Therefore, understood as an absolute coercion to the person (the victim), the physical force (*vis*) always suppresses the freewill of the person by directly blocking the deliberative faculties of the victim, hence rendering him incapable of acting voluntarily. It coerces the freedom of the victim and forces him to place a merely physical act without deliberation hence excluding all traces of voluntariness. So an act placed is not voluntary, but it is an act of man. The person who places the act does not own the act but the act is rather attributed to him who is exerting the physical force. For this reason, the act he places under the influence of force is not a juridic act, and the author of the act is not imputable. Since this act is regarded as not having taken place (can. 125 § 1), it is said to be non-existent.

Physical force (*vis*) exerted physically and directly from outside (*ab extrinseco*) by the physical human force upon the body of the other to which he cannot resist, is always directed to the external acts to be placed by the victim. The intention is always to obtain from him a mere declaration of the in-existent will or a mere physical manifestation of the declaration of will. In other words, physical force may be exerted in order to make the victim to perform a certain act that he did not intend to perform, or to omit an act he wanted to perform. For it to vitiate a juridic act, it is not enough that there be an exertion of external force upon the will of the victim, but also there must be a direct correlation between the irresistible force and the act placed. There must also be some resistance by the victim against that external force or the victim be of contrary disposition against the coercion. It qualifies as *vis* if his resistance or contrary position becomes inefficacious against the

⁴⁰ ULPAN, 32 *ad edictum*, D.19.2.15.2; PAUL, 1 *sent.*, D.4.2.2. he defines it as “maioris rei impetus, qui repelli non potest”.

⁴¹ AQUINAS, *Summa theologiae, pars tertia et supplementum*, Q. 48, a. 1: “id cuius principium est extra nihil conferente eo qui vim putatur.”

external force being exerted by the aggressor.⁴² In such a case, even if the victim sees that their resistance may not have any positive result against the force exerted, they are still morally obliged to demonstrate this resistance or a contrary position. Otherwise, if the victim gives in, or fails to demonstrate any resistance to this force, then the act remains valid and changes the tune, now from physical force, to an act performed under grave fear.

Case of reference

We take a case of a religious priest who, with a formal declaration of his ordinary (major superior can. 134 § 1), has been impeded from exercising ministry due psychological infirmity. When he comes to the provincial superior in his office, and, at gunpoint orders the superior to dispense him from the declared impediment and the superior grants the dispensation, not having any option. If, after being dispensed under such circumstances, he begins celebrating Masses in public with the Christians and performing other acts of priestly ministry in the parish, can we say that this dispensation was valid?

The second case involves a student who has mutilated himself gravely, and who by virtue of can. 1041, 6° is irregular for the reception of sacred orders. If he comes with a certain chemical substance in the form of a drug that weakens the will of the victim, and releases this chemical substance to the diocesan bishop of his diocese, then asks him to grant him a dispensation from the irregularity so that he may proceed and receive the diaconate ordination in a week's time. Then the letter dispensing the candidate from the irregularity together with the dismissal letter is presented to another ordaining bishop, then and in a week's time the candidate is ordained a deacon, while the bishop is still under the influence of the drug. Later on, after recovering from the influence of the drug, the bishop realizes that he had dispensed the candidate under the influence and he has already been ordained. Can the dispensation be said to have been efficacious?

In both cases we are dealing with dispensations granted under the influence of force. There was a physical coercion of the executive authority using external force, such that the respective competent superiors could not resist

⁴² See SANT'ALFONSO MARIA DE LIGUORI, *Theologia moralis*, lib. V, *De actibus humanis*, art. II. *De Voluntario et involuntario*, p. 692; A. D'AURIA, *Il timore grave*, p. 16; G. MICHIELS, *Principia generalia de personis in Ecclesia. Commentarius libri II Codicis iuris canonici, canones praeliminare 87-106*, 2nd ed., Paris: Desclée et socii, 1955, p. 503, 614-615; L. VELA SANCHEZ, *Atto giuridico in Nuovo dizionario di diritto canonico*, ed. C.C. Salvador, V. De Paolis, G. Ghirlanda, Milano: Edizioni Paoline, 1993, p. 66.

the force implied from outside by their adversaries. The doctrine equates the use of chemical substances to psychical coercion.⁴³ For instance, any dispensation granted while the Superior is induced by hypnotism or in some chemically induced state is equated to physical force (can. 1323, 3°). In both cases, strictly speaking, no dispensation was granted.

However, even though the dispensations granted would not be valid, the sacraments celebrated by the priest, in the first case, are valid, and the deaconate ordination received by the candidate, in the second case, is also valid, because irregularities and impediments do not concern the validity of the reception of the sacrament orders or the validity of sacraments celebrated by the impeded priest. Since the dispensations granted were invalid, the deacon ordained while irregular for the reception of holy orders remains irregular for the exercise of the diaconate order received (can. 1044 § 1, 1°). In order to exercise lawfully the orders received, he needs to be dispensed from this irregularity.

It is not always automatic that any act performed under the pretext of force will be invalid. For a dispensation to be truly valid, it is necessary that the external coercion on the will of the superior be absolute (*vis absoluta*).⁴⁴ That is, the superior must have been actually incapable of overcoming or overpowering the force exerted upon his will by the priest, and in the second case, the bishop must have taken a contrary position before the influence of the chemical drug employed against him.

From a juridical and moral point of view, physical force that voids a juridic act ought to be “absolute”, that is, him upon whom the force is being exerted must have attempted morally or physically to resist the coercion in as much as he can. Such resistance can either be external or internal, manifested externally and externally congruent to what is happening internally.⁴⁵ Therefore, if the superior did not agree internally with the action or coercion, but did not manifest any resistance or a contrary position against the act performed under coercion, it may be so difficult to justify whether he acted under coercion. More so if he was overpowered by fear having personally evaluated that his resistance would not bear any fruit against the force being exerted, and decided to cooperate with the adversary, then the dispen-

⁴³ See L. CHIAPPETTA, *Il Codice di diritto canonico*, p. 160, footnote 1; J. GARCIA MARTÍN, *Le norme generali del Codex iuris canonici*, Venezia: Marcianum Press, 2015, p. 414; F.J. URRUTIA, *Les normes générales*, p. 204; A. STANKIEWICZ, *I vizi della volontà*, p. 195.

⁴⁴ See COLLEGII SALMANTICENSIS, *Ff. discolceatorum B. Mariae de Monte Carmeli*, tom. 3, Cap. V *de dispensatione legis*, Punct. VII, n. 82.

⁴⁵ Cf. G. MICHIELS, *Principia generalia*, p. 615-616.

sation granted would be valid, because it would have been placed subjected to grave fear, but not force (*vis*). In this case, he is considered to be fully responsible for the act placed both morally and juridically.⁴⁶ Consequently, he cannot revoke such a dispensation unless there is another grave and just cause for doing so. Instead, he can rescind the dispensation to the hierarchical superior for the revocation of the dispensation granted by him.

Any form of physical violence or coercion which does not take away completely the free will of the Superior while granting the dispensation ought not to be considered as physical coercion but a product grave fear. Therefore, we can talk of physical coercion (*vis absoluta*) only when such a force eliminated, fully and absolutely, all the deliberative faculties of the will, such that the superior was blocked and unable to discern and own the action he was placing.

4.2 GRAVE FEAR (*METUS GRAVIS*)

Canon 125 § 2 of the 1983 Code addresses the effects of grave fear on the efficacy of a juridic act placed. While physical force (*vis physica*) eliminates completely the deliberative faculty of the will, grave fear,⁴⁷ tends to determine the will of the passive subject and its psychic faculties by conforming to the threat or psychological pressures imposed from without such that it influences the will in the process of placing a juridic act. Hence, fear refers to moral coercion which originates from within but not from without, such that under its influence the person himself decides from within to act in a certain way.

To define the immediate juridical effect of this fear (*metus*), the canonical doctrine and jurisprudence refer to the classical description of Ulpian, *Metus instantis vel futuri periculi causa mentis trepidatio*.⁴⁸ That is, a trepidation of the mind caused by an immediate or future danger or evil. Implying that in that situation the subject finds himself before an imminent evil, then the mind is disturbed, filled with fear it makes a choice of placing an act which appears to offer a quick solution in order to escape from the incumbent fear.

⁴⁶ ALFONSO MARIA DE LIGUORI, *Theologia moralis*, Lib. V, *De actibus humanis*, art. II, *De voluntario et involuntario*, p. 692; MICHIELS, *Principia generalia*, p. 615-616; G. DOSSETTI, *La violenza nel matrimonio in diritto canonico*, p. 88-90; A. D'AURIA, *Il timore grave*, p. 20.

⁴⁷ It is also called moral or psychical force or *vis animo illata*, designated in Latin as *vis compulsiva, vis moralis, vis or coactio condicionalis, vis causativa, vis relativa, vis psychica*. See A. STANKIEWICZ, *I vizi della volontà*, p. 196; G. MICHIELS, *Principia generalia*, p. 618.

⁴⁸ ULPIAN, *II ad ed.*, D.4.2.1. See also G. DOSSETTI, *La violenza nel matrimonio in diritto canonico*, p. 90.

So, the mind makes a decision not because it likes the decision itself, but because that decision enables it to overcome the threat at that particular moment.

Even if the *metus* does not exclude the deliberative faculties of the will like the physical force, it attacks the aspect of freedom of the will, hence determines the choice of the act. It influences the volitional process by arousing fear by means of a threat, then puts the will of the *matum patiens* (passive subject) in front of an alternative, either to perform a given act as a lesser evil so that it can overcome that unjust harm or evil, or to chose otherwise and be subject to the threatened evil for a longer period. The threatened evil, therefore, through the fear aroused in the passive subject, cripples the will in its aspect of freedom and self-determination, but does not take away the deliberative faculty. It causes the will to deviate, inducing the subject to choose or perform an act, which, without the threat, he would not have performed.

Taken from this perspective, then, a person acting under the influence of grave fear (*metus gravis*) is a person who opts to act after a moment of deliberation, but however, the act which he chooses to place is conditional: if he were totally free, he would have acted in a different way, that is if there were no threat.⁴⁹ The doctrine, therefore, separating an act placed freely from an act placed voluntarily, concludes that under the influence of *metus*, a person acts voluntarily, that is, with full knowledge and will, but aiming to avoid a grave evil, but not freely because he is conditioned in his choice. Therefore, *metus* modifies the voluntariness of the act, in so far as it modifies the object of the will, rendering it involuntary *secundum quid*. *Metus* being a psychological pressure inserted by means of threat does not exclude the deliberative faculty of the will. It leaves intact the voluntary dimension of the act, but diminishes only aspect of the freedom, or liberty of the will. Consequently, even if the *metus* is grave and intentional or unjustly exerted does not by itself render an act null or invalid, unless the law itself states that in that particular case, an act placed under grave fear will be null, or in cases where the subject due to some psychological conditions, like in cases of terror is gravely disturbed to an extent that one loses his equilibrium.

There are two terms often are used as synonyms, yet they are not identical, *metus* and *timor*. For juridical and linguistic precision there is a difference between them. They are two vices which affect the efficacy of a juridic act performed from two different dimensions. Their influence on the person

⁴⁹ Such a conduct of the will was described by a Roman cansul Paulus with a famous phrase “quamvis si libertum esset nolluissem, tamen coactus volui.” D.4.2.21.5.

placing a juridic act is always determinant.⁵⁰ *Metus* is moral coercion.⁵¹ It refers to a threat inflicted by one subject upon the other. *Timor* instead, refers to the state of apprehension,⁵² which derives from the soul of the passive subject by which one is forced to act in a certain way with an aim of avoiding an imminent evil which has threatened him. *Timor* influences the intellect, while *metus* influences the will. When we talk of *timor gravis* we refer to a state of anxiety which influences directly the perceptive organs by means of an organic connection over the psycho-sensitive system of the subject, such that it disturbs both the memory, and imagination and eventually it indirectly disturbs the reasoning and then the intellectual faculty. Consequently, it conditions the volitional faculty, diminishes it, and eventually excludes it totally from the decision-making process. *Metus*, instead, leaves the intellectual faculty intact, and does not influence at all the intellectual faculty, such that one has the possibility of making a judgement, however, it influences only the will. With the deliberative faculty left intact, a subject who is threatened acts and arrives at the decision he makes after a period of deliberation. However, the decision made under the influence of this vice is chosen as a lesser evil appropriate at that particular moment with the scope of avoiding the imminent threat or of choosing a lesser evil.

The scholastic doctrine established that a juridic act placed under the influence of *metus* remains a voluntary act.⁵³ Along this line of thought, can. 125 § 2 CIC/83 establishes a general principle that any juridic act placed under the influence of grave fear unjustly inflicted is valid, unless the law establishes otherwise.⁵⁴ Therefore, when a competent authority or a competent superior grants dispensation to the subject under the influence of fear exerted justly or unjustly, the dispensation is valid. If the Superior claims that he

⁵⁰ Cf. G. MICHIELS, *Principia generalia*, p. 504-506; M. CONTE A CORONATA, *Institutiones iuris canonici*, p. 176; A. D'AURIA, *Il timore grave*, p. 27-28.

⁵¹ *Metus* is also called *metus activa sumptus seu causa obiectiva*.

⁵² *Timor* is also called *metus passiva sumptus*.

⁵³ THOMAS AQUINAS, *IV Sent.*, d. 29, q. 1, a.1. See also L. CUCIUFFO, *Contributi tomistici alla dottrina del matrimonio canonico*, Bologna: Edizioni Studio Domenicano, 1992, p. 37.

⁵⁴ The law identifies a number of cases in which the influence of grave fear leads to the invalidity of the juridic act placed: in vows and oaths taken under grave and unjust fear (cann. 1191, 3° and 1200 § 2); admission to novitiate, religious profession (cann. 643 § 1, 4°; 656, 4°; 658); election (can. 172 § 2, 1°); renunciation of ecclesiastical office under grave and unjust fear (can. 188); matrimonial consent given under the influence of grave fear inflicted from outside (can. 1103); judicial confessions and declaration of parties (can. 1538); judicial sentence (1620, 2°); remission of a penalty (1360); renunciation of an ecclesiastical office (can. 118); placing of vows (can. 1191); making promissory oaths (can. 1200 § 2).

granted the dispensation under the influence of grave fear unjustly inflicted upon him, the superior himself (*ex officio*) or the person who received the dispensation, or the successor of the recipient in office place an action before the ecclesiastical tribunal seeking that the dispensation be rescinded by a court judgement. The superior himself may not revoke the dispensation, unless there is another grave reason warranting the revocation, otherwise he would lose in case of a hierarchical recourse. Alternatively, either of the parties injured by the dispensation may initiate a hierarchical recourse against the decree granting the dispensation before a hierarchical superior.

Remember, the *facti species* of reverential fear does not enter here. Reverential fear is fear that arises from those whom one owes obedience and reverence. The source of fear is always the parent's or superior's indignation, and this indignation must have been foreseen to be grave and long lasting. So far, reverential fear does not determine the validity of a dispensation granted.

4.3 DECEIT (*DOLUS*): SUBREPTION AND OBREPTION

The word *dolus* is used in canonical doctrine in two ways: as a vice against a performed juridic act in the sense of can. 125 § 2 in which it is translated in English as “deceit”; it is also used in penal law to refer to one of the subjective elements determining the imputability of the person who violates a penal law or penal precept. In this case it is referred to as “malice”. In this case, we address *dolus* as deceit.

Deceit⁵⁵ involves manoeuvres, lies, untrue words or actions, falsity employed by a person to confuse, hide the truth, or present the reality under a false aspect with an aim of leading a superior into error, enticing his will and finally inducing him to accomplish or place a juridic act which he would not place or which he would have placed otherwise had he known the truth. In other words, *dolus* is a deliberate concealment of facts or deliberate assertion of what is untrue in order to persuade someone to act in a certain manner.

The doctrine distinguishes determining deceit (*dolus causam dans*) from incidental deceit (*dolus incidens*). *Dolus causam dans* occurs when falsehood influences the will in a substantial way, in relation to the motive or the

⁵⁵ Deceit is defined in the *Digest* as *omnis calliditas, fallacia machinatio, ad circumvenendum, fallendum decipiendum alterum adhibita* (ULPIAN, D.4.3.1.2), where Michiels defines it as “*deceptatio alterius deliberate et fraudulenter commissa, qua hic inducitur ad ponendum determinatum actum iuridicum.*”

motivating cause advanced by the person asking for a dispensation, so that the superior is induced to grant a dispensation which he would not have granted, had he had all the truth about the cause.⁵⁶ Incidental deceit (*dolus incidens*), instead, comes into existence when the lie does not determine substantially the decision made, such that with or without the lie, the decision would still remain as it has been taken. It is a lie that usually affect the impulsive causes.⁵⁷

Deceit can be perpetrated by means of words or false gestures. The deceived person, in this case, freely places a juridic act, but the object of will is not well enlightened by the truth – otherwise he would definitely have refrained from placing the act, or have placed it differently. Deceit, unlike physical coercion (*vis*) and grave fear (*metus gravis*), affects directly the intellect, knowledge, hence, enticing the superior to err about the truth of the matter at hand in terms of the true circumstances of the case or the very nature of the object being advanced as a cause for requesting the dispensation. Therefore, can. 125 § 2 of the 1983 Code, addressing the question of deceit, establishes that an act placed as a result of deceit is to be considered valid, but rescindable. That is, it can be nullified, except in cases where the law, universal or proper law states otherwise.⁵⁸

There is a close connection between deceit and error. The doctrine has always held that deceit leads to error, hence influencing the validity of an act in two ways. First, whenever it leads the competent authority or the superior to an accidental error, that is, when an act placed *ex dolo* touches the accidental elements of a juridic act but not its substance, the act placed by the competent authority or superior in this case is valid but rescindable, unless the law states otherwise.⁵⁹ Secondly, when it leads to a determinate or substantial error, that is, when the error concerns the essential elements of an

⁵⁶ See I. CHELODI, *Ius canonicum de personis*, Vicenza-Trento: società anonima tipografia, 1942, p. 169.

⁵⁷ See B. OJETTI, *Commentarium in Codicem iuris canonici. Liber primus. Normae generalis (can. 1-86)*, Roma: Pontificia Universitas Gregoriana, 1927, p. 154.

⁵⁸ There are a number of cases where the general law attaches an invalidating clause on acts performed under the influence of deceit: in vows and promissory oaths (cann. 111 § 3 and 1202 § 2); elections (can. 172 § 1, 1°); admission to religious profession, both temporary and perpetual (cann. 656, n. 4, and 658); matrimonial consent (can. 1098); renunciation of an ecclesiastical office (can. 188).

⁵⁹ In the 1983 Code, juridic acts placed under the influence of error are valid but rescindable. However, in some cases the law determines that they are null. This we see in cann. 188 on renouncing an ecclesiastical office; cann. 1097 §§ 1-2 and can. 1099 on matrimonial consent placed under the influence of error.

act or a condition *sine qua non* required for placing that act, that act is null and is to be considered invalid.⁶⁰

Applied to the context of dispensation, deceit is often associated with the cause (motive) which is expressed in the petition as a motivating cause. The decision made by the competent authority to relax a law expresses his will. This will should be well informed by the reasons presented to him as the motivating cause, which justify the request for relaxing the general norm in that particular case. Law demands that in order to dispense from a norm there must be a just and reasonable cause (can. 90 § 1). This fact must be drawn from the reasons presented in the petition. These reasons must be true and reflect the true image of the concrete situation and circumstances surrounding the case for which the dispensation is being requested. This truthfulness of the cause therefore, rests basically with the sincerity and genuineness of him who is presenting the petition. Without this truth, we fall into the vices of obreption and subreption.

4.3.1 Subreption

Subreption is defined by the Code (can. 63 § 3) as intentional “withholding of the truth”, that is, intentional hiding of the truth. From a general point of view, such an intentional act of withholding the truth is always geared towards obtaining with ease the dispensation while hiding the essential circumstances which would be so determinate or influence in shading more light into the cause, so that the competent authority may have a complete picture of reality as it is before arriving at an informed decision. In such case, the deceit or falsehood directly determines the decision of the authority because the competent authority, in deciding to relax the law for the person in that particular case, does not have a complete truth or knowledge of the situation or the cause.

Subreption occurs when in the petition submitted for the dispensation, certain facts concerning the motivating cause are withheld, yet by law, style, and canonical praxis they are necessary and ought to be expressed for validity of the dispensation. It does not matter whether this withholding of the truth is done in good faith or in bad faith, it all renders the dispensation

⁶⁰ See J. NOVAL Y GUTIÉRREZ, *Commentarium codicis iuris canonici*, Liber IV, *de processibus*, pars I, *De iudiciis*, Roma: Augustae Taurinorum, 1920, p. 224; M. WIJLENS, “Commentary on can. 125,” p. 179; V. DE PAOLIS, A. D’AURIA, *Le norme generali*, p. 394-397; L. CHIAPPETTA, *Il Codice di diritto canonico*, p. 161; F. ROBERTI, *De processibus*, vol. 1, *De actione de preaesuppositis processibus et sententiae de merito*, Roma: Institutum Utriusque Iuris, 1956, p. 365.

granted invalid. The 1983 Code determines the elements which must be included in a request for a dispensation for it to be granted validly in certain circumstances. Can. 1049 § 2 demands that he who is requesting a dispensation from the irregularity of abortion and voluntary homicide, must mention the number of the delicts committed in the request. Canon 65 demands that in the request for a dispensation made after having been denied by another Ordinary or Dicastery of the Roman Curia, a mention of the denied dispensation must be included in the request.

If the petitioner conceals that which is not considered as essential for a dispensation, and that which is not demanded for the validity of the dispensation by law, style, nor praxis, the dispensation will be valid.⁶¹ Subreption actually leads to invalidity of the dispensation granted because the superior's decision to dispense from that law is based on facts which are presented. Those other hidden facts are not part of the object of the decision of the superior. Hence the dispensation granted does not extend to them. The superior may not decide on or extend to that which he is ignorant about, and if this ignorance concerns that which is constitutive of a juridic act (substance of the act), the dispensation is null. Therefore, the hiding of truth is an act of deceit that determines the decision of the superior in this case.

4.3.2 Obreption

Obreption is defined as making false statements with the intention of obtaining an advantage, that is, by deceit. In this case none of the motivating causes presented to the competent authority is true. The Code maintains that in the petition at least one of the motivating causes must be true. If none of them is true the rescript is invalid because the will of the competent authority or the Superior is conditioned by lies. He is literally lied to about the motivating causes. Therefore, whether that decision is made in good faith or bad faith, the obreption still determines the decision.

Exposition of falsity may happen when, for instance, one is talking of the quality of persons and presenting false documents, as it would be in the case of a person who was once married asks and forges a false document of divorce (civil divorce) when in real sense he still lives with the spouse, outside the institute therefore no separation at all. Obreption therefore is a vice that

⁶¹ See A. VAN HOVE, *De rescriptis*, Mechelen: Dessain, 1936, n. 155; G. MICHIELS, *Normae generales*, p. 361-362; J. GARCÍA MARTÍN, *Gli atti amministrativi nel Codice di diritto canonico*, p. 758-759.

directly attacks the intellect and indirectly the will because the false cause induces the authority to decide in error. It induces error on that which is substantial to the act. In this case the authority acts without a just cause.

There is a distinction between the motivating cause and the impulsive cause. Motivating cause, also called final cause, is a cause that determines the competent authority to grant a dispensation requested. Impulsive cause, called also "secondary cause", facilitate the concession of the dispensation but not determining the will of the Superior.⁶² Since a motivating cause determines the very decision made by the superior it is gravely vitiated by obreption. An impulsive cause considered individually does not determine the decision made by the competent authority; hence, considered as a unit, it has not much effect even if it is placed under obreption.

Whether false claims are made in good faith, bad faith, error, ignorance, pride or malice, obreption substantially vitiates the dispensation and therefore the dispensation will always be invalid, provided the motivating cause is false.⁶³ The petition for the dispensation may contain one cause, or a number of motives for which a dispensation is being requested for. If only one motive is presented, it is taken as the motivating cause. Therefore, if it is false, the dispensation is invalid; if more than one reason is presented in the petition, as long as one of the causes is verified in fact, and the verified cause is one of the motivating causes, the dispensation is valid. If the causes alleged are only impulsive (impelling causes) then all of them together may constitute a motivating cause. If one of these impulsive causes were false, the others being truthful will still have the effect of a true motivating cause.⁶⁴

Taking into consideration the question of can. 63 § 3, in a rescript of which there is no executor, the motivating cause must be true at the time the rescript is issued, in the others, at that time of execution. The truth which the canon bring to mind here, whenever it is vitiated by obreption and subreption,

⁶² See F. CAPPELLO, *Summa iuris canonici*, tom. I, n. 150; A. VAN HOVE, *De rescriptis*, n. 156; G. MICHIELS, *Normae generales*, p. 371; A. REIFFENSTUEL, *Ius canonicum universum, appendix ad quartum librum*, n. 206; A. REIFFENSTUEL, *Theologia moralis*, tract. II, dist. IV, n. 22; F. SCHMALZGRUEBER, *Ius ecclesiasticum, universum*, vol. 5, Lib. IV, pars 3, tit. 16, § 5, Roma, 1843-45, n. 150.

⁶³ See SACRA CONGREGATIO PROPAGANDA FIDE, 9 maii 1877, *Colectanea de Sacra Congregatio Propaganda Fide*, n. 1470; L. CHIAPPETTA, *Il Codice di diritto canonico*, vol. 2, n. 398, p. 81.

⁶⁴ See F.M. CAPPELLO, *Summa iuris canonici*, tom. I, n. 152; A. VAN HOVE, *De rescriptis*, n. 159; G. MICHIELS, *Normae generalis*, p. 367; L. CHIAPPETTA, *Il Codice di diritto canonico*, I, p. 160; V. DE PAOLIS, A. MONTAN, *Il libro primo del Codice: Norme generali (can. 1-203) in Il diritto nella storia della Chiesa*, vol. 1, ed. Gruppo Italiano Docenti di Diritto Canonico, Bologna: Dehoniane, 2000, p. 304-305.

is the objective truth, for which there is no compromise when it is vitiated whether in good or bad faith. The vice is substantial, and it compromises substantially the validity of the rescript, but one exception to this general rule is created in case of dispensation granted *motu proprio*. Since it is granted by the superior himself at his own initiative, it is not vitiated by subreption. However, it is compromised by obreption.

It has to be noted that an ecclesiastical authority who has the faculty to dispense from a law may dispense his subjects *motu proprio* whenever he finds it necessary to release someone from the obligation of observing a law which is burdensome to him.⁶⁵ However, any dispensation granted as a result of subreption and obreption is null and invalid.⁶⁶

A dispensation granted in gratuitous form (that is directly from the superior to the subject with the intermediate (executor)) the motivating cause must be true at the moment the dispensation is being issued. For commissary dispensation (with executor) the motivating reason must be true at the moment of execution. For instance, if a religious asks to be dispensed from a disciplinary norm, for instance from a prohibition laid down by their constitutions of not eating meat at all, and claims that he has a certain illness which demands that he or she eats meat several times a week, yet in reality, this religious does not have any sickness but is just a pretense. If this religious is dispensed while he or she is perfectly healthy, then the dispensation will be invalid on the ground of obreption. However, if at the time of the request the person was healthy then later before receiving the dispensation they contracted that illness or if the dispensation is a commissary one, before it is delivered the person falls sick, the dispensation will be valid, because can. 63 § 3 demands that the cause be present at the moment of receiving the rescript.

On the other side, if a request for a dispensation is made because the person was truly sick at that particular moment of making the petition, but before the dispensation is granted, or before it is delivered to them, they are healed, the dispensation will not serve any purpose. The reason being the motive for which the dispensation is granted has ceased, and therefore there is no cause or just reason for granting the dispensation, even if the major superior had already written the rescript but it had not been delivered.

⁶⁵ See A. TAMBURINI, *De iure abbatum*, tom. 3, disp. IV, quest. VII, n. 18, p. 39.

⁶⁶ See COLLEGII SALMANTICENSIS, *Ff. discolceatorum B. Mariae de Monte Carmeli*, tom. 3, Cap. V, *De dispensatione legis*, Punct. VII, n. 85.

CONCLUSION

To conclude, the canonical juridical system protects the rights both of the superiors in fulfilling their office and of their subjects. Any act which contravenes the right of the competent ecclesiastical authority to fulfill his office must be reviewed and rescinded. As it has been demonstrated, the absence of a just cause, and acting under the influence of deceit, force and fear, compromise the efficacy of a dispensation granted in such cases. Whenever these vices compromise the validity or efficacy of the dispensation granted, or whenever the dispensation granted under the influence of these vices causes harm to the public good or have resulted to grave harm to the rights of the superior, the superior always has an opportunity to rescind the dispensation.

As we all know, laws are meant to guard and promote order within the community. They protect the social fabric of the society and of the whole juridical system as a unit. Dispensation as such, relaxes the legal obligation in particular cases, in order to ensure that the common good pursued by the law is achieved by individuals in another way, especially when following the law in its current shape proves to be burdensome to an individual, as in following it as it is, one fails to achieve this intended end. We are aware that there are cases where one may not follow the expression of the law to the letter because in its current expression it proves to be burdensome to him or her, and that it hinders the achievement of the individual good within the juridical system. It is in such cases that the competent authorities are empowered by the law to grant dispensations if this contributes to the spiritual good of individuals. Therefore, in such cases, it is not within the jurisdiction of an individual to stop the observance of the law or release himself from the obligation of observing the law. One remains subject to the law and is bound by the law, unless the intervention of the competent ecclesiastical authority to relax the law in individual cases – if its observance proves to be burdensome to some.

To protect the stability of law and order within the ecclesiastical juridical system, competent ecclesiastical authorities must use caution in determining the existence of just cause before granting the dispensation from a law. They may consult experts before reaching a definitive decision in complex cases, but most of all they must use the faculty of discretion in determining whether to grant dispensation or not. To enrich their prudence in judging these cases, they should inform themselves about the recent developments in the legislation, doctrine, and jurisprudence on the matter. It is important that they

beware of the legalistic and restrictive interpretations by some scholars and too broad interpretations, which may compromise the proper application of the law and attainment of *salus animarum*. Remember, if a dispensation granted does not help the subject to attain the spiritual growth and the salvation of the soul, then it is not worth being granted.

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SKUTECZNOŚĆ DYSPENS UDZIELONYCH
BEZ UZASADNIONEJ PRZYCZYNY I POD WPLYWEM
BŁĘDU, OSZUSTWA I SIŁY FIZYCZNEJ

Streszczenie

Dyspensa jest jedną z podstawowych instytucji typowych dla prawa kościelnego, a doktryna kanoniczna zdefiniowała ją bardzo precyzyjnie. Ewoluowała w ramach systemu kanonicznego i jest stale modyfikowana i doskonalona przez prawodawstwo kanoniczne. Kanon 85 Kodeksu z 1983 r. definiuje tę instytucję jako pojedynczy akt administracyjny, wydany przez osoby posiadające władzę wykonawczą, którego głównym celem jest złagodzenie mocy samego prawa kościelnego w konkretnym przypadku dla duchowego dobra wiernych. Nie jest to narzędzie wymierzania sprawiedliwości, ale instrument roztropnego administrowania. Niekiedy może dochodzić do nadużyć tej instytucji kanonicznej przez same kompetentne władze lub przez podmioty ubiegające się o dyspensę. Aby pomóc ludowi Bożemu i kompetentnym władzom kościelnym docenić wartość kanonicznej instytucji dyspensy w systemie kanonicznym, autor artykułu broni idei słusznej przyczyny i ostrzega wiernych chrześcijan przed próbami uzyskania dyspensy w drodze podstępny, użycia siły lub w sytuacji ciężkiej bojaźni.

Słowa kluczowe: arbitralność; kompetentna władza; obrepcja; subrepcja; wystarczająca przyczyna.