Dispensation from the Law: The Canonical Institution

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I. Introduction

One of the unique institutions in the legal system of the Catholic Church is called dispensation. It is unique and specifically canonical in character because it is an institution unknown in civil law. One can hardly imagine a naturalized Filipino citizen, ordinarily disqualified by law from running for public office, being dispensed from the legal requirements and allowed to run in an election. Over the centuries, although it has not had an insignificant influence on the development on various civil jurisdictions, the important Common Law area of equity owes much to it.

Dispensation is defined as the relaxation of a merely ecclesiastical law in a particular law, within the limits of their competence, by those who have executive power of governance, and by those who either explicitly or implicitly have the power of dispensing whether by virtue of the law itself or by lawful delegation.[1] Its effect is that, while the law itself preserves its

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1. CODE OF CANNON LAW, C.85 (1983). The basic law of the Catholic Church is the Code of Canon Law, codified for the first time in 1917, and revised in 1983. The official version is in Latin although there are other officially approved translations. There are two English translations, one by the Canon Law Society

essential validity and binding force for others, the binding force of that law is suspended in a particular case with respect to a person or a number of persons, or even for an entire community, for a time.[2] For example, the law requiring a marriage where at least one of the parties is a Catholic must be celebrated according to canonical form may be dispensed if there are serious circumstances. The dispensation would have the effect of allowing the Catholic party to contract marriage without having to observe the requirements of canonical form. The binding force of the law would be suspended in this regard but the law itself maintains its validity and will continue to be binding on other persons who have not been similarly dispensed.

Obviously, not every law admits of dispensation. Fundamental to this canonical institution is the theological distinction between merely ecclesiastical positive law and divine or natural law. Merely ecclesiastical positive laws, though not all of them, may be dispensed. On the other hand, a divine or natural law cannot be dispensed. This article will be divided into two parts: first, the distinction between divine and natural law on the one hand, and a merely ecclesiastical law on the other; and second, the matter of dispensation proper.

II. The Distinction between Divine Law and Ecclesiastical Law

A. Basis of the Distinction

The basic law that governs the Catholic Church is the Code of Canon Law. The Code which governs the Latin rite was approved and promulgated in 1983 while the code for the Oriental Catholic Church was approved and promulgated in October 1990.[3] For our purposes, the focus will be the Code

of Great Britain and Ireland and the other by the Canon Law Society of America.

2. L. Vela, *Dispensatio, in* NUOVO DIZIONARIO DI DIRITTO CANONICO 420-421 (Corral, De Paolis & Ghirlanda eds., 1993).

3. The denominations "Eastern" or "Oriental" are the customary ways of identifying a large number of Christian Churches whose origins, remote or immediate, are rooted in the eastern regions of the Roman Empire, divided by Diocletian at the end of the third century, as opposed to the Western or Latin regions of the same empire which included present day Spain, France, North Africa, and Britain. These Eastern Churches are associated with the ancient jurisdictions of Antioch, Alexandria, Jerusalem, and Byzantium or Constantinople. Members of these Eastern Churches are found all over the world today. There are four groups of Eastern Churches: the Oriental Orthodox, the Assyrian Church of the East, Eastern Orthodox Church, and the Eastern Catholic Churches. The fourth are in full communion with the Church of Rome; they are also known as Uniates. *See* M. Fahey, *Eastern Churches, in* THE NEW DICTIONARY OF THEOLOGY 301-306 (Komonchak, Collins & Lane

for the Latin Church. This Code is a compilation of norms from a total of 1752 canons. Some of them are on the level of fundamental theological principles,[4] while others are implications and consequences of these theological principles.[5] Still, others are concrete and practical, bordering on the bland norms.[6] Some of these norms are clearly ecclesiastical in origin.[7] Others are merely disciplinary in nature.[8] Furthermore, some are considered articulations of natural law.[9] The Code is, therefore, a motley aggregate of these various norms of varying importance. In view of these differing natures and origins of the various laws included in the Code of Canon Law, the Code itself contemplates the possibility of dispensation from some church laws but not from others.

B. Ecclesiastical Laws

There are certain laws that are clearly ecclesiastical in origin and in nature. As such, they can, in principle be dispensed. Nonetheless, as previously mentioned, not all laws that are ecclesiastical in origin are susceptible of dispensation. Cc.86 and 87 establish the general norm that three kinds of laws of ecclesiastical origin are not subject to dispensation: (a) to which the extent they define those things that are essentially constitutive of juridical

eds., 1991); B. Schultze, *Eastern Churches, in* ENCYCLOPEDIA OF THEOLOGY 380-395 (Rahner ed. 1975); D. Salachas, *Diritto Orientale, in* NUOVO DIZIONARIO DI DIRITTO CANONICO 396-399 (Corral, De Paolis & Ghirlanda eds., 1993).

4. For example, C.897 which concerns the Eucharist: The eucharistic sacrifice, the memorial of the death and resurrection of the Lord in which the Sacrifice of the cross is forever perpetuated, is the summit and the source of all worship and Christian life.
5. C.1141: A marriage which is ratified and consummated cannot be dissolved by any human power or by any cause other than death.
6. C.490.1: Only the bishop is to have the key of the secret archive.
7. The canonical form of marriage as prescribed by C.1108: Only those marriages are valid which are contracted in the presence of the local ordinary or of the parish priest, or of the priest or deacon delegated by either of them, who in the presence of two witnesses assists at the marriage.
8. C.1643: Cases concerning the status of persons never become res judicata, not excepting cases which concern the separation of spouses. C. 1012 according to which the minister of sacred ordination is a consecrated bishop is merely disciplinary, because there was a time when in the long and tortured history of this matter when non-consecrated bishops were allowed to ordain. *See* GIANFRANCO GHIRLANDA, DE ORDINE 10 (1983).
9. C.1057.1: A marriage is brought into being by the lawfully manifested by persons who are legally capable. This consent cannot be supplied by any human power.

institutes or acts; (b) procedural laws; and (c) penal laws. An example of the first would be C.127.1, which states that "when the law prescribes that in order to perform a juridical act, a superior requires the consent or advice of some college or group of persons, then the college or groups must be convened in accord with C.166...; for the validity of the act, it is required that the consent be obtained..." An example of a procedural law is C.1598.1, "when the evidence has been assembled, the judge must, under pain of nullity, by a decree permit the parties and their advocates to inspect the acts which are not yet known to them." Lastly, a penal law would be C.1394.1, which provides, "without prejudice to the provisions of C.194.1.3, a cleric who attempts marriage, even if only civilly, incurs a *latae sententiae* suspension."

Other than these laws, ecclesiastical laws can, in general, be dispensed. The law prescribing the obligation on Catholics to contract marriage according to canonical form can be dispensed. To illustrate, in practice, a bishop can release a Catholic from this obligation and allow him to marry in a protestant ceremony or even in civil rites. A Catholic is forbidden to contract marriage with a non-baptized person because of the so-called impediment of disparity of cult, but a bishop can allow such a marriage in a particular case.

C. Divine Laws

Other laws are clearly not ecclesiastical. Rather, they are understood to be derived from divine or natural law, and for that reason, they cannot be dispensed. A human office or institution does not possess authority to suspend the binding force of law from a superior legislator. For example, C.1024 requires two fundamental requirements for ordination: the candidate must be male and he must have been baptized. Although there is debate concerning the first, the disposition of the competent ecclesiastical authority at the present time is that this is a requirement of divine law arising from the will of Christ the Lord himself. Therefore, it is divine in origin, and as such, it cannot be dispensed. The second requirement that he must be baptized is, clearly and by consensus, of divine origin.[10] By reason of this divine origin, C.1024 cannot be dispensed. This effectively means that a woman cannot be

10. Sanctification as an effect of the sacraments means two things: a cleansing for what is holy is clean and pure; and a dedication to and consecration for something sacred. All the sacraments are said to sanctify in the first sense but not all are said to sanctify in the second way. Baptism by which man is configured to God and is dedicated to him sanctifies also in the second sense. It is an empowerment, by virtue of which man can participate in those acts that are proper to the faithful, as the liturgy, for example. THOMAS AQUINAS, IV SENTENTIARUM L4,D4,Q1,A3 and A4; THOMAS AQUINAS, SUMMA THEOLOGIAE, III, Q.63, A.2.

allowed to be ordained; neither can one who is not baptized be allowed to be ordained.

D. Laws of Disputed Nature

There are also laws of the Church whose nature or origin is not clearly established and where experts have not arrived at a certain consensus. A good example of this is the nature of impotence as an impediment to marriage. The preponderance of opinion, under the disciplines of both the Codes of 1917 and 1983, maintains that impotence arises from natural law. This is the constant tradition of the Church and the established jurisprudence of its tribunals. Part of the reason for this position was the understanding that marriage was directed towards the procreation of children and the good of the spouses. Included in the "good of the spouses" is what was called the *sedatio concupiscentiae.*[11] Understood to be included in the institution of marriage is the release and satisfaction of the sexual tensions of man. For this reason, those entering marriage should have the capacity for full sexual intercourse, not necessarily for procreation. Otherwise, they would not be able to fulfill this aspect of marriage. There are certain quarters, however, that hold the contrary, and question this nature of the impediment. Such advocates, though in the minority, have not gained any real following recently. Significantly, in a decision of the *Roman Rota* dated January 10, 1978 and penned by Ferraro,[12] two consultors of the Commission for the Revision of Canon Law dissented from the opinion that impotence as an impediment to marriage is of natural law origin.[13] There has also been a long disquisition by Anastacio Gutierrez.[14]

11. This reasoning is implicit in the magisterial article of Urbano Navarrete, S.J. on the meaning of the consummation of marriage. *See* U. Navarrete, *De notione et effectibus consummationis matrimonii,* 59 PERIODICA 628-635 (1970).

12. He held that a decree issued by the Holy Office of the Vatican Curia concerning the meaning of "consummation of marriage" is of positive church law and is therefore not retroactive. *See* 103 MONITOR ECCLESIASTICUS 284 (1978) (publishing Ferraro's decision).

13. It was because of the minority, if persistent, dissent that the formulation of the the first paragraph of C.1084 was changed from "impotence...by natural law itself invalidates marriage" to "impotence...by its very nature invalidates marriage." 7 COMMUNICATIONES 54-56 (1975); 9 COMMUNICATIONES 360-361 (1977).

14. ANASTACIO GUTIERREZ, IL MATRIMONIO ESSENZA-FINE-AMORE CONJUGALE 8-9 (1974). The point of these references is not to resolve the complex issues which have entire histories behind them; rather it is to indicate the limited point being made here, namely that the nature of the impediment of impotence is disputed.

III. DISPENSATION

A. Dispensation and Juridical Acts Similar to It

Dispensations, according to C.85, is the relaxation of a merely ecclesiastical law in a particular case. It can be granted within the limits of their competence by those who have executive power of governance and by those who, either explicitly or implicitly, have the power of dispensing, whether by virtue of the law itself or by lawful delegation. This concept of dispensation involves the following notable features:

(a) Dispensation is an exercise of administrative authority. It is therefore not legislative in character. It may be granted then by anyone who has executive power. In ecclesiastical parlance, these people are called local or personal ordinaries.[15]

(b) It involves a relaxation of the obligation contained in the law but does not affect the juridical stability of the law itself which retains its force and is not thereby abrogated. For example, a presbyter who is dispensed from his vow of celibacy can then validly contract a marriage. The law of celibacy remains in force and continues to be binding on others, while the obligation to observe it is relaxed in a particular case with respect to the person so dispensed.

(c) The dispensation may be granted only in respect of merely ecclesiastical laws, that is to say, those laws which emanate purely and solely from a competent ecclesiastical authority. This has been previously discussed earlier wherein the distinction between the two types of laws, a distinction that lies at the remote base of the possibility of dispensation, was explained.

(d) Such a dispensation is granted only in a particular case, that is, for a particular individual person or persons and in a particular set of circumstances. These people are, in virtue of the dispensation, not bound by the obligation imposed by the law; all others continue to be bound by such obligations. For example, if the constitutions of a religious congregation do not allow the reelection of a superior general for a fourth consecutive term, the electors can, according to the provisions of C.180, postulate that person. This means that the electors are making two simultaneous juridical acts: first, they elect this person notwithstanding his canonical impediment; and second, they ask that the law prohibiting the fourth consecutive reelection be suspended in this particular case.

15. They are called ordinary because they occupy an office to which are attached certain powers [their powers are "ordinary", not delegated]. They are local ordinaries if their authority is exercised over and defined by territory, and personal if their authority is exercised over persons and not defined by territory. The bishop is a local ordinary because his diocese is territorially defined; the provincial superior of the Jesuits is a personal ordinary because his jurisdiction is exercised over persons no matter where these persons are.

(e) A dispensation is essentially, though not necessarily and in every case, a temporary measure granted to individuals for a particular purpose. It is a temporary measure in the case of the superior general elected to a fourth consecutive term, although it is hardly said to be temporary in the case of a dispensation from the vow of celibacy.

The canonical institution most similar to it, and from which it must be clearly distinguished, is called a "privilege." A "privilege" is defined in C.76 as a favor given by a special act for the benefit of certain persons, physical or juridical; it can be given by a legislator or by an executive authority to whom the legislator has granted the power. It has been described as a "favorable private law." It is an objective norm that permits certain persons to act lawfully in a manner different from that of the rest of the community.[16] A privilege is distinct from a law in that the former is essentially private, applying as it does only to a certain group of people in the Church. It is different from a dispensation because a privilege is permanent and stable, creating a new objective norm and constituting the beneficiary in a new and different juridical condition. Dispensation, on the other hand, merely suspends the binding force of a law in a particular case or specific instance, without creating a new objective juridical norm.

B. Authority Competent to Grant Dispensations

Dispensation is an administrative, rather than an executive, act. The Code contemplates two groups of persons who are competent to dispense from the law: (a) those with executive power; and (b) those to whom the power to dispense has been granted. The power to dispense may be granted in either of two ways: (i) by virtue of the law itself; or (ii) by lawful delegation.

16. For example, according to the universal law of the Church, superiors are forbidden in any way to induce the members to make a manifestation of conscience to themselves [C.630.5]. This is a manifestation of the person's innermost thoughts, his fears, his hopes, and his problems and difficulties. The law of the Church forbids superiors from compelling members to make this to them because it will be used in decisions concerning their assignments to work and responsibility; perhaps it will even be used to make decisions on whether a particular member will be allowed to continue in the congregation. From the point of view of human rights, it could even be construed as an unwarranted invasion of privacy. But superiors of the Society of Jesus are allowed to require this manifestation of conscience and members are obliged to make this same manifestation according to a privilege granted to the Society of Jesus from its foundation and has been confirmed repeatedly by the Holy See, for example in a rescript of Pius XI of 20 June 1923 in 4 ACTA ROMANA SOCIETATIS 261 (1923). *See* ALDO CREUSEN AND ELLIS, RELIGIOUS MEN AND WOMEN IN THE CODE 128-132 (1965).

1. The So-Called Ordinaries

Those with executive power are called ordinaries in ecclesiastical terminology. C.134.1 enumerates them: (a) the pope; (b) those who preside over a diocese or its equivalents in law;[17] (c) those who preside over these territorial jurisdictions even if only temporarily;[18] (d) vicars general; (e) episcopal vicars; (f) the major superiors of clerical religious institutes of pontifical right; and (g) the major superiors of clerical societies of apostolic life likewise of pontifical right.[19]

2. The Non-Ordinaries

There are those to whom the power to dispense has been granted but who are not ordinaries. Nevertheless, they possess the authority to grant dispensations from certain laws because they have been granted the authority to do so either by lawful delegation or by virtue of the law itself.

3. By Lawful Delegation

Legislative power cannot be delegated by legislators below the Roman Pontiff.[20] Since the authority to dispense is executive rather than legislative,

17. The equivalents of a diocese are: prefecture apostolic, vicariate apostolic, territorial abbacy, territorial prelature, and apostolic administration. There are different terms to describe the various territorial divisions of the Catholic Church. Those who head these various jurisdictions are respectively: diocesan bishop, prefect apostolic, vicar apostolic, territorial abbot, territorial prelate, and apostolic administrator.

18. Examples of those who are said to govern these territorial jurisdictions only temporarily are the two juridical figures of the diocesan administrator mentioned in Cc.419 and 421 and the pro-prefect and pro-vicar mentioned in C.420.

19. The terms in (f) and (g) need some explanation. In religious law, a local superior is one who presides over a house or a community, while a major superior is one who presides over at least two houses or communities (and are, therefore, local superiors). A provincial is, therefore, a major superior, while a rector is a local superior. An institute or congregation is clerical if it is composed mainly of priests; the Jesuits are a clerical institute, the La Salle Brothers are not, neither are the congregation of sisters. A religious institute is where the three public vows of poverty, chastity, and obedience are made; a society of apostolic life has vows, but either they are not public or not all the three vows are made (the Maryknoll Fathers and the Columban Fathers are institutes of apostolic life). Finally, pontifical right refers to the source of the approval of the institute. If an institute or congregation is approved on the level of the diocesan bishop, it is of diocesan right; if it is approved on the level of Rome by the pope, it is called pontifical right.

20. C.135.1.