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THE NON-RECOGNISED ASSOCIATION AND ITS CAPACITY TO ACT IN COURT

5. The Johanno-Pauline codification

A more enlightened procedural and associative regime is signalled in the 1983 Code. The final form of the procedural norms of this Code reflect the twin imperatives of novelty and continuity which animated the redactors, i.e. conserving the general framework of the 1917 Code while renewing it according to the spirit and doctrine of the Second Vatican Council. The revision of the procedures of the New Code was dominated by the oft-mooted problem, how to reconcile a procedural system, itself atypical when compared with civil systems, with the need for juridical and procedural formality that would not become an end in itself. To this end c. 1446 §1 provides an important *caveat* to the norms of litigation. It provides for the avoidance, where possible, of contentious cases and the pursuit of extrajudicial solutions of conflicts as befits the evangelical *lineamenta* of the Christian Community. Similarly the enhancement of the rapidity and brevity of the processes by leaving much of the time-limits to the determination of the judge; a more consistent respect for the dignity of respondent and accused; and most of all the insistence on the protection of the subjective rights of the faithful as one of the principal optics with which to view the *raison d'etre* of the action (no. 7 of the *Principia* of the 1967 Synod of Bishops).

The norms on procedural capacity in the 1983 Code represent a return to the Roman theory of capacity. The Code does not use expressions like legitimation but has preferred to keep to the Roman formulae[70]. In general procedural capacity is designated by expressions such as in *iudicio adesse, stare in iudicio, agere et respondere, agere per se, per procuratorem vel curatorem, stare in iudicio per alium* etc. In doctrine the terminology used by canonists varies according to whether they subscribe to the German or Roman theories. Thus Roberti, Olivero, Figueroa and Ricciardi distinguish *the juridic capacity* of parties, the *capacity* to be party to a process, procedural legitimation and procedural postulation. More recently Llobell distinguishes three levels, the first being the general juridic capacity of c. 1476, then the capacity to act as in c. 1478 and the capacity to postulate as in c. 1481. Pompedda breaks down the procedural prerequisites into three: a) the capacity to be party, a consequence of juridic capacity; b) procedural capacity, or *legitimatio ad processum* and; c) procedural legitimation or *legitimatio ad causam*. P.V. Pinto states that three capacities are required in the canonical process: a) juridical capacity, i.e. being a subject of rights and obligations that are juridically protected; b) the capacity to act in general, i.e. maturity of mind and age; c) the capacity to act in a specific case, i.e. the possession of the right to place a concrete juridical act. What seems common to canonical doctrine then are three capacities: a) juridic capacity; b) procedural capacity; c) procedural legitimation, which can be active or passive.

[70] Cf. P.V. PINTO, *I processi...* (cf. nt. 4), 235, nt. 335.

With regard to associative rights the 1983 Code incorporates the sea-change expressed in the decree on the mission of the laity from Vatican II:

> while preserving the necessary link with ecclesiastical authority, the laity have the right to establish and direct associations, and to join existing ones[71].

The foundation of the right is evidently found in man's nature which is social and by means of which it has pleased God to assemble all those who believe in Christ to make of them a People of God (1 Pet 2,5-10), a single body (1 Cor 12,12) and thus signal that the corporate phenomenon accords with a fundamental need in the faithful, a need that is both human and christian, and at the same time offers a sign of unity and communion of the Church in Christ, who said to his disciples, "where two or three are gathered in my name there am I in the midst of them" (Mt 18,20). Canonists have interpreted the source of the phenomenon differently. Corecco held that it arose from a charism of the Spirit[72]. Navarro feels it is a natural human desire[73]. Gerosa suggests that at the source of such phenomena is the supernatural impulse of the Spirit[74]. Miras probably holds the most balanced position. He explains that not every expression of the phenomenon responds to a charism of the Spirit and not every charism of the Spirit has been

[71] «Debita cum auctoritate ecclesiastica relatione servata, ius est laicis consociationes condere et moderari conditisque nomen dare» (AA 19).

[72] Cf. E. CORECCO, «Istituzione e carisma in riferimento alle struttura associative» in *Das konsoziative Element in der Kirche*, St. Ottilien 1989, 95-96.

[73] Cf. L. NAVARRO, *Diritto di associazione e associazioni di fedeli*, Milano 1991, 45.

[74] Cf. L. GEROSA, *Diritto ecclesiale e pastorale*, Torino 1991, 163.

found in associative entities[75]. The text of the Council, however, effectively establishes the right to associate as a right that is founded in the natural law on the one hand and on the impetus of the Gospel on the other[76].

The achievement of Vatican II lay in its retrieval of what many considered to be a marginal reality for the Church and recalling that the associative phenomenon expresses the very nature of the Church as a mysterious communion of believers in Christ. As a juridical imperative, however, the Council avoids elevating it to an absolute right in the life of the Church, chiefly by asserting that it is conditional upon the *necessary link with hierarchical authority*. Vatican II formally recognises the right of association only to laity but the motives adduced allowed canonical doctrine, through the 1983 Code, to apply it to all the baptised, be they clergy or laity. Thus canon 215 of the Code states:

> The christian faithful have the right to found and govern freely associations which serve charitable or pious purposes or which foster the christian vocation in the world, and they are free to hold meetings to pursue these purposes in common[77].

This canon originally former part of the project which was established to draw up a fundamental constitution for the Church, the *Lex Ecclesiae Fundamenlalis*, and afterward, when it failed, transposed into the

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[75] Cf. J. MIRAS, «Carisma y estructuras asociativas: un binomio necesario?» in *Das konsoziative Element in der Kirche* (cf. nt. 72), 155.

[76] Cf. A. DEL PORTILLO, *Fieles y laicos en la Iglesia. Bases de sus respectivos estatutos juridicos*, Pamplona 1981², 108.

[77] «Integrum est christifidelibus, ut libere condant atque moderentur consociationes ad fines caritatis vel pietatis, aut ad vocationem christianam in mundo fovendam utque conventus habeant ad eosdem fines in communi persequendos.»

Code, then still in the process of revision and redaction. During this process the working group *De Laicis* also prepared a text which was related to the right, eventually taking the form of canon 31 of the *Schema canonum libri II "De Populo Dei"* of 1977. During the sessions of the study group *De populo Dei*, the canon was suppressed for the purpose of avoiding unnecessary repetition and for the fact that the right had already been recognised in the contemporaneous project, the *Lex Ecclesiae Fundamentalis*. It was left to the Coetus *De Laicis* to explain the rationale behind the change of regime:

> Nevertheless the group considered certain rights, faculties and duties to come without doubt from the condition itself of the baptised, by force of which in fact they are of divine, positive and natural law. This complex, however, of rights and duties, inasmuch as it is based upon divine law and appears as a radical exigency having a foundation in the ontological condition itself of the Christian faithful, has existence before any positive law and takes its force independently from it: it seems congruous — indeed necessary — that human law should equally recieve and clearly enuntiate such rights and duties and should defend them by apt instruments of protection, because christian dignity, just as human dignity, is the source and root of fundamental rights and duties in the order of a common vocation to holiness and in order to extend the kingdom of God; these are the rights and duties of Christians. And this is the juridical situation common to all the faithful whatever their particular function in the Church[78].

With Hervada's schema of a hierarchy of rights[79], the right enuntiated in canon 215 is a right of freedom

[78] Cf. Coetus *De Laicis*, *Communicationes* 2 (1970) 91.

[79] For a discussion of Hervada's schema see R. BARRETT, "The Right to Integral Catechesis as a Fundamental Right of the Faithful", *Apollinaris* 47 (1994) 179-206.

(*condicio libertatis*). The only endogenous limitation placed upon it is that the associations so formed be established for the purposes of charity or piety or to foster the christian vocation in the world. The 1983 Code, therefore, offers a very broad mandate to associations with regard to these purposes; the perfection of personal life, the promotion of public worship, of christian life, of the apostolate, of evangelisation, the exercise of charity and piety and the christian animation of the temporal order (c. 298 §1). Basically they may be founded for any activity that directly or indirectly touches on the mission of the Church, *pace* those functions which the hierarchy is alone competent to perform.

The Latin Code (*CIC-1983*) distinguishes between public and private associations where the Eastern Code (CCEO) deals only with associations in general. Accepting the distinction, for the moment with all the usual qualifications, the consultors who worked on the revision of this part of the law in the study group *De Laicis*, elaborated seven characteristics of the private association: 1) they are freely established by the faithful; 2) the hierarchy in one way or another recognises them and recommends them, granting juridic personality either by law or by formal decree; 3) their purposes, spiritual and apostolic, pertain to the faithful in virtue of their baptism; 4) they do not receive a mission from nor act on behalf of the hierarchy; 5) they have their own statutes which are examined by ecclesiastical authority; 6) they are subject to the jurisdiction of their legitimate pastors in the same way as individual members of the faithful; 7) their goods are not ecclesiastical but are governed by civil norms. Essentially, then, these associations represent a valid exercise of a right by means of a union of wills which is guaranteed by divine law. Just as it is for members to place the foundational act, so too it is for them to compose the statutes in which they must specify the end to be pursued, the means which they will use, the persons with whom they give life to the entity, the government of the association, conditions of admission and membership, and the title and name of the association.

A fundamental distinction is to be made between two kinds of private association, namely, those that are recognised and those that are not recognised, for much, from a procedural point of view, depends on the distinction. The criterion for recognition is the examination and approval of the statutes of the private association, regulated by canon 299 §3. The regulation of non-recognised associations is determined by c. 310, the latter corresponding to *associations of fact* of civil legislatures[80]. We may further sub-divide the second category into four classes:

> a) private associations of fact (their statutes have yet to be examined by the competent authority;
> b) non-recognised private associations of which the authority has taken notice (c. 299 §3);
> c) non-recognised private associations commended by authority (c. 299 § 2);
> d) non-recognised private associations recommended by authority (c. 299 §2)[81].

The lack of concession of juridic personality brings with it what effectively amounts to a procedural penalty, for the 1983 Code does not envisage much beyond the subjective configurations (so necessary in order to

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[80] Cf. A. MONTAN, «Le associazioni dei fedeli nel Codice di diritto canonico», *Quaderni di Diritto Ecclesiale* 3 (1990) 332.

[81] Cf. F. SCHULZ, «La posizione giuridica delle associazioni e la loro funzione nella Chiesa», *Apollinaris* 49 (1986) 123-124.

be able to act in court) spelt out by canon 113 §2 of the Latin Code:

> besides physical persons, there are also in the Church juridic persons, that is, subjects in canon law of obligations and rights that correspond to their character.

If we interpret this canon rigidly alongside that of canon 1400 §2 which speaks of procedural protection for the rights of persons, be they physical or juridic, then clearly nonrecognised associations and recognised associations which do not enjoy juridic personality are not in a position to vindicate or protect rights as entities in themselves.

The question is sometimes posed as to why associations must undergo a *recognitio statutorum* in order to have some standing in the Church. Thus canon 299 §3 of the 1983 Code stipulates:

> No private association of the Christian faithful is acknowledged unless its statutes are recognised by the competent authority.

This requirement was actually derived from an observation received in a *Relatio* put before the Commission in 1981. The Commission was asked whether a new canon should be attached to the schema requiring the approval or erection of a private association as a necessary prerequisite for its canonical recognition. Up to this point, the prospect of a private association lacking juridic personality but existing within the Church's framework was quite acceptable — such associations would arise from agreements between the faithful and would require for their recognition no intervention from the hierarchy concerning the statutes. The question of the examination of the statutes arose only with reference to the concession or private juridical personality[82]. In a subsequent phase it was decided that recognition of the statutes was a sufficient requisite for the conferral of juridic personality[83]. Thus the Commission accepted the general lines of post-conciliar doctrine which saw in the decree *Apostolicam actuositatem*, n. 24, the existence of a type of private association which possessed neither explicit recognition by authority nor juridic personality. The proposal of the 1981 *Relatio*, however, and the final form of the canon rejected this development and marked a return to pre-conciliar doctrine, as is clear from the motives expounded for introducing the new canon:

> The reason is because this norm regarding its substance agrees with can. 686 §1 of the 1917 Code. Even an ecclesiastical association which is not a private juridic person requires the collaboration of ecclesiastical authority, in order to exist. Thus it is distinguished from an association of civil law which pursues an ecclesiastical end and which is commended or approved. Approval is required because otherwise the vigilance mentioned in canon 679 would not be able to be exercised. Nor could it be declared that ecclesiastical authority can dissolve every ecclesiastical association even that which does not enjoy juridic personality (c. 702 §1) if this authority has no part in such an association in the ecclesiastical order[84].

The assumption of the request is of course mistaken for the request assumes that the constitution or approval of a private association is coterminous with an act of authority. As a result the recognition of the statutes of a private association has become something of a thorn in

[82] Cf. *Communicationes* 18 (1986) 303.
[83] Cf. *Communicationes* 18 (1986) 343, 363.
[84] Cf. *Communicationes* 15 (1983) 87.

the body of norms governing associations. The recognition of a private association is intended to show that an association exists in the Church and consequently possesses the conditions necessary for *ecclesialità.* Some commentators go so far as to suggest that the foundational act creating a private association of the faithful is enough to grant it this ecclesiality[85]. On the other hand, there are those who feel that the lack of recognition on the part of the hierarchy carries important and negative consequences for a group or private association with particular regard to its capacity to participate procedurally[86]. The legitimacy of non-recognised associations or groups in the Church, however, particularly those that have grown up since the Council in response to its call to universal holiness, is not denied by the majority of canonists[87]. De facto there exist many groups and private associations, especially at the parochial, interparochial and diocesan level, which do not satisfy the norm of canon 299 §3. Navarro argues that there is no doubt that such groups are legitimate expressions of the associative movement in the Church even if they cannot be recognised as private associations. Thus the Italian Episcopal Conference speaks of *free aggregates*

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[85] Cf. L. NAVARRO, *Diritto di associazione...* (cf. nt. 73), 76, nt. 88.

[86] Cf. A. MONTAN, «Le associazioni dei fedeli nel Codice del diritto canonico», *Quaderni di Diritto Ecclesiale* 3 (1990) 332; J. HENDRIKS, «Le associazioni dei fedeli», *Quaderni di Diritto Ecclesiale* 3 (1990) 367.

[87] F. SCHULZ, «La posizione giuridica...» (cf. nt. 81), 122; E. CORECCO, «I laici nel nuovo Codice...» (cf. nt. 81), 213; G. FELICIANI, «Le associazioni dei fedeli...» (cf. nt. 81), 691; F. MORRISEY, «Statuts juridiques des personnes dans le Code et communication du magistère», *L'année canonique* 31 [1988] 134; L. NAVARRO, *Diritto di associazione...* (cf. nt. 73), 79.

which are not explicitly recognised and which do not need any particular authorisation to attain that ecclesial consistency required to work and live within the juridical sphere of the Christian community[88].

6. Procedural capacity and non-recognised associations

With regard to procedural capacity, canon 310 states the general principle:

> A private association which has not been constituted a juridic person cannot as such be a subject of obligations and rights; however, the Christian faithful associated together in it can jointly contract obligations and acquire rights and possess goods as coowners and copossessors; they can exercise their rights and obligations through an agent or proxy.

This canon, therefore, envisages at most that institute we have from Roman Law, namely the collective suit, or *consortium litis activum* in which all members of an affected association or group act as coparties to one action. The difference here is that in order to be legitimated to act in court all the members would have had to demonstrate an interest or prejudice that affects each coparty and thus pass beyond the thresholds of the prerequisites to an action and thereby enjoy juridical protection. Viewed together with canon 113 §2 this action may seem to offer a severe limitation to the procedural activity of private associations that are not recognised. It is not entirely bleak. The Code does consider the same associations as unitary entities to which one may attribute some obligations and some rights

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[88] Cf. Conferenza Episcopale Italiana (CEI), *Nota pastorale, Criteri di ecclesialità dei gruppi, movimenti, associazioni*, n. 16, 321.

(cc. 304, 306, 309, 298 §2). Condorelli concludes that such associations are

> entities all the same, even if deprived of juridic personality [...] and qualifiable in the light of the concrete norms which govern them as subjects of law insofar as they are treated by it as unitary centres of determinate juridic relations that are not the product, either of a single human subject or of a juridic person[89].

For some canonists, therefore, such private associations are subjects of rights and obligations without personality. Others suggest entities such as *private juridic persons*, and even, at an early stage, some recognition of the civil personality of some groups such as would permit them to appear before the administrative and judicial organs of the Church. This *intermediate* solution would permit, without damage to the existing twin-track system, to such groups some procedural participation.

From a procedural point of view, canon 310 envisages the entities concerned as an ensemble of physical persons which must avail of legal representation in order to have a voice in court. There are problems that remain with this norm. What of the respondent to such an action? The Code seems to require that the active party name the co-defendants in its libellus, all those belonging to the group or association. In order to avoid this kind of complication, however, some civil legislatures permit the association to act in court as a unitary subject or single entity, represented not be a procurator but by whoever is director or president[90]. Yet even in

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[89] CONDORELLI, «Considerazioni problematiche sul concetto e sulla classificazione delle persone giuridiche nello *Schema de Populo Dei*», *Diritto Ecclesiale* 91 (1980) 451.

[90] Cf. C. MANDRIOLOI, *Corso di diritto processuale*, Torino 1985, I, 244.

legal systems for which the legislator does not envisage such a *factispecies*, like that of the 1917 Code, doctrine is not unaware of the problem. Thus Roberti, for instance, felt that the question should be left to the statutes to determine:

> Private associations [...] which have not received erection or approval [...] regarding rights are naturally *capax* [...] they can act in court as parties. Their representation, however, is determined by the statutes of the association or by the will of the members[91].

Mindful of the remark of Roberti and the suggestion of Lombardia in the Sixties that some sort of civil personality might merit an *ad hoc* recognition by the competent ecclesiastical authority, it is surely possible for canonical doctrine to make some provision for the procedural participation of pluri-subjective phenomena in the Church, a provision which is not made in the rather strict parameters of the positive law at present. The growth of such movements within the Church spurs canonical science to seek some avenue for the vindication of their rights.

One avenue toward such a goal suggests itself in the concepts of collective and diffused interests that comes to us from the civil side of administrative law. With the emergence of the concepts in civil doctrine some canonists have sought to apply the lessons learnt in the administrative field there to the vindication of associative interests in the Church. Thus in Italian administrative law, diffused interests may stand alongside or contrapose subjective rights, on the one hand, and legitimate interests, on the other[92]. Leaving aside, for the

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[91] Cf. ROBERTI, *De processibus* (cf. nt. 1), 513.

[92] Cf. DENTI, v. *interessi diffusi*, in *Nuovissimo Digesto*, Torino 1982, III, 305.

moment, Cassese's important critique of the distinction made between subjective right and legitimate interest[93], diffused interests constitute a particular category of substantial juridical situation which, in the order of positive law, is identified on the twin basis of personal title and relationship between the subject and the good to be protected. These interests describe only those juridical situations which pertain to a plurality of subjects more or less determined by some external principle, gathered together into a collectivity, and which has as its object some good that is not susceptible to exclusive possession or alienation[94]. The concept of diffused interests then, though still relatively embryonic, represents an attempt to conquer new strata of interests more often than not associated with social or environmental issues, which up to now have not merited procedural protection or substantive attribution. Italian administrative jurisprudence has demonstrated itself sensitive to the problem posed by diffused interests. Although this category of interest is difficult to attribute to the human

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[93] Cf. S. CASSESE, *Le basi di diritto amministrativo*, Milano 1989, 333-338. Cassese offers a systematic development of the insight of Federico Cammeo who described legitimate interests as «una categoria di diritti che assumono per ragioni storiche nel nostro ordinamento, il nome di interessi legittimi» (F. CAMMEO, *Corso di diritto amministrativo*, Padova 1911/1914, n. 209).

[94] One thinks, for instance, of unmarred landscapes, specially designated parkland, health, some historical or artistic patrimony etc. Whether examples suggest themselves in the Chernobyl incident in the former USSR or the Union Carbide escapage in India, such events have helped to focus juridical reflection on forms of protection upon goods not previously the subject of contentious cases in the courts. Moneta provides useful examples from cases before regional administrative tribunals in Italy (MONETA, «I soggetti nel giudizio amministrativo ecclesiastico» in *La giustizia amministrativa nella Chiesa*, Città del Vaticano 1992, 59, nt. 8).

subject as individual, there are indications which suggest a process of subjectivisation has begun. Thus one avenue toward subjectivisation is suggested in the notion of territoriality or proximity which would render particular subjects in a given area legitimated to safeguard some good or benefit upon which an administrative provision impinges with prejudicial effect. One thinks of residents objecting to the provision for the building of a nuclear reactor in their locality[95].

7. Interpretation and jurisprudence

The vindication of associative rights, particularly with regard to a non-recognised association, has recently been tested in a number of cases before the Second Section of the Apostolic Signatura. As the circumstances were entirely new with regard to jurisprudence at the Second Section, the first case occasioned a request to the Secretariat of State and thence to the Pontifical Commission for the Authentic Interpretation of the Code for an interpretation on the matter (c. 16 §1).

The Commission decided to seek the opinions of a number of experts and when they reported back the general conclusion of the consultation seemed to favour the granting of active legitimation to a group of aggrieved faithful seeking recourse against the decision of their own bishop but only when they act as individuals by means of an institute common to Roman Law, the *consortium litis activum*. One of the reports stands out from the rest for its detailed and informed discussion of the question of procedural prerequisites. This consultor discussed active legitimation according to

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[95] Cf. P. HAYWARD, *Administrative Justice According to the Apostolic Constitution «Pastor bonus»*, Roma 1993, 136-137.

the doctrine of the proceduralists Roberti and Figueroa for whom procedural capacity (*legitimatio ad processum*) was distinguished from legitimation (*legitimatio ad causam*). Procedural capacity is a presupposition of the process in general while legitimation is a presupposition of the action, the one a general designate, the other a concrete one[96]. The consultor pointed out that in general active legitimation is a condition one recognises in terms of subjective right and that the titular of an action needs to possess personal title to a subjective right, whereas in this case one is dealing with recurrents in a recourse action. Hence the need to expand the traditional parameters of subjective right and he suggested that whoever is legitimated with respect to the object of an interest (in this case the annulment of the impugned provision) possesses a qualified subjective situation, independently of whether he or she possesses a material right or not[97]. Relying for the most part on Roberti's doctrine, he argued that this subjective situation is determined by the interests of the party seeking satisfaction through the proposed action, such that were the party deprived of such an action, he or she would be prejudiced by means of a deluded expectation, dispossessed of that which is properly due to them in the juridical order. Consequently if this notion of interest, here a procedural instrument rather than a substantive situation, then the judge will require a discretion to decided whether the recurrent may seek a judicial defence, keeping in mind the concrete circumstances of the request and whether the recurrent can demonstrate a relationship with the object of contro-

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[96] Cf. Consultor B, PCCI, Prot. n. 1301/87, allegato II.
[97] Cf. Consultor B, PCCI, Prot. n. 1301/87, allegato II.

versy[98]. This intervention was important for the Commission because at the discussion stage it became clear that the recurrent did not have to be a titulary of a subjective right as such in order to have legitimation for jurisdictional redress, but that it was enough, regarding the challenge of an administrative act in an administrative tribunal, that one had been prejudiced by an administrative decree, after the tenor of c. 1737 §1.

The discussion stage of the decision took place on 3rd April 1987. Present at the discussion were professors of canon law and officials of the Roman Curia. The Secretary of the Commission began the discussion by pointing out that it was not their task to discuss the legitimacy of the impugned provision but to discuss the procedural capacity of the group concerned in the recourse. He noted that apart from one, the other experts that had submitted observations were unanimous in favour of an affirmative response to the procedural capacity of the group, but not without qualifications. There was concern about the mandate of the group: it did not seem to possess juridic personality or indeed any kind of recognition by competent authority, about the possession of some interest in the matter to which the recourse related, and about the possession of a just motive for the recourse. The President intervened and stressed that essentially there were two questions that needed to be addressed; a) the status of the group in canon law, b) the interest or right that is at stake[99]. One of the participants proposed the *consortum litis activum* as a way out of the problem and argued that the

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[98] This position, one should note, is confirmed in Francesco D'Ostilio's treatment, *Il diritto amministrativo della Chiesa*, Città del Vaticano 1994, 269.

[99] Consulta, PCCI, Prot. n. 1301/87, allegato IX.

content of the interest involved would have to be spelt out. Another participant argued that due to the lack of a mandate of procurance the group as group could not be considered legitimated but that the individuals may be. Another consultor suggested that while in agreement with the tenor of the interventions it should be left to the judge to examine if the interest invoked actually corresponds to a legitimate interest[100]. The president intervened again and asked how far one could configure a legitimate interest which sought to resist the demolition of a church. In the case concerned one could not speak for certain of a right nor could one appeal to c. 1221 on the right of entry of the faithful. He then added that participants should keep in mind that a broad avenue of access could paralyse the administrative activity of the Church[101]. One participant objected strongly to the introduction into canon law of a concept that belonged to Italian administrative law, namely legitimate interest, causing much confusion and argued that the Decretals offered an alternative in the concept of *gravamen*. Another responded that the confusion in administrative law was caused not by the distinction between legitimate interest and subjective right but that between simple and legitimate interest. The discussion closed with the unanimous agreement that the group, qua group, did not have active legitimation, or the right to recourse, while its individual members could seek redress, in a *consortium litis activum*, since the existence of a legitimate interest consisted in the injury suffered and this would be left to the discretion of the judge to determine more precisely. Accordingly, promulgated in the 1988 issue of the *Acta Apostolicae*

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[100] Cf. Consulta, PCCI, Prot. n. 1301/87, allegato IX.
[101] Cf. Consulta, PCCI, Prot. n. 1301/87, allegato IX.

Sedis, an authentic interpretation of 29th April 1987 was formulated in the following terms:

> The Doubt: Whether a group of the faithful, lacking juridical personality and even the recognition envisaged in canon 299 §3, can legitimately make hierarchical recourse against a decree of its own diocesan bishop.
>
> The Response: Negative, as a group; affirmative, as individual members of the faithful acting either singly or together, provided that they really have a grievance. However, in evaluating the grievance, the judge must be allowed suitable discretion[102].

The formula left some problems unresolved. It didn't clarify, for instance, whether legitimation to recourse *in via administrativa* was to be denied to any and every entity which is not formally erected into a juridical person or whether private associations who have simply had their statutes recognised, but are not formally granted personality, would qualify for legitimation. The decree of the Commission mentions the recognition of c. 299 §3 but it is not clear whether this was made to underline the absolute lack of legitimation on the part of a group of the faithful which may be deprived not only of juridic personality but also of recognition; or whether this recognition could confer on the group a reduced subjectivity that could render it capable of acting court for the protection of its rights[103]. The sphere of entities erected into juridic persons does not, however, exhaust associative phenomena in the Church nor is it sustainable that beyond associations formally

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[102] Text in *AAS* 80 (1988) 1818, comment in "Responsa", *Periodica* 78 (1989) 261-268.

[103] Cf. MONETA, «I soggetti...» (cf. nt. 94), 57; P. HAYWARD, *Administrative Justice...* (cf. nt. 95), 135.

recognised or approved that there is no space for other aggregates of the faithful as if the lack of approval meant condemnation to the margins of the ecclesial community[104]. As regards the legitimation of subjects in the decree, it states that active legitimation can only be recognised to the faithful (acting individually or conjointly) "as long as they have really suffered an injury" with the further specification that regarding the judgment of the injury "the judge should enjoy a suitable discretion". The reference to *gravamen*, to an injury effectively suffered by the faithful that intend to act, cannot but presuppose the existence of an interest, of a subjective juridic situation upon which the administrative provision has impinged. The decree, however, does not specify what type of subjective situation nor what grade of subjectivisation must be present to give a group the required juridical consistency. In a move which some authors have criticised[105], this is left to the jurisprudence of the competent tribunal to resolve, namely the Second Section of the Apostolic Signatura.

Leaving aside the modifications of competence introduced by the reform of the Roman Curia (*Pastor bonus*) in 1988, since the principal innovation, an award of damages, has yet to be tested, it seems that the procedure for administrative recourse at the Second Section essentially amounts to a judgment on legality. Thus recurrents may approach the Second Section from the relevant Congregation if they allege that the provision may be impugned on the grounds that it amounts to a violation of law, either in procedure or in

[104] Cf. J. LLOBELL, «Associazioni non riconosciute e funzione giudiziaria», *Monitor Ecclesiasticus* 113 (1988) 375.

[105] Cf. MONETA, «I soggetti...» (cf. nt. 94); P. HAYWARD, *Administrative Justice...* (cf. nt. 95), 133, nt. 372.

decision. In 1976 the then prefect of the Signatura, Aurelio Sabattani, emphasised that the canonical concept of legality which is involved in such recourses differed markedly from that which operates in Italian administrative law, principally by its rather broader terms. Thus when examining the legality of an impugned provision, the Second Section would look beyond the terms of the positive law enshrined in a Code, specifically: a) canonical laws from any authority endowed with legislative powers; b) civil laws canonised by canon law; c) concordats entered into by the Holy See with individual nations; d) customs within the stated limits; e) principles of divine positive and natural law which may not be contained expressly in church law; f) suppletory norms of canon law; g) properly approved statutes and constitutions or precepts given to individuals; h) orders, regulations or norms given by administrative authorities in the concrete application of the law[106]. A number of cases from the jurisprudence of the Second Section, however, raise the question of the parameters of the examination of legality. As these cases also deal with associative rights they are especially relevant for our discussion.

Case 1: Prot. n. 17447/85 CA

The first case to be examined (Prot. No. 17447/85 CA), which occasioned the Signatura's request for a clarification from Interpretation, offers us a useful window on to the issues involved in the vindication of associative rights. It involved a committee of people, professedly members of a parish, which had organised

[106] Cf. A. SABATTANI, «Iudicium de legitimitate... (cf. nt. 57), 237.

itself to oppose the reduction of a town-centre church to nonsacred use, its demolition and the sale of the land on which it stood. The administration of the Archdiocese concerned had refused the request of the committee to preserve the church on the grounds that such an action lay within the competence of the Archbishop, given him under the terms of canon 515 §2, which attaches only one condition, namely that the presbyteral council be consulted about the closure. Accordingly consultation with the parishioners, so the administration argued, was simply not envisaged or required by the Code. When this case came before the Second Section a number of consultors, internal to the Signatura, were asked for reports. Consultor B helped to set forth the doctrine of Roberti on active legitimation, as *the faculty to propose a certain action or of responding to the same; or a quality acknowledged to a certain person so that he himself might propose a determinate action*[107]. Consultor C was more concerned about the status of the group. He argued that as the committee did not consist solely of parishioners, it could not be considered a true *coetus fidelium*, and that therefore it was difficult to see how such a group could enjoy true subjective rights or interests in the Church. Indeed the legitimate recurrent would be the juridic person of the parish which has standing in court through its legal representative, namely the pastor (cc. 532, 1480 §1). Parishioners do not enjoy the right to be consulted in the circumstances because they cannot show that a true patrimonial right would be affected by the closure as envisaged by c. 1222. He concludes that recourse against the reduction and closure of the parish church

[107] Cf. Sig. Apost., Prot. n. 17447/85 CA, II, consultoris B, n. 7, p. 2.

may only proceed on grounds that are *expressly* acknowledged in the positive law. Both c. 1222 on reduction and c. 515 on suppression suggest that only those with patrimonial rights attached to the church or parish would be adversely affected by a decree of closure. Consequently it matters not that such individuals are indeed parishioners to the church concerned: the positive law in the canonical order does not foresee any way that such individuals may legitimately vindicate adversely affected rights as individuals since only the juridic person of the parish as such would enjoy standing. The only concession he makes to some light at the end of the procedural tunnel is to suggest that were parishioners to challenge the closure they would in any case need a mandate of procurance to lodge a judicial petition, as is required in class actions[108]. The fourth consultor, consultor D, was a little more optimistic. He argues that the faithful involved in parish church buildings enjoy not so much a right as such but a fragment of a right (*aliquod fragmentum iuris*). Just because the rights of the faithful are subordinate to those of the hierarchy in such matters does not mean that they are thereby annihilated. If the faithful support such buildings financially, they at least have an interest in them. He asks how pastors can ask people to pay for churches and after having obtained their support and built the church, then decide to demolish it without any sense of accountability. While he acknowledges the importance of c. 223 which permits authority to limit the exercise of rights, he adds that such rights are not thereby suppressed, the key word in the canon being *moderare* not *supprimere*. He concludes that not all the plans of diocesan administrations are permitted by the demands

[108] Cf. Sig. Apost., Prot. n. 17447/85 CA, vot. consultoris C, 8.

of natural justice and concludes that c. 1737 which speaks of *any just motive* in recourses may be applied to the case and allow the group legitimation provided their petition does not lack the required mandate of procurance[109].

The argumentation of the Promoter of Justice in this case is to be found in a preliminary votum. In this report he acknowledged that the advocate for the recurrents had correctly identified the *crux* of the problem in the case, notably, the defect of active legitimation on the part of groups which are not juridical persons. Furthermore he noted that the only way of resolving the problem is to demonstrate a real injury and thereupon to form a *consortium litis activum.* With regard to the first point, the Promoter argued that the group must demonstrate *beforehand* that they possess a personal, direct, current and juridically-founded relationship with the ecclesiastical administration. It is not enough to show an otherwise laudable desire to protect an historical monument. The judgment of the injury must be assessed from the new situation which emerges in the case from the demolition of the church. This said, the Promoter recommends a certain severity be exercised by the judge in such cases so that the pastoral ministry of a diocesan bishop would continue to enjoy a certain discretion, even if, from a canonical point of view, hierarchical recourse prevents abuses of authority on the part of certain bishops[110]. The case for severity seems to be based, both in the argument of the *ponens* in the case and in that of the Promoter of Justice, on extrinsic grounds,

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[109] Cf. Sig. Apost., Prot. n. 17447/85 CA, vot. consultoris D.

[110] Cf. Sig. Apost., Prot. n. 17447/85 CA, I, vot. prom. iust., allegato 62, 12-13

i.e. that too broad an avenue of access would paralyse local administrations[111].

The definitive decree on the case was published on 21st November 1987. The law section of the decree deals with the general principles of law by noting that in order to legitimately invoke the ministry of the judge, beyond procedural capacity one also needs active legitimation. It then addresses the problem posed by c. 1476 and interprets the canon to refer to procedural capacity for physical persons which capacity cannot be extended to civil juridical persons. Active legitimation is defined as a concrete capacity to seek the resolution of a controversy in court, abstractly as a particular and juridically protected relationship with the object of controversy. In order then to act in a concrete case one needs to be titulary of a subjective right or interest which is asserted to have been injured[112]. In determining the status of the injury the judge must decide whether the interest involved fulfills the requirements of doctrine, i.e. *be personal, direct, current* and at least implicitly protected in the law[113]. The rest of the decree notes that the committee concerned in the recourse not only lacks juridical personality in the canonical order but even some form of minimum recognition and consequently it lacked procedural standing in court. Similarly it could not interpose recourse as a *consortium litis activum* which must be done at the threshold of the process since it had not presented a mandate of procurance. Finally not all the members of the committee were members of the parish and thus the committee did

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[111] Cf. Sig. Apost., Prot. n. 17447/85 CA, I, litt., 4 mar. 1987; II, allegato VII, 1-2.

[112] Cf. Sig. Apost., Prot. n. 17447/85 CA, decr. def., n. 3, p. 4.

[113] Cf. Sig. Apost., Prot. n. 17447/85 CA, I, decr. def., n. 4, p. 5.

not seems to be titulary to a right or protected interest in the case. As regards the rights invoked by the committee (cc. 209, 213, 214, 216, 217, 222, 225, 229, 231), the decree responds that the assertion of these general rights prove nothing with regard to the issue at hand. It is one thing to assert such rights and quite another to associate them inherently with a specific parish church or sacred building; otherwise the faithful would not be able to move from one parish to another and ecclesiastical authority would find it impossible to suppress, unite and divide parishes[114].

There are four points worth making about this first case:

a) The evolution of the question of the procedural prerequisites for recourse in this first case demonstrates an oscillation between the rather generous terms of the President of Interpretation to the stricter requirements urged by some of the consultors, particularly consultor C. Where the former is content that the recurrents prove themselves to be holders of an interest that is personal, direct, current and at least *implicitly* protected in the law, the consultor argues that the protection must be explicit in the law. This latter position suggests a certain positivism has crept in to the case and a rather sharp division between *ius* and *lex* with a consequent rigorism detectable in the interpretation of the latter. Sabattani's enumeration of the broader ambit of the concept of *lex* in the traditional clause *propter legis violationem* suggests that the argument of the *ponens* in the case is to be preferred.

b) Similarly the discussion of the nature of the injury (*gravamen*) to be demonstrated in the case seems

[114] Cf. Sig. Apost., Prot. n. 17447/85 CA, I, decr. def., n. 7a, pp. 7-8.

difficult to reconcile with the requirement of c. 1737 §1, namely that it is enough that *a foreseeable* injury be shown at this stage, along the lines of the tradition in this area which foresaw its demonstration through *probable conjecture*[115].

c) Furthermore, there seems to be a lack of clarity with regard to the distinction made between substantial interest and interest considered as a procedural instrument. This confusion is verified in the discussion of the interest to act (*interesse ad agire*) and interest of fact (*interesse di fatto*), i.e. that interest involved in the merits of the case (to obtain a favourable pronouncement from the judge) and that involved in the demonstration of an interest which legitimates recourse (i.e. of a relationship with the object of controversy). At the threshold stage of the recourse only the latter requires demonstration[116].

d) The application of the Code Commission's decree in this case seems to be prematurely rigid, not difficult to understand if one has in mind the need to avoid the paralysis of local administrations, but perplexing for those canonists who are seeking ways of developing doctrine on the subject of collective and diffused interests. Surely it would have been wiser, some have argued, to post-pone a decision until this had been accomplished or even arrived at an application which left room for further developments[117].

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[115] Cf. HOSTIENSIS, *Summa Aurea*, II, De appell., 6, 1-2, 801-803.

[116] Cf. MONTINI, «Il risarcimento del danno...» in *La giustizia amministrativa della Chiesa* (cf. nt. 94), 197, nt. 65.

[117] Cf. MONETA, «La tutela dei diritti dei fedeli di fronte all'autorità amministrativa», *Fidelium iura* 3 (1993) 300-305.

Case 2: Prot. n. 19672/87 CA

This case involved the bishop of a certain diocese who noted that a parish church was no longer large enough to satisfy the needs of a modern worshipping community and looked into the possibility of building a new church in another location within the territory of the same parish. Having obtained the consent of the pastor, presbyteral council and the college of consultors, the bishop decided that the project should go ahead. The decision to abandon the use of the old church did not please a number of parishioners who alleged that the new site would make it more difficult for them to fulfill their obligations on Sundays and Holy Days. Acting with a mandate from seventeen of the parishioners, the procurator interposed hierarchical recourse against the decision to the Congregation for Clergy. The Congregation responded on 16th October 1987 rejecting their petition on the grounds that the diocesan bishop enjoyed the competence to erect, suppress, or modify parishes, with the lone proviso that he hear the presbyteral council, after the norm of c. 515.

The recurrents then appealed to the Second Section of the Signatura against the decision of the Congregation on the 19th and 23rd of November 1987 and requesting advocacy. The Second Section responded on the 3rd of December requesting the acts of the case from the Congregation. The Promoter of Justice proposed a number of questions to the recurrents on the 14th January 1988, criticised them for seeking satisfaction from a civil court, decided against suspension of the decree until they could demonstrate that they had suffered some hardship as a result of the decree, namely the violation of a subjective right or of an interest that was personal, direct, current, founded in law and proportionate.

In the pleading of the advocate a case is made for some sort of participatory interest, arising from the fact that the parishioners contribute financially to the parish. On the strength of this *legitimate* interest, the advocate urges:

> We don't intend to say that the recurrents can vindicate in this court some subjective rights, but it seems we are able to affirm with tranquility that they, enjoying legitimate interests, possess active legitimation in the promotion and prosecution of the administrative provision in the course of the defence of their interests which — as is well known — are guaranteed, above all by natural law, and thereafter by almost all civil systems, but in a particular way, by the Church, whence one can speak of *fundamental rights* even with improper expression[118].

This reworking of the concept of interest, however, fails to show how such an interest is protected in the law as required by the response of the Code Commission and the decree of the Signatura. The three reports (1.XII.1987, 4.I.1988; 8.I.1988) of the Promoter on the case deal with admissability but the second of the reports sets out perhaps the most serious substantive argument against the case of the recurrents. The Promoter states that from a canonical point of view only the bishop and pastor may act in the name of a parish (cc. 532; 1276) and that the right invoked by the recurrents as parishioners, namely the right to worship, cannot be identified with a specific church or building — this exercise of the right pertains to pastors to determine (*locus autem concretus pro culto, seu ad illa adiumenta accipienda, determinatur a legitimis pastoribus*, cc. 368, 374, 515, 1206). He also notes that the consent

[118] Cf. Sig. Apost., Prot. n. 19672/87 CA, mem. adv. recurr., allegato 18, n. 5.

mentioned in c. 1222 §2, which the recurrents invoke, refers only to those who enjoy *legitimate* rights and interprets this to mean patrimonial or similar rights. The bishop is not required by law to obtain the consent of the faithful who are involved in such a case as no such rights have been demonstrated. In fairness the report did acknowledge that the faithful do enjoy a general interest in the conservation of church buildings but that such an interest does not have sufficient consistency to legitimate administrative recourse. The final report urged a negative decision from the Signatura, a resolution of the problem of expenses and that the recurrents be counselled to restore harmony to the community and revive communion with their bishop. On the strength of the reports of the Promoter of Justice, the definitive decree decided against the admissability of the recourse on the grounds that the recurrents were unable to demonstrate that patrimonial rights had been affected by the provision. They did not, therefore, enjoy active legitimation to propose the recourse.

This second case does evidence some confusion on the part of the Congregation for Clergy, the hierarchical superior of the diocesan bishop in this matter. The Congregation seemed reluctant to fulfill its mandate, namely to examine not just the strict legality of the impugned provision but also its opportuneness. A recourse to the hierarchical superior surely cannot be rejected on the grounds that the bishop concerned was *competent* to issue the decree. The mandate which the Congregation enjoys from the Code and from *Pastor bonus* calls for a judgment on its merits as a just decision. Surely there must be some remedy for this situation such that the faithful involved could argue that they have a right that the superior instance perform its mandatory duty rather than seek refuge behind the battlements of the Signatura.

Finally this case demonstrates, on the part of the diocesan authorities, a marked lack of understanding of the theological principles involved in the two kinds of recourse. These may be breifly enumerated: 1) the right of the faithful to propose a recourse is one that is guaranteed by the law of the Church and comes from the guiding principles for the revision of the Code; 2) the nature of the recourse involved at the different stages needs be distinguished, i.e. hierarchical or administrative; 3) the suspensive or not effects of hierarchical or administrative recourse; 4) the theological purpose of recourse, i.e. the good of the faithful is not always reducible to the interests of diocesan government. In sum there is a need for greater appreciation of the concept of the rights of the faithful[119].

Case n. 3: Prot. n. 21024/89 CA

In a third case an individual, acting on behalf of concerned parishioners, lodged recourse against the decision of the local bishop to reorder the existing parish church, arguing that the decree laboured from a number of misunderstandings of liturgical law. The individual, a parishioner, attempted to show that the recommendations of the liturgical commission involved in the case were based on an exterior or activist concept of liturgical participation which concluded that true participation would be aided by the demolition of all "barriers" between priest and people, in this case the altar rail and *reredos* of the old church. The recurrent noted a number of instructions of Paul VI which had warned that the object of liturgical reform, namely the attainment of no-

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[119] For more on this subject see my article, "The Rights of the Faithful - Some Signs of Progress", *ITQ* 61 (1995) 250-264.

ble simplicity, was not commensurate with the random destruction of the Church's artistic and cultural heritage. The Signatura, however, found against the admissability of the recourse on the grounds that the diocesan administration had followed the terms of the law in proceeding against the church, namely it had fulfilled the requisite degree of consultation, which does not involve consulting of the laity, unless they can show patrimonial or legitimate rights to be affected.

Case n. 4: Prot. n. 21024/89 CA

This case involved a group of parishioners who petitioned the suspension of the decree of their archbishop restructuring the parish. The archbishop had decided to suppress three existing parishes A, B, and C and in their stead to establish one new parish effective 3rd April 1989. The church of parish A would be renovated and then formally entitled as the new parish church, while the church of parish B would be reduced to non-sacred use and the church of parish C would be reduced and sold. The parishioners did not object to the suppression of the three parishes but the restructuring of the parish church in parish A, i.e. the removal of the altar rail, the modification of the *reredos* and the change in seating arrangements. The civil title to the church was invested in the archbishop as the corporation sole while in canon law the legal representative of the parish was the pastor. American law, however, does not recognise the juridical personality of Roman Catholic parishes. In this case the archbishop performed two functions, the delegate of the pastor, in accord with c. 532 and the Ordinary exercising the office of vigilance mentioned in c. 1276.

The Congregation for Sacraments and Divine Worship in a letter of the 10th May 1989 decided that the recourse of the parishioners was to be rejected on the grounds that the archbishop had consulted the presbyteral council before proceeding with his decision and that no consent was required on the part of the faithful. The recourse was rejected, therefore, on the grounds of legitimacy[120].

The substantive argument of the petition of the recurrents focused on the translation of a much-vaunted catch-phrase of liturgical reform, *participatio actuosa*, which is most often translated as *active participation*, thereby, they argue, neglecting the internal dimensions of liturgical reform and emphasising a purely extraneous and activist engagement in liturgical functioning. The recurrents argued that this concept was employed to justify reform by demolition rather than by stealth and due respect given to places of worship and the artistic and cultural legacy of catholic churches, contrary to the express wishes of the Pope who presided over liturgical reform. A salient quotation to illustrate the point is taken from Paul VI's instruction *Opera artis*:

> Mindful of the legislation of Vatican II and the directives in the documents of the Holy See, bishops are to exercise unfailing vigilance to ensure that the remodelling of places of worship by reason of the reform of the liturgy is carried out with utmost caution. Any alterations must always be in keeping with the norms of the liturgical reform and may never proceed without the approval of the Commission on sacred art, on liturgy, and, where applicable, on music, or without prior consultation with experts. The civil laws of the various countries protecting valuable works of art are also to be taken into account[121].

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[120] Cf. CCDDS, Prot. n. CD 73/89, litt. 10 maii 1989, alleg. II/4, b.

[121] Cf. Sig. Apost., Prot. n. 21024/89 CA, petit. iud., alleg. I/17, 3.

Furthermore the recurrents attempted to argue that according to chapter 27 of *Lumen gentium* bishops should not refuse to listen to their subjects, positivised at c. 213 §3, and that they are also legitimately interested by the force of the canonical rule *quod omnes tangit debet ab omnibus approbari*. Regarding the temporal goods of the Church, the recurrents stated that c. 1284 requires good housekeeping on the part of the administration and that when added to the remarks of the American conference in the pastoral *Economic Justice for All*, then these texts require a degree of accountability on the part of the hierarchy to the faithful particularly when dealing with the modification or alienation of church property. The proposed modifications to church A were in fact very costly. Moreover the costs involved allegedly exceeded the maximum sum fixed for alienation by the same conference beyond which permission from the Holy See would be required. Such a permission was not requested by the bishop concerned. The argument of the recurrents then focused on five points: a) the administration misunderstood the terms of liturgical law; b) the administration failed to comply with art. 126 of *Sacrosanctum concilium* which envisages a commission on sacred art; c) the church in the case is itself a precious object, being a listed building, consequently permission is required from Rome in line with c. 1292 §2; d) there was no consultation of aggrieved parishioners (c. 1733 §1); e) the cost of the project exceeds the maximum figure established by the conference for the alienation of ecclesiastical goods[122].

On 8th May 1989 the Congregation responded through an advocate to the points raised by the recur-

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[122] Cf. Sig. Apost., Prot. n. 21024/89 CA, litt. ep., alleg. V, 3.

rents and concluded in the negative regarding the merits of the recourse. Subsequently the case was presented to the Apostolic Signatura. The Promoter of Justice composed a lengthy account of the *iter processus* of the case and then discussed the question of admissability by introducing the judgment of a previous case that the right to worship cannot be identified with a particular church building. He argued that a general interest in the conservation of a church building for historical reasons does not produce the typology of interest required to establish and legitimate administrative recourse. He also pointed out that there are two meanings to the word alienation in canon law, the first refers to the transfer of ownership of some good (c. 1292) while the second refers to the transfer of location (c. 1295) — neither sense is involved in the case. Regarding the principle invoked by the recurrents, namely *quod omnes tangit*, the promoter pointed out that this rule deals with collegial acts not with administrative acts as involved in this instance. The administration he concluded had observed the fundamental rights of the faithful by consulting with the presbyteral council and the diocesan pastoral council. On the strength of these reasons the Promoter argued that the recourse not be admitted.

The definitive decree, having some useful liturgical applications, was published in the liturgical journal, *Notitiae*, unfortunately with scant regard to forum in the sense that the names and places involved in the case were not suppressed. The decision cites the response of the Code Commission and the subsequent jurisprudence of the Signatura in such cases and makes four salient points in the expositive section: a) any kind of interest is not sufficient to legitimate recourse — it must be worthy of juridical consideration; b) the right mentioned in c. 214 cannot be identified with a specific building; c) the interest involved in the case is not protected by the positive law; d) while the faithful are fully entitled to voice their concerns, this in itself is not a legitimating foundation for administrative recourse. The conclusion to be drawn from this case seems to be that the jurisprudence is evolving along a determinately negative route, namely not to grant judicial protection to interests that are not explicitly defended in the positive law.

Case n. 5: Prot. n. 21883/90 CA

This rather confused case involved the recourse of a group of parishioners against the suppression of a parish. There was some discussion as to whether the archdiocese concerned actually issued an administrative act. Similarly there was also the problem of whether the administration had fulfilled the terms of c. 515 §2 requiring consultation of the presbyteral council before the decree of closure was issued. The initial judicial petition of the recurrents claimed that they possessed *sufficient interest* to propose the recourse. The expression was evidently borrowed from common law's analogous institute, *application for judicial review*. Originally recourse was mistakenly made to the Signatura which redirected the recurrents to the competent Dicastery, the Congregation for Clergy. The essential points of argument in the petition constellate around whether the presbyteral council was consulted before the decision was taken to close. Regarding the merits or just-ness of the decision the recurrents alleged that while they were assured they would be consulted they were not in fact consulted and that regarding opportuneness the recurrents alleged that the parish was a thriving community that was financially solvent.

The motive for closure seemed to be based on inaccurate data.

Evidently the decision to close the parish was made by the administration and this was communicated to parishioners on the weekend of 27th and 28th January 1990. The administration, however, responding to a number of questions put by the Congregation for Clergy, insisted that in meetings of representatives of the presbyteral council held on 9th and 15th May 1989 the situation of parish A was discussed, though it concedes that the issue was not discussed by the plenary but simply by the council's steering committee which deemed further consultation to be unnecessary. The archbishop attached to his response a formal decree dated the 5th June 1990 which speaks of a *parish closure*. The expression seems to be intended as an amalgam of two very distinct institutes, one suppressing the parish, the other the reduction of a church to non-sacred use Since no canon is cited in the decree, consultation took place after the decision and concerned only the executive committee of the presbyteral council, doubt is thrown on whether a true administrative act was in fact issued.

The initial report of the Promoter of Justice in this case posed the question as to whether the recourse was lodged within the mandatory thirty days from the decision of the competent Dicastery and concludes that as this was indeed the case, the recurrents then have lodged a legitimate recourse. Regarding the question of active legitimation the Promoter notes that the parish enjoys juridical personality by law (c. 515 §3) and may appear in court by means of its legitimate representative (c. 1480 §1), namely the pastor, or in his absence, the administrator (cc. 532, 540 §§1-2). Consequently it would seem that under this title the recurrents have no standing as the parish's legal representative. Neither may the group appear as Parish A Steering Committee since this group has no recognition as a private association, nor have its statutes been recognised as the parish's legal representative[123].

Three subsequent reports or *vota* appeared when the deputy Promoter of Justice was asked to step in to the process. They show a marked evolution in thought on the matter of the grounds for admissability. In the first draft of the second phase (draft C^{2a}) the deputy Promoter sets out the argument to be used, dealing with the procedural prerequisites (n. 2-4), the defects (n. 5-7) and the decision (n. 8-9) and concludes that the defect of legitimation on the part of the recurrents is not proven, that there is a violation of the law of procedure on the part of the active administration and that there is a violation of law in decision with regard to the reduction of the church to non-sacred use. Furthermore, consonant with the terms of art. 101 §1 of the *Normae speciales* of the Signatura, he urges that the monies of the recurrents be returned to them and the Congregation be asked to pay costs, calculated at around two million Lire, which it might exact from the Archdiocese in question. The last draft of the *votum pro rei veritate* devotes a sizeable portion of its exposition to drawing a distinction between suppression of a parish (c. 515 §2) and reduction (1222 §2). It also treats more exhaustively the four questions at hand, namely, a) defect of procedure on suppression; b) defect of procedure on reduction; c) defect of decision on suppression; d) defect of decision on reduction, concluding in the affirmative on a, b and d, and negatively to c.

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[123] Cf. Sig. Apost., Prot. n. 21883/90 CA, vot. prom. iust., alleg. 21, n. 26, p. 13.

The recurrents sought the suspension of the decree of suppression which the Signatura denied though it did request that the church, by now closed and much of the decor removed, be restored to its condition *quo antea*, before the principal recourse was lodged. The definitive decree noted that the recourse had been lodged within the statutory time limits and that although the legitimate representative of the juridical person of the parish is the administrator, nevertheless the recurrents are parishioners in the said parish and as parishioners enjoy the right that in everything which affects them as parishioners the norm of canon law should be observed. This principle represents the kernal of the doctrinal development signalled by the deputy Promoter. In this case, the Code establishes norms which affect the validity of an action, i.e. in the suppression of a parish the presbyteral council must be heard. This was not done substantially but only formally, i.e. the council was *informed* of the closures after they were announced — they were not, therefore, *consulted* in the full sense of the term such as to fulfill the requirements of the Code. The definitive decree concluded a) the recurrents enjoyed active legitimation; b) there had been a violation of the law of procedure regarding the suppression of parish A through the nonobservance of c. 515 §2; c) there had also been a violation of law of procedure regarding the reduction of the church to non-sacred use through the non-observance of c. 1222 §2, namely by not hearing the presbyteral council. As for expenses the Signatura decided that one million Lire should be returned to the Signatura from the initial deposit and that the Congregation for Clergy should be asked to pay two million Lire which could be exacted from the Archdiocese in question. This decision was confirmed in a definitive decree of the adjudicating college[124].

One of the distinguishing characteristics of this last case was the *actio iudicati* brought by the recurrents to deal with an administration that simply refused to implement a directive to have the church restored to its condition before the recourse (*statu quo praeterito*). This institute comes from Roman Law according to which a recurrent could seek a remedy against a respondent who had not complied with the terms of a decision, and thus risked a *condemnatio in duplum*. The Signatura responded by pointing out that the active administration had re-issued the decree of closure and this time had respected the procedural norms, therefore, the *actio iudicati* was rejected.

Conclusion

The legitimation to be party to an action is verified when the recurrent not only possesses a general juridical capacity, but when he also enjoys procedural capacity and legitimation, i.e. that he may act in court *per se* and validly place procedural acts. This objective condition is achieved when a party can demonstrate a relationship with the object of controversy and a situation of advantage with regard to the subject, i.e. the possession of a right or an interest to which the matter relates, as has happened in the last case we examined before the Signatura. The subjective situation, traditionally considered in terms of subjective right, also envisages the possession of an interest. Interest in administrative recourse needs to be distinguished, as either substantial

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[124] Cf. Sig. Apost., Prot. n. 21883/90 CA, decr. def., alleg. 63, p. 1.

or procedural. In the latter case a situation that is recognised in some direct or indirect way by the positive juridical order and which bears the characteristics of being personal, current and direct. The principle of legality provides recurrents with a springboard (*punto di aggancio*) into the vindication of their right that in everything which concerns them *qua* parishioners the law might be effectively observed by the active administration. The new forms of interest being opened up in civil jurisprudence with regard to associations deserve some reception in the canonical order, but for the present the *consortium litis activum* of Roman Law provides the faithful acting conjointedly with a useful instrument of vindication. Now that such an instrument has received its baptism of fire one hopes that the future of non-recognised associations of the faithful may be characterised by the bright hope of feasible and vindicable rights in the Church.

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