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

Introduction

On the 29th April 1987, in response to a request of the Apostolic Signatura, the Pontifical Commission for the Authentic Interpretation of the Code of Canon Law agreed on a doubt of law and its resolution regarding the possibility of a group of aggrieved members of the Christian faithful obtaining recourse against an allegedly injurious decree of their own diocesan bishop. The Commission agreed that as a group this could not be done but as individual members of the faithful, whether acting individually or together, this could be done, provided they really had a grievance. The Commission added that in evaluating that grievance the judge must be allowed suitable discretion (Prot. N. 1301/87).

A doubt of law, where it arises from a debate in doctrine is thus normally resolved by an authentic interpretation of the Pontifical Commission. This particular resolution, however, did not arise properly speaking from a debate in doctrine but from a request for clarity from the Apostolic Signatura whilst considering a case before it (Prot. N. 17447/85). A question arises, therefore, as to the suitability of promulgating an interpretation in order to resolve a particular case. Surely, some canonists have argued, it would be more appropriate to allow doctrine to discuss the possibilities afforded by such a *factispecies* before effectively closing the debate by means of an authentic interpretation. In fact the interpretation has actually opened a debate rather than closed it and it is out of the context of that debate that this article is written.

The article attempts to deal with the precise questions that arise from the specific *factispecies* of its title, namely the capacity to act in court of a *group* of the Christian faithful which has been injured by an administrative act in its juridical sphere. Quite clearly there are two principal questions that arise from this scenario: What is meant by the term *active legitimation* (traditionally expressed as *capacitas agendi in iudicio*)? What is meant by the expression *non-recognised association*?

It is not the purpose of this article to resolve definitively the great questions of administrative law, namely the question of the suitability of the distinction between subjective right and legitimate interest and the question of the degree of subjectivisation to be accorded collective interests. Rather what is offered is a panorama of the varying contours of canonical doctrine from which some possible resolutions appear with greater clarity than others. The scope that is given to the resolutions of other administrative systems is designed not to give the impression that the canonical order bears comparison with civil systems on the same terms, but to indicate what is distinctive about the canonical regime according to the principle that comparison and contrast lead to greater definition. The unique finality of canon law is, one hopes, always respected to its proper degree in this study. That finality bears repeating at this stage so that it is clear where the ultimate purpose lies in committing oneself to a study of a canonical question of this kind.

The proximate and principal end of canon law is the observance of christian justice and fraternal charity in the people of God while the remote or mediate end is eternal beatitude as enshrined in the last canon of the 1983 Code, *salus animarum lex suprema est.* Through the observance of the commandments and of the law of the Church the individual believer is caught up into the economy of justice and charity which is a feature of the communion of the faithful and is thus enabled to participate in the communion which unites the Church with her Lord. Consequently the canonical system does not seek the collective good of the community over and against the good of the individual believer but strives to harmonise both in the pursuit of justice and charity. These are predominately the fruits of the just life through the actuation of the principal christian virtues. The principle enshrined in the traditional expression *tranquillitas ordinis* is therefore married to the good of the individual believer.

1. Terminology

The expression *capacity to act in court* comes to us filtered, as it were, through one of two theories of procedural capacity. The Roman theory, preferring a much more concrete schema, breaks down the prerequisites into three; a general juridic capacity, a procedural capacity and a more specific capacity to act in a particular case (*capacitas agendi in iudicio*). The German theory prefers a more abstract schema according to which in order to act in court the plaintiff must possess four qualities: general juridic capacity, procedural capacity, procedural legitimation and postulation[1]. This latter

[1] Cf. F. ROBERTI, *De processibus*, Roma 1941[2], 542, n. 197.

theory was introduced into canonical doctrine largely through the efforts of Roberti who was influenced by the doctrine of the Italian proceduralist, Chiovenda[2]. While the 1917 Code, particularly when seen through the optic furnished by an authentic interpretation of 1941, was regarded as vindicating the German theory[3], recent commentators on the 1983 Code regard the new codification as a vindication of the Roman theory because the final promulgated text preferred to use the simple more concrete terms of Romano-canonical tradition[4], notwithstanding the efforts of a noted proceduralist in the Seventies, Raphael Figueroa[5]. This spurs us on, therefore, to examine the sources in Roman Law before embarking on a discussion of canonical texts.

The word *capacitas* admits of three meanings in classical Latinity[6]. Strictly speaking, it refers to the ca-

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[2] Cf. F. Roberti, *De processibus* (cf. nt. 1), 542-543, n. 197-198.

[3] Cf. I. GORDON, *De iudiciis in genere*, I, Roma 1979, 345.

[4] «Il codice non conosce espressioni come *capacità processuale* o *legittimazione processuale*. Ha preferito tenersi a formule romanistiche, quali: *in iudicio agere, stare in iudicio, legitima persona standi in iudicio* (per es. cann. 1505-1506)» (P.V. PINTO, *I processi nel codice di diritto canonico*, Città del Vaticano 1993, 235, nt. 335).

[5] R. FIGUEROA, *La «persona standi in iudicio» en la legislación eclesiastica*, Roma 1971. The difficulty of Figueroa's work lies in its tendency a) to superimpose later canonical terminology on Roman sources without due regard for the two generation theory of Vetulani on the use of Roman texts in Gratian; b) to force the German theory on a Romano-canonical tradition which has resisted, justifiably I believe, its tendency to abstractions and qualifications.

[6] According to Lewis & Short, the first, is interpreted as «a capacity of holding much, capacity» [rare], citing Cicero (*Tusc.* 1, 25, 61). The second identifies its usage amons jurists as «a capability of entering upon an inheritance, right of inheritance». The third as designating an intellectual sense, the capacity to understand (Cod. Just. 1, 17, 1, §1) (cf. LEWIS & SHORT, *A Latin Dictionary*, Oxford 1989, 282).

pacity to contain something, therefore, a corporeal sense, hence the expression *spatium capiendi*, thus It., *capacità*, Fr., *capacité*, Germ., *Fassungsfähigkeit, Vermogen etwas zu fassen*, Eng., *capacity, content*)[7]. It may, in second place, have a subjective meaning in relation to a human faculty; designating the capacity of the mind to perceive or understand something (*ratione habita intellectus*). Thirdly, and this is the sense which interests canonists, it denotes, among the lawyers of the classical period[8], a certain ability or aptitude to participate, either actively or passively, in the juridical order, placing acts or simply enjoying the power to do so (*speciatim apud iurisconsultos ponitur pro jure, quod quis habet capiendae hereditatis seu legati*)[9].

The combination of the word *capacitas* with the verb form *agendi* has a special significance for legal science as it refers principally to the capacity of a subject to place acts, to acquire and exercise rights or assume obligations with particular regard to an action[10]. Standard treatments of classical Latinity offer a twofold division of possible meanings for the form *agere*. The first, its original meaning is a bucolic one, referring to the ability to drive before oneself or to lead sheep or cattle (*ante se pellere, ducere pecora seu armenta*), and the second is further distinguished into two meanings, the first group referring to persons (*de*

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[7] Cf. A. FORCELLINI, v. *capacitas*, in *Lexicon totius latinitatis*, Patavii 1940, I, 520.

[8] For a survey of the different approaches to the division of the history of Roman Law, see A. STANKIEWICZ, *Institutiones iuris romani*, Romae 1989, 16-21.

[9] Thus Cod. Th. 9, 42, 1: «Nullus est dominus in cuius persona de capacitate quaeri possit».

[10] Cf. P. RESCIGNO, v. *capacità di agere*, in *Novissimo Digesto Italiano*, Torino 1957, II, 861.

hominibus) and the second to things (*de rebus*). With regard to the form *agens/agentis* two senses are given; an adiectival and a substantive. The latter sense is found in the *Digesta Iustiniani*, to designate acting court, acting against another or with others, and is used in connection with an active participation in a judicial process. It is this primarily juridical sense which interests this article[11].

As for translation, while little difficulty is found in Romance languages (with due regard for complexities in the German)[12], a problem is posed in the Common Law tradition, for which the nearest equivalent to the Romano-canonical institute appears in the expression *locus standi*. This institute has appeared in the procedural doctrine of English administrative law in the recent past as some cases will show in the comparative section of this article. The difficulty of finding exact equivalents, however, in the Common Law for procedural capacity are manifested in the English translations of the canonical expressions *capacitas agendi, stare in iudicio, persona standi* that are offered in the two official English language versions of the Code of Canon Law. The translations tend to differ according to which side of the Atlantic one takes one's orientations from. Thus the British translation of the expression

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[11] F. ROBERTI, *De processibus* (cf. nt. 1), 544, n. 198; 548, n. 199; CHIOVENDA, *Principii di diritto processuale civile*, Napoli 1928², 587, n. 34; 589, n. 35.

[12] Thus for Roberti general juridic capacity (*capacitas partis*) is rendered as *Partesfähigkeit* in German; procedural capacity, as designated by the two expressions *legitimatio ad processum* and *legitimatio ad causam*, is rendered *Prozessfähigkeit* and *Sachlegitimation* (though see Figueroa's reservations about Roberti's use of *Sachlegitimation* at *La persona standi*, p. 30); cf. F. ROBERTI, *De processibus* (cf. nt. 1), 542, n. 197.

potest in iudicio agere of c. 1476 borrows from English civil usage and employs the phrase *to plead before a court* whereas the American translation (CLSA) of the same expression prefers the phrase *to act in a trial.* The British translation, with its respect for the civil process, appears somewhat quaint and lacks the more concrete tone of the American terms with its greater respect for the Romano-canonical sense. Similarly the British translation of the phrase *personam standi in iudicio* from cc. 1505 and 1620, 5° reads *the right to stand in court* where the American translation opts for *legitimate personal standing in court.* Here again the American translation is to be preferred from the point of view of its closeness to the original. From a comparartive point of view then the two British translations of these canonical procedural institutes seem to oscillate between a conception of a process which is reduced to a *petition* for a hearing (hence the expression *plead)* and the more formal conception of the process as the solemnised procedural vindication of a right after the manner of Celsus' famous dictum. The American translations of this institute have much to commend them, in the first instance, because they take into account the formal object of the trial as understood in the Romano-canonical process and, on the second count, because they better provide for the suitably abstract quality of the Roman concept of *persona standi in iudicio.* For the most part then we will opt for a rendering that owes more to the American than the British version in order to stay close to the Romano-canonical tradition, namely that for *capacitas agendi iudicio* we have preferred the phrase *the capacity to act in court*[13].

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[13] Gordon explains: «Capacitas agendi apud romanos comprehendebat quidquid requiritur ad agendum in casu concreto,

2. Roman law

When examining the sources in Roman Law it is important to keep in mind that, considered as an homogenous legal tradition, they are characterised by a certain pragmatism or even functionalism with regard to procedural prerequisites, fastening less on general principles of law and more on specific remedies to specific problems. It is this pragmatism which distinguishes Roman Law from modern continental legal theory and offers points of comparison with the Common Law tradition[14]. Historically, the greater majority of Romanists tend to distinguish two periods in the evolution of the civil process, the first when the civil process was conducted orally (*legis actiones*) from the second during which actiones were conducted and resolved on the basis of written formulae (*iudicium*)[15]. The intervention of the city-state in disputes between citizens, which was originally designed to assist in the provision of justice, allowed disputes to arrive at a certain abstraction and to be conducted, in the period of the Republic, before a magistrate (*in iure*) so that a decision (*iudicium*) could be reached. The magistrate at this time was generally a citizen, selected by the *praetor* and the parties, but during the Principate became a *professional*, i.e. a permanent functionary appointed by the *Princeps*. The list drawn up of such private citizens during the period of

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ideoque videtur comprehendisse tum maturitatem aetatis et mentis tum ius ad agendum in casu requisitum»; cf. I. GORDON, *De iudiciis in genere* (cf. nt. 3), I, 341.

[14] Cf. B. NICHOLAS, *Introduction to Roman Law*, Oxford 1988³, 1.

[15] Cf. P. BONFANTE, *Istituzioni di diritto romano*, Torino 1957, in *Opere complete di Pietro Bonfante*, X, 119; F. SCHULZ, *Classical Roman Law*, Oxford 1954, 72; O. ROBLEDA, *Introduzione allo studio di diritto privato romano*, Roma 1979², 61-66.

the Republic lent its name to the civil process, namely the *ordo iudiciorum privatorum*[16]. It is doubtful that in this period Romans considered the civil process as a defence of rights as such; rather actions were *granted* to a plaintiff, and only in this qualified sense may one say that the plaintiff enjoyed a *right* to a resolution[17]. Actions could be granted or denied by the *praetor* on the basis of whether the plaint enjoyed a viable prospect of succeeding (i.e. whether it was perceived that the plaintiff had a reasonable ground for complaint) and in this regard, the Roman practice of rejecting or accepting actions (*actionem dare*) provides a favourable comparison with the practice of a prejudicial investigation and rejection of petition *in limine litis* in the modern canonical process[18]. One should hesitate, however, to impose on Roman sources the kind of concept of process articulated by Suarez from the famous axiom attributed in the Justinian collections to Celsus, namely as an action to vindicate a subjective right. Rather procedural rights were granted on the basis of the concession of an action. Properly-speaking then, the Romans understood the reality which today we would consider a subjective right as more a faculty or exigency before another rather than a subjective situation[19].

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[16] Note the qualification of Scialoja who states that this neat division does not appear so explicitly in Roman sources; cf. V. SCIALOJA, *Procedura civile romana, esercizio e difesa dei diritti*, Roma 1936, 81-82.

[17] Cf. O. ROBLEDA, *Quaestionum quarundam expositio pro schola institutionum iuris romani*, Romae 1966-67, 4; B. NICHOLAS, *Introduction to Roman Law* (cf. nt. 14), 64-69.

[18] Cf. A. METRO, *La «denegatio actionis»*, Milano 1972, 84.

[19] Cf. O. ROBLEDA, «El derecho sujetivo en Gayo» in *Studi in onore di Gaetano Scherillo*, Milano 1972, 8.

The lawyers of the classical period spoke of civil actions as distinct from praetorian actions, the former corresponding to the expression *actionem competere* and the latter corresponding to the expression *actionem dare*[20]. Civil actions were those which had their foundation in the *ius civile* from which the *praetor* reported a formula that had to be adapted to the factispecies presented before the magistrate. Praetorian actions were those created by the magistrate *ex novo* and hence could be denied to the plaintiff. Adapting the procedure from that of the civil action, the *praetor* announced his intention to protect the given situation outlined in the edict. The provision by which the *praetor* denied an action to a plaintiff was generally pronounced at the threshold of the suit (*in limine litis*), and, therefore, before the procedural moment when the action was taken up, i.e. before the joinder of issues. The point is that this preliminary decision did not touch on the substantive question. Here we are close to what modern proceduralists distinguish as the two moments or stages of judgment; the first to establish the existence of the procedural presuppositions (Germ. *Prozessvoraussetzungen*) and the second to establish the conditions of an action or the requisites to obtain a favourable decision on the merits of the case (Germ. *Sachurteilserfordnisse*)[21].

As regards the prerequisites necessary to bring an action, the expression *persona standi in judicio* first appears in the *Codex Justinianus*, but only as a rubric. Under the rubric *Qui legitimam personam in iudiciis*

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[20] The active form of the expression *actionem competere* did not mean that civil actions could not be denied to a party, as Metro points out; cf. A. METRO, *La «denegatio actionis»* (cf. nt. 18), 84-87.

[21] This institute, that of the denial of an action, survived into the period of the extraordinary process (D. 34, 9, 15; D. 38, 2, 16; D. 38, 2, 20).

habent vel non, Justinian cites three constitutions, all of which deal with the subjective state of the plaintiff, i.e. whether an adult or not. The rubric is clearly an addition of the reforming emperor, ostensible introduced for the purpose of collating three constitutions on the qualifications of the parties. So little is offered in the three texts that one could argue that the rubric is more important than the constitutions, since it demonstrates that the formula *standi in iudicio* (the ancestor of the Common Law expression *locus standi*) had come into coinage by the time of Justinian. One should also keep in mind that texts of Roman Law seem to demand a very practical hermeneutic, i.e. may X or Y be granted an action against A or B. Hence the many appearances of the terms *agere, respondere, accusare*. These verb forms obviously assume subjects of one kind or another so that in reconstructions of the Institutes of Gaius, words like *accusatorii, litigatores, rei* appear to designate the active party[22]. The procedural equation was essentially relational, and this is how the Gaian axiom *ipse mecum agere non possum* came to be applied to the fundamental procedural relationship[23].

The very general qualification required in a party bringing an action was that he should be capable of re-

[22] One should note that at this time the term *reus* also designated the active party; cf. R. FIGUEROA, *La «persona standi in iudicio»* (cf. nt. 5), 10. The respondent was often described in composite terms, *is cum quo agitur, is qui convenitur, is qui pustulator* (D. 2, 11, 10; D. 11, 1, 1).

[23] The expression actually occurs in the context of the Gaian treatment of the possibility of an action taken by a master against his son or his slave. Since they are in the possession of the *dominus*, he cannot act against them; to do so would be tantamount to acting against himself (for text and translation see F. DE ZULUETA, *The Institutes of Gaius*, Oxford 1946, I, 268).

ceiving the law (*capax legis recipiendi*), recalling that, for the Romans, this condition was regarded as one of the privileges of citizenship, in an age when law was seen as a liberation from strife. The party had to be a subject then of rights and obligations as designated by the expression *capax iurium et obligationem* and in later doctrine applied, *mutatis mutandis*, to aggregates of persons in associations or *collegia*. Thus a stable condition is to be distinguished from the more dynamic, according to which a party could *de facto* place juridic acts (*capax actus juridicos ponendi*)[24]. Figueroa thus defines general juridic capacity as the aptitude to realise acts with juridic effects (*capacidad de obrar es la idoneidad para realizar actos con efectos jurídicos*)[25].

The Romanist Guarino furnishes us with an elegant formula with which to describe collections of persons organised in assocation, i.e. *collegia*, a formula which adequately takes into account recent contributions to the much exercised question as to whether the Romans worked with a concept of juridic personality of the kind similar to that which came to be articulated with maturity in the work of the medieval canonist Sinibaldo dei Fieschi[26]. Guarino thus uses the expression *impersonal*

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[24] Cf. CHIOVENDA, *Principii* (cf. nt. 11), § 34, 36; O. ROBLEDA, *Quaestiones quarundam* (cf. nt. 17), 1-11; ARANGIO-RUIZ, *Istituzioni di diritto romano*, Napoli 1960[10], 46, 66.

[25] The Roman sources cited, however, simply mention modifications on the freedom of persons to engage in contracts (D. 13, 6, 1-2; D. 16, 3, 1, 15; D. 19, 1, 13, 29).

[26] The Romanist Biscardi, in a recent offering, suggests that one cannot exclude the possibility that the Romans worked with an immanent concept of juridic personality (see A. BISCARDI, «La rappresentanza sostanziale e processuale dei *collegia* in diritto romano» *Apollinaris* 63 [1990] 42-43), a balanced corrective to the received wisdom in Anglo-saxon circles following the dimissive

juridic subjects (*soggetti giuridici impersonali*), as distinct from the canonical concept of the juridic person, to speak of the way the Romans understood the general juridic status of associations[27]. With this in mind it seems important to point out that notwithstanding Schulz's indications to the contrary, Roman sources of one kind or another testify to a very wide-ranging experience of associations[28]. We can identify four essential

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expostulations of Schulz on the subject (see F. SCHULZ, *Classical Roman Law* [cf. nt. 15], 86-87).

[27] Two important texts suggest, as De Robertis points out, that even if strictly-speaking the idea of juridic personification does not appear in the laws or the commentaries of the *iuris consulti*, nevertheless the lawyers of the classical period could not have been unaware of sources which reveal signs of abstraction and personification in Roman thought about aggregates (see LIVY, I, 8, 1 and SENECA, [Epist. 102, 6]). The merit of De Robertis's monumental work on associations is that unlike Shulz he takes into account the many non-juridic sources (i.e. archeological inscriptions and literary allusions) which testify to considerable evolution in Roman thought on the associative phenomenon throughout the period of the Republic and thereafter into the period of the Principate (see F. De ROBERTIS, *Storia delle corporazioni e del regime associativo nel mondo romano*, Bari 1973, II, 407).

[28] I have opted to emply the expression *association* for phenonmena which were called by a variety of terms (*amicitia, chorus, collegium, classis, cognatio, commune, societas, convictus, convivium, corpus, curia decuria, factio, grex, ordo schola, sodalicium, spira, statio, studium* etc.). The use of the general term *association* is designed to overcome the division which Schulz makes between corporations (*collegia*) and partnerships (*sodalitates*), the latter being an organised body of persons with a fixed number of members each partner having a disposable share of the common property and where a partner dies or withdraws the *societas* is inevitably dissolved. The corporation, on the other hand for Schulz is an organisation with a variable number of members who are the owners of the property not as single persons but as «joint tenants» or with joined hands (*zur gesamten Hand*) as Savigny has it. The term *corporation* was unknown, however, to the lawyers of the

features which give associations their specificity in Roman sources: a) a common end or finality (*scopo commune*) that represents the ideological bond among the constitutive elements; b) organization, the means by which the finality is realised; c) the adherents, i.e. persons willingly gathered together in association; d) the permanence or durability of the end, or its conceptual continuity even if it only exists as an intention of these other elements[29]. With this preliminary typification we can distinguish them from other collective entities of the time: they differ from the State, its collegial organs, the official colleges of magistrates and priests, and from *municipia* because none of these depend for their inception and continued existence upon the will of the individuals of which they are composed. They differ, furthermore, from the conjugal and familial community, since these are not brought into being by the free will of their components and from simple reunions of persons since these do not have a conceptual continuity which exists before and after occasional meetings[30].

Associations in Roman sources are traditionally identified in five broad categories: a) professional associations, or corporations in the technical sense; b) convivial or voluntary associations, designed to establish a social life for their members; c) religious associations, designed to honour a divinity freely chosen as distinct from those orders like the Vestal Virgins who exercised public functions on behalf of the State; d) funerary associations, designed to ensure members of a

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classical epoch, hence it seems more appropriate to emply the expression *association* precisely to include the many kinds of guild, corporation, society and group which dominated the Roman world.

[29] Cf. F. De Robertis, *Storia delle corporazioni* (cf. nt. 27), I, 6-7.

[30] Cf. F. De Robertis, *Storia delle corporazioni* (cf. nt. 27), I, 6-7.

fitting burial; e) political associations, designed to exert a direct influence on the political life of the city-state[31]. Biscardi, writing more recently, prefers to group them under three main main categories which he feels are closer to actual Roman typology: a) *collegia* formed for cultic motives, for mutual assistance (*collegia tenuiorum*), for convivial ends, for games (*ludorum causa*) and for funerary rites (*collegia funeratica*); b) associations purporting some economic end (*collegia aurifodinarum, collegia argentifodinarum, collegia salinarum, collegia fontanorum* etc.) among which one may number the *societates publicanorum* constituted for public contracts; c) later professional and artistic associations, in which slaves could participate with the consent of their owners, that existed alongside *sodalitates* (to be distinguished from *collegia privata* by the more public nature of their ends)[32].

The question of the procedural capacity of such bodies is very much coloured by the function of State recognition in the life of associations which seemed to go through a profound shift from the period of the Republic to the Principate. Much depended on whether an association was licit or illicit. The notion of liceity quite clearly functions differently in a right-of-associa-

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[31] Some associations, however, combined two or three of the aspects outlined above, such as the convivial associations in the last century of the Republic, like that of Clodius, whose political machinations led to the restrictive legislation of the *senatusconsultus* in 64 BC; cf. J.P. WALTZING, *Études historiques sur les corporations professionelles chez les Romains*, Bruxelles 1895-1896, I, 32-56; F. DE ROBERTIS, *Storia delle corporazioni* (cf. nt. 27), I, 10-20.

[32] Cf. A. BISCARDI, «La rappresentanza sostanziale e processuale...» (cf. nt. 26), 47.

tion regime and in a right-by-concession regime[33]. The former existed under the Republic, really speaking until the associations of Clodius were banned in 64 BC for political skulduggery. The latter existed during the Principate when associations, like those incidentally of Christians, fell under a presumption of suspicion, precisely as a result of the conspiracy of Clodius. In the first kind of regime State recognition acts as a recognition of precise norms regarding the constitution and activity of associations while in the second regime it acts as a *sine qua non* regulating not only the norms and membership of associations but their very existence. The *lex Iulia de collegiis*, effectively the milestone in the transition from one to the other kind of regime, has unfortunately not been preserved in full nor do we have a guide to its contents from the numerous constitutions which were passed to implement it[34]. Neverthe-

[33] The difference between the two legislative regimes offers interesting parallels in the two codifications of the Catholic Church. Thus the Pio-Benedictine Code of 1917 determined that the faithful did not have a right of association as such; associations came into being by an act of the competent ecclesiastical authority. The Johanno-Pauline Code of 1983 recognises a prior right of association to the faithful with the proviso that they fulfil the condition attached by the Second Vatican Council to such associations, namely *cum debita relatione hierarchica* (in *Apostolicam actuositatem*, 19). The problem is by no means an academic one since precisely this issue has come to a head recently in the decree of the Bishop of Lincoln, Nebraska which prohibits the faithful in that diocese from formally ascribing to a number of associations membership of which the Bishop determines is not reconcileable with bona fide standing in the Catholic Church. For a dicussion of the canonical issues, see J.T. MARTIN DE AGAR, «Brevi cenni sulle fondamenti dei rapporti fra gerarchia e associazioni» *Apollinaris* 62 [1989] 51f.

[34] This is the judgment of Schulz's work of 1951 but this neglects archeological inscriptions.

less Waltzing and De Robertis provide some idea from a survey of archeological inscriptions and a painstaking analysis of legal sources. The only text of the *lex Iulia* regarding associations which survives comes to us from a marble inscription at the Capitoline Museum in Rome. It reads:

DIS. MANIBVS
COLLEGIO. SYMPHONIA
CORVM. QUI. SACRIS. PVBLI
CIS. PRAESTV. SVNT. QVIBUS
SENATVS C. C. C. PERMISIT. E
LEGE IVLIA. EX. AVCTORITATE
AVG. LVDORVM CAVSA.

The inscription refers to the offering of *pietas* to the dead by a group of choristers during the reign of Augustus (hence the absence of the title *Divus* from the inscription with which emperors were normally described after their deaths). Scholars have debated the meaning of the abbreviation C.C.C. but the most probable solution is offered by Henzel as *cogi, coire, convocare*[35].

As regards associative phenomena, Roman Law permitted several persons to act together as parties to on action. One of the earliest references to this institute occurs in the *Digesta*, attributed to book 62 of a commentary of Paulus on the edict, which text poses the problem of monies owed by a single debtor to several creditors. Paulus comments:

> Should there be several [parties] who have the same action, they are to be considered as one plaintiff. So that several should be considered as stipulating some thing or several

[35] Cf. BERGER, «Les lettres CCC», *Revue internationale des droits de l'antiquité* 6 (1951) 79-89.

> silversmiths, in whose name they are made one: they are to be numbered as one, because only one debt is involved, and when several tutors of a pupil converge, they are numbered as one, because they convene in the name of one pupil[36].

So Paulus argues that as a general rule, in such cases, a single action is conceded *as if* the parties were one party (*unius loco habentur*). In the *Codex Justinianus* two texts appear which provide for a single action pursued by multiple actors or an undefined group of private citizens. The first refers to a decree of the emperor Julian on 3rd September 362:

> We hereby abolish and annul the prescriptions [exceptions] which litigants, under the pretext that they are coparties, are accustomed to contrive when they desire to protract a trial; and license shall be extended to litigants whether they are of the same forum or live in different provinces, without adjoining the presence of a coparty or coparties, to bring or defend actions for a part thereof[37].

The version of this constitution in the Theodosian Code adds an interpretation which explains something of the context of Julian's efforts to stem the practice. The interpretation shows that coparties often excused themselves from defending a suit on the pretext that they did not all come from the same province or under the jurisdiction of the same judge or that could not be all present at the same time. It was ruled as a dilatory tactic[38]. Though Julian's text above appears to amount to an abolition of the institute, a careful reading of the

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[36] D. 2, 14, 65, 9.

[37] Cf. I. 3, 4; Tr. PHARR, *The Theodosian Code and Novels and Sirmondian Constitutions*, Princeton 1952, 46.

[38] Cf. *Codex Theodosianus* 2, 5, 2, in MOMMSEN, *Theodosiani libri XVI cum Constitutionibus Sirmondianis*, Berlin 1905, I, 82.

original shows that he does not determine that the possibility of a collective suit is removed; he merely excludes a faculty, once granted, of placing collective exceptions which in practice hampered the swift resolution of disputes. Another constitution of the emperors Valentinian and Valens in 364 states:

> A case common to several persons can be conducted, even though some of them are absent, if those present are prepared to guarantee that an absent principal (*dominus*) will ratify this action, and if they should be sued for anything, they should make certain by giving security that the judgment will be satisfied[39].

The traditional interpretation of this phenomenon, referred to in standard texts as a *consortium litis activum*, suggests that the parties involved bring the action *uti singuli*. They happen to share in a common suit, they are united *ad hoc* by the specific circumstances of the action, in this case, a common debt or *reus*, hence the expression *consortium* or partnership. This institute needs to be distinguished from the *actio popularis*. This action was granted to citizens who felt aggrieved in one way or another, to bring an action with no greater qualification than that they happened to be citizens of the city-state. Thus the seminal text attributed to Paulus states *Eam popularem actionem dicimus, quae suum ius populi tuetur*. It is not altogether clear, however, that this institute really represented quite the *carte blanche* approach to the granting of actions as is often assumed in modern legal theory. There is a qualification involved, that they belong to the citizenry of the city-state.

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[39] Cf. C 40, 2. Tr. PHARR, *The Theodosian Code* (cf. nt. 37), 47.

To sum up then we can say that the *Codex Justinianus* is the first to use the expression *persona standi in iudicio*, a formula created by juridic practice, to illustrate a few concrete cases where certain kinds of personal subjects lacked standing in court. In none of the three constitutions cited by Justinian is it suggested that there are abstract prerequisites which qualify the subject's standing in court. There are however concrete prerequisites which suggest that the modern and abstract distinction between juridic capacity and procedural capacity does not have precise or recognisable antecedents in early Roman sources. Despite the obscure and incomplete nature of the sources, Roman texts do however demonstrate a very practical and active notion of capacity, which, balanced against the rather abstract optic furnished by Justinian's rubrical expression *persona standi in iudicio*, probably affords us some idea of the precise concept with which Roman Law in the classical period worked. In the cases enumerated it would appear to be the lack of procedural capacity in the modern sense of the term which renders the personal subject inapt as a party to an action. The possibility of several parties bringing an action is attested to in Roman sources though little by way of commentary is furnished by the *iurisconsulti*. Essentially these actions were conceded to a group of citizens who were united by a single objective, usually, creditors to a common debtor. It remains unclear whether this practice amounted simply to a remedy granted for the sake of *oeconomia litum* or whether it constituted an autonomous legal institution. Roman sources also permitted an *actio popularis* which granted to the citizens, qualified simply as citizens, the possibility of bringing an action on behalf of the *populus Romanus*.

3. Canonical tradition

Tertullian has left us, in his *Apologia*, an elegant defence of the Christian Community as the *associative phaenomenon* par excellence and indeed in places puns on the Julian Law's enigmatic abbreviation C.C.C. with regard to the Community's freedom to meet. The Church itself had suffered for being a non-recognised association especially during the Principate when such associations came under suspicion, a suspicion which, we know from Pliny's letters to Trajan, led to the *cognitiones per tormenta* of Christians. Out of this experience it seems surprising that some degree of doctrinal development within the tradition had to wait until recently for its explicit formulation. Nevertheless there are *indicia* discernible in the period of the greatest achievement of canonical science.

The discovery of the *Digesta* in the *Codex Florentinus*, around the year 1070, stimulated a comprehensive renewal of law which, catalysed by the reforming efforts of Gregory VII, led to the flowering of study of church legislation alongside the study of the *pagina sacra* under the over-arching exegetical principle *sunt diversa non adversa*. By the end of the Twelfth Century decretalists had developed a response to Justinian's achievement, namely the *concordantia discordantium canonum* of Gratian, otherwise known as the *Decretum*. The long process of redaction of the received text of the *Decretum* itself bears witness to the assimilation of aspects of Roman juridic culture[40], the

[40] One should note the considerable body of scholarship now available on the redactional process of the *Decretum* but particularly the work of Adam Vetulani. These textual studies show that the Roman Law citations and texts which appear in the received MSS of the *Decretum* were probably not part of the Master's ori-

parallelism of which is most eloquently demonstrated in the final collation of canonical legal texts in the Sixteenth Century *Corpus iuris canonici*[41]. Despite the parallelism the language and idiom of the canonical corpus is already informed by centuries of Christian practice filtered through a mass of magisterial doctrine and intervention in the form of decretal letters. The canonical system, therefore, is based on antecedent (rather than precedent) and is constructed on the principle that tradition, especially apostolic tradition, is somehow normative for subsequent generations, or, as Irenaeus puts it, *sic mediantes divinae*.

In the second part of the *Decretum* Causes 2 to 4 deal with limitations on the concrete capacity of plaintiffs to testify or accuse in an ecclesiastical process. This is the section most relevant to our discussion. The general principle is stated in C. 2, a. 1, c. 14:

> Some are prohibited from accusing for reasons of sex or age, such as a woman or a ward, other by reason of sacrament, such as those who merit a stipend, others by reason of authority or power, in which acting honestly, they cannot be brought to court to testify (*in ius euocari non possunt*).

This text presents us with our first quandary: do the terms of decretals represent such legal dispositions as may fall within the conceptual framework of a doctrine of procedural capacity? Figueroa has no doubt that they

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ginal work (cf. A. VETULANI, «Gratien et le droit romain» in *RHDF* 24/25 [1945-47] 11-48; ID., «Encore un mot sur le droit romain dans le Décret de Gratien», *Apollinaris* 21 [1948] 129-134).

[41] Berman points out that where the Romans simply state the concrete terms and meaning of the norm, Gratian is interested in the underlying principle and it is this which he teases out from the text (cf. BERMAN, *Law and Revolution*, 244).

do, though he interprets the above citation as representing no more than a simple statement of legality, saying little more than a parallel text from the *Digesta*. The problem of the application of juridic terminology to decretal dispositions resurfaces in the interpretation of the norms which appear in the *Decretum* regarding accusations of laity against clergy. At first glance expressions like *liceat accusare* appear to be dealing with liceity rather than with capacity, while the use of the absolute *accusare non potest* seem to regard prohibitions regarding capacity. Such a conclusion is probably an over-simplication of the situation, granted the fact that the *glossae* on such forms seem to reflect a considerable diversity of opinion. Diversity is the hallmark of the texts and glosses regarding the capacity of heretics, the former conceding, the latter denying to them some form of active procedural participation[42]. Little doubt, however, seems to have existed about the capacity of people otherwise *incapax* (heretics etc.) to bring an action *in propria causa*[43], a principle inspired by the Christian notion of *aequitas*, identified by the *Decretum* in parts with an elevated concept of justice[44]. Regarding the bringing of actions by laity against clergy, the *Decretum* seems to exclude this on the basis of a doctrine of the responsibility and status granted to clerics, but what this means in terms of procedural capacity is difficult to de-

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[42] Cf. R. FIGUEROA, *La persona standi* (cf. nt. 5), 34, nt. 5.

[43] «Omnibus, quibus accusatio denegatur, in causis propriis accusandi licentia non est neganda» (cf. C. 4, q. 6, c. 2).

[44] There are several examples which illustrate Gratian's doctrine of justice, but perhaps none more so than his citation of a decretal of Calixtus which states the general principle: «Iniustum iudicium et diffinitio iniusta, regio metu et iussu, aut cuiuscumque episcopi aut potentis a iudicibus ordinata uel acta, non ualeant» (cf. C. 11, q. 3, c. 89).

termine[45]. The key expressions used are *non valet* and *non debent* which certainly could be read in terms of propriety rather than essential capacity, an interpretation which is confirmed by one of Gratian's comments on another decretal[46]. But Gratian is struggling. He is trying to reconcile the traditional prohibition of the decretals in this matter with the window of opportunity he evidently wishes to leave open for the faithful (*oves*) to bring an action against a cleric out of the virtue of faith[47]. This he argues is also present in the tradition.

Figueroa interprets the terminology of the Decretists, *prohiberi, non sunt recipiendi, non sunt suscipiendi, non possunt, non licet, non admittuntur, sunt repellendi*, to express a lack of concrete capacity in some form or other. The difficulty with such an interpretation lies with the identification of expressions like *non possunt* with others of the nature of *non licent* or

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[45] The modern secular legal world would find Gratian's reasoning a little difficult to stomach: «Sacerdotes, qui proprio ore corpus Domini conficiunt, ab omnibus sunt obediendi et timendi, non dilacerandi aut detrahendi, quia a quibus se Domini populus benedici, saluari et instrui cupit, nullatenos eos debet arguere, nec uulgus in accusatione suscipi. Populus enim ab eis docendus est et corripiendus, non nisi ab eo, quia non est discipulis super magisterium. [...] Patres enim omnes i.e. sacerdotes uenerandi sunt, non respuendi aut accusandi uel insidiandi» (cf. C. 6, q. 1, c. 8).

[46] The text at C. 6, q. 1, c. 9 refers to the accusation of bishops and suggests that these should not be heard from the subjects of the bishop or from those who are «low-lifes» (*pravae vitae*), because, hinting at the evangelical precept, the disciple is not greater than his master. Gratian, however, comments: «Ipsa autem detractio, licet ex uicio detrahentium, tamen iusto Dei iudicio nonnumquam aduersos bonos excitatur, ut quos uel domestica presumptio, uel aliorum fauor in altum extulerat, detractio humiliet» (cf. *Corpus iuris canonici*, I, 555-556).

[47] «Oues pastores non accusent nec reprehendant, nisi a fide exorbitauerint» (cf. C. 2., q. 7, c. 22).

non debent. The rather absolute nature of Figueroa's statement that the legislation in the *Decretum* on procedural standing does not differ substantially from that found in Roman Law seems difficult to reconcile not only generally with the rather different terms of the canonical texts but also specifically with exceptions allowed by Gratian, for example at C. 2, q. 7, c. 22. Yet also among the subsequent generations of glossators there are signs of openness to the idea that laity may bring actions if they can allege some injury has been suffered as a result of a decree or judgment that is unjust, i.e. an injury that is *juridically* relevant[48]. This openness is confirmed in the emergence in the Twelfth Century of the extra-judicial appeal.

What of groups of the faithful? The appearance in court of groups of the faithful does seem to be attested to in the *Decretum*. In a section on accusations there appears a decretal dealing with the question of whether a group of monks may appeal against their own abbot. Alexander III decrees:

> We respond, that the monks, unless by another manifest and reasonable cause it is an obstacle to that which concerns obedience and submission to the abbot, should in no way be rejected in the accusation of an abbot[49].

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[48] Thus Roland Bandinelli (later Alexander III) comments on C. 3, q. 4 that «Dicimus eos omnino repudiandos in criminali causa praeterquam in crimine simoniae et haereseos; in civili quoque, nisi suam suorumque exseqantur iniuriam» (cf. *Die Summa Rolandi Bandinelli et Incerti Auctoris Quaestiones*, [ed. F. Thaner, Innsbruck 1874]; also *Die Summa Magistri Rufini zum Decretum Gratiani*, [ed. T.P. McLaughlin, Toronto 1952], 232-234).

[49] «respondemus, quod monachi, nisi alia manifesta et rationabilis causa impediat, eo, quod de obedientia et subiectione abbatis esse noscuntur, ab eius accusatione sunt nullatenus repellendi» (cf. X., 5, 1, 1).

What is significant in the response is that the plurisubjective nature of this action does not seem to disqualify the monks as plaintiffs. The decision of Alexander is not incidental, for the text appears as a source for the very generous terms of canon 1646 of the 1917 Code. It is not an entirely satisfactory example though, for the monks involved, while a plurality, do not seem to be *organised* in any way or in such form that they enjoy a consistency beyond the merely *ad hoc*.

In the *Decretals* of Gregory IX we have a number of decretals collated together which would appear to respond more specifically to the question of whether a group of the Christian faithful were granted actions or appeals in ecclesiastical instances. Thus a decision of Innocent III is recorded in which he writes to the Bishop of Beauvais concerning the location for the hearing of a case against a fraternity of priests accused of a crime. The decretal appears under the rubric *Clerici super excessibus coram suo episcopo conveniri debent, non coram his, quibus serviunt*. Innocent decrees:

> We respond thus to your fraternity, that it is for you, as ordinary judge to hear the recourse of the co-plaintiffs (*conquerentes*), more so regarding those crimes which are known to have been committed in your diocese; not in the diocese in which the delinquents now serve, unless an indulgence or special custom permits them to vindicate themselves there[50].

The decretal is really a response to the question of competence and only incidentally provides *indicia* re-

[50] «Super quo fraternitati tuae taliter respondemus, quod ad te, utpote ordinarium iudicem, de talibus debent conquerentes habere recursum, maxime si super his criminibus impetuntur, quae in tua noscuntur dioecesi commisisse; nisi forte hi, quibus delinquentes ipsi deserviunt, ex indulgentia vel consuetudine speciali iurisdictionem huiusmodi valeant sibi vindicare» (cf. X. 2, 2, 13).

garding procedural participation. From the context this appears to be passive rather than active participation.

By far the most useful quarries of sources regarding recourses and collective capacity comes to us in the extrajudicial appeal and the *beneficium novae audientiae* which followed the reorganisation of the Roman Curia in 1588. The first was more properly a remedy granted to plaintiffs who objected, on the grounds of injurious effect, to the decisions of ecclesiastical superiors made outside the strictly judicial sphere, hence the nomenclature *appellatio extra iudicium*. It thrived in the Thirteenth and Fourteenth Centuries before running into complaints from the Fathers of various Councils, notably of Constance (1417), of Basel (1435) and of Lateran V (1515) but particularly at the Council of Trent (1549-1563) where its suspensive effect was abolished[51]. The second remedy assumed its role when Roman Congregations took over the competence for appeals against the extrajudicial acts of inferior authorities. The Sacred Congregation of the Council dealt with many of these cases and passed a judgment on the merits of the decision of the lower authority.

In a number of cases involving groups of clerics or laity, the Congregation granted a generous concession to recourse against extrajudicial provisions of one kind or another. Thus in a case from Burgos on the 14 November 1733, concerning the construction of a new church and its dedication under the title of the old church it replaced, a group of parishioners sought and obtained recourse against the decision of the capitular vicar to give it a new name[52]. Similarly three presbyters

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[51] Cf. *Concilium Tridentinum*, sess. 13, c. 1; sess. 24, c. 10.

[52] Cf. SACRA CONGREGATIO CONCILII, *Thesaurus Resolutionum* (*TRSCC*), 14 novembris 1733, 265-266.

were granted recourse against a decree of their bishop in a decision of 8th May 1744[53]. Perhaps one of the most important principles of the jurisprudence from the Congregation comes to us in a rubric from a resolution of 1745 which states:

> A bishop can neither administer nor arrogate to himself something from among those things which need to be assigned for their governance to lay administrators of the Sacred Palaces[54].

In another resolution, of 17 May 1749, regarding the division of a parish, the chief men of a village urged its separation, against the decree of the bishop, on the grounds that the parochial church of the village was too far and the road to the new site was dangerous. While the case actually failed, it did so, not on whether the group enjoyed standing, but on the merits of the argument[55]. In one decision, of 16th May 1747, significant as much for its dispositive as for its expositive section, the decision of the bishop was judged to have been contrary to the demands of justice as he had offered no reasons in the face of the proofs of the recurrents[56].

A number of requests for a new hearing demonstrate a very generous concession made to the ability of groups, whether lay or clerical, to bring a complaint in an administrative instance against an injurious decree issued by a diocesan bishop. The *factispecies* of such requests vary greatly from dissensions over the removal of a parish priest to appeals against the division of a

[53] Cf. *TRSCC*, 8 maii 1745, 166.
[54] Cf. *TRSCC*, 8 maii 1745, 166.
[55] Cf. *TRSCC*, 17 maii 1749, 55-56.
[56] Cf. *TRSCC*, 6 maii 1747, 172.

parish. There are also a significant number of cases from this period in which the petitions of groups of the Christian faithful allege unjust injury by an episcopal provision related to their participation in divine worship or access to the spiritual goods of the Church. The decision is challenged not simply because personal interests have been harmed but because what was considered a just arrangement of religious services and goods had been overturned by an allegedly unjust administrative act. Some of these involve patrimonial rights but there are also moral and spiritual rights that are upheld before the Congregation.

What may we conclude from canonical tradition? Firstly that a number of texts from the *Corpus iuris canonici*, although sparse with regard to the precise configuration of a non-recognised association, demonstrate that a plurality of subjects did enjoy active procedural capacity. Access to the extrajudicial appeal and petitions before the Roman Congregations show a concern in the tradition to protect subjective situations that had been allegedly harmed as a result of an injurious decree. The tradition suggests that this injury could be either current or threatened, that the latter would be based on a probable conjecture and that the subjective situation would need to be protected in the law (*in iure*). Whether that protection had to be implicit or explicit remains an open question[57].

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[57] One needs to recall that this protection in any case is much broader in canon law than say in Italian law, since while the latter requires an explicit protection in the positive law, the former requires simply that the injured situation be protected *in iure*. What this means is spelt out by Sabattani: 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)

4. The pio-benedictine codification

Two theories regarding procedural capacity have dominated canonical doctrine. The first, the Roman essentially distinguished two capacities, the juridic from the procedural, while the second, the German distinguished four capacities; juridic (*capacitas partis*), procedural (*legitimatio ad processum*), the capacity for a particular process (*legitimatio ad causam*) and the capacity to postulate (*ius postulandi*), i.e. to act in court for oneself without the agency of another. From the point of view of procedural theory, the Roman view was based on a simple setting of the procedural relationship as consisting of two parties who seek the intervention of a judge; essentially then a process involving two disputing parties. The German theory, is based on a view of the procedural relationship which gives more weight to its public nature and the intervention of the judge.

The Pio-Benedictine Codification represented a victory for the German theory. This said we should note that nowhere in that codification is there an expression for the concrete capacity of a party to act in court; nowhere is it explicitly stated that expressions like *stare in iudicio* refer to procedural capacity or that the formula *agere et respondere* refers to procedural legitimation. Nevertheless in the preparatory phases of the 1917 Code, it seems that the general expression *persona standi in iudicio* became a euphemism to de-

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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 or regulations given by administrative authorities in the concrete application of the law; cf. A. SABATTANI, «Iudicium de legitimitate actuum administrativorum a Signatura Apostolica peractum», *Ius Canonicum* 16/2 (1976) 237.

signate the two conditions that according to the German theory, consituted procedural capacity, namely *legitimatio ad processum* and *legitimatio ad causam*. This interpretation is offered by one of the leading commentators of the final promulgated text, Francesco Roberti[58]. It is not for us to represent here all the texts which show the evolution of the final formulae but we can state with confidence that they show a concern to make the requirement of *standing* a threshold one which the judge must see to before admitting a person to participate in a process[59].

With regard to the qualification of that *standing*, i.e. whether the plaintiff needed to demonstrate a subjective right or whether an interest sufficied, canonical doctrine has, since the Seventies, been much exercised by the claims of Pio Ciprotti that the 1917 Code implicitly accepted the Italian division of procedural prerequisites into subjective right and legitimate interest. Others have argued that since the explicit terms of the Code do not identify such a usage we cannot presume to foist a division onto the text that is clearly imported from a foreign juridical culture. Up until recently it has been difficult to respond, in a convincing way, to Ciprotti's

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[58] Cf. F. ROBERTI, *De processibus*, Civitate Vaticana 1940², 543, n. 197.

[59] The promulgated text of the relevant canon reads: «Eodemque modo antequam aliquem ad agendum admittat, cognoscere tenetur num is in iudicio possit iure consistere» (cf. c. 1609 §2, *CIC-1917*). This comes from schemas E and F which used the formulae *personam standi in iudicio* and *in iudicio possit consistere* respectively (cf. F. ROBERTI, *Codici iuris canonici schemata*, Civitate Vaticana 1940², IV, 92-93). For a synthetic account of the evolution of the respective texts see R. J. BARRETT, *The Capacity to Act in Court Against an Administrative Act which injures a Group of the Christian Faithful in its Juridical Sphere*, Roma 1996, 65-74.

argument since the archives of the 1917 Code have remained closed to jurists. This situation has now changed. It is interesting to have discovered on consulting those archives that a document was produced in the redaction stage of the norms on processes which clearly shows that the redactors of the Code had deliberated on the matter. The document was entitled *De dispositionibus administrativis*, dated 1913, and represents the results of the *verbali* report of a meeting held the previous year. During a meeting of 30th November, presided over by Gasparri and attended by the architects of the procedural norms of the Code, Lega, Many, Sincero, Giorgi, Melata, Ojetti, Sola and Santucii, the distinction between *diritto soggettivo* and *interesse legittimo* was proposed as a basis for the Church's emergent administrative system. The consultors did not respond to the idea with enthusiasm. Ojetti was dissatisfied with a theoretical distinction between right and interest. Giorgi did not agree with it as a criterion for a division of competence between ordinary and administrative tribunals. Melata suggested as an alternative an objective text, namely the administrative act itself as the criterion for division. Sola argued for a public law – private law distinction, i.e. controversies between private persons to be resolved judicially and those involving the public good to be resolved administratively. Finally Santucci argued that the Sola's distinction was imprecise since all controversies retain some judicial character since they involve a superior who has the power to judge. He suggested it was simply a matter of procedure; controversies between two private subjects should go to the judicial forum and those involving the public authority should go the administrative forum. At the end of the discussion it was decided not to introduce the distinction *qua* criterion of competence into the Code. The existence of this document demonstrates, more than the doctrinal arguments of the Seventies, that Ciprotti's invocation of c. 1667 from the Code to justify the introduction of a doctrine of legitimate interest amounts to an unjustified imposition on the final text[60].

With regard to pluri-subjectivity and the 1917 Code the first point worth making is that legal symmetry and a desire to imitate civil codifications led the redactors to adopt a rather rigid system of subjectivisation particularly concerning collective subjects[61]. Thus the notion of moral personality was systematically introduced into the Code[62]. The attribution of this qualification to collective entities like associations, sodalities and pious unions tended to respect the idea of concession from authority, in common withg the civil practice of the time. Thus c. 686 of the 1917 Code states:

> No association is recognised in the Church that is not either erected or at least approved by legitimate ecclesiastical authority[63].

This canon assumes a strict and causal relationship between the birth of an association and its recognition by authority. Legal and formal recognition in this

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[60] Cf. Archivium Secretum Vaticanum, Box 72, *De processibus*, *Verbali*, Fol. 20.

[61] Cf. A. GAUTHIER, «Le persone giuridiche nel Codice del 1983», *Angelicum* 69 (1992) 108.

[62] Needless to say, for the redactors of the 1917 Code the expressions *moral* and *juridic* personality were equivalent while there is a distinction to be made in the 1983 Code (cf. G. LO CASTRO, *Personalità morale e soggettività giuridica nel diritto canonico*, Milano 1974, 28, nt. 15).

[63] «Nulla in Ecclesia recognoscitur associatio quae a legitima auctoritate ecclesiastica erecta vel saltem approbata non fuerit» (c. 686 §1).

regime functions as a substantial prerequisite in order to allow a group of organised physical persons to participate actively in an ecclesiastical process. Clearly if an entity was not constituted a moral person it could not act in court *qua coetus*. While this law was workable in a rights-by-concession regime it would become impossible in a regime for which associative rights pre-exist their hierarchical recognition. Essentially the 1917 Code did not provide a framework wherein the right to associate was duly recognised. Alvaro del Portillo explained this as the natural product of a passive view of the relationship between the faithful and the hierarchy[64]. This remained the situation up to Vatican II although the Congregation of the Council, in a decree of 13th November 1920, had provided that the baptised were permitted by means of a private accord to constitute non-recognised associations with certain juridical effects[65].

Commentators, faced with the fact of the existence of associations within the Church and with the *corpus* of social teaching beginning from *Rerum novarum*, nevertheless initiated a search for some basis in doctrine for an improvement in their status. Thus Michiels situated the right to associate within the rights of the human person, and as such the right to associate of the baptised could not be doubted[66]. Lombardi cast the relationship in terms of continuity rather than opposition, arguing that rights proper to human nature in the world are not destroyed but elevated in the Church[67]. Even so,

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[64] A. DEL PORTILLO, «Ius associationis et associationes fidelium iuxta Concilii Vaticani II doctrinam», *Ius Canonicum* 8 (1960) 5-6.

[65] Cf. L. NAVARRO, »El derecho de asociación del fiel», *Persona y Derecho* 1 (1990) 169.

[66] Cf. G. MICHIELS, *Principia generalia de personis in Ecclesia*, Romae-Parisiis-Tornaci 1955², 396.

[67] Cf. C. LOMBARDI, *Iuris canonici privati institutiones*, 483.

the promulgated text of the 1917 Code did not accord with such enlightend readings and hence the need for reform. An evolution in doctrine seemed closed by the expositive part of the decree of the Congregation of the Council of 13th November 1920 when it signalled that the private type of entity *non habet esse ab Ecclesia, nec ab Ecclesia agnoscitur quoad iuris effectus*[68]. There was one canon from the Code, however, which at least potentially could provide a doctrinal basis for a prising apart of the prohibition against the procedural participation of private associations of one kind or another. In the section of the Code dealing with the process of canonisation c. 2003 §1 permitted to a legitimate group of the faithful the instruction of a process for a particular *venerandus*. The expression used is significant. It states *quivis fidelis vel legitimus Christifidelium coetus* may begin the instruction of the case. While due recognition is given to the rather specific nature of this norm, it does constitute the only occasion where the 1917 Code permits a collective action of sorts to a non-recognised association. Only very recently have some canonists alighted on the possibilites for doctrine afforded by this canon[69].

RICHARD J. BARRETT

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[68] Cf. SCC, *Corrienten.*, 13 novembris 1920, *AAS* 13 (1921) 139.

[69] Cf. C. VENTRELLA, «La tutela degli interessi diffusi nel diritto amministrativo italiano e nell'ordinamento canonico», in *Diritto canonico e comparazione*, Torino 1993, 183-196.