Ius Ecclesiae, 16 (2004), p. 711-739

CONSTITUTIVE LAW AND JURIDIC INSTITUTES (c. 86)

The category of indispensable law commonly called « constitutive law » is governed by the rule of c. 86: « Laws are not subject to dispensation insofar as they determine the elements that are essentially constitutive of juridic institutes or acts » (1). This rule is also found in c. 1537 of the Eastern Code, with the addition of procedural and penal laws (2). As E. Baura notes, the distinction between which elements of an act or institute are essential and which are accidental is not always evident in the practical order (3), and H. Socha observes that this may lead to uncertainties in the application of c. 86 (4). Identifying the essential matters can be an

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(1) The Latin text is given below. All translations in this study are those of the author.

(2) *CCEO* c. 1537: « Dispensationi obnoxiae non sunt leges, quatenus determinant ea, quae institutorum aut actuum iuridicorum essentialiter sunt constitutiva, nec leges processuales et poenales ».

(3) E. Baura states: « ... il giudizio su quali siano gli elementi essenziali e quali accidentali non sarà sempre evidente sul piano pratico ». See *La dispensa canonica dalla legge*, Pontificio Ateneo della Santa Croce Monografie Giuridiche, no. 12, Milano, Giuffrè, 1997, p. 168; see also idem, in *Comentario exegético al Código de derecho canónico*, Pamplona, Ediciones Universidad de Navarra, 1996, vol. 1, p. 682.

(4) According to H. Socha, « Vorliegen und Grenzen der Wesenselemente von Rechtseinrichtungen und -handlungen sind nicht immer leicht und verläßlich auszumachen... Das kann zu Unsicherheiten in der Anwendung von 86 führen ». See K. Lüdicke (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici*, vol. 1, Essen, Ludgerus, 1991, at c. 86, p. 3.

especially difficult task with respect to juridic institutes. The juridic act is a clearly defined notion in canonical doctrine, and one readily finds treatment by the authors of the essential elements of standard juridic acts such as marriage consent, religious profession, administrative acts, contracts, etc. However, such clarity is lacking with respect to the constitutive elements of juridic institutes. This study seeks to remedy this problem by investigating the meaning of constitutive law with particular reference to juridic institutes. By way of introduction, it may be helpful to consider a hypothetical case.

The prefect of a small apostolic prefecture wants to know whether he can dispense from the requirement of having a finance council (c. 492). The prefecture is in a remote and underdeveloped area of the world where the faithful are largely illiterate; the clergy are few, laden with multiple responsibilities, and mostly live at some distance from the curia. The prefect believes it is better to have no finance council than to burden the missionaries or to rely on laity who lack the necessary knowledge and experience. Consequently, he thinks he has a just and reasonable cause for a dispensation, having taken into account the gravity of the law and the circumstances of the case (c. 90). Can he himself dispense from the law, or must he petition for an indult from the Holy See?

The solution to the case depends on whether c. 492 is a constitutive law or a merely disciplinary law. It has the nature of a constitutive law in that it determines an essential part of the diocesan curia (a juridic institute), and the required offices and organs of the diocesan curia are also required of an apostolic prefecture unless the law determines otherwise (cf. cc. 368; 371, §1; 381, §2). While it may seem evident that c. 492 is a constitutive law since it is a necessary organ of a particular church, this conclusion does not follow from the explanations of constitutive law given in a good part of the canonical doctrine extending from the time the revised Code was promulgated up to the present day. Authors note that constitutive law establishes the essential elements of a juridic institute or act, and they conclude from this that if any such element were lacking, the institute or act would be non-existent since it is missing something essential to its nature. It follows from this way of thinking that the requirement of a finance council is merely disciplinary, because if it were constitutive, the juridic institute of

the diocesan curia could not exist without it (5). However, the rest of the curia still remains intact even without a finance council. Based on the explanation of constitutive law presented by these authors, one could only conclude that the finance council is not essential to the diocesan curia, so the law requiring it is not constitutive and, consequently, the prefect can dispense from it (6).

In this study we shall show that this understanding of constitutive law is incomplete because it does not adequately account for the nature of constitutive laws as they relate to juridic institutes.

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(5) This conception of constitutive law is somewhat widespread. Examples include prominent canonists and commentaries:F.J. URRUTIA says constitutive law cannot be dispensed because it establishes the elements without which the juridic institute or act would not exist: «Nequit versari dispensatio quoad legem *constitutivam*, seu quae statuit elementa sine quibus non exsistit: 1) *institutum* iuridicum ... [et] 2) *actus* iuridicus ...». See *De normis generalibus, Adnotationes in Codicem: Liber I*, Rome, Pontificia Universitas Gregoriana, 1983, p. 53.J.E. RISK says «the absence of any one essential element would render either the institute or the act juridically or lawfully non-existent» (in J.A. CORIDEN, T.J. GREEN, and E. HEINTSCHEL [eds.], *Code of Canon Law: A Text and Commentary*, New York and Mahwah, NJ, Paulist, 1985, p. 65).E. LABANDEIRA says a constitutive element of a juridic institute or act cannot be dispensed without depriving them of their nature: «... cada institución jurídica ... y cada acto jurídico típico ... tienen unos elementos esenciales de los que no pueden ser privados sin que pierdan su naturaleza. Una dispensa en esos terrenos sería caer en el nominalismo jurídico, con grave daño para la seguridad y el bien de las almas». He gives two examples of the absurdities that would result if a dispensation from constitutive law were contemplated-dispensing from the need for a community to establish a parish or dispensing from the elements of will, object, and cause in a contract. See *Tratado de derecho administrativo canónico*, 2nd ed. rev., Pamplona, Ediciones Universidad de Navarra, 1993, pp. 340-341.J.P. MCINTYRE says that an essential element that is missing would invalidate an act or an institute (in J.P. BEAL, J.A. CORIDEN, and T.J. GREEN [eds.], *New Commentary on the Code of Canon Law*, New York and Mahwah, NJ, Paulist Press, 2000, p. 130).To be sure, not all authors take this approach. A. MENDONÇA, for example, says the dispensation of a constitutive law «would amount to a derogation from the law in question, and the institute or act concerned would be radically and essentially defective;» but he does not say it would be non-existent (in G. SHEEHY, et al. [eds.], *The Canon Law: Letter and Spirit*, Collegeville, Liturgical Press, 1995, p. 49).

(6) The logic behind this conclusion can perhaps be demonstrated better as a syllogism: (1) Constitutive law defines the essential elements of a juridic institute or act so that, without any such element, the institute or act is non-existent. (2) The diocesan curia is a juridic institute. (3) The diocesan curia is not non-existent when there is no financial council. (4) Therefore, the law requiring a finance council cannot be constitutive but is merely disciplinary.

The explanation of constitutive law—as establishing the essential elements without which an act or institute is non-existent—is correct with reference to juridic acts, but it does not apply to most juridic institutes. In the above case, the juridic institute that is the diocesan curia would not be non-existent without a finance council; all the other offices and organs would remain. The curia would suffer a serious defect without a finance council, since the supreme legislator has made it a necessary requirement of every diocesan curia, but the curia would not lose its essence without it.

The first part of this study seeks to understand the meaning of constitutive law in c. 86 by examining it in its context and explaining the key terms of the text. The second part investigates parallel places in the law and the purpose and circumstances of the law to shed further light on the mind of the legislator. This will show that c. 86 cannot be understood in the same way for juridic institutes as it is for juridic acts and that, indeed, the concept of constitutive law has a much broader meaning with respect to juridic institutes than it has for juridic acts.

1. *The Context and Text of C. 86.*

Canon 17 directs the interpreter of the law first to consider the proper meaning of the words of the law considered in their text and context. After a brief overview of the context of c. 86, we shall examine the text of the canon and explain the meaning of the key words.

1.1. *The Context of Canon 86.*

Canon 86 is in the section of the Code on dispensations, which is in Title IV of Book I, on singular administrative acts. A dispensation is a singular administrative act granted by rescript, so the common norms on singular administrative acts (cc. 35-47) and rescripts (cc. 59-75) also apply to dispensations as well as the general norms on juridic acts (cc. 124-126) (7). Canon 86 is the second of the canons in the title on dispensations (cc. 85-93). Canon 85

(7) For a comprehensive study of the rescript as a singular administrative act, see J. CANOSA, *Il rescritto come atto amministrativo nel diritto canonico*, Pontificia Università della Santa Croce Monografie Giuridiche, no. 24, Milan, Giuffrè, 2003.

gives a definition of dispensations, saying in part that they pertain only to the merely ecclesiastical law; thus, divine laws cannot be dispensed. Canon 86 excludes another category of law from dispensation, commonly called constitutive law [8]. Canon 87, § 1 treats the competence of the diocesan bishop to dispense the faithful from universal and particular disciplinary laws issued for his territory or his subjects by the supreme authority of the Church; it adds that he cannot dispense from procedural laws, penal laws, or laws whose dispensation is specially reserved to the Apostolic See or some other authority. Canon 87, § 2 treats the competence of the ordinary to dispense from universal and particular laws issued by the supreme authority in a case when recourse to the Holy See is difficult and there is danger of grave harm in delay, and this also applies to laws whose dispensation is reserved to the Holy See provided it is accustomed to grant the dispensation in the same circumstances. Diocesan laws, laws issued by a particular council, and laws of the conference of bishops may be dispensed by a local ordinary in accord with c. 88. Canons 89-93 treat other matters on dispensation not directly germane to this study. Of principal concern from this context are the six categories of laws distinguished in cc. 85-87, namely: (1) divine laws, (2) constitutive laws, (3) disciplinary laws, (4) procedural laws, (5) penal laws, and (6) laws whose dispensation is specially reserved to the Apostolic See or another authority. The diocesan bishop may only dispense from laws in the third category (apart from the exceptional situations of cc. 14 and 87, § 2 with respect to laws whose dispensation is reserved).

1.2. *The Text of c. 86.*

The Latin text of c. 86 reads: «Dispensationi obnoxiae non sunt leges quatenus ea definiunt, quae institutorum aut actuum iuridicorum essentialiter sunt constitutiva». The key terms of the canon for purposes of this study are *dispensatio*, *obnoxius*, *definire*, *institutum iuridicum*, *actus iuridicus*, *essentialiter*, and *constitutivus*.

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(8) Divine laws that are essentially constitutive of juridic institutes and acts (such as the natural law requirement of free consent to make a marriage) are not the concern of c. 86, since it is already clear from c. 85 that divine laws cannot be dispensed.

The meaning of the noun *dispensatio* is given in c. 85. It is a relaxation of the merely ecclesiastical law in a particular case. Dispensations may be granted within the limits of their competence by those who have the necessary executive power of governance, whether by law or delegation. The constitutive laws referred to in c. 86 are merely ecclesiastical laws because c. 85 already implicitly excluded all divine laws from dispensation, including those divine laws that are essentially constitutive of a juridic institute or act.

The adjective *obnoxius* means «subject to». The canon says constitutive laws are *not* subject to dispensation. On the one hand, this could mean that no one except the legislator himself may dispense from constitutive law. This may have been the understanding of the group that drafted c. 1537 of the Eastern Code (9). On the other hand, c. 86 could mean that constitutive laws cannot be dispensed by anyone, not even by the legislator. We believe this second view is correct. The canon says in no uncertain terms that constitutive laws are not subject to dispensation; it does not say that their dispensation is reserved to the legislator. However, this does not eliminate the possibility of the pope or competent Roman dicastery granting a privilege (special faculty, indult) contrary to a constitutive law, as discussed below.

The meaning of *instituta* (*iuridica*) in c. 86 is by no means immediately obvious; even its translation is inconsistent (10). In fact,

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(9) Initially, the draft Eastern canon was exactly the same as c. 86. The category of procedural law was added to make it clear that only the legislator himself could dispense from it, but not the patriarch, major archbishop, or the dicasteries of the Holy See. Although this explanation was given only regarding procedural law, it would be logical also to extend it to constitutive law and penal law, since all three categories of law are in the same canon. «... il principio secondi cui la dispensa non è possibile nelle leggi *ad iudicia spectantes* è generale, cioè non si riferisce solo al vescovo eparchiale, come il can. 175 § 1, ma anche a tutte le altre autorità che non sono il legislatore stesso che ha promulgato le leggi, così al Patriarca, all'Arcivescovo Maggiore e agli stessi Dicasteri della Santa Sede ...». See *Nuntia*, 18 (1984), p. 92.It was explained that penal law could not be dispensed *ex natura rei*, but this seems to have been based on a confusion between a dispensation from a penal law and a «dispensation» from the penalty itself: «Per quanto riguarda le leggi penali si nota che esse *ex natura rei*, commesso il delitto ed inflitta la punizione *ferendae sententiae*, non ammettono una dispensa, ma una *remissio poenae* se esistono le condizioni richieste (emendamento, riparazione dei danni e dello scandalo)». In ibid.

(10) P. ERDÖ notes that the phrase *institutorum aut actuum iuridicorum* of c. 86 is translated in three ways in the various vernacular versions of the Code: juridic

P. Erdö has concluded that its use in c. 86 of the *CIC* and c. 1537 of the *CCEO* has no parallel elsewhere in these Codes or in the 1917 Code ([11]). Still, there is some consensus in the doctrine that the term «juridic institutes» is not limited only to institutes of constitutional law ([12]) but may be understood very broadly as «any juridic reality typified by a unitary ensemble of norms» ([13]). Authors give various examples of juridic institutes, including the parish, institutes of consecrated life, ecclesiastical office, associations, dispensations, the diocese, the diocesan curia, preaching and the sacraments, juridic personality, contracts, legal rights, juridic status, marriage, domicile, the vicar general, juridic persons, the clergy, the hierarchy, etc.

An *actus iuridicus* is a human act, lawfully placed, by which a person capable in law manifests his or her intention to bring about a specific juridic effect or effects recognised in law ([14]). Juridic acts

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institutes and acts, institutes and juridic acts, or institutions and juridic acts. He says the first is correct. This is the common view of other authors as well. See «La nozione dell'istituzione nel CIC (Osservazioni sul c. 86)», in F.R. AZNAR GIL (ed.), *Magister canonistarum: Estudios con motivo de la concesión al Prof. Dr. D. Urbano Navarrete, S.I., del doctorado honoris causa*, Bibliotheca Salmanticensis Estudios, no. 163, Universidad Pontificia Salamanca, 1994, p. 44.

([11]) Ibid., pp. 46-47.

([12]) See W. AYMANS and K. MÖRSDORF, *Kanonisches Recht: Lehrbuch aufgrund des Codex Iuris Canonici*, vol. 1, Paderborn, Ferdinand Schöningh, 1991, p. 274; BAURA, *La dispensa canonica dalla legge*, p. 169; ERDÖ, *La notione dell'istituzione*, pp. 52-53.

([13]) In BAURA'S words, a juridic institute is «... qualunque realtà giuridica tipizzata da un insieme unitario di norme» (*La dispensa canonica dalla legge*, p. 169). Elsewhere, Baura says the term refers to those basic forms of the juridic order that are typified by an ensemble of rules treating the same matter: «En el sentido amplio empleado por el canon, la expresión *institución jurídica* alude a aquellas formas básicas de la organización jurídica, que están tipificadas por un conjunto de reglas que versan sobre una misma materia ...» (in *Comentario exegético*, vol. 1, p. 681). L. CHIAPPETTA defines it as the complex of principles and norms that regulate a determined law or relation that has in itself a certain completeness: «L'*istituto giuridico* è il complesso di principi e di norme che regolano un determinato diritto o rapporto avente in sé una certa completezza ...» (in *Il Codice di diritto canonico: Commento giuridico-pastorale*, 2nd ed. rev., vol. 1, Rome, Edizioni Dehoniane, 1996, p. 131).

([14]) The precise wording of this definition is mine, but it draws upon common elements found in other authors. It is beyond the scope of this study to explain the definition, but this is unnecessary, as the canonical doctrine is well established. See, e.g., O. ROBLEDA, «De conceptu actus iuridici», in *Periodica*, 51 (1962), pp. 413-446;

are commonplace in the canonical system. Examples include marriage consent, religious profession, transfer to the church *sui iuris* of one's spouse, vows and oaths, promulgation of laws, singular decrees (e.g., assignment to an office, removal from office, canonical erection of a sacred place, erection of a parish, dedication of a church, establishment of an association of the faithful, establishment of a juridic person, suppression or division of a juridic person, etc.), the grant of a rescript (dispensation, privilege, other favours), judicial decrees and sentences, imposition or declaration of penalties, alienation of ecclesiastical goods, contracts, wills and donations. The concept of the juridic institute is much broader than that of the juridic act. A juridic act is a specific, legally circumscribed act of a physical person or collegial group. A juridic institute is any entity regulated by law. The constitutive laws governing a juridic act are few in number, as they pertain only to the essential elements that constitute the act itself. The constitutive laws that govern a juridic institute generally are more plentiful, as they refer to everything legally necessary to comprise the institute as determined by the legislator. Moreover, the same matter may be both an act and an institute, such as marriage consent.

The verb *definire* means « to solve », « to limit », « to define », « to determine » ([15]). It is best translated as « determine » in c. 86. In fact, the legislator uses the word *determinare* in the parallel c. 1537 of the *CCEO*. Constitutive laws *determine* those things that are essentially constitutive of juridic institutes or acts. Translating *definire* as « define » risks misunderstanding the canon by limiting constitutive laws only to formal legal definitions.

The adjective *constitutivus* means « determining », « constituent », « component », « originative ». It is best translated as « con-

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IDEM., *La nulidad del acto jurídico*, 2nd ed., Rome, Università Gregoriana, 1964; W. ONCLIN, *De requisitis ad actus iuridici exsistentiam et validitatem*, in *Studi in onore di Pietro Agostino d'Avack*, vol. 3, Milano, Giuffrè, 1976, pp. 397-419; S.M. HUGHES, « A New Title in the Code: On Juridical Acts », in *Studia Canonica*, 14 (1982), pp. 391-403; J. FORNÉS, « El acto jurídico-canónico: sugerencias para una teoría general », in *Ius Canonicum*, 25 (1985), pp. 57-89; R. PALOMBI, « Aspetti dell'invalidità dell'atto giuridico nella vigente legislazione canonica », in *Apollinaris*, 66 (1993), pp. 219-250; and H. PREE, « On Juridic Acts and Liability in Canon Law », in *The Jurist*, 58 (1998), pp. 41-83, 479-514.

([15]) LEO F. STELTEN, *Dictionary of Ecclesiastical Latin*, Peabody, MA, Hendrickson Publishers, 1995, p. 68.

stituent» or «constitutive», as it refers to the necessary elements comprising a juridic institute or act. The verb form, *constituere*, means «determine», «make», «appoint», «constitute», «establish», «arrange» ([16]). Thus, the constitutive elements of a juridic institute or act are those things that determine or make it what it is in law. It should be noted that *constitutiva* does not modify *leges* but *ea* («those things», i.e., the necessary elements of a juridic institute or act). The canon does not use the expression «constitutive law». Nevertheless, *leges constitutivae* was the term used by Pope Paul VI in *De episcoporum muneribus*, as discussed below, and it is widely accepted in canonical doctrine. It is a useful term for expressing the meaning of this distinct category of laws.

The adverb *essentialiter* demands particular attention. In the classical period of ancient Rome, the adjective *essentialis* had but one meaning. It came from *essentia* (a translation of the Greek οὐσία), the essence or substance of a thing; «essential» in this sense means «that which pertains to the essence or nature of thing». By the Middle Ages the word also came to mean «indispensable», «necessary». In the same vein, the adverb *essentialiter* not only means «essentially» in the original sense of pertaining to the essence of a thing, but it also has the second sense of the adjective and may be translated as «basically», «fundamentally», «necessarily» ([17]). The words «essential» and «essentially» also have these two meanings in English and other modern European languages (e.g., *essentiel*, *essenziale*, *esencial*) ([18]). The word *essentialiter* in c. 86 may have either meaning, depending on the matter at hand. The principal thesis of this study is that the first meaning applies to elements that are constitutive of juridic *acts* and only rarely to juridic institutes; the second meaning applies to elements that are constitutive of juridic *institutes*. If an essentially constitu-

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([16]) Ibid., p. 56.

([17]) R.E. LANTHAM et al. (eds.), *Dictionary of Medieval Latin from British Sources*, Oxford University Press, 1997, p. 807.

([18]) In German, the word *wesentlich*, used to translate *essentialiter*, has a number of different meanings, including *hauptsächlich*, *nennenswert*, *bedeutsam*, *wichtig*, *grundsätzlich*, *grundlegend*, *unerläßlich*, etc. See O. SPRINGER (ed.), *Der Neue Muret-Sanders Langenscheidts enzyklopädisches Wörterbuch*, Berlin, Langenscheidt, 1974, p. 1793; and J. GRIMM and W. GRIMM, *Deutsches Wörterbuch*, Leipzig, S. Hirxel, 1960, vol. 2, cols. 592-600.

tive element were missing from a juridic act, the act would be null, because it would be lacking something that pertains to its very essence. If an essentially constitutive element were missing from a juridic institute, the juridic institute may or may not be non-existent. In most cases, the juridic institute would still exist, but it would be deficient because it would be lacking a fundamental and necessary juridic requirement.

2. *The Mind of the Legislator on Canon 86.*

We have presented an explanation of the meaning of the text of c. 86 by examining it in its context and defining its principal terms. We have seen that a key word of the canon, *essentialiter*, has two meanings, but a large part of the canonical doctrine has only recognized the first one, so a doubt arises whether both meanings are indeed applicable to c. 86 or just the first. To clarify such an obscurity, c. 17 directs the interpreter to explore further by investigating parallel places in the law, the purpose and circumstances of the law, and the mind of the legislator. Thus, after briefly seeing how the words *essentialis* and *essentialiter* are used elsewhere in the Code, we shall examine the historical antecedents to c. 86, especially the 1966 Motu Proprio, *De episcoporum muneribus*, and the divergent canonical doctrine on it, as well as the drafting of c. 86 in the Code revision process. All this is intended to clarify the *mens legislatoris* regarding the meaning of c. 86.

2.1. *Parallel Passages.*

The adverb *essentialiter* is used in only one other canon besides c. 86. Canon 124, § 1 states: «For the validity of a juridic act, it is required that it be placed by a capable person, and there be present in it those things that essentially constitute the act itself, as well as the formalities and requirements imposed by law for the validity of the act». The adjective *essentialis* is used in five canons, one of them on the execution of an administrative act (c. 42) and the other four on the essential properties, obligations, and elements of marriage (cc. 1056; 1095, 2°, 3°; 1101, § 2; 1125, 3°). In each of these canons, the first meaning of *essentialis* is evident. If something essential were lacking, the act of executing an administrative act and the act of marriage consent would be invalid. However, these canons use the word «essential» principally in

connection with juridic acts, not institutes; the same is true of the Eastern Code (19). Since there are no exact parallels in either Code that would help explain the meaning of *essentialiter* in c. 86 with reference to juridic institutes, it is all the more necessary for a correct interpretation to explore the purpose and circumstances of the law. This we shall do by first considering the antecedents in law to c. 86, especially *De episcoporum muneribus* and the canonical doctrine on it.

2.2. *Antecedents to c. 86 since the 1917 Code.*

The 1917 Code did not know the term *lex constitutiva*. However, it appeared in a 1921 document of the Sacred Congregation for Religious on the erection of new religious congregations, which was a revision of a document first published in 1901 (20). The expression was found in a section on the approval of constitutions. After giving a long list of what must *not* be included in the constitutions, the document stated positively that «the constitutions should contain only the constitutive laws of the congregation and the laws directive of the activities of the community, whether pertaining to governance or to the discipline and norm of life» (21). The document went on to define these laws more precisely as those giving the notions and dispositions pertaining to the nature, vows, members, and way of life of the congregation and the governance, administration, and offices of the congregation (22). Con-

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(19) The *CCEO* uses *essentialiter* and *essentialis* in the same ways as the Latin Code except that c. 1523, which is the parallel of *CIC*83 c. 42, does not use the expression «essential conditions» but speaks of «conditions attached to the mandate for the validity of the act». For the other uses of these words, see *CCEO* cc. 776, § 3; 814; 818, 2°, 3°; 824, § 2; 931, § 1; and 1537.

(20) Congregation for Bishops and Regulars, *Normae secundam quas S. Congr. Episcoporum et Regularium procedere solet in approbandis novis institutis votorum simplicium*, 28 June 1901, Rome, Typis S.C. de Propaganda Fide, 1901.

(21) According to no. 22 i, «... constitutiones continere debeat tantum leges constitutivas Congregationis et directivas actuum communitatis, sive quod ad gubernium attinent, sive quod ad disciplinam et normam vitae» (Normae ex Decreto 6 mart. 1921 secundum quas sacra Congregatio de religiosis in novis religiosis congregationibus approbandis procedere solet, 6 March 1921, in *AAS*, 13 [1921], p. 317). This sentence was reproduced exactly as it had been in the predecessor document of 1901, p. 11, no. 33.

(22) «Constitutionum codex continere debet ea quae respiciunt notiones et di-

stitutive law was thus portrayed as a broad category of law dealing with the fundamental matters of the religious institute's nature, membership, governance, structures, offices, etc. Clearly, the authors of this document did not regard constitutive laws as limited only to laws that determine those elements of the religious congregation such that it would not exist without every such element. Rather, constitutive law in this document consisted of all the laws establishing the necessary and fundamental matters required of every religious congregation.

The immediate antecedent to c. 86 in the universal law was the 1966 Motu Proprio of Pope Paul VI, *De episcoporum muneribus* [23], whose purpose was to implement the Vatican II Decree *Christus Dominus* 8b, which had given to diocesan bishops the power to dispense in particular cases from general laws of the Church except for laws specially reserved to the supreme authority. *De episcoporum muneribus* excluded from the bishop's dispensing authority the laws that the Apostolic See was never accustomed to dispense, or only very rarely dispensed. Before listing all the laws whose dispensation was reserved, the pope established several general rules and principles, of which a sentence in no. IV is most pertinent to this study: « The faculty to dispense is exercised regarding preceptive or prohibitive laws, but not constitutive laws » [24]. Nothing further was said about constitutive laws. This same no. IV excluded procedural laws from the dispensing power of bishops and said that the grant of a permission, faculty, indult, or absolution is not included in the notion of dispensation. The following norm said that bishops may dispense only from ecclesiastical disciplinary laws, not from any divine laws that the pope may

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spositiones: (*a*) de religiosae Congregationis natura, votis, membris et modo vivendi; (*b*) de Congregationis gubernio, administratione et officiis » (ibid. no. 23).

[23] PAUL VI, Apostolic Letter, 15 June 1966, in *AAS*, 58 (1966), pp. 467-472. Elsewhere, this pope used the term the *ius constitutivum*, but he was referring only to constitutional law. See Allocution *Post duos menses*, 21 November 1964, in *AAS*, 56 (1964), p. 1009; and Allocution *Singulari cum Animi*, 20 November 1965, in *AAS*, 57 (1965), p. 988. This later came to be called the *lex fundamentalis Ecclesiae*. See *Communicationes*, 1 (1969), p. 105; and E. BONET, « De iure constitutivo seu potius fundamentali Ecclesiae », in *Apollinaris*, 40 (1967), pp. 123-127.

[24] « Facultas autem dispensandi exercetur circa *leges praecipientes vel prohibentes*, non autem circa leges constitutivas ». Preceptive laws give a positive command to do something; prohibitive laws forbid something.

dispense in virtue of the vicarious power that he may have, such as the dispensation from a ratified but non-consummated marriage, privilege of the faith, etc. (no. V). The remainder of the Motu Proprio contained several additional rules on dispensations, well known to canonists, and a lengthy list of laws whose dispensation was reserved to the Apostolic See, most of which still are so reserved. Indeed, much of *De episcoporum muneribus* was taken up into the 1983 Code. Nothing was said of penal law being reserved, so it may have been considered constitutive law.

In sum, *De episcoporum muneribus* enumerated five categories of law: divine laws, constitutive laws, procedural laws, disciplinary laws, and [disciplinary] laws whose dispensation is reserved to the Apostolic See. In ordinary circumstances and for the spiritual good of the faithful, the bishop could only dispense from disciplinary laws not reserved to the Apostolic See ([25]). Disciplinary laws were circumscribed rather narrowly as preceptive and prohibitive laws, that is, laws in the disciplinary realm which positively command that something be done or prohibit something. There was no definition or explanation of constitutive law but, as in the 1921 document of the Congregation for Religious, it appears in the Motu Proprio as a broad category of law consisting of the laws that are not divine laws, procedural laws, or disciplinary laws (that command or prohibit).

The use of the term « constitutive laws » in *De episcoporum muneribus* took many canonists by surprise. Their commentaries on the Apostolic Letter reveal they had never heard of the term and found it difficult to explain ([26]). Commentators on the 1917

([25]) It is evident that the laws reserved to the Apostolic See are disciplinary laws, not only due to the fact that they are preceptive or prohibitive in nature, but also by the mere fact that their dispensation is reserved. If they were not disciplinary laws, there would be no need to reserve their dispensation, as the bishop could not dispense from them anyway. One category of reserved law in the Motu Proprio was that of the general laws affecting religious as such (IX, 4). Again, this may be considered to refer to disciplinary laws affecting religious, as it would have been unnecessary to reserve constitutive laws.

([26]) Several commentators were quite candid about this. E.g., W.J. LADUE wrote that the fourth and fifth paragraphs of *De episcoporum muneribus* « are without doubt the most perplexing for the jurist, and allow for the greatest variety of opinion in interpretation... Perhaps many had the same feeling, but I must confess that the term, *lex constitutiva*, was somewhat new to me... The interpretation of this relatively

Code had distinguished preceptive and prohibitive laws, invalidating and incapacitating laws, and permissive and penal laws, but they did not know the category of constitutive law (27). Two commentators on the Motu Proprio are worth considering here because of their particular ideas and later influence — Buijs and Bertrams — each taking a much different position. The positions of Michiels and Creusen — although they wrote prior to the promul-

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unexplored juridical concept ... will no doubt give us trouble in the future». See «De Episcoporum Muneribus», in *The Jurist*, 27 (1967), pp. 421-422.E.F. REGATILLO expressed bafflement about the meaning of constitutive law since *De episcoporum muneribus* offered no definition, nor were canonists accustomed to do so. He said it is something highly obscure and difficult to discern in practice: «¿Qué son constitutivas? Ni el Motu proprio lo declara, ni suelen declararlo los canonistas. Es cosa sumamente oscura y difícil de discernir en la prática». See «Facultad de los Obispos para dispensar de las leyes generales de la Iglesia», in *Sal Terrae*, 55 (1967), p. 765.J. LEDERER spoke of the evident difficulty in knowing the meaning of *leges constitutivae*, a term unknown in the *CIC*: «Die aufgezeigte Schwierigkeit läßt sich nicht mit *De episcoporum muneribus* Hinweis beheben, der Ausdruck "leges disciplinares" werde in Nr. IV Abs. 1 Satz 2 doch dahin verdeutlicht, daß die Dispensgewalt der Diözesanbischöfe nur gegenüber gebietenden und verbietenden Gesetzen, nicht aber "circa leges consitutivas" wirksam ist. Die Bezeichnung "leges constitutivae" ist der Sprache des CIC unbekannt». See «Die Neuordnung des Dispensrecht», in *Archiv für katholisches Kirchenrecht*, 135 (1966), pp. 415-443.K. MÖRSDORF found the expression *leges constitutivae* «enigmatic». He speculated that it might be equivalent to *leges constitutionales*. See «The Diocesan Bishop's Power of Dispensation according to the Decree *Christus Dominus*, Article 8 b», in H. VORGRIMLER (ed.), *Commentary on the Documents of Vatican II*, vol. 2, New York, Herder and Herder, 1968, p. 223. R. RYAN agreed with Mörsdorf. See «The Dispensing Authority of the Residential Bishop of the Latin Rite Regarding the General Laws of the Church», in *The Jurist*, 35 (1975), p. 201.Some commentators were silent on the topic, possibly because they had no idea of the meaning of constitutive law. See, e.g., J. DENIS, «L'exercice du pouvoir de dispense des évêques diocésains depuis Vatican II», in *L'Année Canonique*, 13 (1969), pp. 65-78; R. KENYON, «A Compendium of Episcopal and Presbyteral Powers of Dispensation», in *The Jurist*, 38 (1978), pp. 190-202; F. LODOS VILLARINO, «Los obispos y la Sede Apostolica», in *Revista española de derecho canónico*, 21 (1966), pp. 417-460; J. RIETMEIJER, «The Bishop's Competence in Matters of Dispensation», in *Concilium* (1969) no. 8, pp. 52-58. E. REGATILLO did not attempt to explain constitutive law but he gave the example of laws that are constitutive of juridic capacity, such as the law on the legitimation of illegitimate children by the subsequent marriage of their parents. See «Facultad de los obispos para dispensar de las leyes generales de la Iglesia», in *Sal Terrae*, 55 (1967), pp. 754-778.

(27) On this point, see L. BUIJS, «De potestate Episcoporum dispensandi», in *Periodica*, 56 (1967), p. 101.

gation of *De episcoporum muneribus* — are also treated since they are central to Buijs's argument and to the development of the canonical doctrine on constitutive law.

2.3. *Buijs, Michiels, Creusen.*

Although the term « constitutive law » was not found in the 1917 Code and was unknown to most authors, L. Buijs maintained that I. Creusen and G. Michiels had each treated it but had defined it differently. Buijs said Creusen's definition was too broad, and he pronounced as correct what he called the strict definition of constitutive law offered by Michiels ([28]). Thereafter, some authors would cite Michiels on the meaning of constitutive law, some of them reaffirming Buijs's view that constitutive law must be understood in a strict sense ([29]). However, a reexamination of what Creusen and Michiels were actually saying reveals that Buijs had greatly oversimplified and distorted the matter. In particular, Buijs's statement that constitutive law must be understood in the strict sense was mistaken. We shall see that his notion of constitutive law is not the one that found its way into the 1983 Code. Before taking up the position of Bertrams, we must first reconsider the positions of Michiels and Creusen that came to influence canonical doctrine largely via Buijs.

In the first edition of his work published in 1929, Michiels did not use the precise term « constitutive law », but he did speak

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([28]) Ibid., pp. 101-102. Buijs argued that invalidating and incapacitating laws must be in a separate category from constitutive law or it would have been superfluous for the pope to have reserved certain invalidating and incapacitating laws elsewhere in *De episcoporum muneribus* (no. IX). He therefore concluded that Creusen had too broad an understanding of constitutive law, this despite the fact that Creusen did not even use the term « constitutive law »! Buijs set up a false dichotomy between Michiels and Creusen, one that had considerable influence on canonical doctrine. See C.X. HEITZMANN HERNÁNDEZ, *La potestad de dispensar de las leyes universales en la génesis del canon 87*, Rome, Centrum Academicum Romanum Sanctae Crucis Facultas Iuris Canonici, 1989, p. 244.

([29]) Regarding the commentators on *De episcoporum muneribus*, see W. LADUE, « De Episcoporum Muneribus », in *The Jurist*, 27 (1967), p. 422; and J. BERNHARD, « Les premières normes d'application de quatre décrets du concile: Les motu proprio *Ecclesiae Sanctae* et De *episcoporum muneribus* », in AA.VV., *La charge pastorale des Évêques: Décret « Christus Dominus »*, Unam Sanctam, no. 74, Paris, Les Éditions du Cerf, 1969, pp. 400-401. For later authors, see footnote 5.

of laws that establish the constitutive elements of an act (30). In 1930, Van Hove took much the same approach as did Michiels, referring to this category of laws as *leges quae sunt iuris constitutivae* (31). In the revised edition of his book published in 1949, Michiels used very similar terminology, as will be seen. It is this second edition that influenced later authors (32).

Michiels based his understanding of constitutive law on c. 1680, § 1 of the 1917 Code, which he cited in his discussion and used as support for his position. Canon 1680, § 1 was in a section of Book IV treating judicial actions for the nullity of acts. It stated: « An act is only to be held null when it is missing *those things that essentially constitute the act itself*, or the formalities or conditions are lacking that are required by the sacred canons under pain of nullity » (33). The italicized phrase (*quae actum ipsum essentialiter constituunt*) parallels the phrase of c. 86 on those things that are essentially constitutive of acts and institutes (*quae ... essentialiter sunt constitutiva*). The key difference between the two Codes is that *CIC*17 was only treating the nullity of acts, whereas *CIC*83 treats both juridic institutes and acts.

Michiels briefly explained what he meant by constitutive law in his commentary on c. 11 (the present c. 10), which held that invalidating and incapacitating laws are only those that are expressly stated as such in the law. Michiels contended that c. 11 did not apply to « an ecclesiastical law that is constitutive of law » (*lex ecclesiastica juris constitutiva*). This kind of law « positively deter-

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(30) G. MICHIELS, *Normae generales iuris canonici: Commentarius Libri I Codicis Juris Canonici*, vol. 1, Lublin, Universitas Catholica, 1929, pp. 277-278.

(31) A. VAN HOVE, *De legibus ecclesiasticis*, vol. I, tome II, Rome, H. Dessain, 1930, p. 167, no. 157: « ... [leges] quae sunt *iuris constitutivae*, seu quae determinant conditiones ad validitatem actus, cuius facultas non est ex iure divino naturali aut positivo, sed ex sola lege positiva humana, adeo ut actus ille non sit, nisi quatenus ius humanum facultatem concedat, puta iurisdictionem Vicarii Generalis, effectus canonicos professionis sollemnis religiosae ». He did not explain what he meant by the term *ius* in speaking of laws (*leges*) that are constitutive of law (*ius*). There is no doubt from the context, however, that both he and Michiels were referring to ecclesiastical laws that establish the elements necessary for the validity of acts.

(32) G. MICHIELS, *Normae generales juris canonici: Commentarius Libri I Codicis iuris canonici*, 2nd ed. rev., vol. 1, Paris, Desclée, 1949.

(33) « Nullitas actus tunc tantum habetur, cum in eo deficiunt quae actum ipsum essentialiter constituunt, aut sollemnia seu conditiones desiderantur a sacris canonibus requisitae sub poena nullitatis ».

mines the *intrinsic form*, that is, the essential elements of an act itself, and gets from canon law its origin and its entire state, constituting its essence, that is, its [legally] determined nature» ([34]). He said such laws always must be considered implicitly invalidating in that the lack of placing a certain constitutive element of an act denies it formal juridic existence. He mentioned c. 1680, §1 of *CIC*17 as expressly consecrating this principle. He concluded this brief discussion with the example of c. 488, 1° of *CIC*17, which determined what is intrinsic to a religious institute (i.e., its being a society approved by legitimate ecclesiastical authority in which the members profess public vows). Michiels noted that the religious profession of vows would lack formal validity if it were made outside a society approved by the legitimate ecclesiastical authority, or if it were not made publicly ([35]).

Michiels' treatment made no reference at all to the applicability of constitutive law to juridic institutes. His only concern was juridic acts. He saw constitutive law as a kind of invalidating law, one which does not explicitly state that it is invalidating but which is implicitly invalidating in virtue of the fact that it establishes the essential elements of an act. Obviously, if such an element were missing, the act would be null. The same thing cannot always be said, however, of juridic institutes. Authors who would later use Michiels' notion for both juridic institutes and acts evidently did not recognize this.

I. Creusen, while not using the term «constitutive law», had an incipient understanding of it. His remarks appear in the context

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([34]) *Normae generales juris canonici*, p. 341.

([35]) Ibid. «... *de lege* ecclesiastica sic dicta *juris constitutiva*, quae scilicet positive determinat *formam intrinsecam,* seu elementa essentialia ipsum actum, qui ex jure canonico initium et totum statum capit, in suo esse seu determinata natura constituentia. Lex illa semper censenda est implicite irritans (etiamsi in eadem nulla habentur verba irritationem aliquo modo indicantia), quatenus actui sine elemento quodam constitutivo posito denegat formalem existentiam juridicam; hoc principium evidenter fluit ex ipsa rerum natura, et de cetero in can. 1680, §1 expresse consecratur: "nullitas actus tunc habetur, cum in eo deficiunt quae actum ipsum essentialiter constituunt"; ut ecce, lex in can. 488 n. 1 contenta, qua terminatur intrinseca religionis, ideoque professionis religiosae natura, eo ipso naturam professionis religiosae, ideoque validitatem formalem (i.e., qua professio religiosa) denegat omni professioni votorum extra societatem a legitima auctoritate ecclesiastica approbatam, vel non publice factae» (ibid.).

of a discussion on the obligation to observe the law, which is a principal effect of law. He notes that this effect is not adequate for every kind of law, and he gives examples: laws « that immediately establish public or private rights, or protect public order, but do not impose an obligation except indirectly. Such are laws that regulate the constitution of the [ecclesial] society or hierarchy, that establish the elements of a "juridic status", that establish penalties, or that deprive an act of juridic effect or of persons of capacity » ([36]). Although Creusen did not use the expression « constitutive law », he had at least heard of it ([37]). His examples reveal that his notion was closer to the contemporary understanding of constitutive law than that of Michiels because Creusen not only included laws governing juridic acts but also laws regulating juridic institutes (rights, matters of public order, church structures and other constitutional matters, and the juridic status of persons). Certainly, there is no indication from this context that Creusen thought of the laws regulating all these matters as comprising the single category of constitutive law, but his thinking would affect authors reflecting on the meaning of constitutive law in *De episcoporum muneribus*.

Buijs used these two passages from Creusen and Michiels to make the point that Michiels' definition of constitutive law, which he called a strict definition, is the correct one; however, Buijs himself did not have a clear notion of constitutive law, and he misunderstood Michiels. Buijs used the same example as did Michiels (c. 488, 1° of *CIC*17), but he failed to note that Michiels was talking about the *act* of religious profession, whereas Buijs understood Michiels as referring to the essential elements of the religious institute itself (which is a juridic institute, not an act). Some later authors

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([36]) « Sunt enim multae leges quae immediate et directe iura sive publica, sive privata constituunt, ordinem publicum muniunt, mediate et indirecte obligationem imponunt. Tales sunt leges quae constitutionem societatis seu hierarchiam ordinant, elementa "status iuridici" constituunt, poenas ferunt, actus effectu iuridico vel personas capacitate privant ». See A. VERMEERSCH and I. CREUSEN, *Epitome iuris canonici cum commentariis ad scholas et ad usum privatum*, 8th ed., vol. 1, Rome, H. Dessain, 1963, p. 114, no. 96.

([37]) He wrote a brief commentary on the 6 March 1921 Norms of the S.C. for Religious, but without alluding to its use of the term *leges constitutivae*. See *Periodica*, 10 (1922), pp. 295-302.

would repeat this mistake and apply Michiels' notion of constitutive law, which pertained only to juridic acts, to both acts and institutes, and they would conclude that a juridic institute would be non-existent if an essential element were missing. While this is true in respect to some essential elements of some juridic institutes, more typically a juridic institute would still exist even if an essential element were lacking.

2.4. *Bertrams.*

A commentary on *De episcoporum muneribus* worthy of special note is that of W. Bertrams who explicitly named the category of «juridic institute» as the subject of constitutive law. He was later appointed a consultor to the Pontifical Commission for the Revision of the Code of Canon Law ([38]); (Buijs was not). Moreover, Bertrams was in a particularly remarkable position for his ideas to have an impact, as he became a consultor to the Coetus studiorum recognoscendis normis generalibus Codicis (= *coetus* on general norms), which drafted c. 86 ([39]).

Of all the commentaries that appeared shortly after the promulgation of *De episcoporum muneribus*, the article by Bertrams presented the most thorough and confident presentation of the meaning of constitutive law. Without claiming to make a taxative list of such laws, he identified several categories of ecclesiastical law to exemplify what the legislator intended by constitutive law. He said that such laws are firstly those that are constitutive of rights and juridic capacity, and he gave as examples the requirement of the profession of the evangelical counsels of poverty, chastity, and obedience for constituting the religious state and the requirement that the major superior must be a professed member of the institute ([40]). He said that constitutive laws determine the essential elements of juridic institutes and acts; no such element can be dispensed because the resulting institute or act would not be the same as the legislator determined it to be ([41]). Significantly,

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([38]) *Annuario Pontificio Periodica l'anno 1969*, Tipografia Poliglotta Vaticana, 1969, p. 1085; *Communicationes*, 1 (1969), p. 16.

([39]) *Communicationes*, 1 (1969), p. 30.

([40]) W. BERTRAMS, «De Episcopis quoad universam Ecclesiam», in *Periodica*, 55 (1966), pp. 166-168.

([41]) «Agitur in hisce et similibus casibus de ipsis institutis iuridicis, quae a le-

Bertrams used the exact expression that was later to be taken up into c. 86-[*elementa*] *essentialiter constitutiva.*

Bertrams also included as constitutive laws all laws that establish the elements essentially required (*essentialiter requiruntur*) to constitute an office or a status in the Church ([42]). Such essentially required elements cannot be dispensed because they are determined by the supreme legislator to be necessary to that office or status. Bertrams gave priestly celibacy as an example. He said that, in the Latin church, the presbyteral order and its exercise are not compatible with marriage; the obligation of observing celibacy essentially constitutes the institute of the priesthood. This was not a good example, as the law on celibacy is better understood as a disciplinary law whose dispensation is reserved (c. 291). However, the example illustrates his broad understanding of constitutive law, that it not only determines those elements without which an act or institute would be juridically non-existent, but also other necessary elements of a juridic institute required by the universal law. In the category of constitutive law, Bertrams also included all procedural laws pertaining to a change in status or office (laicization of clergy, secularization and dismissal of religious, marriage nullity, transfer from and privation of office, etc.) and all norms whose purpose is the defence of rights, including all other procedural laws and penal laws ([43]).

Bertrams maintained that constitutive law is not subject to dispensation by anyone, but he said that the supreme authority, in a concrete case and with respect to certain juridic institutes, could grant a special faculty allowing an exception to a requirement that is essentially constitutive of that institute ([44]). It appears that Ber-

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gislatore supremo in tali specie sunt constituta; tollere aliquod ex talibus elementis *essentialiter constitutivis* habenda est mutatio ipsius instituti iuridici, prouti legislator supremus illud essentialiter constituit. Instituta iuridica, quae ita suprema Ecclesiae potestate conduntur, ius constitutionale Ecclesiae efformant, quod non est dispensabile. Vere, elementa essentialia institutorum iuridicorum non possunt tolli; si enim tolluntur, institutum iuridicum iam non esset tale, quale specifice constitutum fuit [emphasis added]. Ibid., pp. 166-167.

([42]) «Huc referenda sunt (scilicet tamquam elementa indispensabilia) omnia elementa, quae essentialiter requiruntur ad officium vel statum constituendum in Ecclesia, scilicet in tali specie canonica a suprema Ecclesiae potestatae determinata» (ibid., p. 167).

([43]) Ibid., pp. 167-168.

([44]) «Si in aliquo casu extraordinario exceptio permittitur ... non agitur de di-

trams regarded a dispensation as being somewhat routine and unexceptional, whereas a special faculty, privilege, or indult allowing an exemption from a constitutive element of a certain juridic institute would be more unusual and could be given only by the supreme authority. Bertrams did not say that every constitutive law is subject to such an exception, nor did he need to say this. It is evident that not even the pope can dispense from an element that is essentially constitutive in the original meaning of *essentialis* (that which pertains to its essence), because dispensing such an element would render the juridic institute or act non-existent, as its nature had been determined in law.

Several other commentators on *De episcoporum muneribus* also articulated a broad notion of constitutive law similar to that of Bertrams. C. Berutti said constitutive laws pertain to the Church's very structure, and he noted several kinds of such law: laws that pertain to the juridic status of persons; that regulate the nature or form, the essential properties, and the purpose of juridic institutes; that determine norms pertaining to establishing, changing, and suppressing ecclesiastical offices; or that regulate public divine worship ([45]). Like Bertrams, he explicitly named juridic institutes as the subject of constitutive legislation, and he identified several sub-categories of constitutive laws, which he did not claim were taxative.

F. Timmermans said the primary aim of constitutive laws «is to constitute juridical entities, to grant power or to establish rights besides a mere permission». He gave as examples the law granting to any priest jurisdiction in danger of death, the laws dealing with

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spensatione, sed de facultate a suprema Ecclesiae auctoritate concessa, ut ipsum institutum in hoc casu concreto, exceptionali modo diverso habeatur» (ibid., p. 167). This is certainly a justifiable position, given that *De episcoporum muneribus*, no. IV said that the grant of a permission, a faculty, an indult, or an absolution is not contained in the notion of a dispensation.

([45]) C. BERUTTI wrote: «... *leges constitutivae* ... ad ipsam compagem Ecclesiae attinent et idcirco in IV Declaratione expresse edicitur Episcopos dioecesanos ab eis dispensare non posse. Leges constitutivae sunt praesertim quae sive ad statum iuridicum personarum pertinent; sive naturam seu formam, proprietates essentiales, finem institutorum iuridicorum statuunt; sive normas determinant spectantes ad constituenda, mutanda, supprimenda officia ecclesiastica in iure communi praefinita; sive ad cultum divinum publicum moderandum ordinantur». See «*De Episcoporum muneribus* et adnotationes», in *Monitor Ecclesiasticus*, 92 (1967), p. 558.

the power to delegate jurisdiction, the law granting power to the vicar general or to any other office in the Church, the laws instituting juridical entities such as religious institutes, moral persons, etc. (46).

G.P. Graham identified various categories of law as constitutive laws: laws that have as their direct effect the establishment of a juridic status or condition, laws which establish rights for physical or moral persons, permissive laws which give a freedom or capacity to do something, many invalidating and incapacitating laws, laws establishing required conditions or formalities for acts, but not penal laws. He thought the position taken by Buijs was mistaken (47).

The most extensive study on the concept of constitutive law in *De episcoporum muneribus* was a doctoral thesis by J. Tutone. He said they are the fundamental laws governing juridic institutes and acts. They deal with « the core, heart, or soul of an individual law, a juridic institute, or the very Church itself ». Constitutive laws, he said, are more stable than disciplinary laws. Disciplinary laws are the « applications » of constitutive laws and are « changeable and diverse according to the needs of rite, culture, place, time, or circumstance ». Constitutive laws comprise « the *fundamentum* of ecclesial law », the « core elements », as distinguished from their applications in disciplinary law (48). In Tutone's view, « there is no indication in the text of *De episcoporum muneribus*

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(46) F. TIMMERMANS, « The Power of Bishops to Dispense », in *The Clergy Monthly*, 30 (1966), p. 334.

(47) G.P. GRAHAM, « The Powers of Bishops in Recent Documents », in *The Jurist*, 28 (1968), pp. 413-425. On p. 441 he wrote: « There is no reason to limit the term constitutive law to those laws which positively determine the intrinsic form or essential elements of an act. In the paragraph quoted from Michiels by Buijs, Michiels is explaining canon 11. He is trying to show that some laws are so intimately bound up in the nature of the act that the act would have to be invalid, in the nature of things, if these elements were not present. While agreeing with this statement, one may not see its relevance in the context now under discussion [of constitutive law] ».

(48) J. TUTONE, *Towards an Understanding of the Concept of Constitutive Law in De Episcoporum muneribus: A Study of Its Canonical and Ecclesiological Foundations*, Rome, Pontificia Studiorum Universitas a S. Thoma Aq. in Urbe, 1981, pp. 260, 261, 275.

that the mind of the lawgiver conceived constitutive law as the narrow category proposed by Michiels » (49).

In all these commentaries, it is clear that the authors' understanding of constitutive laws with respect to juridic institutes was not limited to laws that define the essential nature of a juridic institute such that the institute would not exist without such an element. Their examples show that not every juridic institute would cease to exist if a legally necessary element were missing. The articles by Bertrams, Berutti, Timmermans, and Graham all appeared before the *coetus* on general norms met to discuss the revision of the law on dispensations. Surely, the consultors for the *coetus* on general norms would have been conversant with these authors or at least with the ideas of Bertrams, as he was a fellow consultor. Before treating the drafting of c. 86, however, we must first consider a legislative text promulgated in 1967 which is another antecedent of the canon.

2.5. *Another Antecedent: Regimini Ecclesiae universae.*

The most important source of law following *De episcoporum muneribus* and prior to the 1983 Code that would offer some insight into the meaning of constitutive law was Paul VI's Apostolic Constitution on the reorganization of the Roman Curia, *Regimini Ecclesiae universae*. The first chapter of Part I of *Regimini* is entitled « Constitutive Norms » (*Normae constitutivae*). It treats various fundamental matters: the definition of the Roman Curia, statements of basic principles, basic rules of operation, the composition of the congregations, basic regulations for meetings, the officials of the congregations and norms governing their appointment and term of office, some general obligations of the dicasteries and their officials, rules regarding legal formalities, etc (50). The norms of this section are called constitutive but, in nearly every case, the absence of a constitutive element or non-observance of a required norm would not render the Curia non-existent. Still, they are constitutive norms because they establish fundamental and necessary matters pertaining to the Roman Curia.

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(49) Ibid., p. 220.

(50) 15 August 1967, in *AAS*, 59 (1967), pp. 890-893.

2.6. *Constitutive Law in the Code Revision Process.*

The rule on constitutive law that became c. 86 of *CIC*83 was drafted at the very first meeting of the *coetus* on general norms that took up the subject of dispensations, held 28-31 January 1969. A consultor raised the question of laws that cannot be dispensed. He said a dispensation is not possible from all laws, in particular, not from laws that are constitutive of any act, and on this point he referred to c. 1680, § 1 of the 1917 Code. A proposal was made that a norm be added to the draft canon on dispensations by the diocesan bishop to the effect that the bishop cannot dispense from all laws, especially not from constitutive laws ([51]). The adjunct secretary, Willy Onclin, responded that some norm should be put in the title on dispensations, because this question pertains to the very notion of dispensations. He proposed that there should be a second paragraph in the first canon on dispensations. Three different wordings of the paragraph were presented for a vote ([52]). The third wording was approved unanimously. Here we see the purpose for what was to become c. 86: to establish a category of law that is indispensable in keeping with *De episcoporum muneribus.*

It is interesting that the first consultor to raise the issue of constitutive law only spoke about juridic acts, as in c. 1680, § 1 of the 1917 Code, but all three proposals for the new norm mentioned both juridic institutes and acts. Surely, at least one member of the *coetus* had been sufficiently persuasive to get unanimous agreement on the idea that constitutive laws regulate juridic institutes as well as acts. No further discussion on constitutive law was

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([51]) See *Communicationes*, 19 (1987) p. 87. What became c. 87, § 1, on the dispensing power of the diocesan bishop, originally was to be located in the section on diocesan bishops in Book II. However, it was drafted in consultation with the *coetus* on general norms. See ibid. and N.O. SANVICENTE, *The Power of the Diocesan Bishop to Dispense in Canon 87, § 1*, Rome, Pontificia Studiorum Universitas a S. Thoma Aq. in Urbe, 2000, pp. 233-240.

([52]) The three alternatives were quite similar: (1) Dispensatio non datur in iis legibus quibus definiuntur ea quae ipsum institutum aut actum iuridicum essentialiter constituunt. (2) Dispensationi obnoxiae non sunt leges quibus definiuntur ea quae institutorum aut actuum iuridicorum sunt essentialiter constitutiva. (3) Dispensationi obnoxiae non sunt leges quatenus definunt ea quae institutorum aut actuum iuridicorum essentialiter sunt constitutiva. Ibid., pp. 87-88.

recorded throughout the remainder of the Code revision process ([53]). In the next session of the *coetus*, the paragraph on constitutive law was made into a separate canon, which became the second canon in the title on dispensations as it is in the 1983 Code ([54]).

It is evident that the *coetus* believed, as did Bertrams, that constitutive law could not be dispensed by anyone, not even by the pope. Canon 86 says in straightforward fashion that such laws «are not subject to dispensation». If the pope could dispense from them, then constitutive laws would have been enumerated in c. 87, § 1 along with the other laws that the diocesan bishop could not dispense, leaving the pope free to dispense from them. Nevertheless, the fact that no one can dispense from a constitutive law does not exclude the possibility, as recognized by Bertrams, that the supreme authority or Roman dicastery, if competent, could grant an indult or special faculty in an exceptional case exempting a necessary requirement of a certain juridic institute. Regarding the case that opened this study, the Apostolic See could grant an indult ([55]) exempting the apostolic prefecture from observance of the law requiring a finance council until the prefect could find competent persons to serve on it ([56]).

Another point of interest is that the exclusion of procedural law and penal law from the bishop's dispensing power was not introduced into the draft of c. 87, § 1 until 1979, ten years after

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([53]) A report on the progress of the revision of the Code, authored by Onclin and published in 1971, included a paragraph on this issue but shed no new light on the meaning of constitutive law or juridic institutes. See Opera consultorum in parandis canonum schematibus, in *Communicationes*, 3 (1971), p. 91. Likewise, the introduction to the 1977 Schema made special note of the new draft canon on constitutive laws without explaining what they are. See *Communicationes*, 9 (1977), p. 233.

([54]) *Communicationes*, 19 (1987), pp. 186-187, 191; vol. 22 (1990), p. 271; vol. 23 (1991), pp. 44 and 86; for the prior version as a paragraph, see *Communicationes*, 19 (1987), p. 104.

([55]) The term «indult» is used diversely, but an indult granting an exception to constitutive law would be governed by the canons on privileges (cc. 76-84). See my study, «Privilege, Faculty, Indult, Derogation: Diverse Uses and Disputed Questions», in *The Jurist*, 63 (2003), pp. 213-252.

([56]) Since the Apostolic See may grant indults from certain constitutive laws, it follows that the competent diocesan bishop may grant indults from certain constitutive provisions of particular law and from the proper law of institutes of consecrated life and societies of apostolic life of diocesan right.

the text on constitutive law had been drafted ([57])! Was this omission merely an oversight, or had the *coetus* held, as did Bertrams, that procedural laws and penal laws were constitutive laws, so there was no need to make particular mention of them? The latter is more likely because, had the *coetus* considered them not to be constitutive laws, it would certainly be surprising that they would have intended that the bishop could dispense from them, especially given that *De episcoporum muneribus* had explicitly excluded procedural laws from the dispensing authority of the bishop. In any case, the addition of procedural and penal laws to the canon have an important effect in that it enables the supreme authority to dispense from them. If procedural and penal laws had not been included in the canon, leaving them to be subsumed in the category of constitutive law, the pope or competent dicastery could not have dispensed from them in virtue of the rule of c. 86 that constitutive laws are not subject to dispensation-by anyone.

2.7. *The Mind of the Legislator.*

The «mind of the legislator» does not refer to the subjective, private intention of the legislator when he is promulgating a law-which is impossible to know-but rather his «objective mind» ([58]). This mind is sometimes revealed in other places where the legislator (or his predecessor or successor) treated the same matter, as in the 1921 Decree of the Congregation for Religious and the 1967 Apostolic Constitution of Paul VI on the reorganization of the Roman Curia. In both these legal texts, constitutive laws are the fundamental and necessary laws regulating juridic institutes. The *mens legislatoris* can also be known in the interpretative process which occurs by careful consideration of the meaning of the words of the law in text and context and any parallel passages in the law as well as by an investigation of the law's purpose and the circumstances that gave rise to it. The historical circumstances surrounding the drafting of a law can be of particular value in understanding the mind of the legislator. Although the historical record on the draft-

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([57]) *Communicationes*, 19 (1987), p. 214.

([58]) On this point, see my commentary on c. 17 in *New Commentary on the Code of Canon Law*, p. 75.

ing of c. 86 is slight, it is evident that W. Bertrams had a decisive influence on the development of this canon. Not only was he a consultor to the *coetus* on general norms, but the very wording of c. 86 shows direct evidence of his handiwork. The expression *essentialiter constitutiva* had first been used in this exact way by Bertrams ([59]). More importantly, he had explicitly applied the concept of constitutive law not only to juridic acts but also to juridic institutes, in contrast to c. 1680, § 1 of the 1917 Code which pertained only to juridic acts. The thesis of Buijs — that constitutive law must be understood strictly — was not the position adopted by the *coetus* on general norms, because that notion of constitutive law applied only to juridic acts.

De episcoporum muneribus of 1966 implicitly had the same broad notion of constitutive law as did the 1921 Decree of the Congregation of Religious and the Apostolic Constitution *Regimini Ecclesiae universae* of 1967. Constitutive law was contrasted in the Motu Proprio with disciplinary laws, which were defined rather narrowly as preceptive and prohibitive laws. We have seen that Bertrams had a broad notion of constitutive law in his 1966 commentary on *De episcoporum muneribus*. Several other authors also took this position. They did not see constitutive law as only defining the essential elements of a juridic act without which the act would not exist. They also understood constitutive law as determining the essential elements of juridic institutes, and they considered these to be the basic and necessary structures, rules, norms, and principles governing all the juridic institutes of the canonical system. While it is not possible to identify the *mens legislatoris* with any one viewpoint, even if represented by a canonist as influential as was Bertrams, still, the combination of all the evidence we have examined supports the conclusion that this broad notion of constitutive law is consistent with the wording of c. 86. The category of « constitutive laws » of *De episcoporum muneribus* is iden-

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([59]) The 1921 document of the Congregation for Religious and *De episcoporum muneribus* had both spoken of constitutive laws without using the adverb « essentially » to modify the adjective « constitutive ». Although Bertrams may have adopted the adverb from c. 1680, § 1 of the 1917 Code (*essentialiter constituunt*), he put the two words *essentialiter constitutiva* together in his 1966 article in the exact grammatical form as in c. 86, which was first drafted early in 1969.

tical to that treated in c. 86 — the laws which determine the elements that are essentially constitutive of juridic institutes or acts.

Conclusion.

Constitutive laws establish what is *essential* to a juridic institute or act, but this word has two meanings: that which pertains to the very nature of a thing, and that which is necessary or fundamental. The first meaning of «essential» is applicable to juridic acts, such that, if an essential element were missing from the act, it would be null, juridically non-existent. This first meaning rarely applies to juridic institutes, but the second meaning is always applicable. Through constitutive law, the legislator establishes the necessary and fundamental matters regulating a juridic institute or act, which may not be dispensed by anyone, not even by the legislator himself. Nevertheless, the pope or the competent Roman dicastery may grant a privilege (indult, special faculty) allowing an exception to certain constitutive laws. As Paul VI stated in *De episcoporum muneribus*, a dispensation is not the same as a permission, faculty, indult, or absolution. Dispensations may be rather routine and commonplace in ecclesial practice while an indult of the Holy See granting an exemption from a constitutive law is exceptional.

The *coetus* on general norms that drafted c. 86 very likely understood constitutive law as a broad category of non-dispensable law. This follows from the antecedents in law that mention constitutive laws as well as from one part of canonical doctrine that was first articulated by W. Bertrams, who was a consultor to the *coetus*. It was he who in 1966 first used the precise expression *essentialiter constitutiva* with respect to both juridic institutes and acts, and this was the wording adopted in c. 86. By including both juridic institutes as well as juridic acts in c. 86, the understanding of *ea quae essentialiter sunt constitutiva* necessarily must be broadened to include the second meaning of *essentialis*; otherwise the canon has little or no applicability to juridic institutes and its real import is obscured.

Constitutive laws establish the essential elements of juridic acts and the fundamental and necessary requirements of juridic institutes. With this understanding of the meaning of c. 86, it is not difficult to see that a great number of the canons of two Codes are

constitutive laws regulating the numerous juridic institutes of the Church and its canonical system. However, this observation will not likely be convincing to all without a comprehensive, analytic study of the canons and other norms of universal law — a worthy subject for future investigation.

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