NICOLAUS COPERNICUS SUPERIOR SCHOOL | SGMK
Copernican Journal of Law
No. 3 (2/2025), pp. 53–62
DOI: https://doi.org/10.71042/CJL02202503

Ginter DZIERŻON
Cardinal Stefan Wyszyński University in Warsaw, Poland*

The Value of the Principle Set Forth in c. 157 of the 1983 Code of Canon Law in the Context of Systemic Solutions of the Canonical Legal Order

• **Abstract** •

In the present study, the author reflects on the content of c. 157 of the 1983 Code of Canon Law in the context of the systemic solutions of the canonical legal order. He proves that the principle set out in this regulation concerning the free conferral of office by the diocesan bishop should be understood as a general principle, which is not exclusive in nature. In his opinion, non-exclusivity is implied in the introductory clause of c. 157, 'Unless the law explicitly provides otherwise,' which is reflected in systemic solutions regarding the direct conferral of offices by the Pope and competent superiors of institutes of consecrated life within a specific scope. On the other hand, he showed that the introduction of certain exceptions to the general rule was determined by the value of certain acts taken by the superior (the need to obtain the consent of a consultative body (consulted persons) and the specific nature of certain institutions (the autonomy of institutes of consecrated life).

Keywords: Free conferral of ecclesiastical office, Canonical legal order, Systemic solutions, Diocesan bishop.

Introduction

In the 1917 Code of Canon Law, c. 152–159 are devoted to the institution of free conferral of office.[1] In comparison to this collection, in the current codification, in Article 1 of Chapter I: "Conferral of ecclesiastical office", Title IX: "Ecclesiastical

* ORCID ID: 0000-0002-5116-959X; address: Dewajtis 5, 01-815 Warsaw, Poland; e-mail: g.dzierzon@uksw.edu.pl

[1] *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, 1–593 (hereinafter: CIC/17). For an English translation, see The 1917 or Pio-Benedictine Code of Canon Law available at https://www.iuscangreg.it/cic1917.php

offices", there is only one c. 157,[2] which states: "Unless the law explicitly provides otherwise, it is the responsibility of the diocesan bishop to confer ecclesiastical offices in his own particular church by free conferral." It should be noted that the equivalent of the current regulation in the first CIC/17 was c. 152, which stated: "Loci Ordinarius ius habet providendi officis ecclesiaticis in proprio territorio, nisi aliud probetur; Hanc tamen potestate caret Vicarius Generalis sine manadato speciali."

The course of the codification work shows that the current legislative solution was mainly determined by the fact that most of the provisions of the previous CIC/17 referred to the conferral of offices in a general sense, rather than to the institution of free conferral of offices in the strict sense, which is why this situation was corrected by limiting it to a single canon, namely the aforementioned c. 157 of the CIC/83 (Miñambres, 1996, p. 952).[3]

This study will not focus exclusively on an analysis of the content of c. 157 of the CIC/83, but on a more profound issue related to the value of this provision in the context of the systemic solutions of the canonical legal order. However, such a research intention first requires an explanation of the canonical concept of free choice, on which further arguments will be based.

Characteristics of the Institution of Free Conferral of Office

Since the legislator did not decide to introduce a legal definition of free conferral of office in the CIC/83, he left the question of defining this institution to the doctrine. Some commentators have taken up this thread in the literature on the subject. Luigi Chiappetta sees the free conferral of office as a direct decision of the ecclesiastical authority, by virtue of which it not only grants the title but also chooses the person to whom it entrusts the office (Chiappetta, 1996, p. 241). Similarly, Julio García Martín stated that it is a direct conferral of office without the intervention of a third party, made by the competent authority having the free and full right to confer it (García Martín, 1999, pp. 558–559). Finally, Jesús Miñambres defined this form of commission as the direct appointment of the holder of an office by the competent authority responsible for granting it (Miñambres, 1996, p. 953). It should be added that in this case we are referring to the authority re-

[2] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, 1–317 (hereinafter: CIC/83). For an English translation, see The 1983 Code of Canon Law available at https://www.iuscangreg.it/cic1983.php

[3] Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Coetus De normis generalibus. Series Altera. Sessio V. 5-7 May 1980*, "Comminicationes" 21 (1991), pp. 213–216.

ferred to in c. 147 of the CIC/83, i.e. the authority competent to establish, modify and abolish an office (c. 148 of the CIC/83) (García Martín, 1999, p. 559). It is worth adding that this institution is grounded in the doctrine of the Second Vatican Council, articulated in no. 28 of the Decree on the Pastoral Office of Bishops in the Church, which states that the bishop "should enjoy the necessary freedom in conferring offices and benefits; for this reason, laws and privileges that in any way restricted this freedom have been abolished"[4] (Horta Espinoza, 2007, p. 88; De Paolis and D'Auria, 2008, p. 456). As a result, the institution of irremovable parish priests was abolished (CD 31) (García Martín, 1999, p. 558). On the other hand, it should be noted that in opposition to the free conferral of office, there are institutions of dependent conferral of office: presentation (c. 158–163 of the CIC/83) and election (c. 164–183 of the CIC/83).

The form of commission that interests us is characterised by the fact that the designation of a person and the conferral of office are simultaneous, in the sense that we are not dealing here with two different legal acts (García Martín, 1999, p. 558). The CIC/83 contains several provisions which clearly emphasise the freedom to confer office: firstly, c. 317 does not exclude this possibility in the case of the appointment of the president of a public association of the faithful and its chaplain; secondly, this form is also associated with the conferral of the office of parish priest (c. 523), the appointment of a parish vicar (c. 547) and the conferral of the office of chaplain (c. 563); thirdly, superiors of institutes of consecrated life have such authority with regard to members of their institute (c. 626) (Miñambres, 1996, p. 953).

The Diocesan Bishop as the Entity Conferring Office

When considering the content of c. 157 of the CIC/83, it should be noted that in this regulation, the legislator's attention focuses on one hypothesis, in which the diocesan bishop is competent to freely confer offices in his own Church. When considering this issue, it must first be noted that, compared to the CIC/17, there has been a change in this case, since in the provisions of the first CIC/17, the local ordinary was the competent authority (c. 152). The main reason for this

[4] Sacrosanctum Concilium Oecumenicum Vaticanum II, Decretum de pastorali episcoporum munere in Ecclesia *Christus Dominus* (28.10.1965), AAS 58 (1966), 673–696 (hereinafter: CD). For an English translation, see Decree Concerning the Pastoral Office of Bishops in the Church *Christus Dominus* Proclaimed by His Holiness, Pope Paul VI on October 28, 1965 available at https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651028_christus-dominus_en.html

change was the implementation of a proposal made by the consultors during the revision of the CIC/17, aimed at standardising the terminology used in the system (Miñambres, 1996, p. 955).[5]

Due to the fact that the entrusting of an office falls within the executive power, the normative term "diocesan bishop" should be referred to c. 134 § 3 of the CIC/83, according to which this term also includes all those who are systematically equated with him (c. 368 and c. 381 § 2), i.e. territorial prelates, territorial abbots, apostolic vicars and apostolic prefects, and permanently appointed apostolic administrators. On the other hand, it should be noted that, by virtue of law, the vicar general (c. 475) and the vicar bishop (c. 476) do not have such authority, since the clause "with the exception of the vicar general and the vicar bishop" contained in c. 134 § 3 has the character of a law of exclusion (c. 10). Nevertheless, the legislator did not exclude the possibility of them receiving a special mandate from the diocesan bishop in the aforementioned regulation. Therefore, they would also be entitled to make such a decision. As a side note, it should be recalled that in the CIC/17, only the vicar general could receive such a power (c. 152 and c. 1432 § 2) (Socha, 1985, ad. 157, no. 4; Piñero Carrion, 1985, p. 296).

When considering c. 157 of the CIC/83, it should be borne in mind that this provision concerns general systemic assumptions. The CIC/83 provides for a derogation from this rule. According to c. 565, the local ordinary (c. 134 § 2), and within the scope of this legal term, in addition to the diocesan bishop, the vicar general and the vicars episcopal are also included, and therefore they are also authorised to appoint a chaplain (Miñambres, 1996, p. 955).

In this context, the doctrine also raises the issue of the powers of the diocesan administrator. Referring to his status, the legislator stated in c. 427 § 1 of the CIC/83 that although he has the same authority as the diocesan bishop, at the same time he included a clause in this regulation stating "except for those matters which by their nature or by virtue of law are excluded." The current CIC/83 contains exceptions to this rule, which are expressed in c. 509 § 1, according to which the diocesan administrator cannot confer canonicates, and in canon 525, 2°, according to which he may not appoint parish priests in the first year of a vacancy in the bishopric or in the event of an impediment to the functioning of the bishopric (Socha, 1985, ad. 157, no. 5; Aymans and Mörsdorf, 1991, p. 468).

The CIC/83 contains a number of regulations which clearly emphasise the free conferral of offices by the diocesan bishop. These include: appointment to the po-

[5] Pontificia Commissio Codici Iuris Canonici Recognoscendo, Coetus Studiorum De normis generalibus. Sessio Altera (Sessio VI). 14-19 April 1969, *Communicationes 23* (1991), p. 277.

sitions of lecturers in philosophy, theology, and moral theology (c. 253 § 1–2), the appointment of a coadjutor bishop as vicar general (c. 406 § 1), the appointment of officials of the diocesan curia (c. 470), the entrusting of the office of moderator of the diocesan curia (c. 473 § 2), the establishment of a vicar general and episcopal vicar (c. 477 § 1), the conferral of the office of chancellor, vice-chancellor and notary (c. 487 § 1–2 and c. 483 § 1), the appointment of members of the presbyteral council (c. 497), appointing members of the college of consultors (c. 502 § 1), entrusting offices to canons (c. 507–509), entrusting pastoral care of a parish or several parishes simultaneously to several priests acting jointly (c. 517 § 1), entrusting pastoral care to a deacon or another person who has not been ordained a priest, or to a community of persons establishing a chaplain to direct pastoral activities (c. 517 § 2), appointing parish priests (c. 523), appointing a parish administrator (c. 539), appointing a parish moderator (c. 544), appointing a parish vicar (c. 547), appointing a rector of a church (c. 557), the establishment of a judicial vicar (c. 1420 § 1) and diocesan judges (c. 1421 § 1), the appointment of a justice ombudsman (c. 1435) (Socha, 1985, ad. 157, no. 7).

The solution found in c. 157 stems from the fact that, according to c. 381 § 1 (whose source is CD 8a), the diocesan bishop has ordinary, proper and direct power in his diocese, except for those matters which, by law or papal decree, are reserved to the supreme or other ecclesiastical authority (Socha 1985, ad. 157, no. 2; Aymans and Mörsdorf, 1991, p. 468). In the current legal order, the Pope has reserved the right to appoint auxiliary bishops (c. 377 § 4) and coadjutor bishops (c. 403 § 3).

Continuing, it should be added that c. 157 applies only to diocesan offices. The diocesan bishop has jurisdiction only over the particular Church entrusted to him (Chiappetta, 1996, 241). Therefore, he cannot confer an office outside the scope of his jurisdiction (García Martín, 1999, p. 560). Thus, the provision of c. 157 does not cover the conferral of offices in institutes of consecrated life (c. 625), in secular institutes (c. 717 § 1) and in public associations of the faithful (c. 317 § 1 and c. 312 § 1) (Socha, 1985, ad. 157, no. 6).

The Supplementary Nature of the Free Conferral of Office

In accordance with systemic solutions, under certain conditions, the free conferral of office may be of a supplementary nature. According to c. 162, if the presentation is not made within the time prescribed by law, or if two unsuitable candidates are presented, the institution of dependent presentation is replaced by the free conferral of office. C. 165, in turn, stipulates that if no election is made within

a reasonable period of three months, the competent ecclesiastical authority, i.e. the one which has the right to confirm the election or to confer the office by substitution, has the right to confer it freely (Miñambres, 1996, p. 953).

Free Conferral of Office and the Participation of Participatory Bodies

Some regulations of the canonical legal order concerning the free conferral of office indicate the need for consultation in the form of a council or the consent of participatory bodies. This possibility is provided for, *inter alia*, in c. 625 § 3, with regard to the appointment of other superiors of institutes of consecrated life, and in c. 494 § 1 concerning the appointment of the diocesan finance officer, in respect of which the legislator requires that the opinion of the college of consultors be heard. In this context, it had been noted that the general provisions, in c. 127 § 1–2, set out the rules to be applied in the event of the aforementioned hypotheses. They concern the necessity of consulting or obtaining the consent of consultative bodies. The doctrine emphasises that, from the point of view of substantive law, the decision taken in this case by the competent ecclesiastical authority is not a decision of the superior and the consultative bodies, but an act of the superior (Dzierżon, 2013b, p. 11). It have to be noted that the need for the superior to consult the council does not raise any interpretative problems, as he is not absolutely obliged to follow the opinion of the body; however, the situation is different when it comes to obtaining the consent of the body (persons), as this is required for the validity of the act (c. 127 § 1–2) (Dzierżon, 2013b, p. 11; Dzierżon, 2013a, p. 377). This situation raises a serious question: can we still speak of the free conferral of office in this situation? It seems that we cannot.

The Clause "Unless the law explicitly provides otherwise"

The basic provision of c. 157 is preceded by the clause "Unless the law explicitly provides otherwise". With regard to this reservation, it must be noted that in this case the word "explicite", translated as "explicitly", plays an important role. It should be clarified that the word "explicite" is not synonymous with the word "expresse".

Referring to the value of this clause, it is to be stated that it concerns unambiguous objective norms established by particular or customary law (Socha, 1985, ad. 157, no. 8; Aymans and Mörsdorf, 1991, p. 466). This means that in this case, regulations interpreted implicitly are irrelevant (De Paolis and D'Auria, 2008,

p. 457). It should be added that the restriction contained in c. 157 of the CIC/83 Criminal Procedure relating to the authority of the diocesan bishop does not exclude direct papal intervention in the conferral of office (García Martín, 1999, p. 561).

Continuing, it should be added that in the current CIC/83, such reservations appear in c. 523, which does not exclude the possibility of presenting a candidate for office. This applies to the appointment of parish priests from institutes of consecrated life (c. 682 § 1) and c. 497, 1°, which provides for the election of approximately half of the members of the presbyteral council (Provost, 2000, p. 210).

Conclusions

The doctrine regards the principle set out in c. 157 as a general principle relating to the power of the diocesan bishop to freely confer ecclesiastical offices within the scope of his competence in his own particular Church (De Paolis and D'Auria, 2008, p. 456; Aymans and Mörsdorf, 1991, p. 466). It seems that this understanding is consistent with the assumptions of Book I: "General Provisions" of the CIC/83, which aims, on the one hand, to provide a general introduction to codified and non-codified regulations and, on the other hand, to enable proper interpretation by establishing norms that are to become the basis for the correct reading and interpretation of existing regulations (De Paolis and D'Auria, 2008, p. 56). The general nature of the principle means that the ecclesiastical legislator consciously assumes that there will be exceptions to this rule (De Paolis, D'Auria, 2008, p. 558). The analysis shows that this possibility is provided for in c. 565, according to which the local ordinary is authorised to appoint a chaplain.

The possibility of derogations from this rule is also provided for by the normative clause "unless the law explicitly provides otherwise." The analysis shows that in some cases (not only concerning the diocesan bishop), the legislator requires that, before the competent authority takes a decision, the matter be consulted with certain bodies in the form of a council and consent. However, this legal situation raises a certain doubt: is this a case of free conferral of office? The answer to this question would be negative. The analysis carried out in this study concerning the competence of the diocesan bishop shows that the restriction introduced in c. 127 § 1–2 regarding the necessity of obtaining the consent of a consultative body for validity infringes upon his freedom of decision, as it excludes the direct adoption of a decision, in this case involving the participation of third parties. (This observation must also be applied to the competence of other ecclesiastical superiors, whose decisions require the participation of participatory bodies in the form of

consent). It should be added that this assertion is not undermined by the doctrinal thesis that, as a rule, the decision taken is an act of the superior, since consultative bodies do not participate in the final decision-making phase.

Further doubts are raised by the clause "with the consent of his own ordinary" in c. 162. It should be recalled that this provision concerns a case in which the competent authority has not presented any candidates or has presented two candidates who have proved unsuitable. The legislator provides that in such a case the office it is to be freely conferred. This means that the institution of dependent commission has been replaced by that of independent commission. In this case, the *crux interpretum* is the aforementioned clause "assientiente tamen proprio provisi Ordinario." When considering this issue, it should first be noted that commentators rarely (unfortunately) address the question of how this reservation relates to the mechanisms of the institution of free appointment of office. Miñambres noted that this clause was included in the proposed regulation during the revision of the CIC/17 by the "Physical and Juridic Persons" Team during discussions on the position of religious persons (Miñambres, 1996, p. 972).[6] From a legislative point of view, this solution seems to be appropriate in view of the autonomy of religious orders. In this context, however, the question arises as to whether this solution undermines the institution of free conferral of offices. Referring to the content of c. 162 of the CIC/83, Miñambres took the view that its content is unclear; in his opinion, it actually distorts the uniformity of the wording of this regulation (Miñambres, 1996, p. 972). De Paolis and D'Auria, on the other hand, considered this clause to be a *praerequisitum* of free conferral. However, they pointed out that in this case the principles set out in c. 127 apply. These principles indicate that while the superior may take an autonomous decision in the case of a council, the consent of the consultative body (the person consulted) is nevertheless required for the act to be valid (De Paolis and D'Auria, 2008, p. 461).

Continuing, it must be noted that the principle set out in c. 157 is not exclusive. It should be noted that the fundamental principle of the functioning ecclesiastical system is the primacy of the Pope. The Pope therefore not only has authority over the entire Church, but also has primacy of ordinary authority over all particular Churches and their groups (c. 331). By virtue of his direct authority, he is therefore competent to freely confer offices. This study also points out that superiors of institutes of consecrated life also have limited authority to freely confer offices. Therefore, it is reasonable to conclude that the hypotheses mentioned

[6] Pontificia Commissio Codici Iuris Canonici Recognoscendo, Coetus De personis physicis et iuridicis. 12–16 March 1973, *Communicationes*, *22* (1990), p. 238.

above were not included in c. 157 for various reasons: papal authority is based on primacy, while the authority of superiors of institutes of consecrated life is linked to the institution of the autonomy of institutes. In this case, one may be inclined to conclude that the lack of reference to this form of conferring offices in c. 157 is due to the nature of the matter (*ex natura rei*).

In conclusion, it should be stated that the principle set out in c. 157 is to be understood as a general principle, which is not general or exclusive in nature. In this matter, the ecclesiastical legislator, like most legislators, did not decide to introduce a legal definition, as this is dangerous; he therefore left the definition of this institution to doctrine. At the same time, in c. 157, the legislator introduced the clause "Unless the law explicitly provides otherwise," assuming the possibility of exceptions to the general rule, the occurrence of which has been confirmed in the analyses of this study. There is no doubt that the need to obtain consent for the validity of a consultative body directly undermines the direct decision-making power of the competent superior (c. 127 and c. 162), as it involves the participation of third parties. It seems that the adoption of exceptions to the general norm was mainly determined, on the one hand, by specific institutions functioning in the canonical legal order (religious autonomy) and, on the other hand, by the special value of certain decisions (the need to obtain the consent of a consultative body or individual persons).

Finally, the normative reservation "with the consent of the ordinary" in c. 162 raises serious interpretative difficulties. It cannot be disputed (which is understandable) that it is linked to the functioning of the institution of autonomy of institutes of consecrated life. It must be noted that, despite this, the term "free conferral" appears in the aforementioned regulation. The few commentators who have addressed this issue have not answered the intriguing question: why? This raises the question: should this provision be treated merely as a legislative oversight? However, it seems that it ought to be linked more to the introductory clause of c. 157, which states that "unless the law explicitly provides otherwise," thus allowing for the possibility of derogations.

The analysis suggests that the solutions adopted in some of the provisions of the current CIC/83 do not fall within the definitions of free conferral of office drawn up by canonists. This is most likely the reason why the legislator decided not to introduce a legal definition of this institution.

References

Aymans, W., Mörsdorf, K. (1991). *Kanonisches Recht* (Canon Law). Padeborn–Munich–Vienna–Zurich: Ferdinand Schöningh Varlag.

Chiappetta, L. (1996). *ll Codice di Diritto canonico. Commento giuridco-pastorale* (The Code of Canon Law. Legal-pastoral Commentary) (Vol. 1). Rome: Edizioni Dehonaniane.

De Paolis, V., D'Auria A. (2008). *Le norme generali di Diritto canonico. Commento al Codice di Diritto canonico* (The General Norms of Canon Law. Commentary on the Code of Canon Law). Rome: Urbaniana University Press.

Dzierżon, G. (2013a). General principles concerning the act of an ecclesiastical superior requiring the participation of participatory bodies (canon 127 § 1 CIC). *Studia Redemptorystowskie*, *11*, pp. 371–381.

Dzierżon, G. (2013b). Zasady funkcjonowania aktu przełożonego wymagającego współudziału konsultacyjnego pojedynczych osób (kan. 127 § 2 KPK) (The Principles of Functioning of Acts by a Superior Requiring the Consultative Cooperation of Certain Persons (can. 127 § 2 CIC)), *Prawo Kanoniczne*, *56(4)*, pp. 3–13. https://doi.org/10.21697/pk.2013.56.4.01

García Martín, J. (1999). *Le norme generali del Codex Iuris Canonici* (The General Norms of the Codex Iuris Canonici). Rome: Ediurcla.

Horta Espinoza, J. (2007). *Una legge fatta a misura dell'uomo* (A Law Made for People). Rome: Edizoni Antonianum.

Miñambres, J. (1996). Comento al canon 157 CIC (Commentary on Canon 157 CIC). In: A. Marzoa, J. Miras, & R. Rodríguez-Ocaña (Eds.). *Comentario exegético al Código de Derecho Canónico* (Exegetical Commentary on the Code of Canon Law) (Vol. 1). Pamplona: Eunsa, pp. 952–955.

Piñero Carrion, J. M. (1985). *La ley de la Iglesia* (The Law of the Church) (Vol. 1). Madrid: Sociedad de Educación Atenas.

Provost J. H. (2000). Commentary on Canon 157. In: J. P. Beal, J. A. Corriden, T. J. Green (Eds.). *New Commentary on the Code of Canon Law*. New York–Malwah: Paulist Press International, p. 210.

Socha, H. (1985). Allgemeine Normen: Kirchliche Gesetze (General Norms: Ecclesiastical Laws). In: K. Lüdicke (Ed.). *Münsterischer Kommentar zum Codex Iuris Canonici* (Münster Commentary on the Codex Iuris Canonici) (Vol. 1). Essen: Ludgerus Verlag, ad. 157.