Exegetical Commentary on the Code of Canon Law

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§ 1. Privilegium, seu gratia in favorem certarum personarum sive physicarum sive iuridicarum per peculiarem actum facta, concedi potest a legislatore necon ab auctoritate executiva cui legislator hanc potestatem concesserit.

§ 2. Possessio centenaria vel immemorabilis praesumptionem inducit concessi privilegii.

§ 1. A privilege is a favour given by a special act for the benefit of certain persons, physical or juridical; it can be granted by the legislator, and by an executive authority to whom the legislator has given this power.

§ 2. Centennial or immemorial possession of a privilege gives rise to the presumption that it has been granted.

SOURCES: § 2: c. 63 § 2
CROSS REFERENCES: cc. 59, 74, 75, 199 §§ 2 et 3, 312 §§ 1, 3° et 3, 317 § 2, 328, 377 § 5, 438, 1331 § 2, 3°–4°

COMMENTARY

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1. Introductory questions

Canon 76 § 1 defines what is to be understood by privilege. Within this concept, two fundamental aspects can be distinguished in accordance with the canon itself: the substantive,¹ which always presupposes the

¹. Bernárdez calls it a particularized situation produced as a result of the act of concession: A. Bernárdez-Cantón, Parte general de Derecho canónico, 2nd ed. (Madrid 1990), p. 143.
obtainment of a grace or favor,\textsuperscript{2} and the material source from which it issues; a privilege can be acquired by grant of the legislator, by grant of an authority with executive power, and by centennial possession with the \textit{praesumptio iuris} of the prior grant of the privilege.

Labandeira maintains the necessity of distinguishing between the privilege and the act through which it is granted. In his opinion, the doctrinal controversy surrounding the privilege derives from locating the essence of this form "not in the favor granted, but in the act by which it is granted."\textsuperscript{3} In our opinion, the nature of the privilege cannot be centered exclusively on its beneficial and executive character. As Labandeira himself rightly notes, there do exist favors that are granted not through \textit{ius singulare}, but through \textit{ius commune}. At the same time, not all specific acts that grant a favorable situation to their addressee constitute privileges (consider, for example, dispensations). Labandeira proposes two characteristics as defining the essence of privileges: they grant a favor and they are issued to a single addressee. Two further characteristics must be added, however: first, the granting authority must in certain cases act with legislative power (either his own power or that delegated to him), and secondly, privileges are by nature objective law. One cannot fully explain the nature of privileges if these additional characteristics are denied or ignored. Since none of the three essential aspects on which the nature of any juridical phenomenon depends (the content or subject matter, the competency of the subject who carries it out, and the form of the act) is currently free of controversy, it seems appropriate to indicate here the following problems that have produced the principal doctrinal differences of opinion:

a) The \textit{subject matter} (i.e., the content of the favor or grace) should not, strictly speaking, constitute an essential characteristic of privileges: "A privilege is the granting of a singular juridical statute which can be either temporary or permanent; that is, it is the act which grants rights to, or withdraws them from, a single subject. ... By its nature, there is no reason why a privilege must grant advantages or disadvantages, for typically it bestows a juridical statute upon a single entity which it names, without that signifying a statute which is better or worse than that of other entities."\textsuperscript{4} Notwithstanding this restriction on subject matter, the \textit{Codex} establishes it as such \textit{expressis verbis}; therefore, this characteristic cannot be disregarded. This is a matter that is now clearly prescribed in this way by the law in force.

\textsuperscript{2} \textit{Lex privata favorabilis}: D.3, c.3; XV, 40, 25.
\textsuperscript{3} E. \textsc{Labandeira}, \textit{Tratado de Derecho administrativo canónico}, 2\textsuperscript{nd} revised ed. (Pamplona 1993), p. 322.
\textsuperscript{4} J. \textsc{Hervada}, \textit{Lecciones propedéuticas de Filosofía del Derecho} (Pamplona 1992), p. 303.
b) The *nature* of the act depends in large part on the subject who carries it out. Hence it is necessary to determine up to what point the legislator is acting with executive power, or the administrative authority is acting with delegated legislative power. Centennial possession can always be traced back to the decision of the legislator or of the administrative authority since once the presumption of a prior concession is included, there can be no comparison with an acquired prescription, which would not require the involvement of the public power in the act of concession.

   c) The *form* of the concession also affects the nature of certain acts. The ordinary form for the granting of a privilege is the rescript. This, in turn, is itself an administrative act. Can one then conclude that there are some privileges that are administrative acts (those granted by means of a rescript) and others that are not? First of all, one should take note of the fact that, in connection with these juridical phenomena that we call privileges, the legislator has not raised any one form to the category of being essential or required *ad validitatem*.

   These and other questions that affect the essential aspects of privileges will be treated in the paragraphs to follow.

2. *Compatibility of their nature as favors with the principle of equality*

   Pursuant to paragraph 1, every privilege carries with it a grace in favor of the person to whom it is granted. Hence, it seems possible to conclude that every privilege implies an inequality, and since justice requires equality, every privilege must constitute an injustice. This appears to be the latent syllogism in some treatments that oppose the admission of privileges in canon law. This system propounds, on the one hand, a principle of equality among the members of the Church (cf. *c. 208*)\(^5\) that the law must respect, and on the other hand, the subjection of legislative power to the limit of reasonableness\(^6\) and executive power to the principle of legality.\(^7\) Can privileges be admitted within these parameters?

   In order to answer this question, one must first examine the premises of the syllogism formulated above. First of all, to verify whether every privilege entails inequality requires us to analyze, in effect, whether any grace in favor of specific persons is always a cause of inequalities. In this respect it is advisable to distinguish the equality enshrined in *c. 208*—

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7. P. Lombardía, *Lecciones ...,* cit., p.164. Cf., nevertheless, the observations of the same author in the commentary on *c. 35* in *Pamplona Com.*
the fundamental equality among the members of the Church—and equality as a normative principle. The normative principle arises from the fundamental a priori equality; however, it does not yet refer to the existence of subjects, but to one or several features (tertium comparisonis) of these subjects, whose equality must be respected by the norm.

It happens that in the case of privileges, a personal quality is taken into consideration, by virtue of which a favor or a favorable juridical consequence is credited. Berlingò attributes such importance to this feature that he comes to identify privileges with the preference of persons, while dispensations would be characterized, in his view, as the preference of causes. This does not pose an obstacle, in our opinion, to the argument put forward here, since the preference of persons is neither identified with the singularity of the addressee, nor excludes it from being caused by the singularity of the supposition of fact. Moreover, the fact that preference of causes has been identified as proper to dispensations does not mean that privileges can be granted arbitrarily. The author himself believes that privileges have their raison d’ètre in pectore principis. 8

At this point, it is necessary to demonstrate that the principle of equality does not exclude fixed distinctions in the abstract and for all purposes. In other words, equality, as a normative principle, does not establish that it is unlawful to take a personal quality of the subject as a point of reference in connection with specific juridical consequences. Thus, for example, the principle of equality forbids differences to be established among the faithful based on their academic qualifications for purposes of the attribution of the ius connubii, but it does not forbid these differences to be utilized for purposes of access to specific offices. Canon 1420 § 4, for example, prescribes that in order to exercise the office of judicial vicar, one must have a doctorate or at least a licentiate in canon law.

Now if the principle of equality does not require that all addressees of norms have the same rights and obligations—that is, it does not prevent the linking of different juridical consequences (a favorable consequence, a grace, in the case of a privilege) to different situations (subjects in possession of a quality or a worthiness that is “rewarded” with the privilege)—does it therefore prevent unity of the addressee? The answer is no—singularity of the addressee is not a priori contrary to equality. In fact, in some cases, it can be required by it. When a singular norm is directed toward avoiding possible disadvantages that begin as consequences of the abstract character of the law, it is not impinging upon the principle of equality. On the contrary, it is establishing it by measuring all cases against the objective standard to which the law claims to adhere. As Hervada has observed, “if a law produces a good in the generality of cases and a bad effect in a particular case, it causes an inequality in a way that

the singular norm which corrects this bad effect makes the particular case equal to the generality of cases.9

What, then, does the principle of equality require regarding privileges? We understand that it requires equality between the conditions of subjects and the juridical consequences (the graces or favors) attributed in each case through a privilege. There should be a parallel between the quality of the beneficiary that has been taken into consideration and the favor granted by the privilege. The principle of equality also requires that the *tertium comparisonis* adopted for the granting of the privilege suit the norm's purpose. The purpose of the norm, though it be singular, must be the common good.10 Of course, privileges favor the particular good,11 but this must always be done as a function of the common good.12

3. **Compatibility of their singular character with the legislative competence of the person who grants them**

Doctrine has repeatedly affirmed the legislative character13 of privileges as an essential element of their juridical nature. This affirmation is based fundamentally on the fact that the legislator is the only subject capable of granting and interpreting privileges. By contrast, others claim that privileges, though granted by the legislator, are granted with executive power.14 There are also those who, like Bolognini,15 in an attempt to make its location in the Code compatible with its juridical source, (the legislator), have pointed out that the privilege is an anomalous administrative act.

The unavoidable obstacle contained in the expression *privata lex* is precisely that generality is one of the essential characteristics of law. This difficulty is resolved by arguing that what characterizes privileges “is not the singularity of the addressee—that is, the quality of the act which connotes its link to a previous law that develops, applies, and executes it by

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13. For one opinion of the authors and the reasons adduced by them, beginning from the Decretal *Abbate* of Innocent III, cf. J. Arias, "Las fuentes del *ius singulare...*," cit., pp. 943-944. For his part, M. Cabreros de Anta, *Comentarios al Código de Derecho canónico* (Madrid 1983), p. 245, thinks that even though it proceeds from legislative power, it is not law in the strict sense, but rather a less plenary exercise of legislative power.

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making it specific to a particular case—but rather the singularity of the
supposition of fact which it contemplates."\textsuperscript{16} Along the same lines, it has
been noted that privileges, insofar as they are granted in reference to spe-
cific presuppositions of fact, do share the characteristic of abstraction
with legislative mandates.\textsuperscript{17}

The first question that needs to be answered is whether the juridical
regimen of the privilege in the CJC now allows us to lay the question to
rest in the manner just expounded, or whether, on the contrary, it will
launch a new debate on the subject based on new insights.

The wording of the canon permits three interpretations:

a) The reference to authority in c. 76 § 1 \textit{in fine} supposes a funda-
mental change in the nature of the privilege on this point. That is, all privi-
leges—in accordance with the systematic arrangement of the Code and
the fact that they can be granted by legislators and administrators—are
administrative acts. This understanding\textsuperscript{18} appears to be reinforced by
c. 77, which remits to the norms of interpretation of administrative acts to
indicate how the subject called to interpret privileges should act. Like-
wise, the reference to privileges in c. 75 would buttress this position, since
no one doubts the unequivocally administrative character of rescripts.
Further support is provided by the placement of the chapter "Privileges,"
in title IV, which carries the heading "Singular Administrative Acts." This
is the opinion currently maintained by Labandeira, who \textit{a fortiori} of these
arguments robustly affirms that "singular acts can only be executive (ad-
ministrative) or judicial, not legislative."\textsuperscript{19}

b) Neither the systematic placement nor the reference to executive
authority is completely conclusive. Firstly, the argument from the place-
ment in title IV runs counter to the literal terms of c. 35 itself, which, in ref-
ferring to singular administrative acts, mentions decrees, precepts, and
rescripts, while maintaining a noteworthy silence concerning privileges
and dispensations.\textsuperscript{20} In addition, to conclude from the reference to execu-
tive authority that privileges have ceased to have a juridically legislative
nature, is—at the very least—as inexact as concluding the opposite, since
the canon mentions the legislator first, and the competence of the admin-
istrative authority is restrained by authorization from the legislator himself.
In fact, when granting a privilege, the administrative authority does so with
delegated legislative power.\textsuperscript{21} In other words, the granting of a privilege by
one who has only executive power is subject to the rules of cc. 135 § 2 and
30. So, in principle, the privilege must be granted by the legislator, but

\textsuperscript{16} J. ARIAS, "Las fuentes del \textit{ius singulare...}," cit., p. 945.
\textsuperscript{17} S. BERLINGO, "Privilegi e dispense...," cit., p. 102.
\textsuperscript{19} Ibid., p. 330.
\textsuperscript{20} P. LOMBARDIA, commentary on c. 35, in \textit{Pamplona Com}.
\textsuperscript{21} H. SCHWENDENWEIN, \textit{Das neue Kirchenrecht} (Graz-Vienna-Cologne 1984), p. 87.
since c. 76 provides for the possibility that this power is delegated to the administrative authority, it must be granted in accordance with the principles of c. 30, which Lombardía describes in these terms: “1) the assigning of competence is to be made by an act of express delegation, determining precisely the matter which the legislative body may legislate and of the conditions under which this legislative activity can be exercised; outside of this purview, any legislative act of an executive body would be null; 2) the dispositions issued through use of this delegated power are of a legislative nature, being, therefore, fully subject to cc. 7–22.” 22 Finally, considering the expression of c. 75, even if we take the meaning of the text of the canon as cumulative and not adversative, we understand that the principle of specificity must be applied here, according to which, when there are rules that consider a juridical situation specifically, those rules are to be applied before applying rules that are more general. Thus, one would not say that privileges are subject to the same rules as rescripts and also to the rules on privileges; rather, privileges are primarily and principally governed by the rules on privileges, and when they are issued by means of rescripts—which is not essential but is in fact the most typical means—they are also subject to cc. 59–75.

c) We are confronted with two types of privileges that are completely distinct, depending on whether they are granted by the legislator or one with delegated legislative power, or by administrative authority exercising executive power. In the former case, they retain the legislative nature attributed to them by classical doctrine. In the latter case, they would be merely administrative in nature.

This distinction is not based on the form in which the privilege is granted since in that case it could be objected that the form of an act does not change its nature, unless that form has been constituted as an essential element of the act, which does not happen in the case of privileges. The distinction proposed here is based on the content of the favor that has been granted, which will, depending on the case, require the involvement either of the legislator or of the administrative authority. Clearly then, we have arrived at a more subtle understanding: the faculty to grant privileges is possessed in principle only by the legislator; the administrative authority, in order to grant them, requires the authorization of the legislator 23 even if it is a question of something that falls within his competence.

22. P. Lombardía, Lecciones..., cit., p. 155.
4. Compatibility of their character as objective law with their possible acquisition by centennial possession

The hypothesis that every privilege creates objective law appears to have been definitively resolved by the legislator in suppressing prescription as one of the means of acquiring a privilege. The nature of objective law corresponds imperfectly with the possibility afforded by the CIC/1917 of acquisition through prescription\(^{24}\) (c. 63 CIC/1917).

This does not mean that there is still not the following latent question: what differentiates a subjective right from a privilege when the privilege is personal? First of all, a privilege cannot be inherited, nor can it be renounced without the approval of authority; moreover, subjective rights can be acquired by other just claims besides the involvement of authority, whereas privileges necessarily require the involvement of the public power.\(^{25}\)

Canon 76 § 2 presupposes that, for the possessor of the privilege, only the lack of possession can be alleged against him, not the lack of concession.\(^{26}\) According to Feliciani, another form of acquiring privileges, in addition to the direct concession by authority, is communication, applicable to cases in which a privilege is extended to new subjects.\(^{27}\) In reality, this constitutes, in our opinion, a new act of concession. Therefore, neither in the case contemplated in c. 76 § 2, nor in the possible extension of the privilege to new subjects, does the involvement of the authority cease to be present. This presumption certainly has an act of concession as its object. What is presumed is not any type of just claim in the possessor, but the involvement of those who create objective law.

\(^{24}\) A. V. Hove, *Commentarium Lovaniense in Codicem Iuris Canonici*, vol. I, t. V, *De privilegiis. De Dispensationibus* (Malines-Rome 1939), p. 16, maintains that when the privilege is acquired by prescription, objective Law is not created.


Privilegium interpretandum est ad normam can. 36 § 1; sed ea semper adhibenda est interpretatio, qua privilegio aucti aliquam revera gratiam consequantur.

A privilege is to be interpreted in accordance with can. 36 § 1. The interpretation must, however, always be such that the beneficiaries of the privilege do in fact receive some favour.

SOURCES: cc. 49, 50, 67, 68
CROSS REFERENCES: cc. 36 § 1, 1150

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Canon 77 directs attention to the rules for administrative acts as norms interpreting privileges. This prescription is not absolute, however. Since privileges constitute a favorable juridical position, when recourse to the rules of interpretation of administrative acts impedes the benefit from an advantage for those who have it, one cannot have recourse to those rules. This precept makes it clear that not all privileges are administrative acts and that the substantive aspect—attainment of the favor—takes precedence over the formal aspects at the time of interpretation.

In Lombardía’s opinion,¹ c. 77 signifies a reinforcement of the privilege as a rule of objective law since it emphasizes the innovative nature of the definition of the privilege in the canonical system.

The remission to c. 36 § 1 requires us to examine, even if briefly, the guidelines for interpretation contained therein, both for the persons called upon to execute a privilege and for their addressees. The question at hand is: to what extent can a juridical situation be considered included within the sphere of action of the privilege?

A first source of interpretative doubts stems from the fact that the proper meaning of the words and the common manner of speaking do not always offer the interpreter an unambiguous conclusion. Two categories must be distinguished: on the one hand, strictly juridical concepts, that is, those of legislative creation (as is the case with concepts such as judgment, querela nullitatis, appeal, adjudged matter, etc.—all concepts that do not exist outside the realm of law) or those that the legislator himself

¹. Commentary on c. 77, in Pamplona Com.
defines (e.g., c. 361 defines what is to be understood by “Apostolic See” or “Holy See,” and c. 1061 § 1 defines the “ratified marriage”); and on the other hand, indeterminate juridical concepts (such as “means of social communication” (c. 823 § 1), “newspapers, periodicals or pamphlets” (c. 831), “poverty” (c. 845), “act of formal abandonment of the faith,” etc.). These cases are examples of concepts taken from reality, but which, in being used by law to define a supposition of fact or to fix the extension of juridical consequences attributed to the supposition, acquire juridical meaning.

The indeterminate juridical concept\(^2\) is doubtful because it does not clearly outline the reality to which it refers and does not have any precise limits. Nevertheless, it serves to define the supposition of fact to which a determined juridical consequence must be applied, or else is integrated in the definition or extension of the juridical consequence itself. At the same time, it offers a correct understanding only in the context of the privilege in which it is found. The use of an indeterminate juridical concept in the text of the concession of a privilege does not mean, then, the assignment of the faculty to use discretion in choosing, among the various possible solutions, the one that is considered opportune. In civil law it is commonly accepted that the control of the application of indeterminate juridical concepts is considered a problem of the control of the motives of the act, which includes not only the determination of whether the fact exists, but also its juridical value.\(^3\)

This significance has only a kernel of positive certainty (Begriffskern) (that which does, beyond all doubt, enter into the concept) and a kernel of negative certainty (that which, with all surety, is excluded from the concept). Between the two there is a zone of uncertainty (Begriffshof) or “halo of the concept.”

The definition of the concept requires, in addition to the common use of the language, an understanding of the specific juridical function that the concept serves.\(^4\) Only in the functional context in which they are used do the concepts acquire their proper meaning and their specific extension. The application of these juridical criteria to the interpretation of privilege presupposes that the determination of the extension of a supposition of privilege must always be made by adding the specific function of the particular privilege in question to the generic juridical function of every privilege—to grant a favorable juridical statute to its beneficiaries. This extension, in turn, must always be determined in light of the purpose for which the grace or favor is granted.

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2. F. SAINZ MORENO, Conceptos jurídicos indeterminados, interpretación y discrecionalidad administrativa (Madrid 1976), pp. 70ff.
§ 1. Privilegium praesumitur perpetuum, nisi contrarium probetur.

§ 2. Privilegium personale, quod scilicet personam sequitur, cum ipsa extinguitur.

§ 3. Privilegium reale cessat per absolutum rei vel loci interitum; privilegium vero locale, si locus intra quinquaginta annos restituatur, reviviscit.

§ 1. A privilege is presumed to be perpetual, unless the contrary is proved.

§ 2. A personal privilege, namely one which attaches to a person, is extinguished with the person.

§ 3. A real privilege ceases on the total destruction of the thing or place; a local privilege, however, revives if the place is restored within fifty years.

SOURCES: § 1: c. 70  
§ 2: c. 74  
§ 3: c. 75

CROSS REFERENCES: cc. 306, 1233

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The perpetuity of the privilege, which has enjoyed an uninterrupted tradition,¹ is nonetheless not essential to this definition. The granting authority can revoke the privilege (c. 79), and if it was granted upon the approval of the authority, it is extinguished with the expiry of the person who granted it (c. 81).

Traditionally it has been understood that those privileges granted to physical persons can be either personal or real. They are personal if they are granted to subjects, intuitu personae—for being who they are, for their qualifications, merits, or specific circumstances. On the other hand, real privileges are those that, while benefiting a determined person, are obtained by virtue of being the successor of a post, an office, etc. The former remain with the person wherever he or she goes, while the latter depend on

maintaining the office, post, etc.\textsuperscript{2} This understanding transfers to those cases in which the subject possesses the privilege by reason of his or her relationship to a juridical person. From the moment this relationship ceases, the application of the privilege to this person also ceases.

Personal privileges cannot be inherited.\textsuperscript{3} They extend beyond the duration in office of the grantor of the privilege, but not beyond the life of the beneficiary. This prescription is in concordance with the character of the objective law that presents the privilege. The beneficiary cannot dispose of it without a dependence on the intervention of the granting authority.

The cases of complete destruction of the object (§ 3) are understood to include both material and juridical destruction.\textsuperscript{4} For example, in c. 1212: the application of something for profane uses carries with it the juridical destruction of that thing and, therefore, the extinction of the privilege. The case of privileges that present both a personal and a real character simultaneously is not unthinkable. Thus, the example of the privilege granted to a domestic chapel is bound as much to the owner as to the thing, in this case, the home.\textsuperscript{5}

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\textsuperscript{4} W. AYMANS-K. MÖRSDORF, \textit{Kanonistisches Recht...}, cit., p. 267.
\textsuperscript{5} W. AYMANS-K. MÖRSDORF, \textit{Kanonistisches Recht...}, cit., p. 268.
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79 Privilegium cessat per revocationem competentis auctoritatis ad normam can. 47, firmo praescripto can. 81.

Without prejudice to can. 81, a privilege ceases by revocation on the part of the competent authority in accordance with can. 47.

SOURCES: cc. 60 § 1, 71; CD 28; Paen V; ES I, 18 § 1
CROSS REFERENCES: cc. 4, 93, 396 § 2, 509 § 1, 526 § 2

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Once the cessation of a privilege for intrinsic reasons was recorded in the prior canon, the extrinsic causes of cessation are indicated beginning with this canon. These causes are dependent, primarily and principally, on the will of the person who granted the privilege, and on circumstances that can motivate the renunciation of the beneficiary (c. 80 § 1).

The revocation is only effective from the moment it is legitimately communicated to the beneficiary. According to the CIC/1917, a just cause was required for the revocation to be legal. This was not, however, required for its validity.¹ It distinguished between privileges granted by remuneration—and among these, those that correspond to obligations of justice and of gratitude—and privileges granted by mere liberality.² Van Hove³ supports that privileges compensatory by justice are irrevocable, with the exception of cases of harm to the public good, in which case compensation should be conceded. Since the CIC says nothing to this respect, should this doctrinal criterion be understood as applicable in the current discipline? In our view, yes. In keeping with the character of objective law of privilege and with the dependence that is protected with regard to the expiry of the person who conceded it, this doctrinal criterion also becomes applicable in the jurisprudence of the current CIC.

Revocation can be produced by a general ordinance, which not only extinguishes the existing privilege, but also impedes it from being granted in the future. In the same way, a general revocation without a clause

² A. Van Hove, Commentarvium..., cit., p. 223, citing Reiffenstuel.
³ Ibid., p. 222.
prohibiting future concession is possible. Finally, the privilege is susceptible to express revocation.

An interpretation of privilege that can be derived from the fact that the beneficiary does not actually obtain a benefit does not exist. In the same way, there is not a derogative or revocatory interpretation.

The reference made to c. 81 should be interpreted in the sense that, if the privilege is personal, and the person to whose exclusive benefit it was granted renounces it, the renunciation should always be accepted.
§ 1. Nullum privilegium per renuntiationem cessat, nisi haec a competendi auctoritate fuerit accepta.

§ 2. Privilegio in sui dumtaxat favorem concesso quaevis persona physica renuntiare potest.

§ 3. Privilegio concesso alicui personae iuridicae, aut ratione dignitatis loci vel rei, singulae personae renuntiare nequeunt; nec ipsi personae iuridicae integrum est privilegio sibi concesso renuntiare, si renuntiatione cedat in Ecclesiae praejudicium.

§ 1. No privilege ceases by renunciation unless this has been accepted by the competent authority.

§ 2. Any physical person may renounce a privilege granted in his or her favour only.

§ 3. Individual persons cannot renounce a privilege granted to a juridical person, or granted by reason of the dignity of a place or thing. Nor can a juridical person renounce a privilege granted to it, if the renunciation would be prejudicial to the Church or to others.

SOURCES: § 1: c. 72 § 1
          § 2: c. 72 § 2
          § 3: c. 72 §§ 3 et 4

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The terms of § 1 do not give rise to questions of interpretation. They extend to all types of privileges (personal and real, contrary to law or outside of the law, etc).

According to Van Hove,¹ the acceptance of a renunciation of privileges that are not burdensome for others is required for the validity of the renunciation by its very nature. The special objective law conceded through privilege to the beneficiary cannot be renounced by his or her own free will. In effect, the privilege contra ius exempts the beneficiary from the observance of the common law, whose obligation does not arise

without consent of the legislator. The privilege outside of the law grants, in itself, a power that cannot be eliminated without the consent of the legislator. A particular person is not competent to modify the objective law. As long as the renunciation has not been accepted by the authority, it remains a mere desire or proposal and, therefore, is always revocable.

No one can impose on himself or herself the power not to use a privilege, by his or her own free will, as long as the authority has not accepted the renunciation. Acceptance can be made by a special act or by a general ordinance of the law.

Paragraph 3 introduces strong restrictions with respect to the norms relative to the capacity to act of juridical persons. That is, the renunciation of a privilege is not considered a simple juridical act. On one hand, the physical person, although possessing the legitimate representation of a juridical person, cannot renounce a privilege in his or her own name, such as when the privilege has been granted to the juridical person by reason of location or object. It is fitting here to take as understood those privileges that are typically real (indulgences granted to a sanctuary, a temple, etc.) and privileges conceded to a juridical person as a religious institution, a specific community, etc. On the other hand, the juridical person is limited in the possibility of renunciation when prejudice to the Church or to others is supposed, such as when a religious institute or specific community has been granted a privilege whose exercise redounds to the benefit of the Church.

With regard to the previous, it should be added that it is the bishop who can renounce a privilege granted to the diocese. The financial administrator or the bishop's vicar, on the other hand, do not have the capacity to renounce, although they would, in fact, be the people who have competence regarding the matters to which the privilege refers.

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2. A. Van Hove, Commentarium..., cit., p. 229.
81  Resoluto iure concedentis, privilegium non extinguitur, nisi datum fuerit cum clausula “ad beneplacitum nostrum” vel alia aequipollenti.

A privilege is not extinguished on the expiry of the authority of the person who granted it, unless it was given with the clause ‘at our pleasure’ or another equivalent expression.

SOURCES: c. 73
CROSS REFERENCES: —

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The general affirmation of independence of the privilege with respect to the granting authority does not prevent the expiry of the privilege upon the death of the person who granted it in cases where the privilege has been granted with the clause “at our pleasure.” Note that no limitation is established to the right of renunciation of the beneficiary of the privilege when this clause exists. Such a limitation is, however, foreseen for the expiry of the privilege. That is, the clause of “at our pleasure” does not imply a total reserve of the privilege at the will of the granting authority.

As Urrutia indicated,¹ ad beneplacitum can be declared without revoking the granting authority or by law. By the will of the legislator it is understood that ad beneplacitum ceases at the same moment that the office ceases. These privileges are not subject to the rules of negotiation of donation.² This addresses, once more, the idea that the privilege is an objective, not subjective, right.

82 Per non usum vel per usum contrarium privilegium aliis haud onerosum non cessat; quod vero in aliorum gravan- men cedit, amittitur, si accedat legitima praescriptio.

A privilege which does not burden others does not lapse through non-use or contrary use; if it does cause an inconvenience for others, it is lost if lawful prescription intervenes.

SOURCES: c. 76
CROSS REFERENCES: —

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A privilege is considered burdensome if, while conceding a favor, it causes some burden on a third party (e.g., exemption of a tax, power to impose a tax or establish some prohibition).¹

The form of the extinctive prescription appears in this canon. The rule that is foreseen in the Code emphasizes the favorable character of a privilege,² with preference to any other purely dogmatic criteria. If, regarding manners of acquiring privilege, we note that the lack of reference to the acquisitive prescription can be considered indicative of the nature of the objective right and not the subject of the privilege, the reference to an extinctive privilege in c. 82 points rather to the contrary criterion.

What happens in the case of the right that can only be obtained by apostolic privilege that, because it causes a burden to others, falls into disuse?

Here there appears to be a contradiction with c. 199, 2o. This canon undoubtedly refers as much to the acquisitive prescription as to the extinctive, since both appear to be mentioned in c. 197 while c. 199 does not establish any specifications in this respect. Canon 199, 2o declares rights that can only be obtained by apostolic privilege exempt from prescription. On the other hand, according to the tenor of c. 82, all privileges that inflict some burden on others can be lost by legitimate prescription.

². W. AYMANS-K. MÖRSDFOR, Kanonistisches Recht Lehrbuch Aufgrund des Codex Iuris Canonici, I (Paderborn-Munich-Vienna-Zürich 1991), p. 267, clearly shows that the freedom of use is the fundamental prerequisite for privileges.
Which criterion should prevail: taking into consideration the authority with competence to concede the favor, or the burdensome character of the privilege on others?

The primary question that should be kept in mind is whether the restriction of c. 199, 2º refers to rights that can only be conceded by the Apostolic See, and not to cases which, in fact, have been conceded by it, but could also be granted by an inferior authority.

A solution to this lacuna in the law—which is here produced by the existence of two norms with contradictory consequences applicable to one case—would be primarily to consider the cause of the privilege. Certainly, in the canons that the CIC dedicates to privilege, reference is repeatedly made to the need for the authority to intervene for its existence (whether for its creation or its cessation). Later a theological criterion of interpretation appears that also addresses the nature of the objective rights of privilege. This states that the intervention of the public authority (that is, to c. 199, 2º) should be given priority over consideration of the burdensome character for others—that is, the present canon.

By remission of c. 197, in each country the norms of the state law regulating prescription should be applied.

Regarding the difference between contrary use and disuse, disuse is applied to affirmative privileges, when the benefiting conduct that permits the conceded privilege is not put into practice. Contrary use refers to negative privileges, when the beneficiary carries out an act that, by virtue of the privilege, could be omitted.³

§ 1. Cessat privilegium elapso tempore vel expleto numero casuum pro quibus concessum fuit, firmo praescripto can. 142 § 2.

§ 2. Cessat quoque, si temporis progressu rerum adiuncta ita iudicio auctoritatis competentis immutata sint, ut noxium evaserit aut eius usus illicitus fiat.

§ 1. Without prejudice to can. 142 § 2, a privilege ceases on the expiry of the time or the completion of the number of cases for which it was granted.

§ 2. It ceases also if in the judgement of the competent authority circumstances are so changed with the passage of time that it has become harmful, or that its use becomes unlawful.

SOURCES: § 1: c. 77
§ 2: c. 77

CROSS REFERENCES: cc. 1336 § 1, 2, 1338 § 1

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This canon regulates the manner of cessation of a privilege. Paragraph 1 considers the expiration of a time limit. It does not address, therefore, a circumstance that is outside of the power of the granting authority, but rather the opposite. Here the submission of the privilege to the public authority is reaffirmed.

The precept to which the canon refers (c. 142 § 2) foresees that acts in the internal forum are valid even though, by oversight, they are carried out after the term of the concession has passed.

In § 2 the modification of circumstances is considered as a motivation to make the use of the privilege harmful or illegal. It is understood that that privilege becomes harmful when it results in damage to the public good, the recipient of the privilege or others. It is also harmful when the burden worsens considerably for those whom the privilege burdened at the moment of its constitution, so that under such circumstances the privilege would not have been granted.\(^1\) It is reputed that the privilege

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becomes illegal when, for any reason, it contradicts the rules of positive law that have not been repealed through the concession of the privilege, the rules of divine law (positive or natural), and those of morality.\(^2\) This group of circumstances, in the terms of Lombardía,\(^3\) would imply irrationality. All the same, are all illegal privileges irrational? Yes, though not all irrational privileges are such on account of their illegality. In principle, the irrationality additionally considers the case of the proportionality of the means to the end. The advantages and disadvantages derived from privilege should protect in themselves a proportional relationship. The proportionality requires that the benefit surpass the inconveniences that could occur. In calculating the proportionality, not only should one keep in mind, abstractly, the gravity and the importance of the juridical benefits that enter into the equation, but also the degree of probability and the intensity with which they are protected or damaged.\(^4\) That is, the end for which the privilege is conceded should be adequate for the means: the concession of the privilege.

Nonetheless it does not produce automatic cessation. The conceding authority must intervene in the verification of such circumstances. The use of privilege as long as the competent authority has not intervened may be illegal and result in the beneficiary incurring abuse (cf. c. 84). Once the cessation has been pronounced the privilege would be invalid.

\(^2\) A. Van Hove, *Commentarium...*, cit., p. 278.

\(^3\) P. Lombardía, *Lecciones de Derecho canónico* (Madrid 1984), p. 151, understands rationality as, “congruence with divine positive and natural law, as well as harmony with the formalizing efficacy with the various moments of law.”

84 Qui abutitur potestate sibi ex privilegio data, privilegio ipso privari meretur; quare, Ordinarius, frustra monito privilegiario, graviter abutentem privat privilegio quod ipse concessit; quod si privilegium concessum fuerit ab Apostolica Sede, eandem Ordinarius certiorem facere tenetur.

A person who abuses a privilege given by a privilege deserves to be deprived of the privilege itself. Accordingly, after a warning which has been in vain, the Ordinary, if it was he who granted it, is to deprive the person of the privilege which he or she is gravely abusing; if the privilege has been granted by the Apostolic See, the Ordinary is obliged to make the matter known to it.

SOURCES: c. 78
CROSS REFERENCES: c. 1144

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1. General questions

The tenor of this canon speaks of the abuse of power. The simultaneous use of abuse and power is somewhat surprising, since the term abuse is customarily applied to rights, while the analogous situation in the case of power is more commonly called deviation of power. Nonetheless, it remains a doctrinal question. According to other authors, however, the difference between the two abnormal uses of the law would be that the person who abuses the law simply violates it, while the person who defrauds the law in fact cheats it. In any case, it appears clear to us that the term power is not used here in the technical sense of power of government—although this is also included. Rather it appears more accurate to refer to the advantageous situation obtained through the privilege. It is fitting to add another explanation by use of terms: at the present time—facing the maxim of common law that says: *tot modis committitur simulatio quot modis committitur fraud*—fraud and simulation are not identified. Nonetheless, since all fraud involves deviant and anomalous behavior, it

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can be said that ordinarily fraud includes a concealment or simulation. Therefore—and regarding the exegesis of the canon discussed here—we consider that the term abuse is used in its broadest sense as anomalous use of a privilege, including the conduct that is fraudulent by obreption or subreption and situation of deviation of power.

The figure is integrated within abnormal juridical situations. That is, a judgment of failure of the juridical figure analyzed relative to its proper end, which reveals the elimination of that end for which the privilege was conceded (see commentary on c. 76: the normative principle of equality requires that the adopted tertium comparationis be adequate for the finality of the norm) and its substitution by another completely different end. Another manner by which this mutation of the end can proceed is suppression by the beneficiary of all that is fundamental to the concession, while maintaining the use of the privilege, but clearly because of another different purpose of the beneficiary. The end must be examined not only at the moment of the concession, but in the continuance of its effectiveness. Nonetheless, the simple cessation of the purpose of a privilege neither revokes the privilege, nor prohibits its use. If the use is made illegal or irrational, the principles of c. 83 § 2 must be applied.

In summary, abuse should be considered if a beneficiary makes use of a privilege in a sense different or contrary to what was granted by the conceding authority, or when the beneficiary surpasses personal limits of the place or time to which the privilege was limited. The privilege, of course, exists—if it was not impossible to abuse it—but it is not used according to its normal, exact and correct objective. This deviation, of which the abuse consists, must be a deviation of its proper objective or cause.

2. Determination of abuse

We can say that the condition of abuse depends on two essential factors, and an instrumental one:

a) In the first place a law must exist that impedes the effectiveness of the result, if this is presented in a direct and clear manner. But, must this law also condemn the utilization of the twisted path that has been chosen? In our judgment, no.

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6. For this point, we follow the well-known explanation on abuse given by F. de Castro y Bravo, El negocio jurídico..., cit., pp. 370–371.
One example is a privilege that concedes to its beneficiary the possibility that a matrimonial case be reviewed before the metropolitan tribunal, and not before the Tribunal of the Roman Rota. This may be done so that the evidence can be brought forth more easily. In this case, it would be abuse if the beneficiary used the privilege to obtain a sentence that, without adhering to the norms regarding efficacy of certain evidence, adhered more to the pleasure of the petition formulated in the petition. In this case, c. 1608 § 3 would impede the efficacy of the result. It does not require that the same law or precept that impedes the efficacy of the result also condemn the utilization of the twisted path that was chosen: the abuse of the privilege. Canon 84 is necessary and sufficient.

b) In the second place, the conduct of the beneficiary of the privilege must merit the flaw of fraudulence. Does this imply that the conduct must be directed at the violation of law, apart from the fact of the harm produced for a third party? In our opinion, no.

Any voluntary conduct of the beneficiary of the privilege carried out with a purpose different from that for which the privilege was granted should be considered fraudulent. Given this conduct, we understand that a violation of the law of privilege itself is automatically produced. This conduct also produces a transgression of the principle of equality, which is guaranteed in situations of privilege through adjustment of the purpose for which the privilege was conceded. It is not required—although, logically, neither is it excluded—that in addition to this transgression of equality, another type of harm to others be produced as a condition sine qua non for the fraudulent conduct to be recognized. This objective consideration of the fraudulent conduct which validates the abuse of privilege allows that—as we will see later—the responsibility for the possible harm caused be completely subjective: by fraud or negligence.

c) Finally, it is fitting to ask if the following procedure for committing abuse must have some special characteristic. We consider, also in this case, that this is not necessary.

In this respect, the close relationship between abuse or fraud of privilege and the interpretation of the same does not go unnoticed. That is, the validation of a conduct, in order to determine whether abuse is found or not understood within the radius of action of the privilege, is a typically interpretive task. Upon discerning the conduct that includes just use of the privilege, those which are excluded are also determined. The manner chosen for committing the abuse will aggravate or diminish the severity of the competent authority in determining revocation, but in no case will the abuse become just use of the privilege.
3. Juridical consequences of the abuse of privilege

First of all it is necessary to understand that abuse of privilege should not be mistaken as a cause for cessation of the privilege, as in the prescription contained in c. 1331 § 2, 3. This canon prohibits the person excommunicated by a ferendae sententiae excommunication or a declared latae sententiae excommunication from using privileges that had been conceded. Obviously, this prohibition is independent of just use or of abuse that the beneficiary would have made of his or her privileges.

a) Revocation of the privilege

One should ask, once there is a certainty of the abusive use of a privilege, whether its revocation is obligatory or optional.

If the beneficiary is a place, it is clear that the one responsible for the abuse is not the place itself, but the persons who are in some way attached to the place who commit the abuse. In this case it does not appear to us that the revocation is obligatory.

If someone abuses a privilege excessively, he or she acts invalidly, because no power is established that allows the person to act beyond the limits of the privilege conceded. However, the privilege is still not lost ipso iure.7

The authority conceding the privilege should evaluate the abuse in a distinct manner based on whether the proposal results in something that is in itself illicit (e.g., acquiring an immoral intention). Or, the authority should limit him or herself to search for a distinct efficacy for the purpose of the goal (to carry out more rapidly an act that would require, despite the existence of the privilege that was abused, a previous counsel).

b) Reparation of the damage

The person who abuses the particular juridical situation produced by the privilege is not only deserving of its privation, but in the tenor of what is established in c. 128, is also obligated to repair any harm caused. That is, the abusive act of the privilege gives rise to the action of reparation of harm. Therefore it is certain that in order for someone to benefit from the action of reparation of damages, the aforementioned c. 128 requires that the damage be caused by unlawful acts or fraud (addressing a subjective responsibility). The reparation for damages caused through abuse of a privilege must be assessed according to the result.

c) Submitting the abuse to the proper regimen of the act

The qualification of abuse or fraud requires that the true, discovered result remain subject to the norms that should be applicable, in accordance with their true nature, and to the sanctions imposed by the same. In some cases nullity of the act is assumed, in other eviction, relative inefficacy or rescission.