THE CONCEPT OF JURISDICTION IN THE CATHOLIC CHURCH

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The refinement of the concept of jurisdiction is in inverse proportion to the frequency and importance of its employment in Catholic language. The word has been employed in ecclesiology and Canon Law for about seven centuries; particularly in the late middle ages and in modern times it has been to the fore both in ecclesiastical language and in relations between the Catholic Church and modern states. Nevertheless it has been subject to wild fluctuations of meaning(1) and loose use; jurisdiction is a 'sacred' term employed as a blanket word to cover whole ranges of concepts. No rigorous analysis has ever been made of the different ecclesial, canonical and institutional realities the term jurisdiction covers. This leads to its being used still in a very free and easy and even reckless way(2) and, at the same time, makes any strict and reliable definition of its use, or rather uses, extremely difficult. Nor must it be forgotten that, because of the word's relatively late arrival on the scene in western Church language, the meaning of 'jurisdiction' is affected by preexisting language and in particular by such key-words as ordo, potestas and officium. Consequently the meaning of 'jurisdiction' must always be seen in relation to these other terms. To put this in more general terms, it must always be seen in its historical context. One must resist the temptation to fix one single meaning for the word in every period without reference to concrete ecclesial, canonical and institutional structures.

The most authoritative recent official documents to make use of the word 'jurisdiction' are (in chronological order): Vatican I's Pastor Aeternus, Benedict XV's Codex Iuris Canonici and Vatican II's Lumen Gentium. None of these documents offers any definition. In fact the fluidity of meaning mentioned above is present in these texts too and they also make frequent use of other terms (e.g. regimen) to bear exactly the same sense(3).

Taking these texts in reverse order we soon realise that Vatican II has made only scattered use of 'iurisdictio' and then with little weight of meaning. The whole dogmatic constitution on the Church uses it only twice, in § 23 of the third chapter: talking about religious "exemption" from the authority of bishops and to describe bishops' concern for the universal Church; this has no formal authority and is

juridically unimportant. The council has a similar use of the word in other documents to mean a juridically important power (authority) (apart from the constitution on the liturgy, where "jurisdiction" is used (§ 130) with a meaning similar to 'caracter episcopalis')[4].

The use the Codex Iuris Canonici makes of it is only slightly more frequent, but certainly more significant. In fact canon 108 § 3 states that it is of divine institution that there exists in the Church a hierarchy which consists, from the point of view of orders, of bishops, priests and ministers and from the point of view of jurisdiction of the supreme pontificate and the episcopate. The following canon states that members of the hierarchy are constituted in their grade of orders through the sacrament and in their grade of jurisdiction through 'missio canonica'. This brings out strongly the clear-cut separation between potestas ordinis and potestas iurisdictionis, each of which has its own source and object, although they may both be present in the same subject. This separation, which is the key to the development of the meaning of 'iurisdictio', was deliberately removed from § 28 of Lumen Gentium, having been present in the preparatory versions[5].

Another element of the Code's concept of jurisdiction is to be found in canon 145 where participation in potestas iurisdictionis (and similarly for potestas ordinis) is linked with the bestowal of an ecclesiastical office.

The meaning of jurisdiction can also be seen in canon 196 which has "potestas iurisdictionis seu regiminis", canon 329 according to which bishops 'cum potestate ordinaria regunt' the churches and, canon 948 which distinguishes 'regimen fidelium' from 'ministerium cultus divini'. It would seem that 'regimen', 'regimen fidelium' and 'potestas regiminis" are synonymous with 'iurisdictio' and all mean 'government' or 'power of government' of the Church in respect of the life of the Church, apart from its sacramental and liturgical aspects (i.e. 'potestas ordinis' and 'ministerium cultus divini'). This distinction is one of the fundamental elements, even though it says nothing about the subjects of these powers, who must in every case be members of the clergy (canon 118). However the Code has nothing to say about the interrelation of these two powers of order and jurisdiction, except in canon 872 where it says that to give valid absolution the confessor must have jurisdictional power over the penitent as well as the power of order.

In general we may say that the Code makes consistent if not rigorous use of 'jurisdictio' (or 'potestas iurisdictionis') to mean the power of government employed to rule the Church as a visible historical society distinct from civil and political society. This is fundamentally a 'secular' meaning, despite the postulate that it is based in the will of God and despite its being reserved exclusively to the clergy. Its secular inspiration is explicit in the division of the power of government into its three functions: legislative, executive and judicial (e.g. canon 335). The same is true of the distinctions the Code makes between 'ordinary' and 'delegated' jurisdiction and between 'proper' and 'vicarious' jurisdiction, neither of which distinctions apply to the power of order. The Code recognises this power of government in the Pope without limits of degree or extent and in bishops in their own dioceses (canon 108 § 3). In addition, canon 228 recognises that the ecumenical council enjoys supreme power[6] in the universal Church, canon 501 attributes a range of different levels of power to superiors of religious orders and finally canon 873 § 1 states that even a parish-priest has ordinary (i.e. not delegated) jurisdiction for the administration of the sacrament of penance in his own parish. It is obvious that from the point of view of clarity the whole concept and institution leaves much to be desired; it seems to be an ambiguous empirical concept which allows one to say no more than that, according to the subject, power of jurisdiction can have an extremely wide (and hardly codifiable) range of degrees of extension and weight. One cannot help feeling that the whole notion of the power of government of the Church, after having become divorced from the sacramental system which supported it for the first 1000 years and having subsequently been freed from the civil role it had to play, which dominated for a long time during the middle ages and right down to the French Revolution[7], now enjoys an independence within which no regulative principle has emerged to rescue it from empiricism and --ultimately-- abuse.

Vatican I's Pastor Aeternus made even greater use of 'iurisdictio' --six times explicitly and a similar number of times with equivalent expressions. Here the stress is on the 'primatus iurisdictionis' attributed to Peter on the basis of Mt 16, 16-19, and to his successors. This is the highest form of episcopal 'potestas iurisdictionis' which is the unit of measure of all jurisdiction. It is what Vatican I calls the 'potestas... pascendi, regendi et gubernandi'. Two points should be noted. In Chapter III it is stated twice that the primacy is not only in faith and morals, but also in discipline and government, which would make it appear that all these fields are part of jurisdiction. This all-embracing sense is confirmed

in Chapter IV where it is stated that apostolic primacy also includes 'potestas magisterii'. The concept of jurisdiction thus reached is so broad as to be completely independent of the sacrament of order. In his encyclical Mystici Corporis Pius XII went so far as to say that bishops receive the power of jurisdiction from the Pope(8).

It is common knowledge that Vatican II has reversed this thesis, by its teaching that 'episcopalis autem consecratio, cum munere sanctificandi, munera quoque confert docendi et regendi (LG 21) and its admission that it is only the exercise of these functions which is affected by factors external to the sacrament.

This brief summary examination, besides confirming the shakiness of the concept of 'iurisdictio' in Catholic language, has also shown that, emerging in Vatican II, there is now a movement to reshape the use and meaning of jurisdiction, particularly in relation to the sacramental system. There is still weakness of content as is shown by the fact that no 'social' consequences of the sacraments of baptism and the eucharist have been indicated of the sort which are attributed to the sacrament of order. Nevertheless this line of approach has good historical antecedants --it ties up with the traditional theology of the first 12 centuries-- and has had the (happy) effect of introducing further question-marks concerning teaching on jurisdiction in the Church. Aspects which seemed to have been definitely fixed by Vatican I and the Code are now being discussed again. I am thinking mainly of the basic premise on which the whole structure of teaching on jurisdiction in the Church used to rest, viz. that the Church is a 'societas perfecta', endowed as such with sovereignty and a juridical structure just like a modern state. This is the ideological basis of the the idea of providing the Church with the powers which classically belong to states: legislative, executive, judicial (and even penal!), and of recognising a human source of jurisdiction --the Pope, and of rationalising power through a centralised juridical structure which came into being with the Codex Iuris Canonici. This whole approach turned the Church into a society within society and isolated it dangerously; within the Church the hierarchy was isolated from the people of God by the introduction of the criterion of 'superiority'(9) which has no place in the Church. Again the fruitful relationship between ecclesia spiritualis and ecclesia iuris has had to yield to an exaggeratedly juridical approach(10).

All that I have said so far proves that it is the ecclesiological context which fixes the meaning of the concept of jurisdiction. The distinction between order and jurisdiction(11) can only be acceptable within a univer-

salistic ecclesiology where the sacraments are a remote and ultimately unimportant fact, while discipline, juridical structures and teaching are seen as the only important concrete factors. In the local Christian community the picture is the reverse and it is the gathering of the faithful around the Word and the Eucharist in the communion of the Trinity which is in the foreground. In this concrete economy of salvation, discipline, order and authority still have their role to play though it is no longer exclusive or primary or independent. The only way to understand the meaning of 'iurisdictio' is to remember that its meaning and use in the Church arose spontaneously within the one economy of communion of the early Church. This means that in a period of transition in our ways of thinking about the Church we must avoid rigidifying the concept of jurisdiction by any attempt to pin it down to one single meaning. The first point to establish is that 'jurisdiction' does not have an unchanging meaning, but rather has a variety of meaning and status according to the historical context in which it is employed, the subject, the source and the object to which it is applied.

Historical context.

A few examples: It is meaningless to speak of jurisdiction in the apostolic Church. It was the introduction of absolute ordinations[12] --i.e. without relation to a particular ecclesial community-- which gave rise to the distinction between sacramental power (which cannot be removed and extends to all the Churches) and disciplinary authority (which is given in relation to a single diocese or, in the case of titular bishops, to none). The latter half of the fourth century saw the introduction of 'reserved forum' by which bishops and priests were removed from the power of the civil courts with the consequent creation of ecclesiastical courts. In a later period the importance of prelates and Church property in society led the feudal overlords to attempt to control the appointment of these important dignitaries. In the investitures context the Church was able to secure her independence in the choice and consecration of her own ministers, but allowed the feudal overlords the right of conferring on prelates the power of government. Later still Rome began to claim a universal jurisdiction of her own (in fact over the West) with the aim of freeing bishops from political interference. This aim was gradually achieved but the distance separating the sacrament of order (the intra-ecclesial element, intended for the celebration of the Eucharist) from the power of government over the mystical body of Christ, the Church, was still there and continued to widen. There was a rapid growth of the custom of obtaining

and exercising power of jurisdiction without having been ordained priest or bishop (canonically the tonsure was enough, as the Councils, at least from Lyons I to Trent complained). The principle of 'territoriality' also suffered through the 'exemption' of monasteries and mendicants.

The Subject.

Today the 'subject' or depositary of jurisdiction is usually a physical person, even though canon 228, referred to above, says that the ecumenical council enjoys supreme power and the constitution Lumen Gentium recognises in the college of bishops, even when not met in council, a true and proper authority (and analogously for episcopal conferences). Certainly it has never been suggested that the Church as the community of believers is the depositary of authority, despite the fact that practically speaking she is such through her assent and acceptance (or dissent and rejection) and through the witness of her faith ('universitas fidelium in credendo falli nequit', LG 12). In practice the important depositaries of authority are the Pope (and the Roman Curia), the bishop (and his vicar general), the parish priest, and the religious superior. Despite the current crisis of authority, the power of government of these depositaries is still important. The Pope exercises it principally in relation to bishops (nominations, translations, depositions and forced retirements), to religious superiors (cf. the case of Arrupe) and to theologians (cf. the cases of Illich and Küng); the bishops exercise their jurisdiction in an analogous way at a lower level --i.e. in relation to priests-- and over a limited area -- the diocese; religious superiors exercise it in relation to the members of their orders. It is possible to appeal to the Pope (Roman Curia) against decisions of bishops and religious superiors: against decisions of the Pope their is no appeal. Parish priests exercise a sharply delimited authority (the faithful of their own parishes) over defined people (only over the laity) in fields which have a direct bearing on the life of the community (use of Church buildings and property, catechesis, preaching, times of services, attitudes to non-Christians, other Christians, divorced people etc.).

There is no connection between this state of affairs and the sacramental structure of the Church[13].

Source.

This is important both from the doctrinal and from the concrete point of view. It is a matter of some consequence whether the power of jurisdiction is received in the sacrament or through missio canonica, or, finally, by consent.

From what Lumen Gentium approved, it is only in the case of bishops that there is a connection with the sacrament, which is the cause of their authority; this however does not release them from their connection either with the community (consent, acceptance) or with the centre of unity (communion). This sacramental source of episcopal authority puts an end to questions about the bishops' position being simply one of subordination to the Pope's. By episcopal consecration the bishop receives authority both in relation to his own Church (personal authority) and in relation to the universal Church (collegial authority). The exercise of these ministries must also be attributed to the actual consecration, even though the external conditions of its exercise may have to be controlled, according to circumstances, by the college of bishops.

In fact the situation in the Catholic Church today is not so straightforward. For teaching in part still maintains that the bishops receive their jurisdiction from the Pope, as its source. The Pope himself remains the subject of jurisdiction over the universal Church, conditional only upon election by the cardinals and his acceptance of the election. This makes jurisdiction a radically secularised power and obedience a secular duty wholly stripped of the idea of communion. To that extent ecclesial relationships fail to correspond to their prime analogate, the relationship between Jesus and the Father.

The same could be said of an understanding of jurisdiction which places its source simply in the consent of the Church as the universitas fidelium, or -on the other hand- of political authority (jurisdictionalism).

In the end the identification of the source of jurisdiction has overriding importance for the question of the limits of authority. As long as the source is human, these limits must lie with the discretion of the highest authority, or be laid down in a constitutional charter[14]. But if the source of authority lies in episcopal consecration, its limits come from nothing less than the economy of salvation as recognised in the light of faith with the help of epikeia (aequitas).

The Object.

In the past the object of jurisdiction included a wide range of temporal realities. Today one hears a lot about 'spiritual' jurisdiction, but it is often exercised in a neo-temporal way, with the aim of controlling people's social or political behaviour in the name of the faith. The general doctrinal line today would seem to point to the non-sacramental means of sanctification as the object of jurisdiction. The point should not be missed that this is a bogus extrinsic distinction, derived from an impoverished and formalised concept of sacrament, which has been put forward in modern Latin theology. This view is a result of the division between potestas ordinis and potestas iurisdictionis and makes preaching and teaching the object of jurisdiction but not the eucharistic assembly!

On the other hand the whole attempt to lay down strict limits to the field of jurisdiction in the life of the Church - as has been mentioned already - goes back to the definition of the Church as societas perfecta, defined according to criteria derived from constitutional theory and public international law. Vatican II's constitutions on the liturgy (on the theological connection between eucharist and Church) and on the Church (chapters I and II of Lumen Gentium) have broken with and gone beyond this definition. To that extent it is true to say that we need a new theological understanding of the social and historical reality of the Church, which we will only achieve through a more adequate ecclesiology. This means rediscovering the unity between the sacramental and historical dimensions of the Church, going beyond the admittedly rich Thomist distinction between grace and nature. This is a much larger problem than that of ecclesiastical jurisdiction, but the attempt to shed light on the latter may help us see the relevance and urgency of the former for today.

NOTES

1. The best existing historical treatment of the subject (M. De Roulers, "La notion de juridiction dans la doctrine des Décrétistes et des premiers Décrétalistes de Gratien (1140) à Bernard de Bottone (1250)", Etudes franciscaines 49 (1937) 420-255) provides the data for the following table of the meanings of 'iurisdictio' in the 12th and 13th centuries.

In Gratian (1140) and the first decretists	In Huguccio (1188) and Johannes Teutonicus	The first decretalists
administratio	administratio	administratio
auctoritas	auctoritas	
conventum habere		
	cura animarum	cura animarum
	cura parochialis	
dignitatis potestas		
dispensatio		
dispositio	dispositio	
executio officii	executio officii	
gubernatio	gubernatio	
ius episcopi		
ius diocesanum		
lex diocesana		
	lex iurisdictionis	
ordinatio		
	piscare hamo	
	populum praeesse	
populum subiectum habere		
	potestas	
	potestas clavium	
	potestas ministerii	
potestas regiminis	potestas regiminis	potestas regiminis
		praelatum habere

It is easy to see how the very wide range of meanings was gradually cut down, as 'iurisdictio' came more and more into use.

2. In the whole of Vatican II, 'iurisdictio' occurs only six times and nearly always in contexts of little doctrinal importance. The reason why the expression was not used more often is not trivial "elegant variation" but --unless the contrary is proved-- a conscious avoidance of a terminology which was not in tune with the council's ecclesiology. The closest equivalent expression would seem to be 'munus regendi' (LG 21, 27, 32), but throughout Lumen Gentium 'regere' has the very general meaning of leadership of the Church. In any case Lumen Gentium always employs a threefold, not a twofold division of munera. K. Mörsdorf has laid strong emphasis on the expression 'sacra potestas' ("De sacra potestate", Apollinaris 40 (1967) 41-57.

3. The most extreme attempt at a conceptual systematisation of jurisdiction would seem to be that found in the Index systematicus rerum of Denzinger's Enchiridion (33rd ed., 1965). The section 'Deus congregans ecclesiam salutis' has a sub-section dedicated to the Constitutio iuridica ecclesiae with the following sub-headings: a) Perfectio ecclesiae qua societas iuridica; b) Potestas legifera, iudicialis, coercitiva; c) Membra ecclesiae; d) Ordo regiminis. It is in b) and d) that Denzinger systematises jurisdiction, although there are also some references in the section on 'Deus sanctificans per magisterium ecclesiae' in the context of the sacrament of penance. It is obvious that in this conceptual system the entire subject of jurisdiction has been made subordinate to 'Perfectio ecclesiae qua societas iuridica'.

4. The Nota explicativa praevia of Vatican II's theological Commission on chapter III of Lumen Gentium also employs 'iurisdictio' once at the end of § 2: 'Documenta recentiorum summorum Pontificum circa iurisdictionem episcoporum interpretanda sunt de hac necessaria determinatione potestatum'. It is interesting that "iurisdictio" is used with reference to the past even in this context. The Nota covers the matter in § 2 with a series of clarifications on the relation between the 'munera' which a bishop receives at his episcopal consecration and their use. In this context a distinction is made between 'ontologica participatio' and 'expeditio ad actum', a distinction which is foreign not only to the language of Vatican II, but to the whole canonical and theological tradition. This 'expeditio' is said to require a 'iuridica determinatio' on the part of the hierarchical authority, consisting in the granting of a definite office and in the assigning of subjects. Suffice it to recall that traditional theology has always admitted that it is by his episcopal consecration alone that a bishop receives a share in authority over the universal Church; no further 'determinatio iuridica' is required for it to come into effect. Furthermore from the doctrinal point of view it may be noted that no juridical ordinance anywhere provides for a subject to have the substance of a power without the capacity to exercise it. Further specifications are made at a level qualitatively different and inferior to the act which **confers** the power.

5. In the versions of the schema of the constitution immediately before the final one, § 28 of chapter III opened with the following statement: "Potestas sacra tum ordinis tum iurisdictionis, quae ex missione Christi in episcopis residet, vario gradu variis subiectis in ecclesia legitime demandatur". This statement was totally eliminated.

6. Canon 228 is in fact out of tune with the system presented by the Code and represents an ecclesial dimension which the redactors of the Code almost completely excluded. One needs to ask what is the relation between the 'suprema potestas' which is recognised for the ecumenical

council and the 'suprema et plena potestas iurisdictionis tum in rebus quae ad fidem et mores, tum in iis quae ad disciplinam et regimen ecclesiae pertinent', which the earlier canon 218 accords to the Roman Pontiff. Once again linguistic and conceptual ambiguity leaves much room for uncertainty. Does the use of a more precise term for the power of the council imply a wider unrestricted recognition? Or do the clarifications concerning the Pope on the contrary imply such huge scope that any other phrasing could only be restrictive? Or does the difference of expression derive from the fact that the authority of the council --which includes the Pope-- was beyond discussion, while that of the Pope on his own required detailed clarification? It is enough for present purposes to raise the problem, without forgetting that in any case the decisions of the council, according to the Code (canon 227), cannot come into force without being not only confirmed, but also promulgated by the Pope.

7. In fact the survival until 1870 of the States of the Church kept in being until 100 years ago the tight bond between ecclesial and civil powers with a common head (the Pope and the Roman Curia).

8. In his Encyclical Mystici Corporis (1943) Pius XII maintained that the bishops "pascunt et regunt non sui iuris, sed debita romani pontificis auctoritate positi, quamvis ordinaria iurisdictionis potestate fruantur, immediate sibi ab eodem pontifice summo impertita" (DS 3804).

9. P. Costa (Iurisdictio. Semantica del potere politico nella pubblicista medievale (1100-1433), Milan 1969), shows how 'iurisdictio" gradually lost sthe strictly judicial reference it had in its Roman origins. In its judicial sense it presupposed equality of judge and judged, but the emergence of the political meaning of "public power" brought with it inequality between the holder of jurisdiction (the superior) and the object of the jurisdiction (the inferior).

10. -The Munich canonist K. Mördorf has recognised very clearly the danger inherent in the division between potestas ordinis and potestas iurisdictionis which eventually leads to an opposition between the spiritual Church and the juridical Church, as powerfully advocated by R. Sohm. With this in mind Mörsdorf and his school are working on a new doctrinal relationship between order and jurisdiction in the belief that this can be done without altering the present concrete structures of the CatholicChurch.

11. The distinction is first found in the 13th century and in fact 'iurisdictio' is almost completely absent from the Decretum Gratiani. For the development of this distinction fraught with meaning and consequences, see pp. 69-101 of my Lo sviluppo della dottrina sui poteri nella Chiesa universale. Momenti essenziali tra il XVI e il XIX secolo, Roma 1964. In the 12th and 13th centuries the expression 'executio potestatis 'had been widely in use. It brought into focus the use of authority in the Church, from the angle of who was entitled to exercise it. On this topic see A. Zirkel's recent essay "Executio potestatis. Dictum Gratiani post c. 97 C. 1, q. 1. Eine Auslegung", Archiv für katholisches Kirchenrecht 14 (1972) 395-449. J. J. Ryan was unable to take this essay into account in his excellent doctoral thesis defended at Münster in 1972: "The separation of 'Ordo' and 'Iurisdictio' in its Structural-Doctrinal Development and Ecclesiological Significance. A dogmatic-historical Contribution towards the Renewal of Canon Law".

12. It is known that in the first centuries ministers might only be ordained 'relative' to a particular Christian community. By such an ordination a bishop entered into a definitive and therefore life-long relationship with his church. But already in the 4th century we have evidence of this rule being broken in the translation of bishops from one church to another. This practice was especially common in the West and received indirect sanction with the introduction of 'absolute ordinations', i.e. the ordination of a minister, and principally the consecration of a bishop independently of any relationship to a Christian community. Canon 6 of the council of Chalcedon strictly condemns these absolute ordinations. Nevertheless they were widespread and eventually became legal. The result was the divorce between sacramental ordination and ministry.

13. If the more restricted notion of jurisdiction is given up and it is thought of more from the point of view of effective exercise of responsibility and authority in the Church, one can easily recognise the existence of non-institutional or depositaries of jurisdiction. One has only to think of the 'Spirituals' and the 'Hermits', of preachers, and theologians and of pilot-communities, all of whom exercise a growing influence and show the way to redifining ministries in the Church outside the petrified distinctions between sacrament, charism and ministry.

14. The attempt to produce a Lex ecclesiae fundamentalis is still going ahead despite the widespread and serious criticisms it has provoked. Cf. Legge e Vangelo. Discussione su una legge fondamentale per la chiesa, edited by G.Alberigo, Brescia 1972.

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