

EVOLUTION OF THE STATUS OF AUXILIARY BISHOP IN THE EVENT OF VACANCY OF EPISCOPAL SEE

EWOLUCJA STATUSU BISKUPA POMOCNICZEGO W PRZYPADKU WAKANSU STOLICY BISKUPIEJ

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Abstract

The study explores the problem of the status of an auxiliary bishop after the bishopric has been vacated. The author performs an analysis of the regulations of the 1917 Code of Canon Law (Canon 355 § 2) and the 1983 Code of Canon Law (Canon 409 § 2). He demonstrates that in the current legal setting the position of the auxiliary bishop has changed, as he possesses the powers and faculties that he used to hold as vicar general or episcopal vicar before the vacancy occurred. The author shows that the current legal framework has been specifically influenced by the doctrine of the Second Vatican Council and the post-conciliar legislation. He makes a point that the granting of emergency powers to an auxiliary bishop required the ecclesiastical legislator to seek new legislative solutions to legitimise the bishop's authority. He now exercises it by virtue of the law itself.

Keywords: vacant episcopal see, auxiliary bishop, authority, vicar general, episcopal vicar

Abstrakt

Zasadniczy przedmiot uwagi w prezentowanym opracowaniu stanowi problematyka statusu biskupa pomocniczego w sytuacji wakansu stolicy biskupiej. Z dokonanej przez Autora analizy komparatystycznej regulacji *Kodeksu Prawa Kanonicznego* z 1917 r. (kan. 355 § 2) oraz *Kodeksu Prawa Kanonicznego* z 1983 r. (kan. 409 § 2) wynika, iż w obowiązującym porządku prawnym pozycja biskupa pomocniczego ulegała zmianie, gdyż posiada on władze i upoważnienia, które przed wakansiem stolicy biskupiej posiadał jako wikariusz generalny lub wikariusz biskupi. Wykazał, iż na obecny stan prawny decydujący wpływ wywarła doktryna Soboru

Watykańskiego II oraz kilku posoborowych aktów prawnych. Dowiódł, iż przyznanie biskupowi pomocniczemu uprawnień w sytuacji nadzwyczajnej wymagało od prawodawcy kościelnego poszukiwania nowych rozwiązań legislacyjnych wiążących się z umocowaniem jego władzy. Obecnie sprawuje ją na mocy samego prawa.

Słowa kluczowe: wakans stolicy biskupiej, biskup pomocniczy, władza, wikariusz generalny, wikariusz biskupi

Introduction

The starting point for discussion is Canon 355 § 2 of the 1917 Code of Canon Law.¹ It provides that an auxiliary bishop must relinquish his office when the episcopal see is vacant, unless the relevant apostolic letter provides to the contrary. When interpreting this canon, commentators agreed that the power of the auxiliary bishop ceased after the office of the diocesan bishop had been vacated [Bączkiewicz, Baron, and Stawinoga 1958, 522; Vermeersch and Creusen 1937, 350; Regatillo 1961, 356]. The solution adopted in Canon 409 § 2 today is somewhat different. It reads, “When the episcopal see is vacant and unless competent authority has established otherwise, an auxiliary bishop preserves all and only those powers and faculties which he possessed as vicar general or episcopal vicar while the see was filled until a new bishop has taken possession of the see. If he has not been designated to the function of diocesan administrator, he is to exercise this same power, conferred by law, under the authority of the diocesan administrator who presides over the governance of the diocese.”²

Judging by the cited regulations, the solution adopted in CIC/17 apparently evolved over time. The process was fuelled by the doctrine of the Second Vatican Council, which was reflected in the revision of this collection of canon law.

¹ *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, pp. 1-593 [hereinafter: CIC/17].

² *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, pp. 1-317 [hereinafter: CIC/83].

1. The conciliar doctrine and codification

The content of today's Canon 409 § 2 was discussed already during Session V of the Study Group on the Sacred Hierarchy, held between 29 September and 4 October 1969, when the following wording of Canon 7 § 1-3 was proposed: «§ 1. Vacante sede episcopali, Episcopus coadiutor statim evadit Episcopus dioecesis, pro qua fuerat constitutus, dummodo possessionem legitime ceperit ad normam can. 2. «§ 2. Vacante sede episcopali, nisi aliud a competenti auctoritate statutum fuerit, Episcopus auxiliaris, usquedum novus Episcopus possessionem sedis ceperit, servat potestates et facultates omnes quibus sede plena, tamquam vicarius generalis vel tamquam vicarius episcopalis, gaudebat; quod si ipse ad munus administratoris apostolici aut vicarii capitularis non fuerit designatus, eadem sua potestate, a iure quidem collata, plena exercent concordia cum administratore apostolico aut vicario capitulario, qui regimini dioecesis praeest. «§ 3. Cum novus Episcopus dioecesis possessionem legitime ceperit, auxiliares statim ad normam can. 6 § 2 constituat vicarios generales aut episcopales».³

As regards the second paragraph, which is of interest to us, the auxiliary secretary noted that, based on its content, the position according to which an auxiliary bishop who is vicar general should be appointed vicar capitular cannot be upheld. In his opinion, this provision pertained to the vacancy of the episcopal see or diocesan curia.⁴

After that, the idea surfaced in the 1973 recapitulation of the work of the Study Group on the People of God published in *Communicationes*. In his report, commenting on the position of the auxiliary bishop in *sede vacante* circumstances, Cardinal W. Onclin aptly noted that in this case he was no longer vicar general or episcopal vicar but held the powers (*potestates*) that he used to have as vicar general or episcopal vicar *sede plena*. Therefore, when a new diocesan bishop takes his office, he should immediately appoint him vicar general or, at least, episcopal vicar.⁵

³ Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Coetus Studiorum de Sacra Hierarchica. Sessio V* (29.09-04.10.1969), "Communicationes" 19 (1987), pp. 121-22.

⁴ *Ibid.*, p. 122.

⁵ "Ad Episcopum auxiliarem quod attinet, sede vacante, non amplius est vicarius generalis aut episcopalis, sed servit potestates quibus sede plena ut vicarius generalis aut episcopalis gaudebat. Cum autem novus Episcopus dioecesanus possessionem legitime ceperit

The previously proposed solution was summoned at Session XV (2-6 December 1974) in Canon 7 § 2, which was worded as follows: “Vacante sede episcopali, nisi aliud a competenti auctoritate statutum fuerit, Episcopus coadiutor iure successionis non gaudens itemque Episcopus auxiliaris, usquedum novus Episcopus possessionem sedis ceperit, omnes et solas servat potestates et facultates quibus sede plena, tanquam Vicarius generalis vel tanquam Vicarius episcopalis, gaudebat; quod si ad munus Administratoris apostolici aut Administratoris dioecesanis non fuerit designatus, eandem suam potestatem, a iure quidem collatam, exercent sub auctoritate Administratoris apostolici aut Administratoris dioecesanis, qui regimini dioecesis praeest.”⁶ It is worth noting that this canon was recorded as Canon 267 in the 1977 Scheme [Pérez Díaz 1996, 230].

During Session VI of the Study Group on the People of God (8-13 October 1979), attention was drawn to the inconsistency between the proposed § 2 of the canon and no. 26 of the conciliar decree *Christus Dominus*, which read that in the *sede vacante* situation the governance of the diocese should be committed to the auxiliary bishop.⁷ However, despite the opinions of the consultors, the proposed text was approved by a vote of five for, two against [*idem*].⁸

dioecesis, auxiliares Episcopus sine mora debet constituere vicarios generales aut saltem episcopales.” Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Liber II. Synthesis laborum De Populo Dei. Synthesis laborum 4*, “Communicationes” 5 (1973), p. 224.

⁶ Eadem, *Liber II. De Sacra Hierarchica. Sessio XV* (02-06.12.1974), “Communicationes” 25 (1993), p. 112.

⁷ Sacrosanctum Concilium Oecumenicum Vaticanum II, Decretum de pastoralis episcoporum munere in Ecclesia *Christus Dominus* (28.10.1965), AAS 58 (1966), p. 673-96 [hereinafter: CD].

⁸ “Il § 2: il §, secondo vari Organi consultivi, sembra contraddire il Decr. *Christus Dominus* dove al n. 26 si afferma: «optandum quoque est ut sede vacante munus dioecesis regendi, nisi aliud graves rationes suadeant, committatur Episcopo Auxiliari...». Mons. Segretario ed un Consultore preferiscono che il testo rimanga com'è, per non imporre la nomina del Vescovo ausiliare ad Amministratore diocesano. Un altro Consultore nota che secondo lo Schema un Vescovo potrebbe essere alle dipendenze di un presbitero (se tale è l'Amministratore eletto), e la dipendenza aumenterebbe se l'Ausiliare fosse anche Vicario Generale. Il testo viene comunque approvato dalla maggioranza (5 contro 2) con il seguente emendamento: sopprimere le parole « Episcopus ... itemque » (2a e 3a riga).” Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Liber II. De Populo Dei (Series Altera)*.

Pope Paul VI also referred to this issue in the 6 August 1966 motu proprio *Ecclesiae Sanctae*. He explained that in the case of *sede vacante* an auxiliary bishop did not enjoy the powers and faculties that he enjoyed *sede plena* as vicar general or episcopal vicar. He further pointed out that if he had not been elected to the office of capitular vicar until the new bishop took possession of the see, then he should exercise his powers in full accord with the vicar capitular.⁹

At the same time, it should be noted that during the codification, objections were raised regarding the exercise of power by auxiliary bishop under the authority of a diocese administrator. Strictly speaking, circumstances in which he would not have been elected were the discussed case. One of the consultors opposed this solution [Bier 1983, ad 409, no. 1];¹⁰ another one suggested that the auxiliary bishop must be appointed administrator of the diocese [Longhintano 1990, 388].¹¹

Finally, on 25 April 1975, the Pontifical Commission for Interpretation of the Decrees of the Second Vatican Council provided an affirmative answer (yet with reservations) to the question of whether Canon 355 § 2 CIC/17 should be considered repealed under no. 26 CD and I, no. 13 § 3 ES.¹²

Sessio VI (08-13.10.1979), “Communicationes” 12 (1980), p. 313.

⁹ “Ut bono communi dioecesis sufficienter provideatur et Episcopi Auxiliaris dignitas in tuto collocetur, voluit Concilium suum optatum manifestare ut, sede vacante, Auxiliari vel, ubi plures sint, uni ex Auxiliariibus, ab illis quorum ius est dioecesis regimen committatur. Attamen, nisi aliud a competenti Auctoritate in casu peculiari statutum fuerit, Episcopus Auxiliaris, sede vacante, potestates et facultates non amittit quibus sede plena a iure gaudebat, tamquam Vicarius Generalis vel tamquam Vicarius Episcopalis. Tunc autem Auxiliaris, ad munus Vicarii Capitularis non electus, hac sua potestate, a iure quidem collata, usque dum novus Episcopus possessionem sedis ceperit, gaudet, plena concordia exercenda cum Vicario Capitulari, qui regimini dioecesis praeest.” Paulus PP. VI, Litterae apostolicae motu proprio datae *Ecclesiae Sanctae*. Normae de quaedam exsequenda SS. Concilii Vaticani II decreta statuuntur (6.08.1966), AAS 58 (1966), p. 764 [hereinafter: ES].

¹⁰ Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Liber II. De Populo Dei (Sessio Altera)*. *Sessio VI* (10-15.03.1980), “Communicationes” 12 (1980), p. 313.

¹¹ Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Liber II. De Populo Dei. Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibiturum cum Responionibus a Secretaria Consultoribus datis*, “Communicationes” 14 (1982), p. 209.

¹² “D. – Utrum per Decretum Christus Dominus, n. 26, et Litt. Apost. Ecclesiae Sanctae, I, n. 13 § 3, derogatum sit can. 355 § 2 C.I.C. circa cessationem officii Episcopi Auxiliaris

All in all, in the course of the codification, the position of auxiliary bishop in the event of the vacated episcopal see changed, which was eventually transferred to the wording of Canon 409 § 2 CIC/17. This state of affairs was mainly affected by the doctrine of the Second Vatican Council and selected post-conciliar legislation.

2. The status of auxiliary bishop in the 1983 Code of Canon Law

Under CIC/83, when an episcopal see is not filled, it is the auxiliary bishop who plays an important role in governing the diocese. Canon 419 provides that while the see is vacant and until the appointment of a diocesan administrator, the governance of the diocese falls to the auxiliary bishop. As mentioned elsewhere, Canon 409 § 2 addresses the question of the bishop's status.

Yet, the interpretation of this regulation is anything but simple. Having a closer look at this passage, it should be noted that because the appointment of a coadjutor under canon law is an exception to the general rule (Canon 409 § 1), the solutions adopted in Canon 409 § 2 are of much greater importance, since the hypothetical situation shown therein may actually happen much more frequently [Bier 1983, ad 409, no. 5].

No doubt, the power of the vicar general or episcopal vicar, which is addressed by Canon 409 § 2 in terms of executive authority, is ordinary and delegated one (Canon 131 § 2) [Pérez Díaz 1996, 259]. The specific nature of this type of power is that it is attached to the office but is in fact exercised on behalf of another person [García Martín 1999, 486], in this case a diocesan bishop. In other words, it is not autonomous but subordinated [De Paolis and D'Auria 2008, 432]. The systemic solutions proposed in Canon 481 § 1 require that the power of governance of an auxiliary bishop associated with possessing the office of vicar general or episcopal vicar ceases upon vacancy of the office of diocesan bishop [Walczak 2015, 92]. In accordance with the interpretation principle embodied in Canon 15 § 1, an auxiliary bishop loses his office whether or not he is aware of

cessante munere Episcopi dioecesan. R. – Affirmative, nisi expresse ab Apostolica Sede, in casu particulari, aliud provisum fuerit.” Pontificia Commissio Decretis Concilii Vaticani II Interpretandis, *Responsa* (25.04.1975), AAS 67 (1975), p. 348.

the actual circumstances [Bier 1983, ad 409, no. 6]. At the same time, it should be noted that the legislator adopted a completely different approach with regard to steps that may be taken by the bishop up to his notification of the vacancy of the episcopal see. His actions remain legally effective in accordance with Canon 417 until certain notification of the vacancy. This approach should be considered an exception to the rule laid down in Canon 15 § 1 [Sarzi Sartori 2017, 440]; the legislator did not rule out this possibility when setting out this standard by saying, “unless it is expressly provided otherwise.” In this context, it is worth noting that the assumption expressed in Canon 417 rests on a conjecture. G. Bier expressed an interesting view on this matter. He claims that in this hypothetical situation the auxiliary bishop has the power of vicar general or episcopal vicar because he holds the legal title but cannot exercise the power that goes with this office [Bier 1983, ad 409, no. 6].¹³ In this way, the German canon law expert found that *implicite* the analysed content of Canon 409 § 2 had the nature of incapacitating law (Canon 10).

Returning to the main point, the discussed provision is an exception to the general rule laid down in Canon 184 § 2 which reads that, “an ecclesiastical office is not lost on the expiry, in whatever way, of the authority of the one by whom it was conferred, unless the law provides otherwise.” The wording of Canon 409 § 2 seems to stem from the actual nature of things, as it refers to the dependent nature of the office of vicar general or episcopal vicar which, in this case, is rendered unfilled [Ghirlanda 1999, 13]. To support this thesis, another rule set out in Canon 481 § 2 should be considered, namely one which says that when the office of the diocesan bishop is suspended, the one of the auxiliary bishop is not. Importantly, the expression “suspended” used in this canon cannot be interpreted as a loss of the office. For in this situation, the relationship between the diocesan bishop and the vicar general or episcopal vicar, which typifies the ordinary delegated power, is not severed.

¹³ “Zum anderen ist dem Gesetzestext *implicite* zu entnehmen, daß Auxiliarbischof bei Sede Vakanz zwar noch Vollmacht eines General – oder Bischofs besitzt, aber nicht länger die Amtsbezeichnung eines General – oder Bischofs führt. Anderenfalls hätte der einfache Hinweis genügt, daß das Amt als solches, ohne verbundene *potestas* fortbesteht.”

When interpreting Canon 409 § 2, there is another interesting passage that must not be ignored, “when the episcopal see is vacant and until the new Bishop takes possession of the see, the auxiliary bishop retains all and only those powers and faculties which he had as vicar general or as episcopal vicar when the see was occupied.” Speaking of this provision, it needs to be made clear that this hypothesis concerns the powers and faculties that the auxiliary bishop enjoyed as a vicar general or an episcopal vicar while the diocesan bishop was still in office (*sede plena*). It should be noted, however, that the source of his powers changed in this case. As a matter of fact, while holding the office *sede plena* it was the power of governance of the diocesan bishop; and while the office is vacant, it is the law. This thesis is supported by the expression contained in Canon 409 § 2, “conferred by the law” [Ghirlanda 1999, 13].¹⁴ When highlighting the *ratio* of this solution, W. Góralski noted, “The auxiliary bishop is appointed because the diocese needs it, so it is natural that he remains in power when the need is even greater, i.e. when the diocesan bishop is gone” [Góralski 2005, 271].¹⁵

The cited content of Canon 409 § 2 create further interpretation issues in the doctrine. G. Ghirlanda ranked this canon among those difficult to interpret. The first doubt arises when dealing with the scope of the auxiliary bishop’s power. Is this the power that comes from his office of vicar general or episcopal vicar or is it also about the entitlements that he received along with the delegation from the diocesan bishop? When seeking to answer this question, commentators argue that while Canon 142 § 1 sets out the general rule that a delegated mandate does not expire with the termination of the authority of the delegating person. Still, Canon 409 § 2 contains an exception to this rule. It is reflected in the expression “all and only those powers and faculties” (*omnes et solas servat potestates et facultates*), which suggests that only the powers and faculties related to the possession of the office of vicar general or episcopal vicar come into play [Ghirlanda 1999, 14-15]. J. Syryjczyk and A. Pérez Díaz also subscribe to this interpretation

¹⁴ “Certamente si riferisce alle facoltà concesse a iure al Vescovo Ausiliare per l’ufficio stesso del Vicario generale o Vicario episcopale in cui in quanto Vescovo Ausiliare dev’essere istituito (Can. 406).”

¹⁵ See also: Ramos 1997, 226-27.

option. When commenting on Canon 409 § 2, the Polish canon law expert said, “It does not seem reasonable for the legislator to intend to legitimize the powers of an auxiliary bishop previously conferred upon him by a special order, especially given that the diocesan administrator has the duties and authority of the diocesan bishop, that is with the exception of those matters which are excepted by the nature of things or by the law itself” (Canon 427 § 1). His set of competence includes a range of matters (although limited) that are normally attended to by the diocesan bishop and not by an auxiliary bishop enjoying the authority of vicar general. “Consequently, only those powers of an auxiliary bishop must be considered that he has been conferred upon as vicar general by virtue of his office, for Canon 409 § 2 specifically points to the powers and faculties granted by law and not the ones delegated by the diocesan bishop” [Syryjczyk 2003, 70]. In contrast, Pérez Díaz makes a distinction between establishing an office and appointing some to it. In his argument, he points out that a diocesan bishop does not establish the offices of vicar general and episcopal vicar but appoints individuals to hold them. Therefore, in his opinion, the competences of the diocesan bishop in relation to vicars general and episcopal vicars by virtue of a special mandate do not fall within the scope of the rights and obligations related to the office, that is, they are not part of ordinary power [Pérez Díaz 1996, 262].

Crux interpretum is yet another hypothesis concerning the option of granting a bishop special faculties, as provided in Canon 403 § 2. It should first be kept in mind that in Canon 409 § 2 the legislator did not distinguish between an auxiliary bishop and an auxiliary bishop with powers and faculties and only used the general term “auxiliary bishop.” Considering this case, it should be underlined that the regulation is a typical standard restricting the free exercise of powers. Therefore, in accordance with the interpretation approach adopted in Canon 18, it should be interpreted in a strict manner [Dzierżon 2021, 300-303]. Ghirlanda supports the opinion that, as in the previously discussed situation, the auxiliary bishop does not retain his conferred powers in this case, either. The Italian canon jurist points out, however, that Canon 409 § 2 contains the expression, “unless the competent authority has provided otherwise.” This means that, due to the specific circumstances in the diocese, the Holy See may offer a different solution and rule otherwise [Ghirlanda 1999, 13-14]. R. Walczak

did not exclude this option in a situation where a diocese would be facing a particularly difficult situation that requires immediate action [Walczak 2015, 184].

The final question is the status of an auxiliary bishop who governs the diocese until a diocesan administrator takes over. A situation cannot be ruled out in which does not actually hold the position of vicar general or episcopal vicar when the episcopal see becomes vacant. His appointment to these offices is not a *sine qua non* (Canon 406 § 1). The rule set out in Canon 426 finds application in this hypothesis. It says that, “Whoever governs the diocese before the appointment of the diocesan administrator, has the power which the law gives to a vicar general” [Góralski 2005, 283; Sarzi Sartori 2017, 398]. Therefore, apparently, in this case the legislator resorted to the mechanism of legal fiction.

3. Special law

The canonical legal order implements the notion of special law that governs the subject matter hereof. An example of this is the Statutes of the Military Ordinariate in Poland approved by the Holy See in 2021.¹⁶ Article 9 of this document provides that in the event of an obstacle to the operation or vacancy of the episcopal see, the ordinariate is governed by a vicar general who enjoys the same rights and discharges the same duties as the diocesan administrator. In Syryjczyk’s view, the adoption of this solution can be attributed to the fact that this personal unit lacks coadjutor bishops and, in principle, auxiliary bishops [Syryjczyk 2003, 71-72].

Conclusion

As the analysis shows, in the currently binding codification, the status of an auxiliary bishop in the event of vacancy of the episcopal see (Canon 409 § 2) evolved compared to the provisions contained in Canon 355 § 2 CIC/17. Today, he does not lose his powers and faculties vested in the office of vicar general or episcopal vicar. It should be noted, however, that

¹⁶ *Statut Ordynariatu Polowego w Polsce nadany przez Stolicę Apostolską w 2021 roku* (08.05.2021), “Biuletyn Urzędowy Ordynariatu Polowego” 1 (1) 2021, pp. 10-14.

the evolution of his position entailed some challenges of a theoretical and legal nature. With the loss of power by the diocesan bishop, the legislator was not able to opt for him retaining *ipso facto* his offices related to the executive power because by doing so, the legislator would have undermined the nature of the offices of vicar general or episcopal vicar, which are delegated roles, closely linked to the authority of the diocesan bishop. Hence, it decided that the auxiliary bishop enjoyed authority in this respect but by virtue of the law only. In the special hypothesis when an auxiliary bishop is not appointed vicar general or episcopal vicar prior to the vacancy in his episcopal see, the source of power is similar (Canon 426).

The ecclesiastical legislator laid down another principle with regard to action taken by an auxiliary bishop before he has been notified of the vacancy of the episcopal see. Such actions are considered valid. In this case, the legislator relied on legal fiction, guided by the need to ensure the efficient operation of the diocese in terms of governance. In R. Sobański's view, such solutions were adopted for the sake of the best interest of the diocese and out of respect for auxiliary bishop's dignity [Sobański 2010, 838].

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