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ECCLESIASTICAL POWER OF GOVERNANCE**

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CONSULTATIVE PARTICIPATION OF THE LAITY IN THE ECCLESIASTICAL POWER OF GOVERNANCE

Its Value in Canon Law and Current Developments exemplified by the Synod of Bishops

LUKAS MARIA BRECHTEL

Summary: As one of the forms, in which a cooperation can be realised in the exercise of ecclesiastical *potestas regiminis* through laypeople within the meaning of c. 129 § 2, the article discusses the consultation as an important element of Church governance. Based on the ecclesiological foundations for consultative participation in the leadership of the pastors of the Church, it can be recognised, according to respective norms of canon law, that consultation can have a significant influence on an act of ecclesiastical power of governance and that it has a high value in the ecclesial legal order, which should not be underestimated. This is also shown by current developments in the context of the XVI. Ordinary General Assembly of the Synod of Bishops, which demonstrates the value of the consultative participation of laypeople in Church governance in two respects.

Zusammenfassung: Eine der Formen, in denen eine *cooperatio* von Laien an der Ausübung der kirchlichen *potestas regiminis* i.S.d. c. 129 § 2 erreicht werden kann, stellt die Beratung dar. Wie dieser Artikel aufzeigen will, bildet sie dabei ein wichtiges Element kirchlichen Leitungshandelns. Aufbauend auf den doktrinellen Grundlagen für eine beratende Beteiligung an der Leitung der kirchlichen Hirten, kann mithilfe einschlägiger Normen des kanonischen Rechts erkannt werden, dass Konsultation einen signifikanten Einfluss auf einen Akt der kirchlichen Leitungsgewalt haben kann sowie dass ihr ein hoher Wert in der kirchlichen Rechtsordnung zukommt, der nicht unterschätzt werden sollte. Dies zeigt sich gerade auch anhand gegenwärtiger Entwicklungen im Kontext der XVI. Ordentlichen Generalversammlung der Bischofssynode, die auf diesen Wert der beratenden Beteiligung von Laien in zweifacher Hinsicht hinweist.

1 Introduction: The Power of Governance and the Laity

From the Second Vatican Council to the present day, engaging with the question of whether and to what extent laypeople can participate in the Ecclesiastical Power of Governance (*potestas regiminis*)¹ has generated a wide range of positions and proposed answers.² Primarily, this

¹ In the sphere of Church leadership, we must always bear in mind that the terms "leadership" and "power of governance" (*potestas regiminis*) should never be equated. Rather, "leadership" is a generic term to which the "power of governance" must be subordinated as a specific form of "leadership". This means that there are different types of leadership and not all of them actually have "*potestas regiminis*". An example in the Code of Canon Law, for someone who has a function of leadership without *potestas regiminis*, might be the director of a Catholic school (cf. c. 806 § 2). However, the focus here lies on the participation in the *potestas regiminis* as a sovereign act of leadership within the ecclesiastical constitution with special authority.

² This can be clearly demonstrated by the wide range of literature published on the subject. See e.g.: *Ackermann, Konrad Maria, Die Sacra Potestas im Werk von Alfons Maria Stickler und Klaus Mörsdorf. Rechtssystematische Überlegungen zur Möglichkeit einer*

debate is characterised by the different understandings of the so-called "*sacra potestas*". This is a term that was introduced by the Second Vatican Council³ and can be understood as a kind of cipher for the relationship between ecclesiastical power of governance (*potestas regiminis*), on the one hand, and power of orders (*potestas ordinis*), on the other. That these two *potestates* (*regiminis and ordinis*) necessarily have some kind of connection to each other is – in respect of the Church's mission – undoubtedly beyond question.⁴ However, the question remains how this connection between the two powers can be described exactly. Is ecclesiastical *potestas regiminis*, therefore, necessarily always linked to the *potestas ordinis* in the sense of the unity of the "*sacra potestas*" and, thus, only exercisable by clerics? Or can it – possibly in certain cases – also be exercised without having received that power of orders?

The question of the exercisability of ecclesiastical power of governance by laypeople, therefore, depends on how the relation between the unity and bipartition ("Zweigligkeit") of the *sacra potestas* is to be conceived. But the Council gave no answer to this question. Admittedly, it emphasised a certain unity of those two powers, but remained extremely imprecise and opaque regarding the precise definition of this relation.⁵ This resulted in a disagreement of interpretation, with the consequence that the broad debate on this issue finally gave rise to many different opinions and positions – even at the time of the Code reform and until today – which can principally be divided into two groups⁶: some defend the doctrine of a stringent, unified *sacra potestas*,⁷ while others understand their unity in such a way that the two powers can (in certain cases) also be exercised separately from one another⁸. A tension arose that could not even be resolved by the CIC/1983 – on the contrary: its respective norms are the product and

Mitwirkung von Laien an der kirchlichen Regierungsgewalt (= KRR 32), Münster 2020; *Amann, Thomas*, Laien als Träger von Leitungsgewalt? Eine Untersuchung aufgrund des Codex Iuris Canonici (= MThSt III 50), St. Ottilien 1996; *Aymans, Winfried*, Oberhirtliche Gewalt, in: AfkKR 157 (1988) 3-38; *Beal, John P.*, The Exercise of the Power of Governance by Lay People. State of the Question, in: The Jurist 55 (1995) 1-92; *Huels, John M.*, The Power of Governance and Its Exercise by Lay Persons. A Juridical Approach, in: Studia canonica 35 (2001) 59-96; *Meckel, Thomas / Pulte, Matthias* (Hg.), Leitung, Vollmacht, Ämter und Dienste. Zwischen römischer Reform und teilkirchlichen Initiativen (= KRR 33), Münster 2021; *Platen, Peter*, Die Ausübung kirchlicher Leitungsgewalt durch Laien. Rechtssystematische Überlegungen aus der Perspektive des „Handelns durch andere“ (= BzMK 47), Essen 2007; *Provost, James H.*, The Participation of the Laity in the Governance of the Church, in: Studia Canonica 17 (1983) 417-448; *Pulte, Matthias*, Leitungsämter für Laien. Das Ende der Potestas-Doktrin des 2. Vatikanischen Konzils?, in: NomoK@non (2022), at: <https://doi.org/10.5282/nomokanon/220>.

³ Cf. LG 10, 18, 27 and PO 2.

⁴ Ackermann speaks of a „minimum consensus“: „Es herrscht ein Minimalkonsens hinsichtlich der grundsätzlichen Einheit der geistlichen Vollmacht“ (*Ackermann, Sacra Potestas* (Anm. 2), 23).

⁵ Berkman states, with regard to the use of the term in the conciliar documents: „Il [= the term] n'est pas utilisé pour exprimer une unité indissociable entre le pouvoir de gouvernement et le pouvoir d'ordre“ (*Berkmann, Burkhard Josef*, Office ecclésiastique confié à des fidèles laïcs et droit de travail, in: Danto, Ludovic (Hg.), Personne, Droit et Justice. La contribution du droit canonique dans l'expérience juridique contemporaine (Actes du 17e Congrès de droit canonique de la Consociatio Internationalis Studio Iuris Canonici Promovendo), Paris 2024, 77-107, 78). See also *Platen*, Ausübung (Anm. 2), 288.

⁶ Attempts to organise and systematically present these positionings can be found, for example, in: *Celeghin, Adriano*, Origine e natura della potestà sacra. Posizioni postconciliari (= Ricerche di Scienze Teologiche 27), Brescia 1987, 77-432; *Amann*, Laien (Anm. 2), 113-145; *Beal*, Exercise (Anm. 2), 18-52.

⁷ See e.g.: *Aymans, Winfried*, Laien als kirchliche Richter?, in: AfkKR 144 (1975) 3-20; *Amann*, Laien (Anm. 2), esp. 3-30 and 159-165; *Mörsdorf, Klaus*, Weihegewalt und Hirtengewalt in Abgrenzung und Bezug, in: Miscelanea Comillas 16 (1951), cited from: Ders., Schriften zum Kanonischen Recht. Hg. v. Winfried Aymans u.a., Paderborn u.a. 1989, 171-186.

⁸ See e.g.: *Platen*, Ausübung (Anm. 2), esp. 281-396; *Ackermann*, Sacra Potestas (Anm. 2), esp. 209-355; *Huels*, Power of Governance (Anm. 2), 59-96; *Provost*, Participation (Anm. 2), 417-448; *Socha, Hubert*, c. 129, in: MKCIC (Stand: November 2017), esp. Rn. 20.

expression of precisely this tension, which is why there is still disagreement in canon law on the question of the participation of laypeople in ecclesiastical power of governance.⁹

But, as recent studies show, the legal position regarding the question of the exercisability of *potestas regiminis* by laypeople is no longer as tense and ambiguous as it was a few years ago due to a number of legal developments. Thus, on the one hand, (new) possibilities and limits *de lege lata* can be identified and, on the other hand, a direction of movement can be identified that enables an outlook *de lege ferenda*.¹⁰

However, the exercise of ecclesiastical power of governance by laypeople – which will not be discussed further here – must be distinguished from their participation in it. "Participation" is a broader term, namely recognising more forms than "just" the direct exercise itself.

2 Types of Cooperation in the Exercise of the Power of Governance

The fact that laypeople can cooperate in the exercise of the *potestas regiminis* and are, thus, involved in it is clearly stated in c. 129 § 2.¹¹ It uses the term "*cooperari*", which is used by the Code of Canon Law regarding its hierarchical orientation in two manners: On the one hand, it means the supporting activity towards a higher official (the vertical alignment).¹² An example might be the assistance of bishops in the exercise of the pope's ministry according to c. 334. As the example shows, a supporting activity does not necessarily exclude the possession of *potestas regiminis*. On the other hand, "*cooperari*" can also refer to cooperation between the same or different services¹³ (the horizontal alignment), shown exemplary in the cooperation between the bishops of an ecclesiastical region in accordance with c. 434.

But even beyond the different hierarchical orientations of *cooperatio*, there are many ways in which it can be realised. They differ, for example, in the extent to which they actively participate in actions of the power of governance or in their obligatory nature. The *cooperatio* in the exercise of the *potestas regiminis*, thus, recognises different forms or "degrees of intensity"¹⁴.

For example, a notary, who only signs a decree, has a minor share in the act of the *potestas regiminis* it entails. Another form of *cooperatio* would be assistance (or "Zuarbeit" in German), such as gathering certain information on the basis of which an authority makes its decision on an act, or by the preparatory drafting of a decree with which an act of governance is then implemented. Arrieta calls this form of *cooperatio* "staff cooperation"¹⁵.

One form of *cooperatio* in the exercise of the ecclesiastical *potestas regiminis* that should not be underestimated, are the various consultative activities. Consultation can also take place in

⁹ Regarding this, Platen concludes that over the course of time, this debate and its positions „stucked“, cf. *Platen, Ausübung* (Anm. 2), 281.

¹⁰ See the following publication, which will be published soon: *Brechtel, Lukas Maria, Möglichkeiten und Grenzen einer Beteiligung von Laien an der Leitungsgewalt in der katholischen Kirche. Eine Untersuchung im Kontext neuerer Rechtsentwicklungen* (= Mainzer Beiträge zum Kirchen- und Religionsrecht 15), Würzburg.

¹¹ It states: „*In exercitio eiusdem potestatis [= potestas regiminis], christifideles laici ad normam iuris cooperari possunt*“ (c. 129 § 2).

¹² Cf. *Amann, Laien* (Anm. 2), 8; *Socha, c. 129* (Anm. 8), Rn. 7.

¹³ Cf. *Amann, Laien* (Anm. 2), 8.

¹⁴ According to Arrieta, practical experience already shows this: „Practical juridical experience in the Church reveals that there are different forms of cooperation in the exercise of juridical power“ (*Arrieta, Juan Ignacio, Governance Structures within the Catholic Church*, Montreal 2000, 38).

¹⁵ *Ibid.*, 38.

various forms and degrees and, thus, have a different proximity to the act of *potestas regiminis*. One criterion is, for instance, whether it is prescribed by law and perhaps also relevant to validity or whether it is voluntary.

3 Consultation as an Important Element of Church Governance

3.1 Basis

The fundamental basis of all consultative activities in the Church is, as ultimately of all activities of the faithful in the Church, finally the fact, normed in c. 208 and doctrinally founded in LG 32 as well as in GS 49 and 61¹⁶, that “there exists among all the faithful”, by virtue of their baptism and the mission associated with it, “a true equality regarding dignity and action by which they all cooperate in the building up of the Body of Christ according to each one's own condition and function” (c. 208)¹⁷. This means that all members of the Church – albeit to different degrees – are responsible for the mission of the Church.¹⁸ As baptised persons, it is their task and duty¹⁹ to contribute to this and, thus, to do their own part to ensure that the Church fulfils its mission, to be “a sign and instrument both of a very closely knit union with God and of the unity of the whole human race” (LG 1).

One consequence of this common participation in the Church's mission is the right of all faithful, expressed in c. 212 § 3, to communicate their opinion to the pastors “on matters which pertain to the good of the Church”.²⁰ Due to the common responsibility for the mission of the Church according to c. 208, this right may also become an obligation, for example when it is necessary to protect the Church from harm.²¹ With that also corresponds the implicit obligation of the pastors to listen to them.²² By relating this right to the knowledge, competence, and prestige of the respective faithful, the legislator expresses that these must be qualified manifestations of opinion.²³

A further manifestation of the participation of all the faithful in the mission of the Church, regarding laypeople, is the ability of the laity to act as experts and advisors to the ecclesiastical

16 Cf. *Pontificia Commissio Codici Iuris Canonici Authentice Interpretando*, Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus. Fontium annotatione et indice analytico-alphabetico auctus, Città del Vaticano 1989, 57.

17 For the equality of the faithful according to c. 208 see e.g. *Bauer, Manfred*, Theologische Grundlagen und rechtliche Tragweite der Gleichheit gemäß can. 208 CIC/1983 bzw. can. 11 CCEO (= Kanonistische Reihe 25), Sankt Ottilien 2013.

18 The Post-Synodal Apostolic Exhortation on the vocation and the mission of the lay faithful in the Church and in the world, *Christifideles laici*, applies this to the lay faithful. It states for example: “The Church's mission of salvation in the world is realized not only by the ministers in virtue of the Sacrament of Orders but also by all the lay faithful; indeed, because of their Baptismal state and their specific vocation, in the measure proper to each person, the lay faithful participate in the priestly, prophetic and kingly mission of Christ” (*John Paul II*, Post-Synodal Apostolic Exhortation “Christifideles laici” (30.12.1988), in: AAS 81 (1989) 393-521, n. 23).

19 This is shown, for example, by the obligations normed in cc. 210 and 211 to promote the growth and continual sanctification of the Church (c. 210), as well as to proclaim the divine message of salvation (c. 211).

20 For the statement of opinion as a fundamental right of all faithful see: *Pree, Helmuth*, Die Meinungsäußerungsfreiheit als Grundrecht des Christen, in: Schulz, Winfried (Hg.), *Recht als Heilsdienst* (FS Kaiser), Paderborn 1989, 42-85.

21 See *Aymans, Winfried / Mörsdorf, Klaus*, Kanonisches Recht. Lehrbuch aufgrund des Codex Iuris Canonici II, Paderborn u.a. 1997, 96. However, Pree observes, that this officium should not be understood as a legal obligation in the strict sense, cf. *Pree*, Meinungsäußerungsfreiheit (Anm. 20), 69-70.

22 Cf. *Althaus, Rüdiger*, c. 212, Rn. 13, in: MKCIC (Stand: Januar 2022); *Pree*, Meinungsäußerungsfreiheit (Anm. 20), 65.

23 See Pree who, regarding the presence of the elements *scientia, competentia et praestantia*, states: „Es will die Sachlichkeit und Zweckdienlichkeit der Meinungsäußerung im Hinblick auf das bonum Ecclesiae sicherstellen“ (*Pree*, Meinungsäußerungsfreiheit (Anm. 20), 64).

pastors and to assist them through this service. This ability, connected to the right established by c. 212 § 3,²⁴ is normed in c. 228 § 2²⁵. One excellent way of fulfilling this service, which is expressly mentioned in the Code of Canon Law, is to participate in councils. The Code itself provides several permanent councils which are intended to achieve this goal: above all the pastoral council of the diocese (cc. 511-514) and the parish (c. 536) and the finance council of the diocese (cc. 492-493) and the parish (c. 537).

3.2 Consultation as a Significant Influence on an Act of the *potestas regiminis*

When having to decide on important questions – possibly with *potestas regiminis* – the pastors of the church are well-advised to consult persons who are competent in this matter. These may be persons who are well versed in this topic through research or competence, or who have a connection to the matter due to their function, or who are established as excellent advisors – which brings us to the triad of c. 212 § 3: "*scientia, competentia et praestantia*". It is evident that the holders of ecclesiastical power of governance cannot be fully versed in all matters. If, for example, a diocesan bishop has to decide whether a church is so destroyed that it "cannot be used in any way for divine worship and there is no possibility of repairing it", so that he "can relegate it to profane but not sordid use" (c. 1222 § 1), it seems appropriate – even if not prescribed by law – to seek the professional advice of experts with specialised knowledge in this matter. Expressly required is such an advice of experts for example in the context of the building and repair of churches (cf. c. 1216).²⁶

In certain important cases, the legislator itself prescribes that it is necessary to obtain advice (*concilium*) from a college, a group, or an individual. In the area of constitutional law, this usually concerns the diocesan bishop, who must hear the presbyteral council "in affairs of greater importance" (c. 500 § 2). A classic example would be the erection, suppression, or alteration of a parish in accordance with c. 515 § 2. When the consultation – as in the example given – is required by law, the non-observance or improper execution of this consultation results in the nullity of the act in accordance with c. 127 §§ 1 and 2.²⁷ This shows the high value the legislator attributes to consultation. In these cases, seeking counsel becomes an essential element of the act of *potestas regiminis*.

Now the question arises: does this also apply to consultation given by laypeople? The answer to this is: yes. An example is the obligation to consult the finance council of the diocese in cc. 1263 and 1277.

But even if seeking counsel is not always prescribed by the legislator, the office holders are nevertheless entitled to seek wise advice. According to c. 212 § 3, it is even their obligation to listen to them if a faithful turns to them with a prudent opinion. Although the validity sanction of c. 127 does not apply in this case, it is, nevertheless, a legal obligation. Consequently, the legislator also attaches great value to consultation that is not expressly prescribed by law.

²⁴ Cf. Aymans-Mörsdorf, *Kanonisches II* (Anm. 21), 118.

²⁵ It says: „*Laici debita scientia, prudentia et honestate praestantes, habiles sunt tamquam periti aut consilarii, etiam in consiliis ad normam iuris, ad Ecclesiae Pastoribus adiutorium praebendum*“ (c. 228 § 2).

²⁶ Regarding the consultation of experts by the diocesan bishop see e.g. Hallermann, Heribert, Ratlos – oder gut beraten? Die Beratung des Diözesanbischofs (= KStKR 11), Paderborn u.a. 2010, 249-251.

²⁷ In addition to the hearing of a concilium, c. 127 also deals with the seeking of a consensus (consent).

For c. 127 see e.g. Heimerl, Hans / Pree, Helmuth, *Kirchenrecht. Allgemeine Normen und Eherecht*, Wien 1983, 107-108; Aymans, Winfried / Mörsdorf, Klaus, *Kanonisches Recht. Lehrbuch aufgrund des Codex Iuris Canonici I*, 131991, 369-381; Hallermann, Ratlos (Anm. 26), 42-54.

Insofar, laypeople in this respect actually have a kind of entitlement to participate in the exercise of the *potestas regiminis*.²⁸

But even if the impulse does not come from a faithful, it can often be useful for a decision-maker to seek advice on their own initiative. In this regard, Hallermann states, that the awareness of decision makers of their own need for counselling and the use of expert advice are often fundamental to ensuring that the right decisions are made.²⁹ This acceptance of one's own need for counselling is, therefore, important, even if it is not always easy to admit this need.

In this context, it should be noted, that consultation can also mean providing new impulses which the decision-maker then takes up and which he would otherwise not have considered at all. This once again shows the extent to which consultation can directly affect an act of *potestas regiminis*.

The process of decision-making is heavily influenced by consultation and depends on it.³⁰ In this way, the faithful can – through their counselling activities – actually have an effective influence³¹ on the exercise of ecclesiastical power of governance. However, this requires the willingness of the decision-maker not only to hear the advice, but actually to listen to it, to reflect on it and, if necessary, to adopt it.³² A mere "alibi-like" consultation without any real willingness to reflect on the opinion presented and possibly accept it not only misses the purpose of the consultation, but is ultimately a kind of hypocrisy and also (and not only because of this hypocrisy) damages the church community³³.

As already explained, canon law recognises a number of councils in which consultation can be ensured in an institutionalised manner. C. 228 § 2 expressly stipulates that lay participation in these bodies is principally possible. However, it should be noted that *ad normam iuris* there may also be councils in which lay membership is not possible.³⁴

A good example of a council in which lay people fulfil an important advisory role is the diocesan pastoral council (cf. cc. 511-514). The Post-Synodal Apostolic Exhortation on the Vocation and the Mission of the Lay Faithful in the Church and in the World, *Christifideles Laici*, describes it as "the principle form of collaboration, dialogue, and discernment" (CL 25) at the diocesan level. Already with this, *Christifideles Laici* shows the high value of the consultation exercised there. It further states: "The participation of the lay faithful in these Councils can broaden resources in consultation and the principle of collaboration – and, in certain instances, also in decision-making – if applied in a broad and determined manner" (CL 25). The interjection about the decision-making underlines the central importance of these consultation councils. They are about nothing less than active participation in shaping the mission of the Church, realised in a certain Particular Church. They do not simply exist "pro forma", but are founded on the principle that all the faithful, also "the laity have their work cut out for them in the life and activity of the

²⁸ See also: *Socha*, c. 129 (Anm. 8), Rn. 8.

²⁹ „Die Einsicht von Handlungsberechtigten in die eigene Beratungsbedürftigkeit und die Inanspruchnahme von fachkundiger Beratung sind oft grundlegend dafür, dass richtige Entscheidungen getroffen werden“ (*Hallermann*, Ratlos (Anm. 13), 56).

³⁰ Cf. *Provost*, Participation (Anm. 2), 437.

³¹ Cf. *Socha*, c. 129 (Anm. 8), Rn. 8.

³² Cf. *Hallermann*, Ratlos (Anm. 26), 56.

³³ To the extent that potential opportunities for the good of the Church are squandered or avoidable mistakes are made.

³⁴ Here in particular, we must think of the presbyteral council or the college of consultors (cc. 495-502). However, it should be remembered that the college of consultors – unlike the presbyteral council (cf. c. 500 § 2) – is not merely consultative, as the following canons show: cc. 272 (in connection with c. 1018 § 1 2°), 413 § 2 (in connection with c. 421 § 1), 419, 485, 1277 and 1292 § 1.

Church", and that their work is so necessary, "that without it the apostolate of the pastors is often unable to achieve its full effectiveness" (AA 10)³⁵. The high value of the cooperation in the *potestas regiminis* in form of consultative participation in the various consultative councils of the Church's pastors should, therefore, never be underestimated.³⁶

This is also underscored, for example, by the directory for the pastoral ministry of bishops³⁷. Based on the vocation of all faithful to participate in the mission of the Church (which is already described above), it states that the consultative bodies "guarantee a dimension of communion in the pastoral governance of the Bishop" (ApSuc 165).³⁸ Consultation is realised here as an interplay between the bishop's personal responsibility for the people of God entrusted to him and the co-responsibility of all the faithful for the good of the Church.³⁹ As organs of participation in the bishop's governance, the consultation councils are a special expression of this interrelationship and, furthermore, one of the instruments that should and can guarantee that the bishop's leadership is not merely "domination" – in extreme cases possibly even dictatorship – but an expression of ecclesial communion.⁴⁰ *Apostolorum successores* thus, places the bishop's consultation by the respective councils in direct relation to his act of *potestas regiminis*. By guaranteeing "a dimension of communion" (Ibid.), they, in a sense, rub off on his actions. This "dimension of communion in the pastoral governance of the Bishop" (Ibid.) excludes both collective governance and absolutist governance.⁴¹ Even though the shepherd has an irreversible personal responsibility, he is, as Ratzinger emphasises, not an autocrat.⁴² This shows that the bishop, as the shepherd of his Particular Church, is obliged to seek the right path together with all the faithful belonging to it⁴³ and to express this in his acts of governance. In Hallermann's words, consultation in the Church is to be understood as participation and co-responsibility in the leadership of superiors and as an effective contribution of the faithful to the realisation of the Church's mission in the world.⁴⁴

Using the example of the pastoral council, it can be stated: The laypeople who belong to this council do not participate in the manner of an "outsider" but are actively involved and, therefore, also part of the process. In this sense, they actually participate in the exercise of *potestas*

³⁵ *Second Vatican Council*, Decree on the apostolate of the laity "Apostolicam Actuositatem" (18.11.1965), in: AAS 58 (1966) 837-864.

³⁶ Cf. Brechtel, *Möglichkeiten* (Anm. 10), 191-192.

³⁷ *Congregation for Bishops*, Directory for the pastoral ministry of bishops "Apostolorum Successores" (22.02.2004), Città Del Vaticano 2004.

³⁸ „By virtue of their baptism, all the faithful enjoy true equality in dignity and action. Hence, all are called to cooperate, according to their particular circumstances and responsibilities, in building up the Body of Christ and in fulfilling the mission that God gave the Church to accomplish in the world. The organic nature of ecclesial communion and the spirituality of communion require the Bishop to evaluate the structures of participation envisaged by canon law. These structures guarantee a dimension of communion in the pastoral governance of the Bishop, insofar as they generate a kind of reciprocal interplay between what a Bishop is called to contribute to the good of the diocese through exercising his personal responsibility, and the contribution made through the collaboration of all the faithful" (Ibid., n. 165).

³⁹ Thereby it refers to *John Paul II.*, Post-Synodal Apostolic Exhortation "Pastores Gregis" (16.10.2003), in: AAS 96 (2004) 825-924, n. 10.

⁴⁰ Cf. Brechtel, *Möglichkeiten* (Anm. 10), 213-214.

⁴¹ Cf. Hallermann, *Ratlos* (Anm. 26), 34.

⁴² Cf. Ratzinger, *Joseph*, *Demokratisierung der Kirche?*, in: Ratzinger, Joseph / Maier, Hans (Hg.), *Demokratie in der Kirche. Möglichkeiten und Grenzen* (= Topos plus Taschenbücher 348), Limburg-Kevelaer 2000, 7-46, 43.

⁴³ Cf. Hallermann, *Ratlos* (Anm. 26), 33.

⁴⁴ "Insofern ist Beratung in der Kirche als Teilhabe und Mitverantwortung am Leitungshandeln der Oberen zu verstehen und als effektiver Beitrag von Gläubigen dazu, dass die Kirche ihre Sendung in der Welt verwirklichen kann" (Ibid., 57).

regiminis. This represents a true *cooperatio* in the sense of c. 129 § 2. According to ApSuc 165, this result can also be transferred to other consultation bodies or forms of consultation.

4 Current Developments – Exemplified by the XVI Ordinary General Assembly of the Synod of the Bishops (2021-2024)

A recent example for the value and development of the consultation in the Church is given by the current Ordinary Assembly of the Synod of Bishops.⁴⁵ Here, one can distinguish between two aspects:

The first aspect is that the Synod expresses the request for a strengthening of consultative participation.

4.1 The Synod's Request to Increase Consultative Participation

The *Instrumentum laboris*⁴⁶ for the first session of the Synod, resp. the attached “Worksheets for the synodal assembly”⁴⁷, emphasises the value of consultative participation in several respects.⁴⁸ Above all, it focusses on the question of forms and the possibilities in which it can be strengthened. It refers, for example, as expressed in the Continental Assemblies, to the „desire for shared decision-making processes capable of integrating the contribution of the whole People of God, particularly those with relevant expertise, as well as involving those who for various reasons remain on the margins of community life”⁴⁹. The InstrL further recognises, that „[t]his desire is often expressed together with dissatisfaction with forms of exercising authority in which decisions are taken without consultation”⁵⁰. In contrast to such forms of exercising authority, it underlines a perspective of community discernment.⁵¹ The adaptation of this perspective „challenges the Church at all levels and in all its organisational forms.”⁵² It is, thus, not just a matter for parishes or certain local communities, but for the Church as a whole. Therefore, B.3.2 poses a number of questions intended to stimulate reflection on this issue, how

⁴⁵ For the institution of the Synod of Bishops see e.g. *Arrieta*, Governance Structures (Anm. 14), 123-132; *Finzel, Helmut*, Die Bischofssynode. Zwischen päpstlichem Primat und bischöflicher Kollegialität (= Dissertationen. Kanonistische Reihe 27), St. Ottilien 2016; *Glaubitz, Elfriede*, Der christliche Laie. Vergleichende Untersuchung vom Zweiten Vatikanischen Konzil zur Bischofssynode 1987 (= Forschungen zur Kirchenrechtswissenschaft 20), Würzburg 1995, 172-175.

⁴⁶ *General Secretariat of the Synod of the Bishops*, Instrumentum Laboris for the First Session of the XVI. Ordinary General Assembly of the Synod of Bishops, at: https://www.synod.va/content/dam/synod/common/phases/universal-stage/il/ENG_INSTRUMENTUM-LABORIS.pdf (Zugriff am: 13.06.2024). Abbreviated in the following with “InstrL”.

Although the relevance of InstrL should not be overestimated, it, nevertheless, is of significance for the course of the Synod: It is “articulating some of the priorities that emerged from listening to the People of God, but avoids presenting them as assertions or stances. Instead, it expresses them as questions addressed to the Synodal Assembly. This body will have the task of discerning the concrete steps which enable the continued growth of a synodal Church, steps that it will then submit to the Holy Father” (InstrL 10).

⁴⁷ “The Worksheets are designed as a working tool to address the three priority issues set out in Section B during the October 2023 Assembly” (InstrL, Introduction to the Worksheets). Although they do not belong to the text of the *Instrumentum Laboris* in a strict sense, they are very closely associated with it as a deepening and extension of the same. Therefore, especially because they are attached to the text of the InstrL as an appendix, they are, for a better readability, in the following, seen as part of the InstrL in a broader sense.

⁴⁸ For a more detailed illustration of the impulses of the *Instrumentum laboris* with regard to consultative participation in the power of governance see: *Brechtel*, Möglichkeiten (Anm. 10), 345-358.

⁴⁹ InstrL B.3.2.a.

⁵⁰ Ibid.

⁵¹ See InstrL 58, 59, B.3.2.d, B.3.2.e, B.3.2.f, B.3.2.2, B.3.2.3, B.3.2.7, B.3.3.a, B.3.3.2.

⁵² InstrL B.3.2.e.

to „imagine decision-making processes that are more participatory, which give space for listening and community discernment supported by authority understood as a service of unity“⁵³. The value of consultative bodies is also expressed by emphasising the need to reaffirm and consolidate the role of existing participatory bodies.⁵⁴ Another important question posed by the document with regard to the consultation bodies, is how the ecclesiastical authority should deal with the situation when, for certain reasons, it cannot or does not want to follow the wise advice of these bodies.⁵⁵ This question is important because it concerns the balance between the freedom of the shepherd, on the one hand, and the concrete influence of the flock (through counselling), on the other.

But now the question arises: did these impulses actually impact the first session of the XVI. Assembly of the Synod of Bishops? Were these questions actually discussed? An answer to this gives us the *Synthesis Report*⁵⁶, which was approved by the members at the end of the first session and which provides information on the topics discussed.

And indeed, it also addresses these aspects. Primarily, the report repeatedly emphasises the need for dialogue in the Church,⁵⁷ which can ultimately also be related to the aspect of consultation. It shows that – in conformity with the InstrL – participation in general was a significant topic during the session.⁵⁸ With regard to the governance of the bishop, for example, it is stated: „This ministry is realized in a synodal manner when governance is accompanied by co-responsibility“⁵⁹. The SynthR highlights the councils as one excellent form of enabling the participation of all in the governance of the bishop. It states, that „through the contribution of `some´“, „the participation of `all´ the faithful“⁶⁰ is expressed. As a consequence, the SynthR notes the Assembly's request, „to make the Episcopal Council [...], the Diocesan Pastoral Council and the Eparchial Pastoral Council [...] mandatory“⁶¹. This shows the great value that is seen in these councils. Furthermore, it reports on calls, „to make the diocesan bodies exercising co-responsibility more operational, including in legal terms.“⁶²

Finally, the report devotes an entire chapter (chapter 18) to the structures for participation. Here, it states, for instance, that „co-responsibility of all in mission must be the criterion underlying the structuring of Christian communities and the entire local church“⁶³ or that „[p]articipatory bodies represent the first instance in which to experience the accountability of those who exercise responsibility.“⁶⁴

53 InstrL B.3.2.

54 See InstrL B.3.3.b.

55 See InstrL B.2.5.4.

56 *General Secretariat of the Synod of the Bishops*, Synthesis Report “A Synodal Church in Mission” of the First Session of the XVI. Ordinary General Assembly of the Synod of Bishops, at: <https://www.synod.va/content/dam/synod/assembly/synthesis/english/2023.10.28-ENG-Synthesis-Report.pdf> (Zugriff am: 13.06.2024). Abbreviated in the following with “SynthR”.

57 See SynthR, Introduction; SynthR 1.h, 2.e, 5.h.

58 The Introduction of the SynthR states: „The work of this Session was carried out in accordance with the ‘roadmap’ laid down in the Instrumentum laboris, by means of which the Assembly was able to reflect on the characteristic signs of a synodal Church and the dynamics of communion, mission and participation that it contains“ (SynthR, Introduction).

59 SynthR 12.b.

60 SynthR 12.c.

61 SynthR 12.k

62 Ibid.

63 SynthR 18.b.

64 SynthR 18.i.

However, the current Synod of Bishops not only emphasises the value of consultation and provides impulses for the future in this regard but should itself be seen as an impetus.

4.2 The Synod of Bishops Itself as an Example of Promoting Consultative Participation

4.2.1 Regarding the Character of the Synod of Bishops

The Synod of Bishops itself has no power of governance, but rather a fundamentally consultative function (cf. c. 343; Nr. 3 *Episcopalis Communio*⁶⁵).⁶⁶ However, its deliberations, impulses, and final documents have an influence on the exercise of papal power of governance, for example in legislation. Examples of this would be the Pope's explicit references to the considerations of the Synod of Bishops in the modification of c. 230 § 1 by the Motu Proprio *Spiritus Domini*⁶⁷ or in the Motu Proprio *Mitis Iudex Dominus Iesus*⁶⁸. The fact that the deliberations of the Synod of Bishops can have an immediate – or at least mediate – impact on papal legislation is also shown by the CIC/1983 itself, insofar as the Synod of Bishops had approved in October 1967 the reform principles developed by a study group, which served as guidelines for the Codex reform process.⁶⁹ Even these examples show that what John Paul II stated in 2003 is true: “The fact that the Synod ordinarily has only a consultative role does not diminish its importance” (Pastores Gregis 58).

⁶⁵ Francis, Apostolic Constitution „*Episcopalis Communio*“ (15.09.2018), in: AAS 110 (2018) 1359-1378. Abbreviated in the following with “EC”.

⁶⁶ Of course, the possibility normed in c. 343 and Art. 18 EC must be observed here, according to which the pope can confer a *potestas deliberativa* on the Synod of Bishops in certain cases. In those cases, the Synod itself can decide on the matters to be negotiated, whereby it is up to the pope to bring these decisions (*decisiones*) into legal force (cf. c. 343; Art. 18 § 2 EC). While c. 343 only speaks here of “*ratas habere*”, Art. 18 EC now also expressly attributes the promulgation to the pope. This indicates that even with this possibility, the final decision lies in the hands of the pope and that he is not obliged to actually implement the decisions of the Synod of Bishops. Ultimately, the possibility of delegating *potestas deliberativa* therefore essentially does not change the consultative or cooperative nature of the Synod of Bishops. Cf. Brechtel, Möglichkeiten (Anm. 10), 218-220; Bier, Georg, c. 343, Rn. 6, in: MKCIC (Stand: Januar 2020); Mörsdorf, Klaus, Synodus Episcoporum, in: AfkKR 135 (1966) 131-136, 132.

⁶⁷ In the preface to the Motu Proprio, the Pope states: “*Quaedam Synodi Episcoporum sessiones necessitatem attulerunt altius argumentum de doctrina perscrutandi, ita ut ipsa naturae responderent horum charismatum et temporum necessitatibus, cum aptum subsidium tribueretur evangelizandi officio, quod ad ecclesiam communitatem attinet. His suffragationibus receptis, superioribus his annis ad evolutam doctrinam perventum est quae collustravit quomodo certa quaedam ministeria ab Ecclesia instituta ut fundamentum haberent communem condicionem baptizati et regalem sacerdotium in Baptismi Sacramento receptum*” (Franciscus: Motu Proprio „*Spiritus Domini*“ (10.01.2021), in: OR 161,7 (11.01.2021) 10).

⁶⁸ No. 48 of the Relatio Synodi says: “A great number of synod fathers emphasized the need to make the procedure in cases of nullity more accessible and less time-consuming, and, if possible, at no expense. They proposed, among others, the dispensation of the requirement of second instance for confirmation sentences; the possibility of establishing an administrative means under the jurisdiction of the diocesan bishop; and a simple process to be used in cases where nullity is clearly evident” (*General Secretariat of the Synod of the Bishops, Relatio Synodi of the third extraordinary general assembly of the synod of the bishops “The pastoral challenges of the family in the context of evangelization”* (18.10.2014), in: AAS 106 (2014) 887-908, n. 48). The fact that this vote was taken into account by the reform of the matrimonial process law by *Mitis Iudex Dominus Iesus* is not only *materialiter* clear from the reforms themselves, but is expressly emphasised by the pope, who writes in the preface to the Motu Proprio: “All of this also reflects the wishes of the majority of our brother bishops gathered at the recent extraordinary synod who were asking for a more streamlined and readily accessible judicial process. Agreeing wholeheartedly with their wishes, we have decided to publish these provisions that favor not the nullity of marriages, but the speed of processes as well as the simplicity due them” (Francis, Motu Proprio “*Mitis Iudex Dominus Iesus*” (15.08.2015), in: AAS 107 (2015) 958-970).

⁶⁹ Cf. Preface to the Code of Canon Law, in: AAS 75,2 (1983) XVII-XXX, XXI and XXIII; See also for documentation: *Synodus Episcoporum, Documentum, quod circa recognitionem C.I.C. in Primo Coetu Generali Synodi Episcoporum a die 30 septembris ad diem 4 octobris 1967 discussum est, necon Relatio et Responsiones Cardinalis Periclis Felici, Relatoris, et Manifestatio sententiae ex parte Patrum Synodalia*, in: Comm 1 (1969) 77-100.

4.2.2 The Synod of Bishops as an “Instrument for Listening to the People of God”

The Apostolic Constitution, *Episcopalis communio*, from 2018 now expresses that “the Synod of Bishops must increasingly become a privileged instrument for listening to the People of God” (EC 6). *Episcopalis communio*, thus, shows how important it is for the fruitful success of an assembly of the synod of bishops, that the bishops speak for the part of the people of God entrusted to them. But they can only do this if they actually listen to it. If the bishops are aware of this, the synod is episcopal in its constitution, but at the same time deeply connected to the entire Church.⁷⁰ These fundamental principles then find a concrete realisation in the normative part of the Apostolic Constitution, when the Articles 5-10 deal with the preparatory phase of the synod assembly. A specific example of how this “listening to the people of God” can be realised is provided by the “Synodal Process” in preparation for the XVI. General Assembly of the Synod of Bishops: there was a separate phase in the Local Churches in which the entire people of God were called upon to become involved in the process and which consequently became a place of listening and consultative participation as well.⁷¹

4.2.3 Lay People as Members of the Synod of Bishops

However, that is not all: since *Episcopalis Communio*, it is now even possible for laypeople to take part in the synodal assemblies as participants. The legal basis for this is Art. 2 § 2 EC. Although laypeople are not explicitly mentioned here, the formulation of § 2 as a “residual group” in relation to § 1 and the fact that the Apostolic Constitution does not differentiate further in this respect, indicate that this possibility really refers to all “who are not bishops” – i.e. also laypeople. This observation is confirmed by Art. 2 5° of the current “Instruction on the celebration of Synodal Assemblies and the activity of the General Secretariat of the Synod of Bishops”.⁷² However, there can no longer be any doubt, since laypeople were also nominated as participants in the XVI. Ordinary General Assembly of the Synod of Bishops.⁷³

However, Art. 2 EC still allows doubts whether the persons appointed in accordance with Art. 2 § 2 EC are actually members of the Synod Assembly, who also have the right to vote in accordance with Art. 16 § 3 EC. This doubt is based on the fact that Art. 2 EC is about the members and other participants of the synodal assembly („Membri e altri partecipanti alle Assemblee del Sinodo”). While now, in Art. 2 § 1 EC, only the members are mentioned, § 2 addresses a non-bishop “residual group” and refers to them as “altri”. Because Article 2 § 3 EC than again refers to the “Membri e gli altri partecipanti”, the assumption arises that the persons of the group mentioned in Article 2 § 2 EC must be understood as these “altri partecipanti”. But according to Art. 17 § 3 EC, only the “membri” are explicitly entitled to vote. The current “Instruction on the celebration of Synodal Assemblies and the activity of the General Secretariat of the Synod of

⁷⁰ Cf. Brechtel, *Möglichkeiten* (Anm. 10), 223.

⁷¹ See: *Secretary General of the Synod of Bishops*, Presentation of the Programme for the celebration of the upcoming Synod approved by Pope Francis during his audience with Cardinal Secretary General of the Synod of Bishops, 24 April 2021 (21.05.2021), at: https://www.synod.va/content/dam/synod/document/common/infographic_synodal_process/SYNODAL-PROCESS-14-05_ENGLISH.pdf (Zugriff am: 04.07.2024), n. 5.2.

⁷² While Art. 2 lists the “Membri dell’Assemblea Generale Ordinaria”, Art. 2 5° mentions “alcuni altri nominati dal Romano Pontefice” (*General Secretariat of the Synod of the Bishops*, Instruction on the celebration of Synodal Assemblies and the activity of the General Secretariat of the Synod of Bishops „Al Romano Pontefice” (01.08.2018), in: Comm 50 (2018) 441-459)

⁷³ See: *Sala Stampa Della Santa Sede*, XVI Assemblea Generale Ordinaria del Sinodo dei Vescovi - Elenco dei partecipanti secondo il titolo di partecipazione (Bollettino of 21.09.2023), at: <https://press.vatican.va/content/salastampa/it/bollettino/pubblico/2023/09/21/0650/01439.html> (Zugriff am: 04.07.2024).

Bishops” resolves these doubts by describing all of the persons listed in Art. 2, and, thus, also the "alcuni altri nominati dal Romano Pontefice" mentioned in Art. 2 5°, as "Membri dell'Assemblea Generale Ordinaria". The practice of the current Synod points in the same direction. Article 2 of the "Regulations for the First Session of the XVI. Assembly"⁷⁴ on the "Members of the Assembly" states this in § 3: "By the will of the Roman Pontiff, the Members elected in accordance with the current legislation are joined by seventy other Faithful, not vested with the episcopal *munus*, men and women". The categorisation in the aforementioned list of participants also supports this assumption.⁷⁵

With this possibility for lay people to become members of a synodal assembly of the Synod of Bishops, the legislator has, thus, created a further milestone in favour of a greater participation of lay people in the exercise of ecclesiastical power of governance – here: consultative participation in the primatial power of governance of the Pope –⁷⁶ and has, thus, shown in this way that consultative participation is indeed of great importance.

4.2.4 Other Forms of Participation in the Synod of Bishops

In view of this significant innovation through *Episcopalis communio*, however, it should not be ignored that it was previously already possible for laypeople to participate in the Synod of Bishops and, thus, share in its consultative function – albeit not as members.

So laypeople could be appointed to take part in the synod as *Adiutores Secretarii Specialis* (cf. Art. 7 °1 Inter Concilii⁷⁷). Although they did not have the right to vote as such, they were, nevertheless, actively involved in the proceedings of the synod. For the first time, two laypeople took part in such a function at the seventh ordinary General Assembly of the Synod of Bishops in 1987.⁷⁸

Nonetheless, even with regard to the persons participating without voting rights, *Episcopalis communio* brought some changes. One is that the Apostolic Constitution established a new group, the so-called "Invitati Speciales", "who are recognized as particular authorities on the theme of the Synod Assembly" (Art. 12 § 2 EC). Furthermore, it now also makes it possible, that „Auditors, Fraternal Delegates and Special Guests may also be invited to speak on the theme of the Synod Assembly“ (Art. 15 § 3), whereby a further possibility is given for laypeople to actively participate in the consultative function of the Synod of Bishops.

It should also be mentioned that *Episcopalis communio*, with regard to the reception and implementation of the conclusions of the Synod Assembly in the Local Church, states that the diocesan bishop should take advantage of the help of his participatory bodies (cf. Art. 19 § 1 EC). Such a participatory body could be the diocesan pastoral council. To the extent that, depending on the subject matter of the conclusions, this could also involve acts of *potestas regiminis*, this also shows a consultative participation in the ecclesiastical power of governance.

⁷⁴ *General Secretariat of the Synod of the Bishops*, Regulations for the First Session of the XVI. Assembly, Vatican City 2023, at: <https://www.synod.va/content/dam/synod/common/resources/documents/XVI-AGO-2023---REGOLAMENTO-ENG.pdf> (Zugriff am: 13.06.2024).

⁷⁵ *Sala Stampa Della Santa Sede*, Elenco dei partecipanti (Anm. 73).

⁷⁶ Cf. Brechtel, *Möglichkeiten* (Anm. 10), 225-226.

⁷⁷ *Benedict XVI*, *Ordo „Inter concilii“* (29.09.2006), in: AAS 98 (2006) 755-779.

⁷⁸ Cf. *Glaubitz*, *Laie* (Anm. 45), 212; *Caprile, Giovanni*, *Il Sinodo Dei Vescovi. Settima Assemblea Generale Ordinaria*, Roma 1989, 71.

5 Conclusion

Through such impulses, *Episcopalis communio* and the current Assembly of the Synod of Bishops are showing that the consultative participation of the laity in the power of governance is, on the one hand, an excellent instrument for the active participation of the people of God in the decisions of the pastors. On the other hand, the Synod shows that questions are currently arising in the universal Church in terms of how it can be further developed and consolidated.

Therefore, the current Synod is a true example of what this article wanted to show: the consultative activities of lay people are a true participation of these in the ecclesiastical power of governance and as such, they have a very high value, which never should be underestimated. This becomes especially apparent in the fact that there are currently some developments.