

**THE RIGHT TO ADMINISTRATIVE JUSTICE IN RELIGIOUS INSTITUTES**

by  
Justin E.A. GLYN SJ

Research Seminar – DCA6395  
Prof. John HUELS

Faculty of Canon Law  
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<i>AAS</i>	<i>Acta Apostolicae Sedis, Commentarium Officiale</i>
c.	canon (unless otherwise stated, references are to the 1983 Code, <i>Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus fontium annotatione et indice analytico-alphabetico auctus, Libreria editrice Vaticana, 1989, English translation Code of Canon Law: Latin-English Edition, New English Translation, prepared under the auspices of the CANON LAW SOCIETY OF AMERICA, Washington, DC, Canon Law Society of America, 1999)</i>
cc.	canons (unless otherwise stated, references are to the 1983 Code)
<i>CCEO</i>	<i>Codex canonum Ecclesiarum orientalium, auctoritate Ioannis Pauli PP.II promulgatus, fontium annotatione auctus</i>
<i>CLSBI Comm</i>	G. SHEEHY et al. (eds.), <i>The Canon Law: Letter &amp; Spirit, A Practical Guide to the Code of Canon Law</i>
<i>CLSA Comm2</i>	BEAL, J.P., J.A. CORIDEN, and T.J. GREEN (eds.), <i>New Commentary on the Code of Canon Law</i>
<i>Exegetical Comm.</i>	MARZOA, M., J. MIRAS, and R. RODRÍGUEZ-OCAÑA (eds.) and E. CAPARROS (gen ed. of English translation), <i>Exegetical Commentary on the Code of Canon Law</i>

## GENERAL INTRODUCTION

The vow of obedience, as one of the evangelical counsels, is a hallmark of religious life in general and religious institutes in particular.<sup>1</sup> Despite their vowed state, however, members of religious institutes remain members of the general body of the Christian faithful and, as such, can “legitimately vindicate the rights which they possess in the Church in the competent ecclesiastical forum according to the precepts of the law applied with equity” (c.221 §1). Indeed, canon law has much to say about the relationship between superior and subject in an ecclesial context and the way in which power is to be exercised. It follows that, although members of religious institutes are parties to hierarchical relationships, acts of superiors cannot be arbitrary but must respect rights on the part of their subjects which are recognised and governed by law.

One area where issues of administrative justice may arise has undoubtedly been much in the public mind of late. This is in relation to administrative penalties or other disciplinary measures, the ongoing revelations of sexual abuse within the Church and the rights which victims, accused and religious institutes have vis a vis each other. Like an iceberg, though, much administrative decision making passes unseen beneath this very public sphere, especially where it is not explicitly penal or disciplinary in character. While not matters of punishment or discipline *per se*, acts such as admitting a novice, allowing him or her subsequently to proceed to vows, moving a religious from one house to another, advancing him or her through the stages of formation, applying a member to a specific apostolate or excommunication (among many others) just as surely involve administrative actions and concomitant rights and may have significant impacts on individuals.

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<sup>1</sup> *Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Libreria editrice Vaticana, 1989, English translation Code of Canon Law: Latin-English Edition, New English Translation, prepared under the auspices of the CANON LAW SOCIETY OF AMERICA, Washington, DC, Canon Law Society of America, 1999, canons 573 §1 and 607 §2. All references to the canons of the 1983 Code (save those beginning a footnote) will be styled “c.” for canon and “cc.” for canons, followed by the canon number(s); *Codex canonum Ecclesiarum orientalium, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione auctus*, Libreria editrice Vaticana, 1995, English translation Code of Canons of the Eastern Churches: Latin-English Edition, New English Translation, prepared under the auspices of the CANON LAW SOCIETY OF AMERICA, Washington, DC, Canon Law Society of America, 2001, canon 410. All references to the canons of the 1990 Code will be styled “CCEO, c.” for canon and “CCEO, cc.” for canons, followed by the canon number(s).

To date there have been few, if any, studies considering the right to administrative justice in general to religious institutes (although there are several discussions relating to particular areas, especially penal law). Superiors have therefore had relatively little guidance on the proper bases of, and formal requirements for, administrative action in the context of a religious institute and the avenues for redress open to a member who feels him or herself to be wronged by a superior's act. This thesis attempts to remedy this lacuna by considering the basic principles of just administrative action in religious institutes: the nature of the authority of superiors over their subjects, the nature and classification of administrative acts, their application to action in religious institutes and the remedies available for justice denied. While I would hope that it could serve as something of a *vade mecum* for superiors, given its length, it will (of necessity) be an outline only.

It will proceed in three chapters. Chapter 1 considers the nature and classification of administrative acts in canon law, the executive authority of superiors in religious institutes and the provisions of the law safeguarding fair procedures including the content of subjects' general rights to administrative justice. Chapter 2 uses these conclusions to attempt to formulate general principles for just administrative action. It then considers exclusions of members from permanent final vows and reassignment within the institutes as paradigmatic applications of these principles. Chapter 3 briefly considers the remedies available to persons who consider themselves aggrieved by a religious superior's administrative act and finally offers suggestions as to areas for future studies which might arise from this thesis. While my focus will mostly be the Latin Church, I will note features of Eastern canon law and practice where these are significantly different.

## CHAPTER 1 – ADMINISTRATIVE ACTS AND RIGHTS IN GENERAL

This chapter aims to chart the scope of administrative action relevant to religious institutes. It begins by considering the nature and classification of administrative acts and then considers the nature of executive authority which religious superiors possess. Finally, it discusses the major legal constraints on superiors' administrative action, focusing on general obligations of a superior and rights of the subject in relation to the placing of an act. Specific rights to challenge an administrative act once it has been placed will be dealt with in Chapter 3.

### 1.1 Classification of Administrative Acts

While the actions of superiors generally fall into one category or another of administrative act (considered below), such acts are not placed in a vacuum. For legality, and occasionally for validity, they may require preliminary steps to be taken by the authority in order to safeguard the rights of those affected or to ensure that the act is appropriate. John Huels therefore uses the term “administrative activity” to cover both administrative acts themselves and the enquiries or other actions which precede and surround them.<sup>2</sup> This term is attractive as it includes and subsumes the general process-oriented norms in cc. 50 and 51 which William Daniel describes as “the general administrative procedure”.<sup>3</sup> Vital though this procedure is, there are many other safeguards on the justice of administrative action, including, for instance, the warning or consultation of affected parties, seeking advice from consultative bodies or enquiries as to whether an act is appropriate.<sup>4</sup> This thesis will consider general and specific rules governing administrative activity surrounding an act when it discusses legal constraints on superiors and rules relating to particular actions.

Administrative acts themselves may be described as juridic acts placed unilaterally by virtue of the executive power of governance, *in nomine Ecclesiae* (in the Church's name) and on behalf of a public juridic person.<sup>5</sup> They may sometimes be similar in form to laws, but their hallmark is their subordinate,

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<sup>2</sup> J.M. HUELS, “Administrative Acts and Activity in Canon Law,” in *The Canonist*, 6 (2015), 65.

<sup>3</sup> W.L. DANIEL, *The Art of Good Governance: A Guide to the Administrative Procedure for Just Decision-Making in the Catholic Church*, Gratianus Collection, Montréal, Wilson & Lafleur Limitée, 2015, 101-131.

<sup>4</sup> E.g., cc. 50, 127, 645 §2, 689 §1, 970, 1222; HUELS, “Administrative Acts and Activity in Canon Law,” 70-78.

<sup>5</sup> HUELS, “Administrative Acts and Activity in Canon Law,” 66; DANIEL, *The Art of Good Governance*, 27.

accessory nature.<sup>6</sup> In particular, while administrative acts bind those to whom they are directed, they are not only subordinate to legislation but also (and unlike legislation) subject to judicial and other forms of challenge and control.<sup>7</sup>

Administrative acts may be general i.e. the promulgation of decrees aimed at a broad audience. The 1983 Code makes a broad distinction based on who that audience is. If it consists of those applying a given law, they are instructions. If it consists of those subject to such a law, they are general executory decrees.<sup>8</sup> Instructions are administrative norms placed by those overseeing the application of a law and directed to its subordinate administrators: general executory decrees may be placed by major superiors and others who do not have power to make laws provided they do not, themselves, contravene a law. The history and practice of drafting has, however, seen both types combined in a single document, sometimes together with other general decrees which cannot be directly linked to legislative acts. This fact has led Huels to suggest a third category of general decree – namely independent general administrative norms. These, like other forms of general decrees, are subject to legislation and cannot be placed by one lacking power to do so: they do not, however, need to be directly linked to any specific empowering legislation. General decrees, of whatever type, which contravene a law have no effect.<sup>9</sup>

Of more everyday relevance to religious life, however, are administrative acts aimed at particular individuals, known as singular administrative acts (c. 34). It is upon these which this paper will focus as they are easily the most common administrative acts in the Church. Most decisions taken by religious superiors (including such important matters as admitting novices to vows, transfers and excommunications) fall into this category.

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<sup>6</sup> F. URRUTIA, “Administrative Power in the Church according to the Code of Canon Law,” in *Studia canonica*, 20 (1986), 270; M.R. MOODIE, “The Administrator and the Law: Authority and Its Exercise in the Code,” in *The Jurist*, 46 (1986), 48-50.

<sup>7</sup> W.L. DANIEL, “The Singular Administrative Act in Canon Law,” in *Studia canonica*, 50 (2016), 201.

<sup>8</sup> Canons 31, 32 and 34. There is no equivalent of these canons in the Eastern Code.

<sup>9</sup> Canon 33; HUELS, “A Theory of Juridical Documents Based on Canons 29-34,” in *Studia canonica*, 32 (1998), 337-370; HUELS, “Administrative Acts and Activity in Canon Law,” 66. Confusingly, “general decree” is used for both legislative and administrative acts, see PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF CANON LAW, reply 5 July 1985, in *Acta Apostolicae Sedis*, 77 (1985), 771. All further references to this collection will be styled “AAS”.

All singular administrative acts are governed by the general norms contained in cc. 35-47 or *CCEO* cc. 1510-1516, as applicable.<sup>10</sup> Among such acts, the principal division which both the Codes recognise is between rescripts (and analogous oral actions) by which a favour is granted on the one hand and singular administrative decrees (which impose a penalty or precept or make some other kind of provision or decision) on the other.<sup>11</sup> Daniel argues that the current Codes' distinctions are too rigid: he proposes a more nuanced division between decisions, provisions, precepts and rescripts.<sup>12</sup> While it is true, as Szabolcs Szuromi points out, that the current law reflects a broad and uneasy grouping of a number of very ancient phenomena,<sup>13</sup> challenging this grouping is beyond the scope of this paper (although difficulties in application will be pointed out as they arise).

Turning first to favourable acts, these may be favours *stricto sensu*, called rescripts if in writing. They include favours given to specific persons. Favours include, *inter alia*, privileges, which are usually perpetual, (c. 76; *CCEO* c. 1531) and relaxation of ecclesiastical laws in particular cases (dispensations, c. 85, *CCEO* c. 1536). Aside from a rescript, a favourable act may be the subject of decree (in which case, it is known as a provision). The key distinction between rescripts and provisions is that rescripts primarily benefit the recipient alone (and thus need not be used by the recipient in the absence of some particular canonical obligation), while a provision is intended principally for the welfare of the community at large (leaving a beneficiary no choice in whether to use it or not).<sup>14</sup> So, in the context of administrative action in a religious institute, a superior's missioning of a man to a given community would be a rescript (and could be declined) if the intention were to accommodate his request for a sabbatical. It would be a decree making

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<sup>10</sup> V.M. MENEZES, "Singular Acts of Executive Power: An Examination of Title IV of Book I of the 1983 Code," in V.G. D'SOUZA (ed.), *In the Service of Truth and Justice: Festschrift in Honour of Prof. Augustine Mendonça, Professor Emeritus*, Bangalore, St Peter's Pontifical Institute, 2008, 390.

<sup>11</sup> HUELS, "Administrative Acts and Activity in Canon Law," 66; DANIEL, "The Singular Administrative Act in Canon Law," 202. cc. 48, 49 and 59; *CCEO* c. 1510.

<sup>12</sup> DANIEL, "The Singular Administrative Act in Canon Law," 246-247.

<sup>13</sup> S.A. SZUROMI, "Canon Law Historical Background of Categories of the Canonical Singular Administrative Acts," in *Studia canonica*, 49 (2015), 643-660. See also J.M. HUELS, "Determining the Correct Rules for Ambiguous Administrative Acts," in *Studia canonica*, 37 (2003), 5-54.

<sup>14</sup> *CIC* 71; MENEZES, "Singular Acts of Executive Power," 404; DANIEL, "The Singular Administrative Act in Canon Law," 193-194, HUELS, "Determining the Correct Rules for Ambiguous Administrative Acts," 35, 38-39; DANIEL, *The Art of Good Governance*, 28.

a provision (and could not be declined) if the intent were to provide a religious house with a superior in case of need. Issues of administrative justice are less likely to arise from the grant of rescripts than provisions. That said, members are equal within the Church and in their standing before the law, and the grant of a favour therefore cannot be an arbitrary act. Accordingly, the *denial* of a rescript (which confers no benefit on an individual but does decide a particular question) would logically be a decree rendering a decision (a category discussed further below) and thus open to challenge in the same way as other such decrees.<sup>15</sup>

In keeping with tradition, c. 59 defines a rescript as a favour granted in writing in response to a petition. Canon 63, however, envisages the grant of a rescript *motu proprio* while *CCEO* 1510 §2 3° does not require a petition for a rescript, leading Daniels to dispute the essentiality of a petition: at the very least, however, the presence of a petition would point to the act in question being a rescript (if the principal beneficiary could not be determined through the actor's intention alone).<sup>16</sup> A particular category of favourable act is the *licentia*. While undefined in the Latin Code, it would seem to be a permission or authorisation granted for the lawful performance of an act, although in a few instances, it is required for validity as well.<sup>17</sup> Important examples are the superior's *licentia* for the valid alienation of a religious institute's property (c. 638 §3) or the Holy See's *licentia* for transfer between religious and secular institutes (c. 684 §5). Although it has a narrowly defined purpose, under the Latin Code at least, a *licentia* may in fact be a rescript or a provision.<sup>18</sup> In either case, however, *licentiae* are subject to the rules on rescripts (c. 59 §2).

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<sup>15</sup> DANIEL, "The Singular Administrative Act in Canon Law," 230-231; cc. 208, 221; *CCEO* cc. 11, 24.

<sup>16</sup> HUELS, "Determining the Correct Rules for Ambiguous Administrative Acts," 13-21; DANIEL, "The Singular Administrative Act in Canon Law," 194-196; G. SHEEHY et al. (eds.), *The Canon Law: Letter & Spirit, A Practical Guide to the Code of Canon Law*, prepared by the Canon Law Society of Great Britain and Ireland in association with the Canadian Canon Law Society, Collegeville, MN, The Liturgical Press, 1995, 37. All references to this commentary will henceforth be styled "*CLSBI Comm*".

<sup>17</sup> J.M. HUELS, "Permissions, Authorizations and Faculties in Canon Law," in *Studia canonica*, 36 (2002), 44.

<sup>18</sup> *CCEO* c. 1510, however, classifies the *licentia* as one species of rescript. For more on its contested nature and history, see J.M. HUELS, "Permissions, Authorizations and Faculties in Canon Law," in *Studia canonica*, 36 (2002), 25-58; MENEZES, "Singular Acts of Executive Power," 419-423.

In contrast to favourable acts, coercive measures may only be taken by decree. It is primarily in relation to such decrees that canon law has developed safeguards (discussed later in this chapter) and recourse (discussed in chapter 3) to protect against abuse. Coercive decrees are either decisions or precepts. Decisions are unilateral executive judgments made relating to a particular set of facts,<sup>19</sup> such as whether to dismiss a novice or vowed member,<sup>20</sup> proceed against a member in relation to a delict or other infraction<sup>21</sup> or remove a person from office against their will.<sup>22</sup> While all coercive measures must be taken by decree, not all decision-decrees are coercive or unfavourable – the (favourable or unfavourable) resolution of a complaint submitted for hierarchical recourse (discussed in ch. 3) is itself an administrative decision. Precepts, by contrast, are (formal or oral) direct commands to a person to do or refrain from something. They are called penal (if a penalty is threatened for breach) or simple (if not).<sup>23</sup> As Michael Moodie points out, the Latin Code, by describing precepts as decrees, makes the concept of “decree” much less clear conceptually than does the Eastern Code (which includes only provisions and decisions within its scope): the Eastern classification allows a decree to be more clearly understood as resolving a specific issue or supplying a particular need within the *community*.<sup>24</sup>

## 1.2 Authority of Religious Superiors to Place Administrative Acts

Having established the broad categories into which an administrative act may fall, it is important to determine what authority religious superiors have to place such acts. Clearly some form of authority is exercised by religious superiors, illustrated most graphically by the vow of obedience. Its exact nature, however, is the subject of some debate. Bishops, who exercise certain powers with regard to institutes of

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<sup>19</sup> Canon 48; *CCEO* c. 1510 §2 1°; HUELS, “Administrative Acts and Activity in Canon Law,” 69; DANIEL, “The Singular Administrative Act in Canon Law,” 202-210.

<sup>20</sup> Canons 653 §1, 696; *CCEO* cc. 461, 500.

<sup>21</sup> Canon 1720; *CCEO* c. 1486. For a detailed analysis of non-penal disciplinary proceedings in religious institutes, see M.F. ROSINSKI, *Due Process to be Followed in the Administration of Discipline in Religious Institutes according to the Code of Canon Law*, JCD thesis, St. Paul University, Ottawa, 2016, 137-223.

<sup>22</sup> Canon 190; *CCEO* c. 972; DANIEL, “The Singular Administrative Act in Canon Law,” 210.

<sup>23</sup> Canons 48; 59 §2; 1319; *CCEO* cc. 1406, 1510 §2 1°, 2°, c. 1513 §5; DANIEL, “The Singular Administrative Act in Canon Law,” 222-228; HUELS, “Administrative Acts and Activity in Canon Law,” 69.

<sup>24</sup> M.R. MOODIE, “Singular Administrative Acts,” in BEAL, J.P., J.A. CORIDEN, and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, commissioned by the CANON LAW SOCIETY OF AMERICA, New York and Mahwah, NJ, Paulist Press, 2000, 110. All references to this commentary will henceforth be styled “*CLSA Comm2*”.

diocesan right, and major superiors of clerical religious institutes of pontifical right, both being Ordinaries, are expressly said by the Code to have ordinary executive power (and hence the power to place administrative acts).<sup>25</sup> The position of other superiors is less straightforward. At first sight, c. 596 §2's description of clerical religious superiors' power of governance as being additional to (*insuper*) the powers possessed by all superiors, coupled with cc. 129 §1 and 274 (providing that clerics are suitable (*habilis*) to exercise the power of governance and restricting the acquisition of offices entailing such power to them) suggests that the power possessed by non-clerics is something less than ordinary executive power. It is certainly true that some acts of executive power (e.g. those to grant dimissorial letters for their members or to give the faculty to hear confessions) are beyond the remit of lay superiors.<sup>26</sup> It is also true that the authority of lay religious superiors was traditionally called *potestas dominativa*, a category distinct from governance. This distinction has, however, been abrogated as part of the broader argument over lay exercise of executive power. A number of factors have contributed to this abrogation. These include various concessions given to religious since the 1960s, the subsequent revisiting of the nature of authority in religious institutes by the drafters of the Code (in discussion with the Congregation for the Doctrine of the Faith) in the light of *Perfectae caritatis* and the apostolic exhortation *Evangelica testificatio* (which conceive superiors' authority as both personal and exercised in a spirit of dialogue) and the power which lay people now have to co-operate in the exercise of governance (c. 129 §2).<sup>27</sup> This history, and the apparently deliberately ambiguous wording of c. 596 which emerged as a result – which no longer qualifies *potestas* as *dominativa* – has led a growing number of authors to argue that lay people (including religious) can at least place those administrative acts necessary for carrying out their offices (including giving and receiving

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<sup>25</sup> Canon 134 §1; CCEO c. 984 §2. R. M. McDERMOTT, "Institutes of Consecrated Life," in *CLSA Comm2*, 762.

<sup>26</sup> *CLSBI Comm*, 328.

<sup>27</sup> SECOND VATICAN COUNCIL, Decree on the Sensitive Renewal of Religious Life *Perfectae caritatis*, 28 October 1965, in *AAS*, 58 (1966), 702–712, English translation in N. TANNER (ed.), *Decrees of the Ecumenical Councils: Volume 2, Trent to Vatican II*, London, Sheed and Ward, Washington, DC, Georgetown University Press, 1992, 939–947; PIUS V, Apostolic Exhortation on the Renewal of the Religious Life *Evangelica testificatio*, 29 June 1971, in *AAS*, 63 (1971), 497–526, English translation in A. FLANNERY (ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents*, Northport, Costello Publishing Company, rev. ed. 1992, 680–706; M. CONFOY, *Religious Life and Priesthood: Perfectae caritatis, Optatum totius, Presbyterum ordinis*, New York, Paulist Press, 2008, 224–254.

delegations to perform such acts), even if they may lack the general ability (*habilitas*) to govern a section of the people of God.<sup>28</sup> On this new understanding, the authority of lay superiors under c. 596 §1 is part of their cooperation in the exercise of governance.<sup>29</sup> *CCEO* c. 441 §2 makes this reading explicit in the case of the Eastern Churches. Accordingly, *potestas dominativa* as a separate category of power for religious superiors seems a superfluous concept in the light of the broad terms of the grant in c. 596 §1. As Elizabeth McDonough notes, even if one were to claim some continuing existence for *potestas dominativa*, c. 596 §3's application to c. 596 §1 of the canons relating to the exercise of ordinary executive power would seem to put beyond doubt that the acts superiors may place under c. 596 §1 are, for all intents and purposes, exercises of ordinary executive power, whether the superior is lay or ordained and whatever the institute's status.<sup>30</sup> In what follows, therefore, this study assumes that the provisions relating to administrative acts and their review apply to the competent superiors of all religious institutes.

### 1.3 General Constraints on Administrative Action

Having determined that religious superiors can place administrative acts and the broad categories of such acts, it becomes necessary to determine the constraints which bind them in doing so. These constraints concern the decision to place the act at all and the formalities of the act itself.

In the first place, the superior will need to determine that the act is necessary or appropriate – the sphere of administrative activity preceding administrative acts. It may be argued that this is less of an issue in the case of favours (where no one's interests are directly prejudiced) than in the case of decrees. Still, caution is needed even here. Firstly, in granting a favour, the superior will need to determine that other people's interests are *not* in fact prejudiced and that the facts are as stated by the petitioner. This is why the Codes invalidate a petitioned favour granted through subreption (where material information required for

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<sup>28</sup> E.M. COTTER, *The General Chapter in a Religious Institute, with Particular Reference to IBVM, Loreto Branch*, JCD Thesis, St Paul University, Ottawa, 2006, 71-83; 94-128; E. McDONOUGH, "Jurisdiction Exercised by Non-Ordained Members in Religious Institutes", in *Canon Law Society of America Proceedings*, 58 (1996) 292-307. J.M. HUELS, "The Power of Governance and its Exercise by Lay Persons: A Juridical Approach," in *Studia canonica*, 35 (2001), 86-96.

<sup>29</sup> For a list of competencies possessed by all superiors (lay or clerical), see McDONOUGH, "Jurisdiction Exercised by Non-Ordained Members in Religious Institutes", 306.

<sup>30</sup> McDONOUGH, "Jurisdiction Exercised by Non-Ordained Members in Religious Institutes", 306-307.

validity is concealed) or obreption (where none of the given reasons is actually true).<sup>31</sup> This is important because, once granted, the favour has a measure of stability, and removing it requires a separate administrative decree (with new preceding administrative action), especially if the favour is permanent (i.e. a privilege, which must be granted by a legislator or his delegate). Even if a favour is abused by the recipient, the grantor can only revoke it after warning the holder.<sup>32</sup> Secondly, while the nature of the act is determined by its principal purpose, it may well have a subordinate purpose. A favour, for example, may be intended to benefit the community. To the extent that it is, the superior must verify that the benefit is actually present. The issue of multiple purposes and affected parties is particularly acute in the case of *licentiae*. As we have seen, these are treated as favours by the Latin Code but have a strong communal dimension. Here (for both the validity and liceity of the acts) the grantor needs to be certain, before the grant, that the recipient has particular qualities (for instance, the suitability to preach to religious in the case of c. 765).<sup>33</sup> Also, granting some *licentiae* may require the consent (at least for liceity) of third parties who may be affected.<sup>34</sup>

In the case of administrative decrees (whether provisions, decisions or precepts), the clear effect on third parties (individuals or communities) means that the standard the superior will have to meet to satisfy him or herself of the need for the act will, necessarily, be higher than for favours. The law may even mandate special precedent administrative activity depending on the act. The term “special administrative procedures” is used for those acts with particular prerequisites.<sup>35</sup> In the context of religious life, precedent administrative activity may include (usually for liceity rather than validity): consultation with third parties (thus the superior is obliged to consult the local Ordinary of a secular cleric seeking entry to a novitiate – c. 644), the consent of another (e.g. that of the diocesan Bishop for the change of the apostolic works conducted in a house – c. 612), the collation of reports or the issue of reasons and warnings (as in the

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<sup>31</sup> Canon 63; *CCEO* c. 1529. If the act needs someone to execute it, then concealment or falsity are judged at the time of execution, otherwise the situation is judged when the favour is granted.

<sup>32</sup> Canons 76, 84; *CCEO* 1531; 1535.

<sup>33</sup> Canon 970; HUELS, “Administrative Acts and Activity in Canon Law,” 76-77.

<sup>34</sup> See e.g. c.667 §4 by which the diocesan Bishop requires the assent of the abbess to admit a third party to the enclosure of a monastery of nuns within his diocese: HUELS, “Administrative Acts and Activity in Canon Law,” 74.

<sup>35</sup> HUELS, “Administrative Acts and Activity in Canon Law,” 70-78; DANIEL, *The Art of Good Governance*, 119.

dismissal process in cc. 695-699, where an improperly constituted body or a lack of reasons for the dismissal will also invalidate it), the conclusion of agreements (for instance, between the superior and the diocesan Bishop for the conduct of particular diocesan works – c. 681 §2), the conduct of inspections (e.g. of religious works by the diocesan bishop – c. 683) or the fulfilment of the requirements of particular law (as, for instance, in transferring a superior – c. 624 §3). In the next chapter we shall consider the specific issues posed – both for validity and liceity – by a requirement to seek the consent of a body or group (c. 127).

In addition to such special procedures, however, c. 50 states that the issuer of *any* decree must seek the necessary information and proof and consult with those whose rights could be harmed.<sup>36</sup> This general right to procedural administrative justice (*ius ad proceduram*) is not merely a formality. It is a vital expression of the rights of all Christ's faithful to vindicate their legal rights and to be judged in accordance with law (a right not restricted to the judicial sphere).<sup>37</sup> It is a recognition by the legislator that administrative acts have potentially serious consequences for individuals and, accordingly, that the discernment which underpins administrative action requires a minimum level of transparency in order to be meaningful and seen to be just.<sup>38</sup> A hearing must therefore be genuine, allowing all affected persons (at least those whose interests would be directly harmed) to know what act is being considered and to exercise a practical right of defence.<sup>39</sup> While not every piece of evidence need be revealed under c. 50 (unless the law specifically requires it in a given case), the Apostolic Signatura requires that the affected party at least know the gist of the matter.<sup>40</sup> That said, c. 50 still only mandates a hearing "in so far as [the authority] is able" (*quantum fieri potest*). This proviso has, understandably, been criticised as allowing superiors to thwart the right to justice. As a rights-limiting clause it must be strictly interpreted (c. 18; *CCEO* c. 1500).<sup>41</sup> Thus, for example,

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<sup>36</sup> Canon 50; *CCEO* c.1517 §1.

<sup>37</sup> ROSINSKI, *Due Process*, 102; DANIEL, *The Art of Good Governance*, 117.

<sup>38</sup> MOODIE, "The Administrator and the Law", 63.

<sup>39</sup> Canon 221; *CCEO* c.24; D. LE TOURNEAU, *Droits et devoirs fondamentaux des fidèles et des laïcs dans l'Église*, Montréal, Wilson & Lafleur Limitée, 2011; DANIEL, *The Art of Good Governance*, 117-118, 127-129, 147-156; B. DALY, "Precepts and their Application," in *The Canonist*, 6 (2015), 188-189.

<sup>40</sup> SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *coram* SILVESTRINI, 5 May 1990, prot. no. 18061/86 CA, reported in W.L. DANIEL, *Ministerium Iustitiae: Jurisprudence of the Supreme Tribunal of the Apostolic Signatura*, Gratianus Collection, Montréal, Wilson & Lafleure Limitée, 2011, 260-274. We consider the Signatura's role in ch.3.

<sup>41</sup> This is especially true given the much stricter requirements in *CCEO* 1517 – DANIEL, *The Art of Good Governance*, 207-208; J. MIRAS, "Title IV: Singular Administrative Acts", in MARZOA, M., J. MIRAS, and R.

mere difficulty in meeting the terms of c. 50 (e.g. the need to travel far or the length of time needed to call a person to appear at a hearing) should not suffice to invoke the limitation: genuine *inability* (as where the person concerned has absconded and cannot be traced) should be required.

There is some disagreement as to whether c. 50, despite its unqualified scope, applies also to provisions. It seems from the canon's drafting history that provisions were not intended to be included: in addition, as Huels points out (and as discussed above), a provision, by definition, is not intended to harm others' rights.<sup>42</sup> That said, certain provisions do have the potential to prejudice the rights of third parties. One may consider, for example, a provision of a diocesan Bishop (under c. 681) entrusting a diocesan work to a religious institute lacking the experience or personnel to conduct it. Indeed, the potential effect on others' rights is the reason (as noted above) why certain *licentiae* in the nature of provisions explicitly require the grantor to be satisfied of the grantee's qualities. The legislator is also clearly aware of this potential for acts meant as favours to have adverse results in practice. So, c. 38 (*CCEO* c. 1515), for instance, provides that any administrative act *including a rescript* (which is favourable by definition) can derogate from acquired rights, laws or customs only if this is done expressly. In cases where provisions have the actual potential to harm third parties, it seems hard to argue that the clear wording of c. 50 should not apply – especially in light of the rule in c. 18 (noted above) that laws must be interpreted strictly, insofar as they limit rights, and broadly, insofar as they extend them.<sup>43</sup>

While laying the basis for the act is important for avoiding the appearance of arbitrariness, for ensuring certainty and for the protection of individual rights, the formalities of the act itself are equally so. All administrative acts (at least insofar as they concern the external forum or are to be executed) must be in

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RODRÍGUEZ-OCAÑA (eds.) and E. CAPARROS (gen ed. of English translation), *Exegetical Commentary on the Code of Canon Law*, Gratianus Collection, Montréal, Wilson & Lafleur Limitée, 2004, 530. All references to this work will henceforth be styled “*Exegetical Comm.*”

<sup>42</sup> See also DANIEL, *The Art of Good Governance*, 113-114; J.M. HUELS, “The Efficacy of Delegation without Notification or Acceptance,” in V.G. D’SOUZA (ed.), *In the Service of Truth and Justice: Festschrift in Honour of Prof. Augustine Mendonça, Professor Emeritus*, Bangalore, St Peter’s Pontifical Institute, 2008, 94-95. By contrast, Julio García Martín would apply canon 50 to all decrees without exception: J. GARCÍA MARTÍN, *Il Decreto Singolare*, Rome, EDIURCLA, 2004, 108.

<sup>43</sup> DANIEL, *The Art of Good Governance*, 117. While this should be true in theory, he recognises that the Apostolic Signatura’s understanding of whose interests might be harmed has been restrictive in practice – DANIEL, *The Art of Good Governance*, 188.

writing and, if they are decree-decisions, must contain at least summary reasons. Both safeguards are essential for meaningful review.<sup>44</sup>

Although the requirement for reasons arguably does not explicitly apply to precepts (c. 51 includes the proviso *si agatur decisionis*, “where a *decision* is concerned”), the requirement for writing does. Oral precepts are valid (if illegal) but lapse with the authority of the one imposing them and are unenforceable in the external forum.<sup>45</sup> In addition, despite the lack of an explicit requirement that precepts (as opposed to decisions) state reasons, penalties cannot be imposed except in accordance with law (which must be construed strictly), and just reasons are always required for penal precepts.<sup>46</sup> In practice, therefore, a penal precept failing to state reasons is thus likely to be null, or at least open to challenge.

It is widely agreed that failing to observe cc. 50 and 51, as with most safeguards surrounding administrative action, will not automatically invalidate an act. Non-compliance with these canons gives rise merely to a right of recourse.<sup>47</sup> Julio García Martín, however, argues that these are general norms suffusing and informing the more specific provisions of the Codes and that failure to follow due process invalidates an act (in the same way as failure to grant a right of defence irremediably nullifies a judicial process).<sup>48</sup> This is clearly too broad. We have already seen that limited effect is given to some acts in violation of cc. 50 and 51, and many day to day administrative acts in religious institutes are placed orally in practice. It is nevertheless true that the Apostolic Signatura has used the lack of reasons under c. 51 to buttress a finding of nullity of the dismissal of a religious, although in that case a special administrative procedure which demands reasons for the decision on pain of nullity (c.699) was also applicable.<sup>49</sup> In addition to any demands

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<sup>44</sup> Canons 37, 51, 54 §2; *CCEO* cc. 1514, 1519 §2; J. BEAL, “Confining and Structuring Administrative Discretion,” in *The Jurist*, 46 (1986), 100-101. MOODIE, “The Administrator and the Law”, 64 points out that the restriction of c. 51 to decisions was a qualification added only at the end of the drafting process.

<sup>45</sup> Canons 54 §2; 58 §2; *CCEO* cc. 1513 §5; 1519 §2; DALY, “Precepts and their Application,” 189-190; 196-197.

<sup>46</sup> Canons 18, 221 §3; 1317-1319; *CCEO* cc. 24, 1405, 1406, 1500; DALY, “Precepts and their Application,” 197-198; MIRAS, “Title IV: Singular Administrative Acts”, 533-534.

<sup>47</sup> MIRAS, “Title IV: Singular Administrative Acts”, 535; DANIEL, *The Art of Good Governance*, 124-131; HUELS, “Administrative Acts and Activity in Canon Law,” 71.

<sup>48</sup> Cf. c. 1620 7°; *CCEO* c. 1303 7°; J. GARCÍA MARTÍN, *Il Decreto Singolare*, 105-152, especially 145.

<sup>49</sup> SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *coram* SABBATANI, 20 January 1986, prot. no. 17156/85 CA, reported in DANIEL, *Ministerium Iustitiae*, 111-136; DANIEL, *The Art of Good Governance*, 130.

of special procedures, some administrative acts *will* be invalid for non-compliance with requirements analogous to cc. 50 and 51. Juridic acts of a diocesan Bishop, for instance, must be in writing (as c. 474 requires these to be signed for validity).

Finally, the need for transparency and certainty means that decrees are not effective unless executed or communicated to the one affected, whether by handing over a copy or, if the gravest of reasons make this impossible, reading the act to the affected person in the presence of a notary or witnesses with all present signing the record.<sup>50</sup> Notice is only dispensed with where a person deliberately refuses to attend to hear the decision or to cooperate by signing the necessary documents.<sup>51</sup> Rescripts (including *licentia*), however, are exceptional. These *can* be applied for without the recipient's knowledge and do not need to be notified, at least where no executor is needed.<sup>52</sup>

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<sup>50</sup> MIRAS, "Title IV: Singular Administrative Acts", 545-547; *CIC* c. 50; *CCEO* c. 1520 §2.

<sup>51</sup> Canon 56; *CCEO* c. 1520 §3; MIRAS, "Title IV: Singular Administrative Acts", 547-548; DALY, "Precepts and their Application," 190.

<sup>52</sup> Canons 61, 62; *CCEO* cc. 1511, 1528; HUELS, "The Efficacy of Delegation without Notification or Acceptance," 106-107.

## CHAPTER 2 – PRACTICAL GUIDELINES FOR SUPERIORS’ ACTION

Chapter 1 set out the general law applicable to administrative acts and the authority of religious superiors to place such acts. This chapter seeks to apply these to formulate practical guidelines on how to prepare for and place an administrative act, bearing in mind that administrative power, as part of the governing office of the Church, is not a matter of legalism or tyranny but is to be exercised in a way which “comports with the original apostolic zeal for the salvation of souls”.<sup>53</sup> We shall first consider guidelines for placing an act: including the outline of the process and the administrative activity required to ensure justice (including issues of consultation). Next, we shall examine the act itself and its formalities before looking in detail at the decision making process for two particular decisions reasonably common in religious life – the decision of whether or not to allow a member of the institute to take perpetual vows and the reassignment of a member within the institute.

### 2.1 Preparatory Activity: The Need for the Act, Hearings, Fact-finding, Consultation

Daniel distinguishes the following preliminary phases of a coercive decision: the preliminary investigation (*instruction*) which includes the gathering of proofs before proceeding so that the act can be made with a complete knowledge of the case and the appropriate procedure for dealing with the matter can be determined.<sup>54</sup> This is, at least conceptually, followed by the *hearing* of the parties and others and the *evaluation* of the evidence before the superior finally places the act.<sup>55</sup>

The situation may have come to the superior’s notice by way of a formal complaint or may be contemplated by the superior as a result of his or her own observations or even as a result of an application by the member (for example to take permanent vows). Whichever is the case, the superior must first be satisfied that an act is needed or desirable – the purpose of the instruction.

The duties of superiors to secure administrative justice in explicitly coercive matters (penal and other disciplinary proceedings) are well covered in canonical literature, and this discussion is therefore

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<sup>53</sup> J.J. COUGHLIN, “*Communio* and Administrative Justice,” in *Apollinaris*, 75 (2002), 730.

<sup>54</sup> DANIEL, *The Art of Good Governance*, 139-145; MIRAS, “Title IV: Singular Administrative Acts”, 527.

<sup>55</sup> DANIEL, *The Art of Good Governance*, 146-158; MIRAS, “Title IV: Singular Administrative Acts”, 528-550.

restricted to a broad outline of the necessary process. In the case of penalties for delicts (canonical crime) or non-penal discipline, the act proposed may be a penal precept (if the superior is an Ordinary) or, more usually, a decree-decision. The superior will also need to bear in mind the strict limits which canon law imposes on administrative disciplinary or penal procedures (as opposed to judicial penal procedures). The Congregation for Clergy, Congregation for the Evangelization of Peoples and Congregation for the Doctrine of the Faith possess some special faculties (which lie beyond the scope of this thesis) to proceed administratively against priests for offences (or, in the case of the first two Congregations, prolonged absence) and to remove them from the clerical state.<sup>56</sup> With these exceptions, however, dismissal from the clerical state or excommunication can only be imposed judicially. In addition, perpetual expiatory penalties or unlimited *latae sententiae* suspensions cannot be established by precept.<sup>57</sup>

Whether the matter is disciplinary or penal, it will need to be formally instructed. Both the instruction and hearing will usually be governed by special administrative procedures such as those dealing with dismissal from an institute or by the broad terms of an administrative penal process (whether using general coercive processes in the Codes or under the provisions of particular law).<sup>58</sup> The instruction, in the case of penal or disciplinary sanctions, will consist of an initial inquiry to determine the threshold question of whether there is enough evidence to proceed against the member in respect of the alleged offence. Since the act is explicitly coercive in nature, the rights of the member which are at stake (such as membership of the institute or freedom from unjust punishment) will generally be clear. As warnings will have to be given for the validity of certain proceedings (such as the dismissal of a member, e.g. c. 697, 2° and 3°), the parties

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<sup>56</sup> CONGREGATION FOR THE CLERGY, Special Faculties: Dismissal from the Clerical State (document and commentaries), Reported in *Canon Law Society Newsletter*, no. 160 (2009), 36–50; CONGREGATION FOR THE EVANGELIZATION OF PEOPLES, Special Faculties to the Congregation for the Evangelization of Peoples, Reported in *Studies in Church Law*, 5 (2009), 69-78; CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Normae de gravioribus delictis*, 21 May 2010, in *AAS* 102 (2010), 419-430, English Translation in J.A. RENKEN, *The Penal Law of the Roman Catholic Church: Commentary on Canons 1311-1399 and 1711-1731 and Other Sources of Penal Law*, Ottawa, Faculty of Canon Law, St Paul University, 2015, 462-477, art. 21.

<sup>57</sup> Canons 1312, 1317, 1319, 1334 §2, 1341, 1425. The *CCEO* is more restrictive in some respects, cc. 1084; 1402, 1406, 1432 §2; ROSINSKI, Due Process, 158-160; J.A. RENKEN, *The Penal Law of the Roman Catholic Church*, 54-68; 114; DALY, “Precepts and their Application,” 187-188, 193-195; B.T. AUSTIN, “Due Process of Law and the USCCB Essential Norms,” *Studia canonica*, 51 (2017), 55-87.

<sup>58</sup> See e.g. cc. 694-699; 1717-1720; *CCEO* cc. 497-500; 551-553; 1468-1470, 1486.

may even be aware of the issues before a formal instruction begins. The hearing, unlike the instruction, is designed not so much to inform the superior of the basis of the decision but to provide the accused with a right of defence (which may result in a change of the superior's mind). This right includes the right to be *informed* of the charges and proposed action, the right to be *heard* in relation to them and (in the case of penal proceedings) a right of *appeal* (assisted by an advocate, if necessary) in order to fully inform the superior and ensure that the accused's view is properly put before his or her interests are affected. Accordingly, the administrative activity preceding the superior's decision (the act itself) will look similar to a judicial process. Evidence will have to be gathered (potentially under oath) and the parties heard by the superior or a delegated judge or other official – sitting with two assessors, if the matter is penal. Canonical standards of proof apply to the proceedings, and the superior will need moral certainty of the member's guilt (similar to proof beyond reasonable doubt in common law systems of proof) in the evaluation phase in order to reach the final decision to impose a penalty (cf. c.1608).<sup>59</sup>

Determining (and safeguarding) the parties' rights and obligations will be much less straightforward where the proposed administrative act is not explicitly coercive *per se* but may still have major consequences, either for the member or for the institute. In this case, where there is no "accused" and the rights at stake are likely to be much less obvious, hearing those affected will still be necessary but much more emphasis will fall on the instruction phase. In order to act justly, the superior will have to first identify the interests of the institute in the decision and then ascertain the members or others whose interests are likely to be harmed by it.

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<sup>59</sup> On administrative justice in explicitly penal or disciplinary processes against religious in general see e.g.: cc. 1717-1720; CCEO cc. 1468-1470, 1486; ROSINSKI, *Due Process (passim)*; DANIEL, *The Art of Good Governance*, 135-178; F.G. MORRISEY, "Dealing Justly with Complaints against Church Personnel," in *Canon Law Society Newsletter*, 182 (2015), 73-95; G. INGELS, "Safeguarding Rights when Investigating Allegations of Misconduct of Clergy and Religious," in *Canon Law Society Newsletter*, 137 (2004), 45-64; G. READ, "The Safeguarding of Rights when Investigating Allegations of Misconduct by Clergy and Religious," in *Canon Law Society Newsletter*, 137 (2004), 65-68; DALY, "Precepts and their Application," 197-202; RENKEN, *The Penal Law of the Roman Catholic Church*, 410-418; R. MCDERMOTT, *Consecrated Life: Cases, Commentary, Documents, Readings*, Alexandria, VA, Canon Law Society of America, 2006, 202-217. On the burden of proof and "moral certainty", see PIUS XII, address to the Sacred Roman Rota, 1 October 1942, in *AAS*, 34 (1942) 338-343, English translation in WH. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota: 1939-2002*, Ottawa, Faculty of Canon Law, Saint Paul University, 2002, 17-22.

It is well established that members of religious institutes, precisely because they have (by their vow of poverty) made themselves dependent on their institute, enjoy a right to adequate support from it – including the rights to systematic formation, stable community, the necessities of life and the acquired right to live religious life itself (cc. 654; 670).<sup>60</sup> These rights are clearly terminated by dismissal or exclusion from vows. They may, however, be affected by lesser administrative acts, for example, where a superior is faced with decisions relating to the care of an elderly or infirm member or where a move might deprive a member of community life. In the instruction of personal matters, c.220, which safeguards privacy, will be particularly important.

Issues of administrative justice may even arise where the act under consideration is a *licentia* or a provision, such as the grant of a faculty or the appointment of a new local superior. For example, in appointing a person to the position of novice instructor (a provision), a superior will be responsible for ensuring that the appointee has the ability, spiritual gifts and preparation for the role.<sup>61</sup> By the same token, the rights of the novices to a proper formation will need to be considered. The superior will have to examine the candidate's ability to form the novices in the institute while respecting the fine balance between gaining a sufficient understanding of the novices' spiritual life to assess their vocation and respecting their rights in the internal forum (especially to reputation and privacy, c. 220; *CCEO* c. 23).<sup>62</sup> As such (and as discussed above), the fact that the appointment, as a provision, has no *direct* coercive effect on anyone should not relieve the superior of their obligations under c. 50. A formal, judicial style of instruction is scarcely appropriate here (in contrast to a coercive case). Nevertheless, it is hard to see how the superior could properly judge the suitability of the person for the office or be satisfied that the rights of potential novices

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<sup>60</sup> E. McDONOUGH, "The Protection of Rights in Religious Institutes," in *The Jurist*, 46 (1986), 168-177.

<sup>61</sup> While the Codes say little beyond that the instructor must be prepared (c. 651 §3; *CCEO* cc. 458, 524) other sources make it clear what kind of candidate is deemed appropriate: JOHN PAUL II, Post-Synodal Apostolic Exhortation on Consecrated Life *Vita Consecrata*, 25 March 1996, in *AAS*, 88 (1996), 377-486, English Translation in *Origins*, 25 (1995-1996), 681-719, §66; CONGREGATION FOR INSTITUTES OF CONSECRATED LIFE AND SOCIETIES OF APOSTOLIC LIFE, Directives on Formation in Religious Institutes, 2 February 1990, in *AAS*, 82 (1990) 473-552, English translation in *Origins*, 19 (1990) 677-699, §§30 and 31; E. McDONOUGH, "Role of the Novice Director," in *Review for Religious*, 59 (2000), 542-546. The requirements of the proper law of the institute in this regard will naturally also be vital.

<sup>62</sup> Canon 652; *CCEO* cc. 459, 525; E. McDONOUGH, "Responsibilities of the Novice Director," in *Review for Religious*, 59 (2000), 650-655.

will not be harmed (c. 50) without at least first gathering some information on the proposed novice instructor (the instruction) and then speaking to the candidate and possibly others (the hearing) before evaluating the decision. The superior may reasonably conclude that, given the inability to identify prospective novices and their lack of awareness in any event of the institute or its charism, hearing them is not possible or desirable and the case therefore falls within the exemption to c. 50. Nevertheless, proceeding without input from someone able to opine on the candidate instructor's suitability would risk the very arbitrariness and poor decision-making which c. 50 is designed to avoid.

Non-disciplinary issues of administrative justice are, however, most likely to arise in the context of administrative decision-decrees. While such decrees are neither penal nor disciplinary, it would be facile to claim that they do not engage issues of administrative justice. Although not having the same judicial cast as a disciplinary proceeding, the superior's decision may well have effects on the member which are indistinguishable in practice from disciplinary or penal measures. An obvious example would be, in the case of a clerical religious institute, the decision not to propose a man for ordination to the priesthood. (The specific issue of profession of vows will be considered below.)

Because of the gravity of the potential consequences, in addition to proofs of both the harm and desirability of the action and hearing the affected person as required by c. 50, particular or universal law may effectively enlarge the instruction phase by requiring that certain specific facts be proven – and even enlarge the standard of proof. For example, c. 679 provides that an urgent cause must be shown by a bishop for excluding a member of a religious institute from his diocese.<sup>63</sup>

Aside from increasing the field of the instruction phase, the institute's particular law or universal canon law may require that the superior consult with one or more third parties before reaching a decision – occasionally for liceity only but often for validity. An example of the first case is c. 50 itself where, as we have seen, the superior must hear persons affected. Similarly, in the preliminary investigation of a delict, an Ordinary should hear experts in determining whether to proceed administratively, judicially or otherwise

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<sup>63</sup> HUELS, "Administrative Acts and Activity in Canon Law," 75-76.

in relation thereto (c. 1718).<sup>64</sup> In these cases, failure to consult will not render the act invalid in itself but may give rise to a right of recourse.

The Codes, however, also provide for a specific class of situations where the *counsel* or *consent* of some other party or parties is needed for validity.<sup>65</sup> While this is a general norm, it is not (as Daniel notes) part of the general administrative procedure since it applies only in particular cases, i.e., when the law specifically states that consultation or consent is required to place an act.<sup>66</sup> Where such consultation or consent is required, the effect of c. 127 is that the act will be *invalid* without it. As Huels points out, the fact that the superior can *insist* on certain obligations when seeking advice from consultors under this canon (c.127 §3; *CCEO* c.934 §4) implies that it is directly applicable only when those consulted are persons subject to the superior's authority.<sup>67</sup>

A law may refer to counsel as when it says that a superior must "hear" (*audire*) certain persons, such as in deciding on the appointment of a lower superior (c. 625 §3) or excluding someone temporarily professed from further profession (c. 689 §1). In such cases, consultation, which may be done in any manner allowed by the institute's proper law, is compulsory for validity. Nevertheless, the views of those consulted do not bind the superior. That said, the advice, especially if unanimous, should be followed unless there is overriding cause to do otherwise.<sup>68</sup> On the other hand, where consent or "deliberative vote" (*suffragium* or *votum deliberativum*) is the term used, not only must the relevant persons or body be consulted, but they must also agree to the act for it to be valid. Such cases include decisions to grant extended leave of absence from the community (c. 665 §1), to transfer a member to another institute (c. 684 §1) or to expel a member from the house for grave scandal (c. 703).<sup>69</sup>

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<sup>64</sup> *Ibid.*, 72-73.

<sup>65</sup> Canon 127; *CCEO* c.934.

<sup>66</sup> DANIEL, *The Art of Good Governance*, 125-126. As we have seen, c. 50 goes to liceity rather than validity.

<sup>67</sup> HUELS, "Administrative Acts and Activity in Canon Law," 72.

<sup>68</sup> Canon 127; *CCEO* c. 934; HUELS, "Administrative Acts and Activity in Canon Law," 70-71; G. NEVILLE, *The Religious Superior's Council in the 1983 Code of Canon Law*, JCD thesis, St. Paul University, Ottawa, 1986, 133; E.L. AYUBAN, "Non-Collegial Acts in Religious Institutes: A Study of Canons 127 and 655 §1", in *Philippine Canonical Forum*, VII (2005), 96-101.

<sup>69</sup> Canon 127; *CCEO* c. 934; HUELS, "Administrative Acts and Activity in Canon Law," 70-71; NEVILLE, *The Religious Superior's Council*, 122-123; AYUBAN, "Non-Collegial Acts in Religious Institutes," 97.

The consultation required may be with people acting as individuals – in which case *all* the relevant individuals must be consulted (however this is done) and, if that is what is required, give their consent (c. 127 §2; *CCEO* c. 934 §2). It may also be with a college or body, such as the Superior’s Council, College of Consultors or similar entity. This is particularly relevant in religious life, where c. 627 (*CCEO* cc. 422; 527) mandates the establishment of a Council in accordance with particular law to advise superiors in the exercise of their office. Many of the examples given above require the consent of this Council. Where the consent or counsel of such a body is required, the act will only be valid if the college has first been convened in accordance with c. 166 (*CCEO* c. 948) or the entity’s proper law and its advice sought in accordance with that canon.<sup>70</sup> The canon does not explicitly state (as it does in regard to individuals) that the superior can only decide against the decision recommended by the body in the event of overriding reasons. Nevertheless, this would seem implied by the context.<sup>71</sup>

In 1985, the Pontifical Council for the Authentic Interpretation of Canon Law issued an authentic interpretation that the superior is not a member of the body which he or she convenes under c. 127 and therefore cannot break a tie between a body’s members.<sup>72</sup> Nevertheless, there is still some question as to whether, in certain religious institutes with different traditions of governance, the position may be otherwise (as it is in many cases in the Eastern Churches).<sup>73</sup>

In very rare cases, however, the superior and council must act collegially in placing the act, in which case the superior *does* form part of the body. While particular law may prescribe other instances, the only case of this kind in the general law is c. 699 §1 (*CCEO* cc. 500 §1; 562 §3) which provides that in deciding whether to dismiss a member for grave and proven cause, the Supreme Moderator and his or her Council are to weigh the evidence as a body and decide collegially on the dismissal by secret vote.<sup>74</sup> In such

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<sup>70</sup> NEVILLE, *The Religious Superior’s Council*, 133-135; AYUBAN, “Non-Collegial Acts in Religious Institutes,” 101-104; HUELS, “Administrative Acts and Activity in Canon Law,” 72.

<sup>71</sup> M. WIJLENS, “Juridic Acts,” in *CLSA Comm2*, 182.

<sup>72</sup> PONTIFICAL COMMISSION FOR THE AUTHENTIC INTERPRETATION OF CANON LAW, reply 5 July 1985, in *AAS*, 77 (1985), 771, English Translation in CANON LAW SOCIETY OF AMERICA, *Roman Replies and CLSA Advisory Opinions 1986*, Washington, DC, Canon Law Society of America, 1986, 91.

<sup>73</sup> NEVILLE, *The Religious Superior’s Council*, 147-156; 171-173; cf. *CCEO* c. 164.

<sup>74</sup> NEVILLE, *The Religious Superior’s Council*, 135.

cases, the provisions of c. 119 (*CCEO* c. 924) on collegial decision-making will apply unless the institute's particular law provides otherwise. This canon requires that all members be summoned and that an absolute majority agree to the proposed action.

To allow for a frank consultation, it is important that the process be genuine, so the persons to be consulted must give their opinion freely and sincerely with a view to the welfare of the community. For this reason, the superior may insist on secrecy in the decision-making process, even by oath or penal precept – c. 127 §3; *CCEO* c. 934 §4.<sup>75</sup> In this regard, the Eastern Code expressly provides that the superior has a duty to provide all necessary information to the consulting body or persons. While the Latin Code does not contain an explicit right to information, it must surely be implied since failure to provide information which the consultees require to render a useful opinion would prevent them from providing the informed advice to the superior which the canon requires and thereby render the consultation process nugatory.<sup>76</sup>

By extension, ensuring that the process is fair and genuine applies to the superior's dealings with the subject as well as any consultors. If the superior ignores reasonable and good faith requests by the subject as to how to deal with the matter, this may also make the process illicit, at least.<sup>77</sup> This could happen, for example, where two processes were potentially applicable, one of which was more favourable to the member than the other (as might happen where a member seeks voluntary departure rather than expulsion).

## **2.2 The Act Itself: Formalities, Delegation and Revocation**

Once the preparation for the act is complete and the superior decides to proceed, the act itself will need to fulfill certain basic requirements for liceity. The first is that there actually *be* an act, at least where the law demands a decision or a request has properly been made. While it is perfectly legitimate that a decision be made not to proceed or a request be turned down, there must be an evaluation and a decision one way or the other: a failure to decide at all is unacceptable. Thus, in the absence of a specific provision

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<sup>75</sup> *Ibid.*, 137-138; HUELS, "Administrative Acts and Activity in Canon Law," 70.

<sup>76</sup> *CCEO* 934 §3; AYUBAN, "Non-Collegial Acts in Religious Institutes," 106.

<sup>77</sup> SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *coram* PALAZZINI, 23 January 1988, prot. no. 15721/83 CA, reported in W.L. DANIEL, *Ministerium Iustitiae: Jurisprudence of the Supreme Tribunal of the Apostolic Signatura*, Gratianus Collection, Montréal, Wilson & Lafleur Limitée, 2011, 203-230; DANIEL, *The Art of Good Governance*, 189.

to the contrary, if no decision on a request is made within three months (in the Latin Church) or sixty days (in the Eastern Churches), which is called “administrative silence”, the request is deemed to have been refused and recourse (discussed in ch. 3 below) can be made against that refusal. The superior negligently refusing to act may also be liable in damages for any harm flowing from his or her failure.<sup>78</sup>

Universal law does not mandate any particular form for a written act. It is traditional that the superior include the date and place of issue, background facts and procedural history, motivating reasons and the title of the issuer’s authority, sign the enacting document and have a notary countersign it, but (subject to particular law) none of this is essential, at least within a religious institute.<sup>79</sup> Even something called only a “letter” may contain an administrative act which will accordingly be enforceable or open to recourse if it grants a favour or makes a decree, regardless of what form it takes. As a result, decision makers would be well advised to ensure that any document which can be construed as placing an act meets at least the minimum requirements of cc. 50 and 51.<sup>80</sup>

While the form of the act is not decisive, it will (subject to the limited enforceability accorded to oral precepts) have to be placed in writing (c. 37, *CCEO* c. 1514), at least if it is to be enforceable in the external forum. If the act is placed in commissorial form (i.e., requires a third party to verify certain facts before executing the act), then the execution of the commission by the person receiving it (the carrying out of the act) will also have to be in writing.<sup>81</sup> It is unclear if “writing”, in this context, includes electronic notification. As Moodie points out, there probably needs to be a written original although, if an executor has received an electronic copy from the one placing the act, he or she will be able to treat that copy as

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<sup>78</sup> Canon 57 §3; *CCEO* c. 1518; DANIEL, *The Art of Good Governance*, 158-167; MOODIE, "Singular Administrative Acts," 115.

<sup>79</sup> DANIEL, *The Art of Good Governance*, 169-170. That said, as Moodie points out, it would very difficult for an executor to be able to verify an act (as c. 40 requires) without a signature or other form of authentication: MOODIE, "Singular Administrative Acts," 102. Where the decision making of a diocesan curia is at issue (which could potentially be the case in relation to a religious institute of diocesan right), the formalities of c. 474, which include the signature of the Ordinary and the chancellor or notary, will need to be followed.

<sup>80</sup> SUPREME TRIBUNAL OF THE APOSTOLIC SIGNATURA, *coram* AUGUSTONI, 18 March 1995, prot. no. 24779/93 CA, reported in *L'attività della Santa Sede nel 1995*, Vatican City, Libreria editrice Vaticana, 1996, 847; DANIEL, *The Art of Good Governance*, 190-193.

<sup>81</sup> Canon 37; *CCEO* 1514; MOODIE, "Singular Administrative Acts," 102-103.

previous notice for the purposes of c. 40 (CCEO c.1521) and so execute the act without waiting for the original document.<sup>82</sup>

In considering the position of executors (third parties who carry out the decision), it is important to distinguish a number of situations. Universal or particular law allows (and sometimes requires) that administrative acts be delegated by a superior in accordance with the universal law or the proper law of the institute. This provision is both necessary and desirable given the varied structures and charisms of religious institutes.<sup>83</sup> A delegation may involve the delegation (or sub-delegation) of *executive power* (i.e., the power to grant favours and/or to take decisions and act upon them) in terms of cc. 137-142. Alternatively, it may be a delegation merely of the *execution* of particular acts under cc. 40-47 and 54. Even here, though, the execution of an act is itself an act of executive power (as it brings the relevant act into force). An executor of an administrative act may be either voluntary or necessary. A *voluntary* executor has discretion as to whether or not to execute. A *necessary* executor's discretion, by contrast, is restricted to determining whether the situation envisaged by the act exists and acting on it if it does.<sup>84</sup>

In either situation, however, it is important to remember that the delegation itself is an administrative act in its own right (a provision), and the law relating to these acts applies. The delegation itself will therefore have to be duly considered and reduced to writing. By virtue of cc. 61 and 62, it need not necessarily be communicated or accepted to be effective, a delegation which is potentially knowable on enquiry is valid. By contrast, a delegation which cannot be known at all by the delegate will *ipso facto* be ineffective, because a completely unknowable act cannot be acted on.<sup>85</sup>

At least where the act is a decision, the written document will, as we have seen when discussing the general administrative procedure, need to include the reasons for the decision. As discussed, there seems good reason for applying this to precepts also. The requirement for reasons is both in order to avert

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<sup>82</sup> MOODIE, "Singular Administrative Acts," 103. Curial praxis and custom would naturally also be relevant in determining the status of an electronic communication.

<sup>83</sup> Canon 638; K. CONNORS, *The Role of the Major Superior with Particular Reference to Apostolic Religious Institutes in the United States*, JCD thesis, St. Paul University, Ottawa, 2011, 232-238.

<sup>84</sup> Canons 40-42, 70; MOODIE, "Singular Administrative Acts," 105-106, 121.

<sup>85</sup> HUELS, "The Efficacy of Delegation without Notification or Acceptance," 69-108.

unnecessary recourse and in order to protect the rights of the affected person(s). While the reasons need only be given in summary, they must at least show that the decision made bears some relation to the information gathered in the information and hearing stages in order to provide a concrete basis for understanding the superior's choices.<sup>86</sup> This would also seem to imply that where special administrative procedures require particular facts be proven (for example that the infirmity of a religious makes him or her unfit to live the life of the institute – as in c. 689 §2 discussed below), the proof of these facts will need to be specifically addressed in the reasons for the decree.

The act will also need to be communicated to those affected. Unlike the safeguards in cc. 50 and 51, this is not a question of liceity but of validity – an uncommunicated act, like an unpromulgated law, has no independent existence since one cannot be bound to an obligation which one cannot know.<sup>87</sup> (The one apparent exception, as we have already seen, is provided by cc. 61 and 62 in the case of rescripts. This situation can be distinguished, though, since favours and faculties do not necessarily require action by a recipient.) As noted above, communication is usually by handing over a copy of the act to the person(s) affected although, in rare circumstances, communication may occur by reading the act to the person or even be deemed where the person affected absolutely refuses to cooperate in receiving it (a refusal which, of its nature, implies that the would-be addressee *does* have knowledge of the act, at least in outline). Similarly, revocation of an act, itself an administrative act, must be by the issuing authority or by his or her superior or successor. Without exception (including in the case of rescripts or *licentiae*), such revocation takes effect only upon its notification to the original recipient of the act (c. 47; *CCEO* c. 1513 §3).

### **2.3 Example 1 – Exclusion from Perpetual Profession**

Here we use the principles set out above to consider exclusion from permanent vows. Applying the principles above, this is a coercive decree – more particularly, a *decision*. It should be noted at the outset that this is not a dismissal *per se* (an explicitly disciplinary procedure). (The norms for actively dismissing

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<sup>86</sup> DANIEL, *The Art of Good Governance*, 170-173; MIRAS, “Title IV: Singular Administrative Acts”, 534; MOODIE, “Singular Administrative Acts,” 111.

<sup>87</sup> MIRAS, “Title IV: Singular Administrative Acts”, 545-547; DANIEL, *The Art of Good Governance*, 173-175; DALY, “Precepts and their Application”, 189.

a member in temporary vows are the same as for dismissal of a permanent member in the Latin Church while specific procedures exist for such dismissals in the Eastern Churches.)<sup>88</sup> The Codes permit refusal of vows by a competent major superior for just cause, including where a member is revealed, after temporary admission, to suffer from an illness or other disability – c. 689 §1 and §2; *CCEO* c. 547 §1 and §2. Aside from the specific case of infirmity or disability noted in §2, the canons do not specify what constitutes a “just cause”. Javier Gonzales suggests that it should be linked to the qualities which justify entry into the institute in the first place under c. 642, namely, maturity of the candidate and suitability for the specific life of the institute.<sup>89</sup> This seems reasonable – if the criterion for refusing permanent incorporation in the institute is justice, then there must be some linkage between that criterion and the criteria for entry, given that (as we have already seen) members have an acquired right, once admitted, to remain in the institute in accordance with its particular law and to receive adequate support from it.

Seen in this light, the exception to the permitted exclusion in §2, where the illness rendering the member unsuitable for life in the institute was contracted through the institute’s negligence or through work performed in it, is also understandable – there would be no justice in allowing an institute to exclude a member from taking vows where his or her unsuitability has resulted from the institute’s own conduct, for example by putting the member in harm’s way or where the institute accepted the member knowing of a pre-existent infirmity and its effects. (Despite §2, §3 provides that insanity alone, even if it prevents taking of further vows, is not in itself, cause for dismissal.)

Even though the act itself is not an exclusion from the institute, it does touch the member’s status within it and leads to exclusion as a matter of practice once the member’s temporary vows expire. It is therefore deemed an exclusion for the purposes of c. 690 (which governs re-admission).<sup>90</sup> While the issue

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<sup>88</sup> *CCEO* cc.499; 552; c. 696. In the Latin Church, however, the onus of proof and the seriousness of the required conduct are somewhat relaxed for dismissal of the temporarily professed – J. ABBASS, *The Consecrated Life: A Comparative Commentary of the Eastern and Latin Codes*, Ottawa, Faculty of Canon Law, St Paul University, 2008, 413.

<sup>89</sup> J. GONZALES, “Legitimate Departure from a Religious Institute,” in *Boletín Eclesiástico de Filipinas*, 78 (2002), 696.

<sup>90</sup> E. MCDONOUGH, “Exclusion from Profession at the Expiration of Temporary Profession,” in *Review for Religious*, 60 (2001), 544, 546. On the origin of the norms on voluntary and non-disciplinary departure from an

will inevitably arise no later than when the member applies for final vows, it is quite possible that consideration of the matter may be forced earlier due to the member's conduct or illness. Barring a person from final profession in these circumstances sends the message that they no longer have a future in the institute and that failure to leave voluntarily is, effectively, "wasting time" (although it may also raise questions about the robustness of the institute's formation process which has allowed the member to proceed as far as he or she has).<sup>91</sup> As such, while it is clearly neither a dismissal nor penal in nature and therefore lacks many of the safeguards associated with such procedures, it has an analogous effect to a penal sanction and may well be read equivalently by any potential future employer of the newly secularised religious. A religious barred by infirmity from taking vows and having possibly forfeited individual property, is particularly vulnerable – losing the support of the institute while possibly, depending on the nature and gravity of the problem, being completely unable to reconstruct a life outside it. Notwithstanding the consequences, as McDermott points out, resort to this procedure may nevertheless be entirely appropriate as a timely way of ensuring that unsuitable candidates are not promoted to permanent vows (dismissal from which would require the much more formal and complex dismissal process provided in cc. 696-700 – as well as the intervention of both the Supreme Moderator and the Holy See).<sup>92</sup> Indeed, while the consequences for the member are undoubtedly severe, this decision is qualitatively very different to a formal dismissal (which *is* effectively a particular form of penal process). Jacinta Opondo points out that there are three reasons why the legislator rightly makes admission to final vows (or its refusal) fundamentally a matter of discretion on the part of the superior. Such admission is, firstly, a matter of discerning the genuineness of a particular individual vocation in conscience. Secondly, it concerns the governance of the religious institute (and the full freedom to admit a member or not which is inherent in

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institute see J. ABBASS, "Departure from Religious Institutes in the Latin and Eastern Catholic Churches," in *Studia canonica*, 32 (1998), 97-128; J. ABBASS, *The Consecrated Life*, 400-401.

<sup>91</sup> MCDERMOTT, *Consecrated Life*, 189.

<sup>92</sup> *Ibid.*

the concept of temporary profession). Finally, it involves the determination (on a case by case basis) of whether exclusion is a proportionate response to the issues raised by the member's conduct or infirmity.<sup>93</sup>

All of this means that, while exclusion from permanent vows may be reasonable and even necessary in some cases, the seriousness of the consequences means that the relevant major superior will have to take particular care to ensure that the administrative activity leading up to the decision is fair. With this in mind, the Codes mandate two particular processes which are potentially engaged prior to exclusion from permanent vows (accordingly making this a special administrative procedure).

The first is that, in the case of the member barred by infirmity, more than one expert must testify both as to the member's illness and to the fact that it renders him or her unsuitable for life in the institute. This certification, and proof that the infirmity was not contracted as a result of the institute's negligence or work performed therein, are required for the validity of the exclusion from vows.<sup>94</sup> By implication, therefore, not only will the experts need to be both unbiased and medically competent but the superior will need to ensure that they are aware, if they are not also members of the institute, of the demands of life in the institute in order to be able to give the required opinion.<sup>95</sup> In addition, the superior will also need to ascertain that the injury or infirmity has not been incurred in the course of work for the institute or through its negligence.

Even if the grounds for exclusion have been made out under one or other head, exclusion from vows is not mandatory. Accordingly, in making the decision, whether on the basis of the member's infirmity or not, the Codes mandate a second special procedure for validity – the consultation process in c. 127/*CCEO* c. 934 discussed above. Having concluded that the threshold requirements for exclusion have been met (whether the just cause is based in the member's infirmity or on some other ground), the superior will, in addition to any expert advice under c. 689 §2, need the advice of his or her council. As we have already

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<sup>93</sup> J.A. OPONDO, *Temporary Profession and Exclusion from Subsequent Profession (Cann. 655; 689): Theological-Juridical Study*, Rome, Editrice Pontificia Università Gregoriana, 2017, 275-276.

<sup>94</sup> Canon 689 §2; *CCEO* c. 547 §2; E. McDONOUGH, "Exclusion from Profession at the Expiration of Temporary Profession," in *Review for Religious*, 60 (2001), 546.

<sup>95</sup> Implied by c. 1574 / *CCEO* c. 1255 on qualifications of an expert – McDONOUGH, "Exclusion from Profession at the Expiration of Temporary Profession," 547.

seen, the duty which the superior has under c. 689 §1 is a duty to *hear* the council. He or she may not validly proceed without advice but may act against it (although should override a unanimous recommendation only for compelling reasons). In addition to these two special procedures, however, the general administrative procedures in cc. 50 and 51 will also apply.

Applying these principles, a sound process would therefore run as follows. Once the superior decides to proceed, he or she must first gather the relevant information including the mandated expert reports (the *instruction*) and then (pursuant to c. 50) inform the member of the broad outline of the grounds upon which the superior proposes to act and give them the opportunity to address the issues raised (the *hearing*).<sup>96</sup> While c. 689 is silent about the timing of the superior's discussions with the council, it would seem to be most appropriate to seek the council's advice during the *evaluation*, i.e. *after* the affected member has been heard but before making the decision. This will ensure that all relevant facts (including all information the member adduces) are laid before the superior's council (except to the extent that any information is truly confidential). It is, of course, easy to imagine circumstances where the proviso to c. 50 will apply because a hearing will not be possible. One example might be if the dismissal is based on infirmity and the person concerned is in a coma. That said, even though canon law may not require it, failure to grant a proper hearing to the member (alone or through representatives in the case of incapacity, for example) may expose the institute to liability at civil law for breach of administrative procedures and/or human rights.<sup>97</sup>

In rendering the *decision*, the superior will have to follow c. 51 in order to bind the subject in the external forum. The decision will therefore need to be in writing, communicated to the subject and state the reasons on which it is based. This will apply even (indeed, especially) if the actual communication of the decision has been oral and in the presence of witnesses in accordance with c. 56 (and a clear written record

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<sup>96</sup> The decision to proceed may, of course, be triggered by the member's own application to take vows – MCDONOUGH, "Exclusion from Profession at the Expiration of Temporary Profession," 546.

<sup>97</sup> A recent example of civil action to enforce the right to a hearing in case of exclusion from permanent profession is COURT OF APPEAL OF LESOTHO, *Sephamola & Ors v Ponya*, C of A (CIV) 2/2013, 19 April 2013, [https://www.lesotholii.org/files/ls/judgment/court-appeal/2013/7/april\\_2013\\_fr\\_joseph\\_sephamola\\_ors\\_vs\\_bro\\_t\\_pony\\_16686.pdf](https://www.lesotholii.org/files/ls/judgment/court-appeal/2013/7/april_2013_fr_joseph_sephamola_ors_vs_bro_t_pony_16686.pdf) (23 July 2017).

will, in any event, serve to protect the institute against any subsequent allegations of arbitrary decision-making).<sup>98</sup> Since, as we have seen, these reasons will need to provide an adequate rational basis for the superior's choices, they should include at least the "just cause" for the dismissal and, if the decision is based on the subject's infirmity, the link (if any) between the infirmity and the institute. Hence, they should include at least a summary of, first, the experts' conclusions as to the illness and its effect on the member's suitability for vows and, secondly, of the superior's decision as to whether the infirmity predated the member's entry into the institute and/or results from the negligence of the institute or work performed therein.

Finally, while the member has no right to compensation for work done in the institute, some form of equitable compensation and, where necessary, follow up support will need to be granted, especially if infirmity is the cause of dismissal (c. 702). Any such provisions should also be included in the decision in order to avoid later uncertainty and potential litigation.<sup>99</sup> In addition, given that, as discussed above, the right of defence also includes the right of appeal, the member should also be informed in the decision about their rights to challenge the superior's decision. These will be considered in more detail in the next chapter.

#### **2.4 Example 2 – Reassignment**

Reassignment is a diverse phenomenon – it may or may not include canonical transfer from one fixed office to another and, depending on the circumstances, could take the form of any specific administrative act. It could be a favour (a sabbatical, for example), a provision (such as a new role), a precept or a decision (for example, in response to a member's disruptive conduct). In the worst case scenario, it could even be mandated from outside by the diocesan Bishop as an extreme resort.<sup>100</sup> The consequences are also generally much less severe for the member than in the previous case since membership in the institute itself is not in doubt. Indeed, some religious institutes (such as the Society of

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<sup>98</sup> OPONDO, *Temporary Profession*, 280-281.

<sup>99</sup> In addition to all the above, particular law – most obviously the institute's constitution, may set further requirements which will need to be followed in relation to either the exclusion procedure or subsequent issues.

<sup>100</sup> Canon 679; R. McDERMOTT, "Ecclesiastical Authority and Religious Autonomy: Canon 679 Under Glass," in P. COGAN (ed.), *Sacerdotes Iuris (Digesta 1.1): Miscellanea in Honour of William H. Woestman, O.M.I./Mélanges en l'honneur de William H. Woestman, O.M.I.*, Ottawa, Faculty of Canon Law, St Paul University, 2005, 235-254.

Jesus) have ongoing disponibility for ministry as an explicit part of their charism.<sup>101</sup> In addition, the vow of obedience will severely constrain the subject's ability to resist any proposed transfer.<sup>102</sup> Nevertheless, the results of reassignment may be significant, for example, where a superior proposes to send a person to work in a place which may exacerbate an existing medical condition or may deprive them of a meaningful community life in the institute.

As with exclusion from final profession, particular law (such as the institute's constitution) is likely to be crucial in determining both the member's specific rights and the procedure to be used. Nevertheless, the broad principles of administrative law decision-making which we have considered above will apply. If what is at issue is a favour or provision, there are unlikely to be any difficulties. Even here, however, the logic of c. 51 applies, and the nature and terms of the assignment should be reduced to writing for the certainty of all parties.

More issues will arise, however, in a case where the reassignment is to take place against the will of the person being moved. Here, the religious' rights to those things necessary for religious life (generally seen as including at least physical subsistence, community life, proper formation and participation in the institute's apostolate and the means of performing religious obligations) as well as to a good name and privacy may all be restricted by a move.<sup>103</sup> Accordingly, any law (including particular law) restricting these rights will need to be interpreted strictly.<sup>104</sup>

That said, the move may well be necessitated by the conduct of the member which interferes with other members' rights. One of the superior's most important tasks during the *instruction*, therefore, will be to consider exactly whose rights (as well as those of the member to be moved) will be affected. These may include members of both the current and proposed communities. During the *hearing*, all of these will be

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<sup>101</sup> See e.g. J.W. PADBERG (gen. ed.), *The Constitutions of the Society of Jesus and their Complementary Norms: A Complete English Translation of the Official Latin Texts*, St Louis Mo, Institute of Jesuit Sources, 1996, articles 603-617; complementary norms 252-254.

<sup>102</sup> MCDONOUGH, "The Protection of Rights in Religious Institutes," 176-181.

<sup>103</sup> See e.g. cc. 608, 610, 611, 220, MCDONOUGH, "The Protection of Rights in Religious Institutes," 185-194.

<sup>104</sup> Canon 18; *CCEO* c.1500. Potentially applicable laws include the particular law of the institute (especially regarding superiors, see e.g. c.624) and, in relation to transfer from one stable office to another, c. 190 (which requires a "grave reason" for any transfer).

“those whose rights could be harmed” within the definition of c. 50 and should therefore be consulted insofar as practical and given a genuine chance to express a viewpoint. The *evaluation* should take all these interests into consideration. Again, especially in the case of a coerced reassignment, the *decision* itself will have to be in writing and state its reasons – at least in outline. As noted above, an act of reassignment taking the form of a precept (at least if it is not penal) does not have to be in writing for validity. That said, the severe restrictions on the enforceability of an oral precept mean that the superior would be well advised to reduce it to writing if he or she wishes to avoid difficulties, especially for any successor who may have to deal with the matter. Likewise, the act of reassignment will need to be communicated to the recipient in some fashion in order to be effective and should also set out any rights to challenge the decision (in order to avoid any later allegation by an affected party that their right of defence has been compromised).

### **Conclusion**

This chapter sought to apply the principles in chapter 1 to the practicalities of governance. We saw, with reference to two practical examples, that the process by which the superior reaches the decision to place an administrative act is critically important in the interests of justice. While in penal and disciplinary matters, the hearing of the matter and a proper right of defence will be particularly important (and usually regulated by law), the superior will need to pay special attention to the instruction phase in *all* cases in order to ensure that the act is appropriate and that the member’s rights are both understood and respected. In many cases, special procedures (such as seeking medical advice) will be legally required. Consultation, especially with the council, will be needed before taking many decisions – especially where the status of the member within the institute is concerned. The decision will have to be written, reasoned and properly communicated.

### CHAPTER 3 – REMEDIES

Having considered the nature and types of administrative action, their place in religious institutes and the manner of their application including in specific cases, this chapter will begin with a brief outline of the ways in which an aggrieved subject might challenge the decision, once made. Finally, it will conclude with an overview of issues worthy of further exploration in this area.

As mentioned above, the right of appeal is generally regarded as integral to the right of defence. Recourse lies under both Latin and Eastern Codes even in the case of “administrative silence”. Unfortunately, while both Codes set out detailed appeal procedures and court structures in respect of judicial decisions, the same is not true where administrative decisions are concerned.

Canon 1400 §2 provides that disputes relating to the exercise of administrative power may be brought only to the superior or to an “administrative tribunal”. This reflects the fact that a system of administrative tribunals was initially approved by the drafters of the Code but removed near the end of the drafting process on the apparent grounds that it would fit uneasily within existing Church structures and potentially compromise bishops’ authority. The Apostolic Signatura (discussed below) is now the only administrative tribunal existing under the Latin Code.<sup>105</sup> The *CCEO* equivalent of c. 1400, c. 1055, notably omits any reference to tribunals.

The result of all of this is that the only explicit avenue for redress available in universal law to an aggrieved member of a religious institute is now what is known as hierarchical recourse, governed by cc. 1732-1739 (*CCEO* cc. 996-1004), a situation recognised as inadequate by the drafters of the Code themselves.<sup>106</sup> One exception to this rule is afforded by c. 125 §2 (*CCEO* c. 932 §2) which allows juridic acts of whatever kind, including administrative acts, to be rescinded by judicial action where they have been placed by virtue of *dolus* (deceit) or force or fear unjustly inflicted. Such acts can therefore be

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<sup>105</sup> T.J. PAPROCKI, “Part V: The Method of Proceeding in Administrative Recourse and in the Removal and Transfer of Pastors [cc.1732-1752]” in *CLSA Comm2*, 1824-1826; J.C. MESZAROS, “Procedures of Administrative Recourse,” in *The Jurist*, 46 (1986), 107-141; K. MATTHEWS, “The Development and Future of the Administrative Tribunal”, in *Studia canonica*, 18 (1984), 3-233.

<sup>106</sup> M.R. MOODIE, “Defense of Rights: Developing New Procedural Norms,” in *The Jurist*, 47 (1987), 430.

challenged according to the ordinary norms for trials. By their very nature, however, such cases are likely to be extremely rare. In addition, of course, the proper law of the relevant religious institute may allow for alternative dispute resolution processes or may give other alternatives for dispute resolution to persons or bodies within the institute itself.<sup>107</sup>

Recourse may be had against any singular administrative act in the external forum not made by an ecumenical council, the Roman Pontiff or the Apostolic Signatura – cc. 1732; 1629 §1; *CCEO* c. 996. As a result, all singular administrative acts in the external forum (regardless of whether the author is clerical or lay or whether they are favourable or not), lie within its purview, but general executory decrees or instructions do not.<sup>108</sup> While the acts of Roman dicasteries do not lie within the scope of hierarchical recourse, they may be the subject of contentious administrative recourse to the second section (*sectio altera*) of the Apostolic Signatura (sitting as administrative tribunal), governed by *Pastor bonus* and considered briefly below.<sup>109</sup>

Before commencing formal recourse, the petitioner and the superior must see whether their difference can be reconciled (c. 1733). There is no formal time limit for such reconciliation, although settlement measures do not prevent or delay the running of time on the recourse process itself – the assumption is therefore that attempts to resolve the grievance move in parallel to the recourse process. Reconciliation is likely to be more workable in some situations than others. (Commentators make it clear that the provision is intended to avoid frivolous or pointless recourse and not to suppress a genuine grievance; cf. c. 1446 which makes similar provision in relation to judicial action).<sup>110</sup> The canon also allows

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<sup>107</sup> On these possibilities, and on the principles which should govern the reviewing superior's decision-making in the light of the Apostolic Signatura's jurisprudence, see OPONDO, *Temporary Profession*, 333-353.

<sup>108</sup> While the remaining canons refer to decrees, this canon makes it clear that all acts are open to recourse. J. MIRAS, "Part V, Section 1: Recourse Against Administrative Decrees", in *Exegetical Comm.*, 2052-2055; J. BEAL, "Hierarchical Recourse: Procedures at the Local Level," in *CLSA Proceedings*, 62 (2000), 94-97.

<sup>109</sup> MIRAS, "Recourse Against Administrative Decrees", 2055; JOHN PAUL II, Apostolic Constitution on the Roman Curia *Pastor bonus*, in *AAS*, 80 (1988), 841-930, English translation in E. CAPARROS, H. AUBÉ, and M. THÉRIAULT (eds.), *Code of Canon Law Annotated*, 2<sup>nd</sup> ed. rev., Gratianus Collection, Montréal, Wilson & Lafleur Limitée, 2004, 1423-1551, art. 123; J. PUNDERSON, "Hierarchical Recourse to the Holy See: Theory and Practice," in *CLSA Proceedings*, 62 (2000), 39-41.

<sup>110</sup> MIRAS, "Recourse Against Administrative Decrees", 2056-2063.

alternative dispute resolution mechanisms to be embodied in diocesan structures but does not make any equivalent provision for religious institutes.<sup>111</sup>

Prior to taking recourse, the aggrieved party must, within ten useful days of the impugned decision, petition the superior in writing (no particular form is required) to withdraw or amend the decision or, failing such a petition, lose the right to recourse. This petition (*supplicatio*) is, however, not required in three cases: where the recourse lies to a diocesan bishop against a decision of a subject of his (e.g. in the case of a decision within a religious institute of diocesan right), where the decision is against a decision deciding hierarchical recourse or where recourse lies by virtue of the superior's "administrative silence" (i.e. failure to respond to a request) – c. 1734 §3, *CCEO* c. 999 §2. If the superior accepts a late petition, then it may revive despite the lapse of the time limits (*fatalia*).<sup>112</sup> If the superior issues a new decree amending the act or rejects the *supplicatio* within thirty days of receiving it, then the time limit for beginning recourse starts with the issue of the new decree. If not, it runs from the thirtieth day (c. 1735).

*CIC* c. 1736 deals with the various options for suspending the act during the recourse process. Commencing the recourse process does not itself suspend an act's operation except in particularly serious cases (such as the dismissal of a member of a religious institute in accordance with c. 700) – c. 1736 §1. In other cases, the superior *may* (but need not) decide to suspend it for serious reasons and provided that there is no peril to the salvation of souls – c. 1736 §2. The person to whom recourse is made against the decision must revisit a decision on suspension – c. 1736 §3. Any suspension lapses in any event if the recourse is not pursued – c. 1736 §4.<sup>113</sup> It must be remembered that an act validly placed with respect to its external elements is presumptively valid – c. 124 §2; *CCEO* c. 931 §2.

The core provision relating to hierarchical recourse itself is *CIC* c. 1737 (*CCEO* cc. 997 §1; 1001). This provides that a person who considers him or herself to have been wronged by a superior's action must

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<sup>111</sup> These structures have, it seems, been very successful in the United States, but less so elsewhere: K. MARTENS, "Protection of Rights: Experiences with Hierarchical Recourse and Possibilities for the Future," in *The Jurist*, 69 (2009), 689-702.

<sup>112</sup> MIRAS, "Recourse Against Administrative Decrees", 2066.

<sup>113</sup> *Ibid.*, 2074-2076; *CLSBI Comm.*, 963-964.

make recourse to that person's immediate superior within fifteen useful days of the expiry of the time limits under cc. 1734 and 1735 (considered above). While this closely parallels the wording of c. 50, in that the party must be able to show some actual or threatened injury,<sup>114</sup> there is no equivalent proviso allowing a superior to prevent an application for recourse (although recourse may, as noted below, be denied).

The Codes do not prescribe a specific procedure for recourse and much (including the determination of who exactly the immediate superior is) will therefore depend on the religious institute's proper law. That said, the person having recourse is specifically granted a right to a procurator, although futile delays are to be avoided and the person him or herself must answer questions as required (c. 1738, *CCEO* c. 1003). The possible options of the superior in relation to the decision under recourse are described in the broadest possible terms. He or she not only has the choice to confirm the decision or declare it null but also, as is deemed expedient, to amend it or to substitute a new decision for it, whether such decision is consistent with the challenged decision or contrary to it (*emendare, subrogare vel obrogare*) – c. 1739. (*CCEO*, cc. 1004-1006 restricts these options somewhat in recognition of potential limits imposed by the laws of particular Churches *sui iuris*.) Such broad discretion would include the option to provide for, or make modifications to, a decision relating to compensation of damages – an option expressly canvassed in *CCEO* c. 1005.<sup>115</sup>

Of course, the decision of the superior to whom recourse is made will also be an administrative act (a decree-decision, as considered above). Hence, it will also, in addition to any specific demands of particular law such as a religious institute's constitutions, need to comply with all the basic procedures for administrative acts (especially cc. 50 and 51). Equally, as canvassed above, administrative silence on the part of a superior to whom recourse is made (where it lasts for longer than three months in the Latin Church, or sixty days in the East) will itself be deemed a decision.<sup>116</sup>

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<sup>114</sup> BEAL, "Hierarchical Recourse," 97; MIRAS, "Recourse Against Administrative Decrees," 2082-2083.

<sup>115</sup> MIRAS, "Recourse Against Administrative Decrees," 2096-2097.

<sup>116</sup> BEAL, "Hierarchical Recourse," 105.

The decision made on recourse will also, in turn, be subject to recourse unless that superior is a Roman dicastery.<sup>117</sup> The result is that hierarchical recourse properly so called is exhausted with the decision of the relevant dicastery. Given that we are considering the decisions of religious superiors in particular, this is most likely to be the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life.

If hierarchical recourse up to and including the relevant Vatican dicastery fails, the only remaining remedy open to an aggrieved party is contentious-administrative recourse before the Apostolic Signatura. This is no longer a recourse against the original superior's decision since the Signatura is not the hierarchical superior of the other dicasteries – all are equal in status.<sup>118</sup> Instead it is a new action against the dicastery which has finally dismissed or confirmed the original decision and is directed to the second section (*sectio altera*) of the Signatura in its capacity as administrative tribunal.<sup>119</sup> However, other affected parties (such as the religious superior whose decision has been confirmed by the dicastery and is now being challenged) will also need to be joined as respondents.<sup>120</sup>

*Pastor bonus* has clarified that the second section's jurisdiction concerns "singular administrative acts" issued or approved by dicasteries within the Curia.<sup>121</sup> In contrast to the case in hierarchical recourse, it is not open to the Signatura to reopen the merits of the impugned decision as such – the fact that a different decision could or should have been made is not sufficient by itself. Instead the issue is whether there has been error *in procedendo* (whether the decision is procedurally illegitimate) or *in decernendo* (whether the decision was unfounded or misapplied the law to the facts – i.e., where a properly instructed decision maker

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<sup>117</sup> BEAL, "Hierarchical Recourse," 103-105.

<sup>118</sup> JOHN PAUL II, *Pastor bonus*, art. 2 §2.

<sup>119</sup> BENEDICT XVI, *Litterae Apostolicae motu proprio datae quibus Supremi Tribunalis Signaturae Apostolicae lex propria promulgatur*, 21 June 2008, in *AAS*, 100 (2008), 513-538, English translation The Proper Law of the Apostolic Signatura, in *The Jurist*, 75 (2015), 619-657, art. 34 §1; DANIEL, *Ministerium Iustitiae*, 3-4; PUNDERSON, "Hierarchical Recourse to the Holy See," 39-43.

<sup>120</sup> K.K SCHWANGER, "Contentious-Administrative Recourse before the Supreme Tribunal of the Apostolic Signatura," in *The Jurist*, 58 (1998), 185.

<sup>121</sup> JOHN PAUL II, *Pastor bonus*, art. 123. The wording in c. 1445 §2 ("acts of ecclesial administrative power") had caused some confusion –SCHWANGER, "Contentious-Administrative Recourse," in *The Jurist*, 58 (1998), 178.

could not legally have reached the decision made).<sup>122</sup> The Signatura may award damages where loss has been incurred.<sup>123</sup>

An application for contentious-administrative recourse must be lodged within sixty useful days of the dicastery's decision (a time limit which can be waived only by the Pope).<sup>124</sup> It must be signed and dated, attach copies of the act (if possible) and a procurator's mandate (or a request for free representation) and specify the claimant, the claim, the details and date of the challenged act (i.e., of the dicastery) and the basis of the challenge.<sup>125</sup>

The Signatura's Secretary receives the recourse, communicates it to all other parties and orders the dicastery to communicate the challenged act within thirty days.<sup>126</sup> Thereafter, the parties' advocates are informed and a deadline set for submissions with the Signatura's promoter of justice submitting a view on the truth of the matter (*votum pro rei veritate*) once the parties have made their submissions. A similar procedure follows for any responses to this *votum*.<sup>127</sup> If the cardinal Prefect (the head of the Signatura), on the advice of the Signatura's principal officials (*Congresso*), believes that the complaint is not manifestly unfounded, he sends it to a full College of five judges – the decision either way must be delivered in writing (with reasons given for a rejection) and recourse against it may be made to the College.<sup>128</sup> The *Congresso* also decides (using a trial within a trial) whether or not to suspend an administrative act while the dispute is ongoing. There is no appeal against its decision (although the matter may be brought before the *Congresso* more than once).<sup>129</sup>

With regard to the substantive hearing of the case and subsequent steps, the College operates analogously to an appellate tribunal in a judicial setting (albeit that there are no appeal rights), with a

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<sup>122</sup> BENEDICT XVI, *The Proper Law of the Apostolic Signatura*, art. 34 §1; PUNDERSON, "Hierarchical Recourse to the Holy See," 41; SCHWANGER, "Contentious-Administrative Recourse," 180.

<sup>123</sup> JOHN PAUL II, *Pastor bonus*, art. 123 §2; BENEDICT XVI, *The Proper Law of the Apostolic Signatura*, arts. 34 §2, 101; SCHWANGER, "Contentious-Administrative Recourse," 180-182.

<sup>124</sup> BENEDICT XVI, *The Proper Law of the Apostolic Signatura*, art. 74.

<sup>125</sup> *Ibid.*, art. 73. Article 75 provides that a recourse will be null where the person or object is absolutely uncertain.

<sup>126</sup> *Ibid.*, art. 79.

<sup>127</sup> *Ibid.*, arts. 80-82.

<sup>128</sup> *Ibid.*, arts. 83-84.

<sup>129</sup> *Ibid.*, arts. 95-99.

formulation of the doubt (question to be decided), written and oral representations by the parties followed by deliberations in secret, a decision based on the verdicts of the majority and, finally, provisions as to execution of the decision (where appropriate).<sup>130</sup> No appeal lies against the Signatura's decisions – although this does not deprive a person of their general right to approach the Pope in relation to a matter (however remote the prospects of success might be in the circumstances).<sup>131</sup>

By way of conclusion to this brief overview of the remedies available for breach of the norms discussed in this thesis, some key points can be noted. The system of hierarchical recourse does provide limited redress for breaches of administrative justice in respect of members of religious institutes. There is, however, no independent oversight within the system itself, and it is not possible (short of an extraordinary petition to the Holy See) for a member to access protection outside it until all possible recourse options have been exhausted. Such external protection as there is (by way of contentious administrative recourse) is limited in scope (in that it only applies to errors *in procedendo* or *in discernendo*) and requires the expense of a proceeding in Rome with a procurator-advocate who has the right of appearance before the Apostolic Signatura.

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<sup>130</sup> *Ibid.*, arts. 85-94.

<sup>131</sup> SCHWANGER, "Contentious-Administrative Recourse," 195.

## GENERAL CONCLUSIONS

This thesis has attempted to provide an overview of administrative decision making and related issues of justice for superiors in religious institutes. In particular, it has attempted to supply guidance on the proper bases of, and formal requirements for, administrative action in the context of a religious institute and the avenues for redress open to a member who feels him or herself to be wronged by a superior's act. It has done so by considering the basic principles of just administrative action in religious institutes: the nature of the authority of superiors over their subjects, the nature and classification of administrative acts, their application to action in religious institutes – with specific, practical examples – and the remedies available for justice denied.

While it has not broken new ground, it has attempted to provide religious superiors and their canonical advisors with a resource which has been hitherto unavailable – an accessible collation, assessment and overview of relevant administrative procedures and institutes in relation to religious life which could serve as something of a *vade mecum* for those placing administrative acts. Further work in this area could include a detailed exploration of hierarchical recourse – especially in relation to disciplinary decisions, possibly coupled with a step by step analysis of disciplinary processes. An exploration of administrative decision making within diocesan structures could be an equally useful companion to this study dealing with religious institutes. Likewise, while the distinctions between the Latin and Eastern Codes have been touched on, these could be explored more fully – particularly in relation to individual processes in religious institutes governed by the Eastern Code.

It is to be hoped that this thesis (and others like it) may play some small part in making the relevant principles of canon law accessible to administrative decision makers and thereby improving the transparency and justice of administrative decision making within the Church.

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