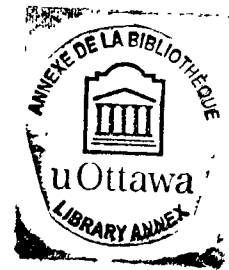


THE DEVELOPMENT AND FUTURE OF THE ADMINISTRATIVE TRIBUNAL

by

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A dissertation
submitted to the Faculty of Canon Law,
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for the degree of Doctor of Canon Law



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ABBREVIATIONS

<u>A.A.S.</u>	Acta Apostolicae Sedis
<u>A.C.</u>	L'Année Canonique
<u>A.G.</u>	Analecta Gregoriana
<u>A.K.K.</u>	Archiv für Katholisches Kirchenrecht
<u>An.</u>	Angelicum
<u>Ap.</u>	Apollinaris
<u>A.S.S.</u>	Acta Sanctae Sedis
<u>c.</u>	coram (before, e.g. an eccl. judge)
<u>c.1, Dist. I</u>	Decretum Gratiani prima pars (cited this way)
<u>c.1, C.I, Quest. 1.</u>	Decretum Gratiani secunda pars (cited this way)
<u>C.C.C./C.C.C.B.</u>	Canadian Catholic Conference / Canadian Conference of Catholic Bishops
<u>CIC</u>	Codex Iuris Canonici (1917)
<u>CIC 1983</u>	Codex Iuris Canonici (1983)
<u>C.L.D.</u>	Canon Law Digest
<u>C.L.S.A.</u>	Canon Law Society of America
<u>C.L.S.A.N.Z.</u>	Canon Law Society of Australia and New Zealand
<u>C.L.S.G.B.I.</u>	Canon Law Society of Great Britain and Ireland
<u>C.L.S.N.</u>	Canon Law Society (G.B.I.) Newsletter
<u>C.S.</u>	Chicago Studies
<u>Clem.</u>	Clementis Papae V Constitutiones
<u>D.D.C.</u>	Dictionnaire de droit canonique
<u>D.M.C.</u>	Dictionarium morale et canonicum (Palazzini)
<u>Digest</u>	Justiniani Digesta
<u>E.I.C.</u>	Ephemerides iuris canonici
<u>Fontes</u>	Codicis iuris canonici fontes (Gasparri - Seredi)
<u>H.P.R.</u>	Homiletic and Pastoral Review
<u>Hostiensis</u>	Card. Henricus de Segusio
<u>I.C.</u>	Ius Canonicum
<u>I.D.E.</u>	Il Diritto Ecclesiastico
<u>I.E.</u>	Ius Ecclesiasticum
<u>Jur.</u>	The Jurist
<u>L.D.F.</u>	Les droits fondamentaux du Chrétien dans l'Eglise et dans la Société, (Actes du IVE Congrès International de droit canonique - Fribourg (Suisse), 1980.
<u>M.C.</u>	Miscelanea Comillas
<u>M.E.</u>	Monitor Ecclesiasticus
<u>M.P.</u>	Motu proprio

ABBREVIATIONS (CONT'D)

Mansi	Sacrorum Conciliorum nova et amplissima collectio
<u>Mo.</u>	The Month
<u>N.C.C.B.</u>	National Conference of Catholic Bishops (U.S.A.).
<u>Novella</u>	Justiniani Novella
<u>Or.</u>	Origins
<u>Panormitanus</u>	Nicholaus de Tudeschis
<u>Per.</u>	Periodica de re morali canonica liturgica
<u>P.L.</u>	Patrologia latina, edited by J.P. Migne, Paris, 1844-1864, in 221 vols.
<u>R.D.C.</u>	Revue de droit canonique
<u>R.D.T.</u>	Revue diocésaine de Tournai
<u>R.E.D.C.</u>	Revista Española de derecho canonico
<u>R.S.V.</u>	Revised Standard Version (of the Bible)
<u>Sal.</u>	Salesianum
<u>S.C.</u>	Studia Canonica
<u>S.R.R.Dec.</u>	Decisions of Sacred Roman Rota
<u>S.T.</u>	Sal Terrae
<u>T.C.L.</u>	The Catholic Lawyer
<u>T.P.S.</u>	The Pope Speaks
<u>VIO</u>	Liber Sextus Decretalium Bonifacii Papae VIII
X	Decretales Gregorii Papae IX

INTRODUCTION

Defense against injustice and injury is a right that derives from the natural law. The forms that this defense may take in a given society depend on positive human law. Every complete legal system, then, whether civil or ecclesiastical, should include remedies that are known and available for use by the members against actions which allegedly violate their rights.

Within the Church, tensions, which are part of the human condition, can give rise to conflicts that affect every relationship and may ultimately harm the very unity and mission of the people of God. It follows, then, that among the tasks of the legislator is the duty to provide for, facilitate, maintain, promote and guarantee the unity necessary for the Church to fulfil its divinely appointed mission. A key aspect to these duties is providing procedures for the resolution of conflict.

A first area of tension where conflict may develop in the Church is in human relationships. Differences in beliefs, opinions, ideas, vision, values or moral standards can lead to conflicts of interest, abuses or disregard of rights, or even personal harm. While we recognize that some provision should be made for the resolution of such areas of interpersonal conflict, this is not the primary concern of our study. However, since the

desire of the Church has always been to seek for a peaceful resolution to situation of conflict, this broader concept must be kept in perspective throughout our study.

A second area of tension concerns ideological resistance to the teaching authority of the the Church; a conflict here could ultimately lead to heresy or schism. To leave this conflict situation unresolved could bring division or a weakening of the "communio" which would harm the dynamism of the Church's mission. This conflict with the magisterium pertains to the teaching authority of the Church and does not come directly under the perview of our study.

A third potential area of tension leading to conflict lies in the relationship between the christian faithful and administrative authorities in the Church, especially when the administrative activity is allegedly arbitrary and harmful. It is the resolution of such conflict that is the subject matter of our study.

Within the christian context, the resolution of situations of administrative conflict may take on a variety of forms. These forms may be based on predominantly psychological, spiritual, conciliatory, authoritative or judicial approaches; however, the purpose of this study is to seek rather a juridical solution to the conflict when every other peaceful approach fails. The juridical nature of the solution does not

imply that it must be strictly legal and divorced from the spirit of the Gospels, but rather presumes that any procedure employed is in harmony with the nature of the Church as a communion of the people of God. Although this ecclesiological background is beyond the scope of this study, the theological notion of the Church as a "communio" remains part of the framework within which any truly christian resolution of conflict must be sought.

Many systems for the resolution of conflict in general and administrative conflict in particular have been used throughout the history of the Church. These systems culminated with the introduction of a new system for the resolution of administrative conflict in 1967. The establishment of an administrative tribunal, erected as the Second Section of the Apostolic Signatura, provided procedures for cases against allegedly harmful administrative activity of superiors, but only as a last resort following recourse to the Roman dicasteries.

The desires of the 1967 synod of bishops and the principles that were to guide the formulation of the 1983 Code indicated that the administrative tribunal was to be introduced at the level of the local Church in the new law. The various preparatory schemata for the Code maintained and developed such procedures up to and including the 1982 schema. However, the proposals were not incorporated into the 1983 law.

The focus of this study concerns the question whether there is a future for the administrative tribunal at the level of the local Church.

For this purpose, the study will examine the historical precedents that led up to the introduction of the Second Section of the Apostolic Signatura and the promulgation of a new law on administrative recourse that appears to exclude the local administrative tribunal. From our study of the systems used throughout the history of the Church, we hope to discover advantages and disadvantages as well as any consistent patterns in order to ascertain those elements that might best be incorporated in any future development of administrative procedures.

The emphasis of this study will be on the procedures for the defense of rights of the christian faithful against allegedly harmful administrative acts of the diocesan bishop or his equivalent in law. Since local procedures already exist for recourse against administrators subject to the bishop, resolution of such cases, while important, is a secondary issue that may be clarified when the principal issue concerning the bishop is resolved.

Questions regarding the procedures to be adopted in cases against administrative superiors within Institutes of Consecrated Life or Societies of Apostolic Life are matter for particular law, and so, are considered beyond the scope of this study. The context within which a solution to administrative conflict will be sought is the local Church, especially at the level of the episcopal conference. This emphasis on a local solution precludes consideration of the intervention of the Apostolic Legate. His participation would be considered essentially external and, at the level of the local Church, does not appear to be in harmony with his primary role.

The principle of subsidiarity seems to indicate that defense of rights against alleged harmful administrative acts should be available at the most appropriate level of the Church. However, the norms of the 1983 Code on administrative recourse do little more than reaffirm the hierarchical recourse provided in the 1917 Code and appear to leave a gap in the law regarding the provision of administrative justice at the level of the local Church.

By investigating those systems used by the Church throughout the centuries, we hope to learn from the experience of the past and ascertain the feasibility of a solution that can be local and at the same time provide a system of justice within the Church that is more completely in harmony with the needs of our times.

CHAPTER I

THE DEVELOPMENT OF PROCEDURES FOR THE RESOLUTION OF CONFLICT IN THE EARLY CHURCH

The relative sophistication of present-day systems and procedures for the resolution of administrative conflict is the end result of a process of gradual evolution that dates back to apostolic times. To be faithful to the sources and spirit of its foundation, any future development in ecclesiastical administrative justice must take these origins into account.¹ For this reason we commence our project with a study of systems and procedures used in the early Church from apostolic times until the first coordinated formulations of a general Canon Law with the Decretum of Gratian and later by the Corpus Iuris Canonici.²

¹ The scriptural and theological foundation of the Church's law is well founded in tradition and recent canonical documentation: cf. Paulus VI, "Iis qui in Gregoriana Studiorum Universitate IIO 'Cursui renovationis canonicae pro iudicibus aliisque Tribunalium administris' interfuerunt", in A.A.S., 64 (1972), p. 781: "Ex his consequitur, ut iuridica ordinatio et compages Ecclesiae ad Revelationem pertineant ideoque aboleri nullatenus possint, et ut doctrina iuris canonici sit disciplina cum theologia solido consociata foedere"; Johannes-Paulus II, Constitutio Apostolica "Sapientia Christiana", 15 aprilis 1979, art. 75, in A.A.S., 71 (1979), p. 494: "Facultas Iuris Canonici, Latini vel Orientalis, disciplinas canonisticas in lumine legis evangelicae excolere ac provehere intendit, in iisdemque studentes altius instituere ut ad investigationem et magisterium formentur necnon ad peculiariora munera ecclesiastica obeunda praeparentur."

² P. Palazzini, D.M.C., Vol. 2, pp. 868-869: "Primam collectionem vere systematicam et completam confecit Gratianus, circa a. 1150, cui titulus Decretum seu Concordia discordantium canonum." "Decretum Gratiani et Decretales Gregorii IX, Bonifacii VIII, Clementinae et Extravagantes constituunt Corpus iuris canonici, a. 1582 authentice editum."

By seeking a determination of the juridical aspects of systems provided for the resolution of conflict in general, we aim to discover indications and directions for future development. In researching Scripture, Apostolic Communities, early Christian writings and judicial practice, we will endeavour to lay a foundation that may justify future administrative procedures and determine aspects of the spirit that should accompany any system for the resolution of conflict with administrative superiors.

A. Foundations provided in N.T. writings

The New Testament presents an abundance of ideals and guidelines regarding attitudes that should govern the relationships between ecclesiastical superiors and the faithful as well as between members of the faithful. Our task, however, is to research only those systems provided or suggested to resolve the various forms of conflict that arose within the apostolic and early christian communities. Christian attitudes are to be presumed or encouraged in all attempts to resolve conflict. This research, however, is limited, since we seek out the practical provisions alone and leave the more theological questions aside. Saint Matthew and Saint Paul provide the major sources of a practical nature for this investigation.

1. Matthew - a system for disciplinary action

Given the fact of conflict among humans, and thus within the Church, it was only natural for early christians to furnish

guidelines for the resolution of such conflict in its many forms. The text of the Gospel of St. Matthew presents these simple guidelines:

If your brother sins against you, go and tell him his fault, between you and him alone. If he listens to you, you have gained your brother. But if he does not listen, take one or two others along with you, that every word may be confirmed by the evidence of two or three witnesses. If he refuses to listen to them, tell it to the Church; and if he refuses to listen even to the Church, let him be to you as a Gentile and a tax collector.³

In this Gospel, the word "sin" ("Now if your brother sin against you.") is of such a general nature that it can embrace any conflict between brothers (i.e. the faithful) or even between a member of the faithful and ecclesiastical authority.⁴ Matthew set down a procedure in four stages that has stood the test of time both for its logic and harmony with the Church as a communion of the people of God.

The four stages proposed by Matthew are: 1) face to face confrontation, 2) using the testimony of witnesses and persuasion, 3) bringing the matter before the local Church, and, as a last resort, 4) considering the person as a heathen and a publican.

³ Mt. 18:15-17 (R.S.V.). All future references to scripture are from R.S.V.

⁴ W. Hendriksen, The Gospel of Matthew, p. 698.

The face to face confrontation was essentially private in order to save the honor of the person challenged and maintain a family atmosphere.⁵ The command to point out the fault of the one accused placed the initiative on the person offended.⁶ If the person concerned remained unreceptive, then the next step was to produce witnesses in order to convince him of his wrong-doing, a well established procedure.⁷ If the evidence of the witnesses was rejected, then the case became public and was presented to the local Church. This "judgement" of the local Church could be subject to misinterpretation, but in context indicated the rendering of a decision that implied an amicable settlement by means of arbitration rather than litigation.⁸ At this point, the stages of the process have been exhausted. There remained only one step in those cases where the person charged was obdurate:

If the sinner rejects the judgement of the full assembly of believers, he is excommunicated (cf. I Cor. 6:1-11). He becomes like a Gentile (i.e., a pagan who is not a member of

⁵ J. Meier, Matthew, p. 205.

⁶ This contrasts with the duty of assuming the initiative required of the offender, should he be conscious of his offence, in the sermon on the mount (Mt. 5:23-24). Cf. J.P. Lewis, The Gospel according to Matthew, Part 2, p. 58.

⁷ Deut. 19:15; John 8:17; II Cor. 13:1; Tim. 5:19; Heb. 10:28; J. Meier, op. cit., p. 205, sees the process as a carefully ordered procedure for Church discipline developed from Lev. 19:17-18 and Dt. 19:15 and paralleled by disciplinary measures at Qumran.

⁸ L. Morris, The First Epistle of Paul to the Corinthians: An Introduction and Commentary, 1964, p. 95: "To judge is an aorist infinitive, with the meaning 'to give a decision' (rather than 'conduct a trial'). The word implies not litigation, but an amicable settlement by means of arbitration."

God's holy people) and a tax collector (a member of God's people who has turned traitor).⁹

These first stages or attempts at a peaceful resolution of the conflict were private actions with no juridical value. They were possible universally and to be encouraged. The steps that followed took on a juridical value since there was a presumption of seriousness and the process became public with visible effects that could include 1) a peaceful resolution to the conflict, 2) punishment, or 3) some form of excommunication.

The advantage of the system proposed by Saint Matthew rests in its double character, a private and a public process that allowed for a peaceful or a contentious resolution of the conflict. The dual nature of the process made it equally available for disciplinary action and for resolution of conflict that occurred between members of the faithful. No distinction was made that excluded challenges to ecclesiastical superiors, but, at the same time, there was little clarity in the expression "tell it to the Church".¹⁰ Whether this meant the local Church leaders or the whole community remains unclear.

⁹ J. Meier, op. cit., p. 205. Another author, W. Barclay has great difficulty reconciling this judicial approach with Christ. Because this approach sounds to him more like the regulations of an ecclesiastical committee he believes it "[...] cannot be a correct report of the words of Jesus, but an adaptation made by the Church in later days, when Church discipline was rather a thing of rules and regulations than of love and forgiveness." Cf. W. Barclay, The Gospel of Matthew, Vol. 2, p. 187.

¹⁰ J. Reuss, The First Epistle to Timothy. The Second Epistle to Timothy, p. 70: Here Reuss has the same difficulty with a parallel passage in the first epistle to Timothy: "It is not clear whether publicly means in the presence of all the presbyters or of the whole community."

2. Paul - judgement and brotherly correction

Saint Paul's major contribution to the resolution of conflict within the Church was directed to the cosmopolitan city of Corinth which embraced not only Jews, Greeks, Europeans, Asians and Africans,¹¹ but included the various social strata known to the Roman Empire.¹² Because of the differing backgrounds of those who made up the Church in Corinth, Paul's solution had to be both simple and universally acceptable without appearing to be a Greek, Roman or Jewish solution. The strategic position and cosmopolitan nature of Corinth made the place something of a launching pad for the propagation of the Gospel,¹³ and the solution for Corinth could be justly applied for centuries because of its universality.

a. A proposal for local judgement

In his epistle to the Corinthians (I Cor. 6:1-11), Saint Paul laid down principles for the resolution of conflict that appear to extend the provisions given by Saint Matthew. What we may term the "practical principle", provides that if disputes arise, they should be resolved within the local christian community. The "spiritual principle" he proposes embraces two parts: 1) there should be no disputes among believers, and 2) it is better to suffer the wrong.

¹¹ L. Sotillo, "La potestad arbitral y judicial de la Iglesia en las causas temporales entre los cristianos de los primeros siglos", in M.C., 1(1943), p. 181.

¹² Ibid., pp. 182-188.

¹³ Ibid., p. 182.

Saint Paul confronted the faithful of Corinth with a rebuke and a challenge. A rebuke, since they were taking their internal conflicts before judges who did not share their faith. A challenge, mainly to their sense of autonomy: "[...] are you incompetent to try trivial cases?"¹⁴ This challenge and rebuke would continue in various forms throughout the centuries, but remains a constant call to local autonomy:

I say this to your shame. Can it be that there is no man among you wise enough to decide between members of the brotherhood, but brother goes to law against brother, and that before unbelievers?¹⁵

b. The legal influences in the life of St. Paul

The proposals put forward by St. Paul are not specific, but, looking to the legal influences in his life we can determine what they meant in practice.

i. The Jewish influence

In the Graeco-Roman Empire, the Jews were given freedom to maintain their own judicial system in regulating the conduct of their

¹⁴ I Cor. 6:2.

¹⁵ I. Cor. 6:5-6.

communities throughout the Empire.¹⁶ The Romans recognised the competence of the Jewish Tribunals, based on the Sanhedrin of Jerusalem, in civil cases when both litigants were Jews. This implicit and practical recognition of the Jewish laws and magistrature allowed Jews to function somewhat as a State within a State.¹⁷ Paul was not seeking an equal recognition of a public process, but rather urged that the matters be settled privately and in an informal way among the members themselves.¹⁸

ii. The Greek influence

The development of independent Grecian city-states with their own legal systems meant that the most reliable access to concepts of Grecian law was Athenian.¹⁹ In Pauline times, we find the frequent use of the institution of the diathetai or college of arbitrators well established in Athens and other parts of Greece. The parties appeared before these arbitrators in preparation for an appearance

¹⁶ C. Holladay, The First Letter of Paul to the Corinthians, p. 79. L. Morris, op. cit., p. 93, cites a Rabbinical maxim: "It is a statute which binds all Israelites, that if one Israelite has a cause against another, it must not be prosecuted before the Gentiles." He points out that the Corinthians did not reach even the Jewish standard, and that "[...] Paul's complaint is not that the believers would not obtain justice in heathen courts, but that they had no business to appear there at all."

¹⁷ L. Sotillo, loc. cit., p. 192.

¹⁸ C. Holladay, op. cit., p. 79.

¹⁹ M. Ostward, "Ancient Greek Ideas of Law", in Dictionary of the History of Ideas, Vol. 2, p. 674a.

before the hèliastai or true judges.²⁰ The first step in the attempt to settle a private dispute in Athens was before a private arbitrator. Each party chose one arbitrator and a third was chosen by mutual agreement to be an impartial judge. Failure to settle at this initial stage meant referring the matter to public arbitrators consisting of Athenian citizens in their sixtieth year. If the matter was not settled at this point, it was referred to the jury court composed of citizens over thirty years of age and in varying numbers.²¹ It appears that the problem confronting Paul in Corinth was one that affected Greeks specifically.²²

Equity was not something abstract for the Greeks, but an essential part of their justice system and its practical administration.²³ The sentence of a public arbitrator could be subject to appeal although he judged according to equity and not by the rigour of the law. The foremost task of the arbitrator was conciliation of the parties. Athenian legal practice favoured the process of arbitration; it was widespread and so extant in Corinth at the time of Paul's epistle.²⁴

²⁰ L. Sotillo, loc. cit., pp. 196-197.

²¹ W. Barclay, op. cit., pp. 49-50.

²² Ibid., p. 49.

²³ M.R. Konvitz, "Equity in Law and Ethics", in Dictionary of the History of Ideas, Vol. 2, pp. 148-154.

²⁴ A. Amanieu, "Arbitrage", in D.D.C., Vol. 1, col. 863.

iii. Roman Law influence

Although the ordinary settlement of legal questions was in the hands of the Praetor, Roman Law also placed great hope in the person of the arbiter. At the time of St. Paul, we discover at least four types of arbiters: 1) the judex privatus given by the Praetor to the parties to help them reach agreement; 2) the arbiter by compromise who was chosen by the parties and judged according to the principles of justice; 3) the arbitrator, whose decision was not based on strict justice, but rather on the principles of equity; 4) the Special Judge, chosen by the Judge or magistrate with full freedom to judge certain points of a process or take conservative measures, these last judges were delegates of another judge who could overturn their decisions.²⁵

iv. Paul's personal vision

From the mixed juridical background of Saint Paul and the future development of Church law, we can argue that he encouraged the use of judges in the form of arbitrators who would judge according to equity and from whose decision there was no appeal. The hierarchy emerged as the authorities chosen for this task in the development that followed.

Added to this personal juridical background was another influence: Saint Paul's personal vision of an imminent judgement of the

²⁵ Ibid., col. 863.

world and his eschatological orientation tied to a vision of the Church as the body of Christ.²⁶ This vision of Church made the relationship among believers so close that to bring a suit against a fellow member of the community was tantamount to bringing a suit against oneself.²⁷ While his ideal for the Church was perfect harmony, Paul did not deny the right to judicial solutions; he was giving a counsel.²⁸ He realised that the faithful would need help in overcoming situations of friction and his counsel was that the resolution of these conflicts should be sought within the community.²⁹

c. Insistence on legal prescriptions

The first epistle to Timothy (I Tim. 5:19) makes provision for accusations against elders or presbyters: "Never admit any charge against an elder except on the evidence of two or three witnesses." This juridical requirement is accepted by authors as coming from the provisions of Deuteronomy 17:6 and 19:15. As a general principle, it is included in John 8:17, Hebrews 10:28, 2 Corinthians 13:1 and Matthew 18:15-17.³⁰

²⁶ E. Walter, The First Epistle to the Corinthians, p. 59.

²⁷ J. Murphy-O'Connor, I Corinthians, p. 47.

²⁸ L. Sotillo, loc. cit., p. 178.

²⁹ J. Murphy-O'Connor, op. cit., p. 47.

³⁰ C. Spain, The Letters of Paul to Timothy and Titus, p. 90; W. Barclay, The Letters to Timothy, Titus and Philemon, p. 116; J.H. Bernard, The Pastoral Epistles, p. 86.

The Mosaic command provided protection for those in positions of authority while at the same time guaranteeing justice. Unless the evidence was sufficient, no action could be initiated against those in positions of authority.³¹ The Mishnah or codified Rabbinic law clarified this position by making clear that one witness was not enough.³² The epistle to Timothy accepted this position in the case of accusations against authorities in the Church. In Mosaic law, provision was made for testing the credibility of the witnesses.³³ This same practice that provided trustworthy witnesses was accepted into early ecclesial procedures.³⁴ As a clear reference to Mosaic law and practice, the passage refers indirectly to capital and non-capital cases (cases involving the death penalty or other minor penalties). The former required 23 judges, the latter normally three. Provision was made in the Mosaic law for judgement of the high priest, but this required seventy-one judges.³⁵

While the provisions of this epistle to Timothy gave protection to the innocent, the just and public condemnation of the guilty

³¹ Deut. 19:15: "A single witness shall not rise up against a man on account of any iniquity or any sin which he has committed; on the evidence of two or three witnesses a matter shall be confirmed."

³² The Mishnah; translated from the Hebrew with introduction and brief explanatory notes by H. Danby, Sotah, 6.3, p. 299.

³³ Ibid., Sanhedrin, 3.6; 4.5; 5.1ff, pp. 385-389.

³⁴ C.J. Hefele, A History of the Christian Councils, Vol. 2, pp. 365-366: The Second General Council of Constantinople (381), Canon 6.

³⁵ The Mishnah; p. 384.

was not overlooked: "As for those who persist in sin, rebuke them in the presence of all, so that the rest may stand in fear"³⁶ The demeanor of the judge was to be that of one who was impartial. The exercise of judgement was to be fulfilled with an open mind and without respect of persons: "In the presence of God and of Christ Jesus and of the elect angels I charge you to keep these rules without favour, doing nothing from partiality."³⁷

The solemnity of this passage marks the importance in which it was held by the writer and the seriousness of the task confronting Timothy.³⁸ Provision was made for the judgement of elders, but the limitations and scope of these procedures was not spelled out clearly. The general context indicates the presence of a higher superior whose task it was to correct abuses. While providing some juridical guidelines, these procedures do not appear to have catered for an inferior seeking justice against the actions of a superior through a direct judicial action.

The text of this epistle justifies two things, 1) the use of witnesses, and 2) the possibility of taking superiors to trial. The requirements regarding witnesses provided both a form of protection for the innocent and juridical possibilities for condemnation of the guilty. Theodore of Mopsuestia warned in his commentary on this passage of the danger from malicious attacks on those in positions of

³⁶ I Tim. 5:20.

³⁷ I Tim 5:21; K.S. Wuest, The Pastoral Epistles in the Greek New Testament for the English Reader, pp. 86-87.

³⁸ J. Reuss, The First Epistle, p. 70.

authority within the Church.³⁹ The context, Mosaic law origins of the passage and subsequent developments in this area indicate some justification for the scrutiny of witnesses in such cases.⁴⁰

d. Brotherly correction

The resolution of the conflict between Peter and Paul at Antioch (Galatians 2:11-14) yields principles that can be part of the fabric of a juridical solution. Peter's example, in living out what appeared to be a double standard was challenged by Paul, who, loyal to his own principles,⁴¹ rebuked him in the presence of all.

The compromise solution of the Council of Jerusalem was that Jews were to go on living as Jews in the observance of circumcision and the law, while the Gentiles were freed from such observances.⁴² When confronted by both parties, Peter chose to follow the Jewish customs; he was inadvertently imposing those same standards on the Gentiles. Questions of guilt aside, example coupled with authority

³⁹ Theodorus Mopsuestenus, Commentarii in epistolas B. Pauli. The latin version with Greek fragments. With introduction, notes and indices by H.B. Swete, Vol. 2, p. 170.

⁴⁰ C.J. Hefele, op. cit., Vol. 2, pp. 365-366: The Second General Council of Constantinople (381), canon 6.

⁴¹ I Tim. 5:20-21: "As for those who persist in sin, rebuke them in the presence of all, so that the rest may stand in fear." Sin here, is not necessarily a moral quality, but is concerned with observance of the law; cf. W. Barclay, The Letters to the Galatians and the Ephesians, p. 20.

⁴² W. Barclay, The Letters to the Galatians, p. 20.

was more effective than words. Peter's action was seen by Paul as doing grave harm to the Church.⁴³

At issue here, were not so much the inconsequential regulations or legalistic dietary laws, but the fact that these differences could divide a community and make impossible the sharing of a meal at the same table. Since the eucharist was celebrated in this context, they could not hold this solemn remembrance together. The unity of the Church as the body of Christ was the deeper question addressed by Paul.⁴⁴

While scripture scholars through the centuries have concentrated predominantly on the questions of faith and justification, the possible guilt of Peter or Paul, or the "Pauline Gospel" that emerge from this passage,⁴⁵ it was St. Thomas Aquinas who centuries later provided the insights that have some bearing for our study. With what authority did Paul confront Peter, the recognized leader of the Church? St. Thomas answers: "[...] the Apostle opposed Peter in the exercise of authority, not in the authority of ruling."⁴⁶

⁴³ G. Schneider, The Epistle to the Galatians, p. 39.

⁴⁴ C. Osiek, Galatians, p. 24.

⁴⁵ R. Kieffer, Foi et justification à Antioche: Interpretation d'un conflit (Ga 2, 14-21), pp. 1-164, presents a summary of the major exponents of this passage.

⁴⁶ St. Thomas Aquinas, "In Epistolam ad Galatas", in Opera omnia... notis... sollicitè ornata studio ac labore Stanislai Eduardi Fretté, Vol. 21, p. 192: "[...] dicendum est quod Apostolus fuit par Petro in executione auctoritatis, non in auctoritate regiminis." English translation in F.R. Larcher, Commentary on Saint Paul's Epistle to the Galatians, p. 46.

Paul opposed Peter publicly and as his equal,⁴⁷ the only authority he had was that of a brother, both to Peter and to the brethren who were harmed by Peter's action. He was equal in dignity but not in authority. His advocate was truth alone. For Aquinas, there is an example here for both prelates and subjects alike. For prelates, he sees an example of humility by which they should not disdain corrections from those who are lower and subject to them; for subjects, he sees an example of zeal and freedom whereby they should not fear to correct their prelates, particularly if their crime is public and verges on doing harm to the public good.⁴⁸

Truth is basic to the settlement of conflict. St. Thomas insists, with St. Paul, that truth should never be put aside through fear of scandal. It was because the truth was not preached openly and the opposite condoned for fear of giving scandal, that a public danger to the Gospel teaching was present; so, the manner of Paul's rebuke was public and extremely clear. If the offence were private, the procedures of fraternal correction should have been observed privately.⁴⁹

⁴⁷ St. Thomas Aquinas, loc. cit., p. 192: "Vel in faciem, id est non in occulto, tanquam detrahens et timens, sed publice, et ut par ei. Lev., XIX,17: Non oderis fratrem tuum in corde tuo, sed publice argue eum, ne habeas super illo peccatum. Et hoc ideo, quia reprehensibilis erat."

⁴⁸ Ibid., p. 192: "Ex praedictis ergo habemus exemplum praelati quidem humilitatis, ut non dedignentur a minoribus et subditis corrigi; subditi vero exemplum zeli et libertatis, ut non vereantur praelatos corrigere, praesertim si crimen est publicum, et in periculum multitudinis vergat."; cf. R. Kieffer, op. cit., pp. 100-103.

⁴⁹ St. Thomas Aquinas, loc. cit., p. 193.

e. A spiritual dimension to situations of conflict

Saint Paul's advice to suffer rather than to fight (I Cor. 6:7), appears to flow from his new vision in Christ. "To have lawsuits at all with one another is defeat for you. Why not rather suffer wrong? Why not rather be defrauded?" Acceptance of suffering was inculcated as sent by God to purge away sin, it was considered a gift with the power of atonement.⁵⁰ Aware that the way of perfection was not for all,⁵¹ Paul proposed an even more perfect solution, based not on justice, but on love. "Why not rather suffer wrong?", was a principle in harmony with the spirit of the Gospels and the sermon on the mount. The Old Testament maxim of "an eye for an eye" was replaced by the counsel of non resistance against the one who is evil, turning the other cheek, giving more than asked for, and walking the extra mile.⁵² Vindictiveness against the one who inflicted harm was replaced by a command to love and to do what is good for each other.⁵³

⁵⁰ D. Davies, Paul and Rabbinic Judaism; Some Rabbinic Elements in Pauline Theology, p. 263: "The pre-Christian no less than the post-Christian history of Jewry is chequered with periods when to take upon oneself the yoke of the Torah was to court suffering and even death itself. Judaism had to come to terms with both these factors, with suffering and with persecutions that often issued in martyrdom. We need not enlarge upon the way in which the Rabbis dealt with the former. We need only point out that they inculcated the acceptance of suffering because it was sent by God in order to purge away sin; suffering has atoning efficacy."

⁵¹ L. Sotillo, loc. cit., p. 178.

⁵² Mt. 5:20, 38-41.

⁵³ Rom. 12:14-17; I Thess. 5:15.

The exhortations of Paul were clear and indicated the attitudes required of those in conflict among the brothers. W. Barclay summarizes:

To go to law at all, and especially to go to law with a brother, is to fall far below the Christian standard of behavior. Long ago Plato had laid it down that the good man will always choose to suffer wrong rather than to do wrong. If the Christian has even the remotest tinge of the love of Christ within his heart, he will rather suffer insult and loss and injury than try to inflict them on someone else - still more so, if that person is a brother. To take vengeance is always an unchristian thing. A christian does not order his dealings with others by the desire for recompense and the principles of crude justice. He orders them by the spirit of love: and the spirit of love will insist that he live at peace with his brother, and will forbid him to demean himself by going to law.⁵⁴

However, this message goes even deeper. The seeking of justice must not be thought of as the highest value, but only as a means to an end. The true value sought should be the living out of the bond of love with the brothers which includes doing no injustice to them.⁵⁵

3. Apostolic communities and conflicts

A study of early apostolic communities to determine how internal conflict was resolved is plagued by many difficulties. Pre-eminent among these difficulties is the nature of the authority exercised and the developing understanding of the place of authority in the Church. A secondary difficulty lies in the fact that most disputes

⁵⁴ W. Barclay, The Letters to the Corinthians, pp. 50-51.

⁵⁵ F. W. Grosheide, Commentary on the First Epistle to the Corinthians, p. 139.

were concerned with the emergence of false doctrine or the diversity of traditions in these communities. Two contrasting ecclesiologies appear to have existed in the nascent Church according to Raymond Brown:

We have seen that the Johannine community did not seem to have authoritative church officers (presbyter-bishops) who could control doctrine by the very nature of their office, and so differed in this aspect from the churches attested in Luke-Acts, the Pastorals, and Matthew.⁵⁶

John's Paraclete-centred ecclesiology offered no real protection against schismatics, and so does not appear to be the ideal vehicle for settlement of conflict with superiors since the only recognised authority in his community was the Holy Spirit. It appears that these internal difficulties led his followers to accept eventually, and somewhat reluctantly the authoritative presbyter-bishop-teaching structure which in the second century became the dominant form of ecclesiology.⁵⁷ The elusive nature of any procedures that may have been in use in the apostolic communities emerges as a feature of both forms of ecclesial structure:

We have spoken about Churches that did have presbyter-bishops toward the end of the first century; for other NT churches of that period, we do not know how supervision was structured. Matthew has clear ideas on how authority is properly exercised (18:15-18) but tells us nothing about the officials in the Church who might be doing this.⁵⁸

Recent studies in the sociological interpretation of scripture have shed some light in this area. One of the principal proponents of this method, G. Theissen, claims that at first, wandering charis-

⁵⁶ R. Brown, The Community of the Beloved Disciple, p. 158.

⁵⁷ Ibid., p. 146.

⁵⁸ Ibid., pp. 143-144.

atics were the authorities in the local communities. Problems were resolved either by the community as a whole or by charismatics who happened to arrive. Two connected but separate approaches are entwined in the sources:

Thus we find juxtaposed sayings which assign the authority to bind and to loose on the one hand to the community and on the other to Peter (a wandering charismatic)(Matt. 18.18; 16.19). We may compare the contradiction between rejecting all authority (Matt. 23.8ff.) and recognizing early Christian 'prophets, wise men and scribes' (Matt. 23.34). This contradiction is easy to understand. The less the structures of authority in local communities had come under the control of an institution, the greater was the longing for the great charismatic authorities. And conversely, the greater the claim of these charismatics to authority, the less interest there was in setting up competing authorities within the communities. But when the local communities grew in size, there was a need for internal government which inevitably competed with the wandering preachers. This is probably the explanation of the differences between Peter and James. Peter, a wandering charismatic with no ties, was more in a position to risk coming into conflict with Jewish food regulation than James, the spokesman for the community in Jerusalem. Peter ate with Gentile Christians in Antioch, but James sent emissaries to make him conform with Jewish norms (Gal. 2.11f.)⁵⁹

In speaking of applying this sociological approach to early Christianity, J.G. Gager says:

One major obstacle in applying it (the sociological interpretation of Scripture) to a movement such as early Christianity is that the historical evidence is so diffuse and fragmentary. Obviously the data are insufficient to serve as the basis, by themselves, for generating major theories. In addition, the lack of satisfactory controls means that our conclusions regarding the degree of conformity

⁵⁹ G. Theissen, Sociology of Early Palestinian Christianity, p. 20.

between a given model and the Christian data must remain tentative and open to reformulation.⁶⁰

Applying this lack of evidence to speculation about juridical theory and practice in early Christian communities could prove foolhardy and inconclusive to our study, so we have remained with the content of the New Testament that is most often quoted by canonists.

B. Early Christian Writings

The Gospel teaching of Matthew which promoted a structural basis similar to Paul's teaching on the resolution of conflict was taken up by the Didachè (composed between the years 80 and 120) and reflected the situation of the Church at the end of the first century.⁶¹ The sense of unity and brotherhood in the early Church outweighed any sense of supreme authority or authoritarianism and must be held up as one of the dominant features of this period.⁶² In the area of conflict, division or damage to the unity of the community brought a reaction which was harsh by modern standards:

⁶⁰ J.G. Gager, Kingdom and Community, p. 3; R. Scroggs, "The Sociological Interpretation of the New Testament: The Present State of Research", in New Testament Studies, 26 (1980), p. 166; here Scroggs supports this same position from another viewpoint: "Most sociologists, particularly those using computer methods to study contemporary societies, would probably be aghast when they learned how little in the way of data was available for the sociological analysis of the New Testament. Furthermore, what we do have is not directly sociologically accessible. That is, most texts are speaking about theological verities, not sociological conditions."

⁶¹ C. Vismara, Episcopalis audientia, p. 7.

⁶² J. Heron, The Church of the Sub-Apostolic Age: Its Life, Worship, and Organization, in the Light of "The Teaching of the Twelve Apostles", p. 117.

Furthermore, correct one another, not in anger, but in composure, as you have it in the Gospel; and when anyone offends his neighbour, let no one speak with him - in fact he should not even be talked about by you - until he has made amends .⁶³

1. Attitudes required in litigation

The general invitation to avoid divisions and make peace was part of the spiritual dimension that emerged in the early Church:

Thou shalt not desire division, but shalt make peace between those at strife, thou shalt judge justly. Thou shalt not respect a person in rebuking transgressions.⁶⁴

The spiritual aspect is equally predominant in the Didascalia Apostolorum (about 250 A.D.) where a lawsuit was considered the last resort. The christian should not only strive to avoid a lawsuit, but even be prepared to suffer loss. This loss was considered gain with God as the result it brought was peace. Heathens were not to know of any lawsuits between christians and the tribunals of the heathen were not to be used.⁶⁵

The Didascalia Apostolorum went directly to the attitudes of those involved in litigation. It distinguished between the party who was meek and yielding, considered a true son of God and son of the light, and the one who was "hard and forward, and overreaching and blasphemous, is a hypocrite, and the Enemy works in him." The sug-

⁶³ The Didachè, p. 24 (15.3).

⁶⁴ H. De Romestin, The Teaching of the Twelve Apostles, p. 67, (Ch. 4,3).

⁶⁵ Didascalia Apostolorum, Book 2: 45-46 , pp. 109-110.

gestion was that the latter should be reprov'd, rebuked and corrected and then received back: "For when such are corrected and reprov'd, you will not have many lawsuits."⁶⁶

In an exercise of logic, the Didascalia Apostolorum drew to a spiritual conclusion, the counsel of St. Paul that contentions should not exist in the Church:

He who is contentious, or makes himself an enemy to his neighbour, diminishes the people of God. For either he drives out of the Church him whom he accuses, and diminishes her and deprives God of the soul of a man which was being saved, or by his contention he expels and ejects himself from the Church, and so again he sins against God. For God our Saviour spoke thus: "Every one that is not with me, is against me; and every one that gathereth not with me, scattereth".⁶⁷

The other side of the coin was that the administration of the bishop should promote harmony and peace:

And you the bishops, be not hard, nor tyrannical, nor wrathful, and be not rough with the people of God which is delivered into your hands. [...] gather the faithful with much meekness and long-suffering and patience, and without anger, and with doctrine and exhortation, as ministers of the kingdom everlasting.⁶⁸

2. The nature of authority in the early Church

The teaching of Clement of Rome on apostolic succession and the arrangement of his hierarchical priorities in the epistle to the Corinthians placed an uncommonly strong emphasis on leadership:

⁶⁶ Ibid., Book 2:46, p. 110.

⁶⁷ Ibid., Book 2:56, p. 118.

⁶⁸ Ibid., Book 2:57, p. 119.

Jesus was sent by God; Christ commissioned the twelve apostles to preach the gospel, and they appointed their first converts to be bishops and deacons. To rebel against the proper officials was to rebel against God.⁶⁹

Pope Clement, in an effort to diffuse and put to an end the schism⁷⁰ that had developed in Corinth, showed an authoritative approach to the resolution of conflict. He saw order as the will of God and disorder as the seed sown by the prince of this world. The obedience of a soldier to his commanders was the measuring stick of order. He portrayed the qualities required in Christians that suited his model of Church. There was strong emphasis on "submissiveness" to officials, "regulated" conduct, "respect" for the elderly, habits of "self-restraint" and "sedateness".⁷¹ He used a definition of love that emphasized passivity in adversity:

[...] love endures everything, is long suffering to the last; there is nothing vulgar, nothing conceited, in love; love creates no schism; love does not quarrel; love preserves perfect harmony.⁷²

Clement urged acceptance of correction and praised reproof as honorable and something that united the faithful with the will of God. Scripture was used to extol the value of suffering and the protection of those who allowed themselves to be disciplined.⁷³ Having attributed the reason for schism to the "jealousy and envy of a

⁶⁹ I. Craig, The Beginning of Christianity, p. 277

⁷⁰ The Epistles of St. Clement of Rome and St. Ignatius of Antioch, pp. 4-5.

⁷¹ Ibid., pp. 9-10.

⁷² Ibid., p. 39.

⁷³ Ibid., pp. 43-44.

few",⁷⁴ he invited the prime movers to submit to the presbyters "bending the knees of your hearts".⁷⁵ His final appeal was to reason which dictated that it was better to be little and honorable within the flock of Christ than to be esteemed beyond merit by others and forfeit the hope given by Christ.⁷⁶

The other solution Clement offered was to encourage the troublemaker to depart, and this in a type of voluntary self-excommunication:

Now, then, who among you is noble, who is compassionate, who is full of charity? Let him say: If I am the cause of sedition and strife and schism, then I depart; I go wherever you wish; I do whatever the majority enjoins: only let the flock of Christ have peace with the appointed presbyters.⁷⁷

Clement's arguments appear to have taken scripture to the extreme as he accused dissenters of blasphemy upon the name of the Lord,⁷⁸ saying that it would be better not to have been born or to have a millstone hung around the neck.⁷⁹ His resolution of the conflict was not based so much on the question or difficulty that had arisen, but rather it favored the authority challenged:

Surely, all those that belong to God and Jesus Christ are the very ones that side with the bishop; and all those that may yet change their mind and return to the unity of the

⁷⁴ Ibid., pp. 11-12.

⁷⁵ Ibid., pp. 44-45.

⁷⁶ Ibid., pp. 44-45.

⁷⁷ Ibid., p. 42.

⁷⁸ Ibid., pp. 38-39.

⁷⁹ Ibid., p. 38.

Church will likewise belong to God, and thus lead a life acceptable to Jesus Christ.⁸⁰

The bishop and God appear to be identified in Clement's intervention in Corinth. Vague general statements left much room for development, but were surely reason enough for not challenging the teaching nor the governing authority of the one who presided over the faithful:

But should any disobey what has been said by Him through us, let them understand that they will entangle themselves in transgression and no small danger.⁸¹

[...] this gate of observance of the law is the gate of Christ; blessed are those who enter by it and walk the straight path in holiness and observance of the law, performing without disturbance all their duties.⁸²

St. Ignatius of Antioch emphasized the role of the bishop as the monarchical head over each individual congregation rather than as the representative of a wider Church organization. In representing the unity and order of his single congregation, his authority, through practical necessity, was used to avert heresy and schism. The role of ecclesiastical authority was at this time still in early stages of development both in practice and understanding.⁸³ This emphasis on authority is also found in the writings of Clement of Rome, Clement of Alexandria, Justin, Irenaeus and other authors prior to Tertullian. Bishops were considered as custodians of order and

⁸⁰ Ibid., p. 11.

⁸¹ Ibid., p. 45.

⁸² Ibid., p. 39.

⁸³ O. Pfleiderer, Christian Origins, p. 284.

their functions were those of oversight and superintendence.⁸⁴ In this context, to disturb or challenge a bishop on the level of his administration was considered as threatening the unity of that over which he was superintendant.

The developments that followed in the subsequent centuries appear to continue and incorporate most of the practices of this early legal tradition within the Church. We now turn to the specific developments within the episcopal tribunals and the use of the Provincial Synod for the resolution of conflict. It is within the context of appeals that we will discover the historical groundwork eventually leading to the formation of the administrative tribunal.

C. The right to appeal and accountability of ecclesiastical authorities

In order to arrive at an understanding of the principles involved in the resolution of conflict between the christian-faithful and authorities in the Church, it is important to be aware of both the gradual refinement of terminology and the strong influence of imperial Roman Law. The resolution of such conflict presumed the right to appeal and accountability of authorities. The appeal was a device peculiar to Roman Law at the time of the early Church and, as it developed, it took on a variety of meanings.

⁸⁴ G.P. Fisher, The Beginnings of Christianity, pp. 553-554.

1. Appeals: The Roman Law background

During the time of the Kingdom (753-509 B.C.) and the Republic (509-27 B.C.) an appeal was possible in criminal cases and normally given the title provocatio. The Valerian law of 508 B.C. gave a right of appeal to any Roman citizen condemned for a crime. The appeal was not a simple review of alleged errors in procedures, but a completely new trial. This applied only in criminal cases; civil cases would be provided for with the advent of the Empire (27 B.C.)⁸⁵

In the pre-imperial period, the sentence of a judge could also be subjected to the process of restitutio in integrum; a person condemned was able to contest the validity of the decision by refusing to pay the amount to which he had been sentenced. He risked condemnatio in duplum against the actio iudicati, but there was no appeal in the strict sense of the term.⁸⁶ Rather, what some might refer to as an appeal, was really an application for an intercession or veto interposed by an official of high rank upon the act of

⁸⁵ W. L. Burdick, The Principles of Roman Law and Their Relation to Modern Law, pp. 703-704. An appeal, in the sense of an application to a higher court to retry or to review the proceedings of a lower court was unknown in civil cases in Roman Law before the advent of the Empire. Cf. Ibid., p. 670.

⁸⁶ J.B. Moyle, Imperatoris Iustiniani institutionum, libri quattuor with Introductions, Commentary, and Excursus, p. 655.

another official. This process did not reverse the decision, but brought about a stay of execution or a return to the status quo.⁸⁷

The right to appeal in early imperial Roman Law depended on the attitude of the emperor of the time. Augustus (27 B.C. - 14 A.D.) gave appellate jurisdiction to the Senate, but successive emperors reserved this power to themselves. The terms provocatio and appellatio were used interchangeably, although provocatio was the acceptable term when an appeal was made in criminal cases. Judicial matters, including appeals, were left entirely to magistrates when the emperor did not reserve this power. He intervened only in those special cases brought to his attention by political influence or because of their importance or complicated nature.⁸⁸ Because Roman Law was in a process of continuous evolution, it is almost impossible to pinpoint one system of appeals at a given time, but, generally speaking, in the strict sense, an appeal was possible only against a final judgement.⁸⁹

The decisions of the ordinary magistrates were open to appeal, but at times, special magistrates were appointed with a provision

⁸⁷ So it was that the college of Tribunes could veto the act of a magistrate or one Praetor veto the act of another. Cf. Digest, Lib. V, tit. I, lex 58 ; W.L. Burdick, op. cit., p. 670.

⁸⁸ W.L. Burdick, op. cit., pp. 705-705.

⁸⁹ Digest, Lib. XLIX, tit. V, lex 4.

that their judgement would be final.⁹⁰ Indeed, the availability of appeal led to abuses. Fraudulent or dilatory tactics were used merely to prevent the execution of a judgement. Certain types of appeal were abusive, vexatious, provocative or designed only for delays and such approaches were subsequently forbidden.⁹¹ In these abuses, parties were prevented from receiving their rights or subjected to losses and great expense. For this reason time limits and penalties were introduced.⁹² Since Rome was established as the See of Peter, it was only natural that these legal provisions should be assumed and adapted to the developing Church. However, a confusion of powers made that development within the Church a slow process.

⁹⁰ Ibid., Lib. XLIX, tit. II, lex 14. A figure arose during the Empire, that of the Praetorian Prefect. Created by Augustus, he was commander of the Praetorian Guard, bodyguard of the Emperor and later the most powerful political figure below the Emperor. He administered all departments of the Government, the Army, Finances and Judiciary. He represented the Emperor in appeals from the provinces. There was no appeal from his decisions since the Emperor believed that the Praetorian Prefect would pronounce the same judgement as the Emperor himself. Cf. W.L. Burdick, op. cit., p. 706; Digest, Lib. II, tit. I, lex 1.

⁹¹ Digest, Lib. XLIX, tit. V., lex 7.

⁹² Novella, XLIX, c. 1,2,3; XCVI, c. 1,2; Codex Theodosianus, 1,2,5; 11,36,1.; Digest, I, Lib. I, tit. XIX, leges 1-8.

2. Church-State: mixed competence

The recognition of ecclesiastical judicial power by the imperial Roman Law was more than the civil recognition of the internal authority of the Church. Spiritual and temporal powers at times penetrated each other's realm, so that any clear separation of Church and State as experienced in today's western society did not exist; kings sometimes intervened in the affairs of the Church and bishops took part in the government of secular affairs.⁹³ In such a context, the question of appeal against Church authorities and the mixed competence of civil and Church tribunals became a perplexed issue.

a. Civil recognition of ecclesiastical judicial power

Constantine (306-337) gave the bishops an effective civil power as part of the Constantinian peace of 331. This meant imperial recognition of the validity of decisions rendered by the bishop in his capacity either as iudex (judge) or arbiter and the obligation of the State to enforce the decisions rendered by the competent eccle-

⁹³ A. Dumas, "Jurisdiction ecclésiastique", in D.D.C., Vol. 6, col. 244. The intervention of the emperor did not necessarily prejudice the authenticity of decisions, since his position was that of one who confirmed rather than made decisions; cf. F. Dvornik, "Emperors, Popes, and General Councils", in Dumbarton Oaks Papers, 6(1951), pp. 1-23.

siastical person.⁹⁴ Thus on the insistence of one of the parties to a case, the other one had to appear before the episcopal tribunal. Even in cases brought before secular courts, the insistence of one of the parties was sufficient to enforce a transferral to the episcopal tribunal. It followed that at various times the verdicts of both tribunals were mutually recognised.⁹⁵

The constitution of the emperors Constance and Constant of 355 forbade the summoning of bishops before public tribunals and directed that such cases be heard by other bishops.⁹⁶ However, in the case of those accusations against bishops that involved eventual penalties, Constance (361) conceded the privilege of appearing before the Synod of bishops. Speaking for the Church, St. Ambrose wrote to Valentinian I in 367 insisting that bishops should not be judged except by other bishops, especially when the matter concerned morals or causes of an ecclesiastical nature. His letter reminded Valentinian of the words and legislation of his father:

In a cause of faith, or of an ecclesiastic of any order, that person should judge him who is neither unequal in function nor dissimilar in law; these are the words of the rescript, that is, it wanted priests to judge priests. Surely if a bishop were also accused and a cause of morals to be

⁹⁴ The Synod of Milan gave the Emperor the right to decide not only questions of discipline, but also of dogma. Emperors invoked Councils, confirmed their decisions and promulgated their canons as imperial laws. Eventually Caesaropapism was made a permanent institution of the theocratic state of Justinian I (527-565). Cf. W. Plöchl, Storia del diritto canonico, Vol. 1, pp. 116-117.

⁹⁵ W. Plöchl, op. cit., Vol. 1, pp. 89-92; Codex Theodosianus, 1, 27 1.; S. Williams, "Papal Arbitration", in New Catholic Encyclopedia, Vol. 10, p. 971; G. Vismara, op. cit., pp. 37, 42.

⁹⁶ Codex Theodosianus, 16,2,12; A. Dumas, loc. cit., col. 243.

examined, it also wanted these matters to belong to episcopal judgement.⁹⁷

Valentinian I (364-375) confirmed the privilege given by Constance, and made provision that two clerics (or two laypersons) could take their case to the episcopal court when both were in agreement to do so.⁹⁸ In such cases the bishop was recognised as having the right to act as judge. A bond of mutual promise (compromissum), with a specified penalty for its violation, was to be exacted before proceeding with the case. The jurisdiction recognised extended only to religious matters in accord with the prescriptions of the Codex Theodosianus.⁹⁹ Another change entered secular law in 384 when Theodosius, Arcadius and Valentinian II legislated that for certain determined questions, bishops and clerics were to appear first before an ecclesiastical tribunal and then before the secular court.¹⁰⁰

⁹⁷ St. Ambrose, Epist. XXI,2, in P.L., Vol. 16, col. 1003: "In causa fidei vel ecclesiastici alicujus ordinis eum judicare debere, qui nec munere impar sit, nec jure dissimilis; haec enim verba rescripti sunt, hoc est, sacerdotes de sacerdotibus voluit judicare. Quinetiam si alias quoque argueretur episcopus, ut morum esset examinanda causa, etiam haec voluit ad episcopale judicium pertinere"; A. Dumas, loc. cit., col. 243.

⁹⁸ "The Novels of the Sainted Valentinian Augustus", 35,1 in The Theodosian Code, p. 545.

⁹⁹ Codex Theodosianus, 16,11,1 .

¹⁰⁰ W. Ploch1, op. cit., Vol. 1, pp. 251-252. Ploch1 is unsure whether these prescriptions included penal causes.

It was not until the last quarter of the fourth century that the emperors recognised the right for bishops to judge ecclesiastical affairs to the exclusion of lay magistrates. In 376, Valens, Gratian and Valentinian II declared that a bishop was competent to hear in his own synod "dissensions" and smaller crimes concerning the observance of religion with the exception of those causes giving rise to criminal action.¹⁰¹ This privilege was later reduced by Arcadius in the east (398) and Honorius in the West, to the judicial power of arbiter that could be availed of only where both parties consented. By the year 399, the principle of separate jurisdictions was recognised by Arcadius and Honorius:

Whenever there is an action involving matters of religion, the bishops must conduct such action. But all other cases which belong to the judges ordinary and to the usage of the secular law must be heard in accordance with the laws.¹⁰²

b. Balancing internal and external law

Depending on the legislation of the time, the secular value of the bishop's judgements varied from that given to the Praetorian Prefect to that of a private arbitrator. Internal arrangements for justice within the Church were more consistent. For instance, St. Innocent I, in a letter to Victricius in 404 insisted that the controversies of clerics were to be judged by the bishops of the

¹⁰¹ Codex Theodosianus, 16,2,23.

¹⁰² Ibid., 16,11,1.

province. Major causes, after episcopal judgement, were to be submitted to the Holy See.¹⁰³

In 408, the emperors Arcadius, Honorius and Theodosius decreed that bishops' judgements should be deemed valid for all persons who acquiesced in being heard by priests. To guarantee the effectiveness of the judgements a public office staff was charged with their execution.¹⁰⁴ The use of the secular arm was a feature of Church law in these early centuries.

The Council of Chalcedon (451) legislated to end the confusion between internal Church law and the law of the christian empire. The council not only legislated the obligatory arbitration of the bishop, but also attempted to clarify and firmly establish the rightful independent position of ecclesial legal systems. The reply of Valentinian III (423-455) separated the two fora; it made clear that except in matters of religion, clerics were totally dependent on secular tribunals whether they were defenders or accused.¹⁰⁵

c. Justinian - a blend of previous legislation

Justinian (527-565) provided an abundance of civil legislation regarding ecclesiastical judgements. Only an imperial order could

¹⁰³ Phillipus Jaffé, Gulielmus Wattenbach, (Eds.), Regesta Pontificum Romanorum ab condita ecclesia ad annum post Christum natum MCXCVIII, Vol. 1, n. 286, p. 44.

¹⁰⁴ Codex Theodosianus, 1,27,2.

¹⁰⁵ Breviarum Alaricum (Lex Romana Visigothorum), "Liber Legum Valentiniani", tit. XII, lex 1; A. Dumas, loc. cit., col. 244-245.

force a bishop to appear in secular court. Normally, the bishop was not to be summoned but an officer sent to take his evidence under oath.¹⁰⁶ Anyone contravening this respect due to the bishop would be liable to serious punishment.¹⁰⁷ For suits against a bishop or clerics, Justinian recognised the hierarchy of appeals within existing ecclesiastical law. Stewards of ecclesiastical establishments were to be sued before the bishop to whose authority they were subject, while officials who claimed to have been injured would sue the bishop by appealing to the metropolitan.¹⁰⁸ In the hierarchy of appeals there was an implicit acceptance of the principle that no one could be judge in his own case.¹⁰⁹

In mixed legal matters the interplay of jurisdictions was respected. The bishop was to determine whether or not the allegations were true. If the party were found guilty, respect for the clerical state demanded that he first be stripped of his sacerdotal or ecclesiastical office before being placed in the hands of secular authorities for punishment. In cases where the evidence was insufficient the case was handed over to the secular authorities who made the final decision.¹¹⁰ Similar arrangements prevailed for

¹⁰⁶ Novella, CXXIII , c. 7.

¹⁰⁷ Ibid., CXXIII, c. 8.

¹⁰⁸ Ibid., CXXIII, c. 23.

¹⁰⁹ Codex Justinianus, Lib. III, tit. V. lex I.

¹¹⁰ Novella, CXXIII, c. 21; LXXXIII, c. 1.

monks, deaconesses, nuns and ascetics.¹¹¹ Since cases against monks and hermits could bring disturbance to religious life, provisions were made for judgement by the bishop without assistance of the secular judge,¹¹² a speedy resolution of the conflict¹¹³ and the possible use of an attorney.¹¹⁴ For causes of lesser importance, a summary form of judgement that remained unwritten was made available in order to provide for swifter justice.¹¹⁵

d. Subjection to secular courts

One vexed question was whether a cleric, who had been cited, should appear before a secular tribunal. Gratian (367-383) insisted that the cleric was not to answer the citation;¹¹⁶ the Council of Agde (506) said that he could do so; the council of Epaone (517) and the fourth synod of Orleans (541) agreed on appearance when

¹¹¹ Ibid., CXXIII, c. 21; this was the ordinance of the Council of Chalcedon (451), canon 9.

¹¹² Ibid., LXXIX, c. 1.

¹¹³ Ibid., LXXIX, c. 2.

¹¹⁴ Ibid., CXXIII, c. 26.

¹¹⁵ Ibid., XVII, c. 3.

¹¹⁶ C.J. Hefele, op. cit., Vol. 4, p. 81.

cited.¹¹⁷ There was an understanding, however, that forbade the clergy from taking a layperson before a secular tribunal without permission of the bishop; this applied equally to the laity who wished to sue a member of the clergy. The secular judge who accepted such a case, without previous authorization, was subject to punishment.¹¹⁸

In the late sixth century, the imprisonment or punishment of a cleric (except in criminal cases such as murder, theft or fraud) by a secular judge left him open to excommunication by the bishop. If, on the other hand, a cleric brought another cleric before the secular judge, the punishment was to be 39 lashes if he were a member of the junior clergy or 30 days imprisonment if he belonged to the higher clergy.¹¹⁹ The threat of excommunication of the secular judge and the prohibition for the clergy to appear before secular tribunals

¹¹⁷ C.J. Hefele, H. Leclercq, Histoire des Conciles, Vol. 2, p. 1038. Hereinafter cited as Hefele-Leclercq. C.J. Hefele, op. cit., Vol. 4, p. 213: Fourth Synod of Orleans (541), canon 20: "In a trial between a cleric and a layman the judge must make no examination except in the presence of the priest or archdeacon who is the superior of the cleric. If two contending parties (a cleric and a layman) wish to carry their trial before the secular tribunal, permission to this effect may be given to the cleric."

¹¹⁸ Hefele-Leclercq, op. cit., Vol. 2, p. 1162: Third Council of Orleans (538), canon 32.

¹¹⁹ C.J. Hefele, op. cit., Vol. 4, pp. 404, 439, 445.

remained constant throughout the following centuries at least to the time of the Decretals of Gregory IX (1234).¹²⁰

The separation of the two powers was somewhat clearer by the time of the synod of Merton (1258) which ruled that if a bishop or prelate was cited before a civil tribunal regarding matters of concern to the ecclesiastical forum alone, he should not appear, but rather put his case to the king, explaining that in this matter he did not owe the king obedience.¹²¹

D. The synodal approach to justice

What emerged in the early Church then was a dual system of justice. Firstly, there was justice available through the ecclesiastical or bishops' courts. These were organized hierarchically so that a person could appeal to higher ecclesiastical tribunals.¹²² Secondly, there was the possibility of appeal or judgement before the synod, either diocesan or provincial. Questions of local justice were resolved within the diocesan synod, while the

¹²⁰ The Council of Angers (1279), repeating canon 7 of the Synod of Bourges, reminded civil judges that they may not oblige ecclesiastics to appear before them for personal actions; those guilty on this count would be excommunicated. Cf. Hefele-Leclercq, *op. cit.*, Vol. 6, p. 257. The Council of Grado (1296) forbade clerics to appear before the secular tribunal for any affair, personal, criminal or real, while the Council of Rouen (1299) made it a prohibition for the lay judge to cite a cleric for such cases. Cf. *ibid.*, Vol. 6, pp. 456-458.

¹²¹ Hefele-Leclercq, *op. cit.*, Vol. 6, p. 97.

¹²² C.J. Hefele, *op. cit.*, Vol. 2, p. 398: Synod of Hippo (393), canon 10 (second series).

emphasis in the provincial synod was primarily on cases against bishops or clergy.

The hierarchical form of the tribunals involved the diocesan bishop, the metropolitan and the primate, with some variations found in the oriental Churches that involved the Patriarch. Allowance was made at times for the use of arbiters¹²³ a summary form of justice was in use for causes of lesser importance in order to provide swifter justice and avoid protracted arguments.¹²⁴ While tribunals were in use, their more complete development would be reflected in a later historical period; it was the synodal approach to justice that best reflects the spirit of the early Church especially where judgement of bishops was at issue.

1. The development of the synod

Ignatius of Antioch, Polycarp of Smyrna and Denys of Corinth testify to the solidarity that existed among bishops in the early Church, but the Synod as an institution symbolising this unity did not emerge until the end of the second century.¹²⁵ From this time,

¹²³ Ibid., Vol. 2, p. 398. The "primate" was a development of the African Church where chairmanship was reserved to the oldest bishops rather than to those of the provincial capitals; cf. F. Dvornik, "Origins of Episcopal Synods", in The Once and Future Church, p. 43.

¹²⁴ Novella, XVII, c. 3.

¹²⁵ J. Hajjar, "The Synod of the Eastern Church", in Concilium, 8, (1965), p. 56.

the Synod was a part of ecclesial life in the east, but not so until the third century in the west.¹²⁶

At first, the Synods were of a local regional character; in the fourth century they took on a larger provincial form.¹²⁷ The diocesan synod, as a separate institution did not emerge until the sixth century. Bishops gathered their clergy after the provincial synods to publicize the laws established there, to admonish clerical obedience of these laws, to judge the implementation of legislation of previous synods, to examine and instruct the clergy; out of this experience the diocesan synod was born.¹²⁸

a. A clearing house for major problems

The provincial synod or council¹²⁹ gradually then became a clearing house for major problems. It took some time to establish

¹²⁶ J. Heron, op. cit., p. 117.

¹²⁷ Ibid., p. 57. The format of the provincial synods followed the administrative organisation of the Empire so that bishops of civil dioceses soon became prominent leaders; cf. F. Dvornik, "Origins of Episcopal Synods", p. 30.

¹²⁸ G. Moroni, Dizionario di erudizione storico-ecclesiastico, Vol. 66, p. 264, p. 274. Reference is made to the Council of Toledo (693) with the first laws bringing about the Diocesan Synod; cf. Hefele-Leclercq, op. cit., Vol. 3, pt. 2, p. 909: The Council of Cloveshoe (747) which ordered bishops on return from the provincial synod to gather their clergy and religious superiors and make known the decisions of the Councils.

¹²⁹ The words are used interchangeably and may refer to either provincial or diocesan synods or councils, although for the first six centuries the expressions refer solely to regional or provincial gatherings of bishops, cf. G. Moroni, op. cit., p. 264, under "Sinodo".

the authority of these gatherings and determine the role of the King or Emperor. Within this context of "bishop - emperor - synod", during the Council of Nicaea in 325, the emperor established a principle regarding the judgement of bishops. He had carried with him denunciations of bishops that he was expected to resolve, but instead he proclaimed to the bishops: "You cannot be judged by men, and God alone can decide your controversies."¹³⁰

By the time of the Synod of Antioch in Encaenis (341), an understanding of the solidarity required among bishops was already clear. A bishop could not be consecrated without the consent of a synod, and disputes were to be decided by majority vote.¹³¹ The structure and function of the synod reflecting the nature of the Church as a communion, was accepted in practice and entered the ecclesial legal structure through the legislation imposed by the bishops, confirmed in other councils, and through explicit or tacit papal acceptance. Only unavoidable hindrances and obstacles were tolerated as excuses for non-attendance at the synod. A bishop who disdained to appear was considered to be his own accuser, since the synod was thought to be an integral part of Church life.¹³² The deliberate non-appearance of a bishop, whether for the synod or the

¹³⁰ C.J. Hefele, op. cit., Vol. 1, p. 282.

¹³¹ Ibid., Vol. 2, p. 72: Synod of Antioch (314), canon 19.

¹³² c. 1, Dist. XX; c. 5, Dist. XVIII; C.J. Hefele, op. cit., Vol. 2, p. 297: Synod of Laodicea (363), canon 40.

ordination of another bishop, meant exclusion from communion until the next synod.¹³³

The imperial principle pronounced at Nicaea was overturned by the Council of Carthage (about 398), where some major tasks of the synod or council were clarified: a) to reconcile disagreeing bishops; b) to judge charges laid by a bishop against a layperson; and c) to review in council alleged unjust condemnations pronounced by a bishop.¹³⁴ Protection of the innocent rated highly among the tasks of the synod. This protection was visible when a bishop unjustly excommunicated an innocent person or someone who had committed only a very slight fault. In the Synod of Agde (506), the bishops demonstrated their concern for unity by legislating that in such cases:

[...] the neighbouring bishops should advise him; and if he does not comply, they should not at the next synod deny the communion to the excommunicated person, so that he may not through the fault of others die without this.¹³⁵

¹³³ C.J. Hefele, op. cit., Vol. 4, p. 82: Sixth Synod of Carthage, canon 11; Synod of Chalcedon, canon 20; Synod of Tarragona, canon 6; c. 13, Dist. XVIII.

¹³⁴ G. Moroni, op. cit., p. 274.

¹³⁵ Synod of Agde (506). The law was later included in the Corpus Iuris Canonici, c. 8, Causa XI, q.3. C.J. Hefele, op. cit., Vol. 4, p. 77, comments: "[...] in the old collection of Church ordinance of Burchard, the end of this canon runs as follows: 'If the bishop will not follow his colleagues, they shall exclude him from their communion until the next Synod'."

b. The permanent synod

In addition to such matters as preparing common legislation and providing for the government of the Church, the synods had also emerged as the place where conflicts were resolved. With the recognition of the fact of tension and conflict within the Church, came the formation of a "permanent synod" (synodos endemousa) in Constantinople from the year 380. The Council of Chalcedon (451) approved this synodal approach. It meant that whenever serious problems were submitted to the Patriarch of Constantinople, he summoned the hierarchy present in the capital (the endemountes) to a synod which was permanent in the sense that it could be called at any moment according to need. The Church considered itself in a state of permanent synodal consultation. This permanent synod exercised dogmatic vigilance, made legislative reforms and took disciplinary measures in a way that did not require the exceptional organization of an ecumenical synod, it was not regarded, however, as an instrument of supreme appeal.¹³⁶

For the rest of the Church, it was a matter of legislating for a frequency of synods that would best provide for the needs and conditions of the province. The great variety of arrangements over the centuries found some unity when the Lateran Council (1214) made

¹³⁶ J. Hajjar, loc. cit., pp. 58-59; Mansi, Vol. 7, col. 361, 365; F. Dvornik, "Origins of Episcopal Synods", p. 34.

the annual synod universal law.¹³⁷ The diminishing practice over the subsequent centuries led the council of Trent to legislate that the provincial synod be held every three years. Regarding the duration of the synod, the council of Paris of 1408 decreed a duration of one month, the council of Salzburg (1418) 15 days, while the council of Basilea (1433) recommended 2-3 days duration. The arrangements remained those chosen by the province.

2. The activity and spirit of the synod

The Provincial Synod represented in a tangible way the solidarity of the communion of the people of God at the level of the local Church. The most simple operation of bishop or priest relied heavily on recognition from the synod. The unknown or vagabond bishops or priests were not to be admitted to functions without synodal approval.¹³⁸ Examples abound where non-appearance at the synod or non-acceptance of its decrees brought more than excommunication as a punishment:

If a bishop does not appear at a provincial synod, he will be shut out from communion until the next council, and must

¹³⁷ c. 25, X V,1. Some of the councils provided for an annual synod - Hippo (393), Tours (567), Frankfurt (742), Soissons (744), Mainz (828); until this time most provincial councils were held twice yearly; C.J. Hefele, *op. cit.*, Vol. 1, pp. 473-474; Apostolic Canon 38(36), (about 500 A.D.). This canon even determines the times for the Provincial synods which subsequently became generally accepted: "Bis in anno episcoporum concilia celebrentur, ut inter se invicem dogmata pietatis explorent, et emergentes ecclesiasticas secundo vero duodecima die mensis Hyperberetaei (id est juxta Romanos quarto idus Octobris)."

¹³⁸ C.J. Hefele, *op. cit.*, Vol. 4, p. 469: Synod of Rouen (650), canon 8.

remain as a penitent during that time, at the place appointed by the metropolitan and the bishops present at the Synod. His house and possessions are, in the meantime, to be administered by the metropolitan.¹³⁹

The bishop who failed to attend the synod was excluded from the communio caritatis with the other bishops until the next synod or council,¹⁴⁰ but disruption caused by an illegal action in the lower ranks of the clergy was equally punishable:

No priest must depose a deacon or subdeacon without knowledge of the bishop. If he does so, the person deposed shall be received back into communion, and he who deposed him shall be excommunicated for a year.¹⁴¹

The effects of this solidarity were horizontal as well as vertical in the sense that one who was excommunicated by a bishop would be regarded as such by all other bishops until the person who handed down the excommunication thought him ready to be received back.¹⁴² Excommunication became the device used to preserve the harmony of the communion. It was applied to bishop, cleric and laity alike, and a person excommunicated could not exercise any ecclesiastical function or be received by another bishop until a synod was held where he could defend himself.¹⁴³

¹³⁹ Ibid., Vol. 4, p. 482: Provincial Synod of Portugal (666).

¹⁴⁰ Ibid., Vol. 4, p. 103: Synod of Tarragona (516), canon 6. This canon was later incorporated into the Corpus Iuris Canonici, c. 14, Dist. XVIII. The Frankish Synods (660-673) made clear that this non-appearance of the bishop at the Synod called for punishment according to the canons; cf. ibid., Vol. 4, p. 480.

¹⁴¹ Ibid., Vol. 4, p. 376: Synod of Arles (554), canon 4.

¹⁴² Ibid., Vol. 4, p. 388: Synod of Lyon (567), canon 4.

¹⁴³ Ibid., Vol. 2, pp. 68-69.

a. Legislation of the synods

There is a certain consistency in the legislation of the synods in that later synods generally confirmed and accepted the legislative practice of earlier ones. The synod of Antioch (341) considered the deposition of a bishop to be within its power and allowed for reinstatement by another synod.¹⁴⁴ If an incriminated bishop refused to appear before the general council of African Churches, he was to be excommunicated according to the prescriptions of the Council of Hippo (393). Insistence on the autonomy of local decisions and opposition to interference from Rome were part of the stand of the African Church, although the right to appeal to the Pope was accepted in later developments.¹⁴⁵

Legislation against the use of secular courts was constant in the synods,¹⁴⁶ as were the exhortations to seek peaceful solutions rather than legal proceedings. Unjust sentences of a bishop were considered invalid and to be reversed by the synod, while his

¹⁴⁴ C.J. Hefele, op. cit., Vol. 2, p. 68: Synod of Antioch (341), canon 4.

¹⁴⁵ Hefele-Leclercq, op. cit., Vol. 2, p. 86: Council of Hippo (393), canons 10,11; Mansi, Vol. 3, col. 822: African Synod (418), canon 17; the Synod of Sardica (modern Sofia) established right to appeal to Rome in 343, cf. Mansi, Vol. 3, col. 40.

¹⁴⁶ C.J. Hefele, op. cit., Vol. 2, p. 398: Synod of Hippo (393), canon 9 (second series).

judgement had no effect unless confirmed by the clergy.¹⁴⁷

The Council of Chalcedon provided in 451 for cases both against clerics and against bishops:

If a cleric has a difference with another cleric, he must not pass by his bishop and have recourse to the secular judges, but he must first unfold the matter before his own bishop, or, if the bishop so wills, the dispute may be settled by umpires who are acceptable to both parties. If any one acts in opposition to this, he shall be subject to canonical penalties.

If a cleric however, has a difference with his own or with another bishop, he shall bring the dispute before the synod of the eparchy (province). If, however, a bishop or cleric has a difference with the metropolitan of the province himself, then let him choose either the exarch of the diocese (the superior metropolitan) or the See of Constantinople, and bring the dispute before this.¹⁴⁸

Confusion remained as late as the seventh century in the prescriptions of councils which included the king in their hierarchy. The 13th national synod of Toledo (683) made provisions for an appeal against the bishop to the metropolitan. However a bishop who believed himself aggrieved by his metropolitan could take

¹⁴⁷ J. Dodd, A History of Canon Law, Oxford, Parker & Co., 1884, p. 208, quoting canon 23 of the Synod of Carthage (398): "Ut Episcopus nullius causa audiat absque praesentia Clericorum suorum; alioquin irrita erit sententia Episcopi, nisi Clericorum praesentia confirmetur." Cf. also C.J. Hefele, op. cit., Vol. 2, p. 412: supposed Fourth Synod of Carthage (398), canons 23,25,26,28; ibid., vol. 4, p. 440: Synod of Paris (614), canon 11 where the prescription is given that if a bishop has a trial with another bishop, he must apply to the metropolitan.

¹⁴⁸ C.J. Hefele, op. cit., Vol. 3, p. 394: Council of Chalcedon (451), canon 9. Cf. also c. 46, c. XI, c. 10, X II, 1. Note that in civil law terminology, "province" and "diocese" did not have the same meaning as their present day ecclesiastical counterparts.

the case to another metropolitan. If his plea was rejected by two such extraneous metropolitans, he could then appeal to the king.¹⁴⁹

The synods between 633 and 680 vindicated for themselves the power to punish bishops in other ways and prescribed punishments for those found guilty of serious crimes.¹⁵⁰ The eighth ecumenical Council of Constantinople (869) confirmed that although appeals against bishops were made to the Metropolitan, the process of judgement was confined to the synod. A priest or deacon deposed by his bishop would appeal to the metropolitan. A bishop could appeal to the Patriarch from a decision of the metropolitan and provincial synod. In this case, the Patriarch was to judge in conjunction with other metropolitans under him.¹⁵¹

The prestige of the Roman Curia increased in the eighth and ninth centuries, so, while the synods continued, their use as a forum

¹⁴⁹ *Ibid.*, Vol. 5, p. 214: 13th national Synod of Toledo (683), canon 12: "If any one takes proceedings against his own bishop, he may appeal to the metropolitan. A bishop, however, who thinks himself aggrieved by his metropolitan, may bring his cause before a strange metropolitan. If two strange metropolitans have refused him a hearing, he may appeal to the King." F. Dvornik, "Origins of Episcopal Synods", p. 36, here Dvornik states that he cannot find any example of an Emperor changing a disciplinary judgement of the synod.

¹⁵⁰ C.J. Hefele, *op. cit.*, Vol. 4, p. 488. If the bishops had property, they were to pay the compensation prescribed by civil law. On the part of the Church, a temporary excommunication was also prescribed. If they had no property, the compensation was not to be paid from the property of the Church, nor could they be sold as slaves, but they were to undergo 20 days penance for every 10 solidi (the legal tender of the time) which they would have to pay in compensation.

¹⁵¹ Hefele-Leclercq; *op. cit.*, Vol. 4, p. 530: Eighth Ecumenical Council of Constantinople (869), canon 26.

for judgement of bishops had become rather rare by the time of the Lateran Council of 1214. This council renewed the privileges of the patriarchal sees of Constantinople, Alexandria, Antioch and Jerusalem, so that in all the provinces subject to them, bishops could still be judged, while the right to appeal to the Holy See remained firm, but was rarely used except in doctrinal matters.¹⁵²

By the time of the Council of Trent (1545-1563), those criminal causes of bishops which were of such gravity as to merit deposition or deprivation of office, were to be tried by the Pope himself or by metropolitans and bishops chosen by him. In less criminal cases, bishops were subject to the provincial council or persons appointed by it.¹⁵³ While it was deemed essential for justice to provide for the resolution of criminal cases, other cases did not receive the same treatment. Because of abuses, false accusations and animosity towards bishops, the Council of Trent saw the danger of inconvenience both to the bishop and the Church, to his flock as well as to his dignity if he were forced to answer these charges. So the council ordered:

That a bishop, even though he be proceeded against ex officio, or by way of enquiry, or denunciation, or accusation, or in any other way whatsoever, shall not be cited or warned to appear in person, except for a cause for which he might have to be deposed from, or deprived of, his office.¹⁵⁴

¹⁵² Ibid., Vol. 5, pp. 1333-1334; c. 23, X V, 33; F. Dvornik, "Origins of Episcopal Synods", p. 37.

¹⁵³ J. Waterworth, The Canons and Decrees of the Sacred and Oecumenical Council of Trent, p. 212: Council of Trent, Session XXIV, Chapter V (on reform).

¹⁵⁴ Ibid., pp. 88-89.

The situation since this decision of Trent has been one of apparent immunity from a judicial standpoint, although the authority of hierarchical superiors such as the Pope and the Roman Congregations did not allow for total immunity from accountability.

b. Procedures of the provincial synod

Abundant evidence exists to show that the provincial synod, structured like the Roman senate, judged both criminal and civil cases of bishops with ecclesiastical and sometimes even civil effects. Matters that in current parlance would be considered administrative also came under the judgement of the synod. The most frequently mentioned were deprivations, depositions, excommunications and alleged harm from the activity of ecclesiastical superiors. While judgements were part of the assumed mandate of the provincial synods, a special role, something in the nature of a review board for sentences of excommunication passed by a bishop, was also exercised. The synod could annul any sentence of excommunication passed by a bishop of the province.

The case of an accusation against a bishop could be received either by the primate, the metropolitan, or a neighbouring bishop, but each recourse would eventually reach the provincial synod which alone was competent to judge.¹⁵⁵ If a bishop was accused, and the votes of the bishops in synod were divided, the metropolitan could call in neighbouring bishops to settle the judgement. If, however,

¹⁵⁵ C.J. Hefele, *op. cit.*, Vol. 1, p. 387. *Ibid.*, Vol. 2, p. 397: Synod of Hippo (393), canon 6 (second series). *Ibid.*, Vol. 4, pp. 387-388: Synod of Lyon.

the bishop should be condemned unanimously by all the bishops of the province, the judgement stood and there was no appeal.¹⁵⁶ Again the Council of Carthage (390) set conditions for the judgement of various persons in the Church that were generally accepted by other synods: "A bishop can only be judged by twelve bishops, a priest by six, and a deacon by three bishops."¹⁵⁷

i. Procedures in the diocesan synod

Since little information is available regarding the procedures used at provincial synods, possible insights may be gained by examining methods employed by diocesan synods and, in particular, by the "partial synods". Due to difficulties with distance and travel which made a joint assembly of all the clergy an exception, the bishops of the Carolingian era assembled their priests in regional groups during their pastoral visitation. While this form of partial synod fulfilled the same role as the diocesan one, it was also

¹⁵⁶ Ibid., Vol. 2, p. 461: African General Synod (418), canon 17. G. Moroni, op. cit., p. 274.

¹⁵⁷ C.J. Hefele, op. cit., Vol. 2, p. 390: The English translation contains "besides his own" while the French translation more correctly renders it "including his own". The Council of Hippo (393) repeats the same requirements in canon 12; cf. Hefele-Leclercq, op. cit., Vol. 2, p. 87. The requirements are repeated at the Council of Rouen (1072), canon 20, with reference to the deposition of the clergy; cf. Hefele-Leclercq, op. cit., Vol. 4, p. 1282.

important for the fact that synodal jurisdiction was exercised under this form.¹⁵⁸

The bishop was normally preceded by the archdeacon or archpriest in those places he intended to visit. The person who convoked the synod then invited priests to present affairs of minor importance for immediate judgement while the more serious causes were reserved to the bishop.¹⁵⁹ In these judgements, the accused could establish his innocence by affirming under oath that he was not guilty. Since searching for proofs would have taken too long for an itinerant judge, the accused had the possibility of purging himself of the accusation in this way. However, since in such instances, the affirmation of one's own innocence would be suspect, the accused was asked to produce at least seven witnesses who would declare under oath that they could guarantee his sincerity and credibility. If the judge remained unconvinced, or if the accused failed to gather the number of witnesses or was not a free man, he could in some places be condemned to justify himself by means of judicia Dei or the ordeals. Although used in Gaul, this was not the practice of the Holy See.¹⁶⁰

¹⁵⁸ R. Naz, "Causes synodales", in D.D.C., Vol. 3, col. 118; F. Dvornik, "Emperors, Popes and General Councils", pp. 4, 18, here Dvornik indicates that synods especially in Africa, introduced the Roman senatorial system for the internal structure of its assemblies.

¹⁵⁹ R. Naz, loc. cit., Vol. 3, col. 119. Another aspect of the Diocesan Synod was the selection of seven (more or less) synodal witnesses - mature, honest and truthful men. These would take an oath to denounce all crimes or behavior around them that were contrary to the will of God and true christianity. Besides these, other faithful could make accusations under the guarantee of an oath.

¹⁶⁰ Ibid., col. 119; Vol. 6, col. 1117-1123: "A l'universalité de la pratique, il faut opposer l'hostilité de la doctrine et de l'autorité pontificale."

The appendix of the Council of Selegunstad (1022) outlined procedures to be followed in a diocesan synod. After customary prayers and formalities and the exhortation of the bishop or his vicar, clerics were to present their cases on the first day. Provision was also made for hearing cases of the clergy on the second and third days, or cases of the laity after these had been treated. The time available permits an argument for a limited or summary process within the synod. A vote or decision of the fathers present after an exposition of the facts seems to indicate a process somewhat akin to that used today in the dicasteries of the Roman Curia.¹⁶¹

ii. Procedures encouraged by the synod

The eighth Council of Carthage (390) indicated the use of a process outside the provincial synod. If someone appealed from a judgement, then both parties were to choose the judge of second instance and could not appeal against this second decision. Bishops acted as arbitrators in hearing appeals of priests from neighbouring dioceses and reconciling them with their bishops in an effort to avoid schism arising out of conflict.¹⁶²

The synod of Lyons (567) proclaimed that a forum was available for every type of conflict within the Church and urged solidarity

¹⁶¹ J. Hardouin, Acta Conciliorum et Epistolae Decretales ac Constitutiones Summorum Pontificum, Vol. 6, Pars 1, Col. 382-384.

¹⁶² C.J. Hefele, op. cit., Vol. 2, pp. 390-391: Synod of Carthage (387-390), canon 8.

among the bishops. Where bishops were in conflict within the same province, they were to be content with the sentence of the metropolitan and fellow provincial bishops. If the conflict was between bishops of different provinces, their metropolitans should meet to decide the matter and a bishop who was injured should be defended by his brother bishops in common.¹⁶³

The synod of Tours (567) also assigned a place for priests in disputes between bishops. It decreed that priests were to be selected as umpires and mediators by both parties and provided punishment for those bishops who did not obey the sentence of these judges and mediators.¹⁶⁴ The national French council of Savonières (859) provided a solution by submitting the case of a bishop to the arbitral decision of four archbishops.¹⁶⁵

The Council of Althiem (Hohenalthiem) of 916 allowed for those who had been condemned by the bishops of a province to appeal to the Pope. It gave a strong reminder that whoever had a just complaint against a bishop or administrators in the Church was first to seek a friendly solution before taking the case to the metropolitan or other judges. In a strong defence of true justice within the Church, this Council proclaimed that no one should believe that the bishops and the clergy were not punished if they committed an injustice.¹⁶⁶

¹⁶³ Ibid., Vol. 4, pp. 387-388: Synod of Lyons (567), canon 1.

¹⁶⁴ Ibid., Vol. 4, p. 389: Synod of Tours (567), canon 2.

¹⁶⁵ Hefele-Leclercq, op. cit., Vol. 4, p. 218.

¹⁶⁶ Ibid., Vol. 4, pp. 745-746.

c. Attitudes required by the synod

The synodal approach to justice was important, not simply for the solutions it provided, but also for the attitudes it demanded on the part of the accused, the accusers and the witnesses. These attitudes emerge in synodal legislation over a period of centuries and reflect the comportment that is a prerequisite for any christian resolution of conflict with superiors.

i. Attitudes required in parties to recourse

The right to appeal gave rise to abuses and accusations against bishops, merely for the purpose of injury and disruption. The Council of Constantinople (381) moved to overcome such abuses by legislating that, henceforth, no accuser would be received without previous examination. This was a move to curb abuses rather than prevent justice. Those who had a private complaint that they had been defrauded or unjustly treated were promised justice without discrimination. In the case of an ecclesiastical offense, the accusers would be examined. No heretic could appeal; this applied to those who were anathematized, those in schism, persons excommunicated (until they had cleared themselves), and those under accusation (until cleared of the charges).¹⁶⁷ The accusers could not bring their complaint until they had promised in writing to undergo the

¹⁶⁷ C.J. Hefele, *op. cit.*, Vol. 2, pp. 365-366: The Second General Council of Constantinople (381), canon 6.

same punishment which the accused bishop would incur, if, after the investigation, they were convicted of bringing a false charge.¹⁶⁸

The Synod of Tours (567) decreed that if anyone obliged a person to appear before the tribunal in a vexatious manner, he would be condemned for the payment of damages caused, and even more, excommunicated.¹⁶⁹ The constant prerequisite of seeking a peaceful resolution was explicit in the Frankish synods of the sixth century.¹⁷⁰

ii. Attitudes of the bishop

The attitudes of the bishop, both as administrator and accused were of great importance to the maintenance of solidarity in the early Church. As early as the council of Nicaea (325), an awareness of the attitudes required on the part of bishops was evident: "Care must, however, be taken to see that the bishop has not passed this sentence of excommunication from narrowmindedness, from a love of contradiction, or from some feeling of hatred."¹⁷¹

¹⁶⁸ Ibid., Vol. 2, pp. 365-366: The Second Council of Constantinople (381), canon 6. This requirement of examination of the petitioner became an accepted part of law when incorporated as canon 21 of the Council of Chalcedon (451) in c. 49, C.II, 1.7. The requirement was still in vogue centuries later in the Council of Aix-la-Chapelle (789). Cf. Hefele-Leclercq, op. cit., Vol. 3, p. 1030.

¹⁶⁹ Hefele-Leclercq, op. cit., Vol. 6, p. 286: Synod of Tours, (567), canon 1.

¹⁷⁰ C.J. Hefele, op. cit., Vol. 4, pp. 369-370.

¹⁷¹ C.J. Hefele, op. cit., Vol. 1, pp. 386-387: Council of Nicaea (325), canon 5.

It was the duty of the bishops of the provincial synod to have vigilance over the attitudes and the correctness of the bishop's procedures. The synod of Sardica (modern Sofia) (347) warned of the danger of a bishop of passionate temperament, who, being angry with a priest or deacon, wanted to cast him out of the Church. It urged that actions of this nature not be taken too hastily.¹⁷² The synod of Rhiems (625) warned against haste in excommunication, reminding all of the right to appeal to the next synod.¹⁷³

Imprudent and hasty appeals were forbidden, ¹⁷⁴ serious motives were required for appeals,¹⁷⁵ and the right to reach an amicable solution were upheld in council legislation of the twelfth and thirteenth centuries.¹⁷⁶ Obstacles placed against ecclesiastical jurisdiction,¹⁷⁷ conspiring against the clergy,¹⁷⁸ and assisting the laity with advice against execution of episcopal sentences,¹⁷⁹ brought serious penalties.

¹⁷² Ibid., Vol. 2, p. 149: Council of Sardica, (347), canon 14.

¹⁷³ Ibid., Vol. 4, p. 445: Synod of Rhiems (625), canon 5.

¹⁷⁴ Hefele-Leclercq, op. cit., Vol. 5, pt. 2, p. 1093: 11th Ecumenical Council of the Lateran (1179), canon 6.

¹⁷⁵ c. 59, X II, 28; Hefele-Leclercq, op. cit., Vol. 5, pp. 1361-1362: Lateran Council (1214), canon 35.

¹⁷⁶ Hefele-Leclercq, op. cit., Vol. 6, p. 144.

¹⁷⁷ Ibid., Vol. 6, p. 698.

¹⁷⁸ Ibid., Vol. 6, p. 597, p. 347.

¹⁷⁹ Ibid., Vol. 7, p. 1246: Provincial Council of Cashel (1453), canon 54.

In another line of development, the Council of Paris (829) pointed out that faults on the part of superiors did not authorize insults and judgements from inferiors and that bishops should avoid the spirit of pride and of domination.¹⁸⁰ Directives that appeared to be contradictory, but were in fact complimentary aspects of administration, arose from the Councils of Bourges (1276) and Salamanca (1335). The former proposed that, as prudent fathers, the bishops should not listen too easily to complaints of monks and their abbots, as these became a means of weakening Church discipline.¹⁸¹ The latter stated that shrewdness in administration should be balanced with the duty of taking appeals seriously.¹⁸² It was the Council of Trent (1545-1563) that summed up the attitude required of bishops when it directed that everywhere they should bear in mind that they were "fathers and pastors", and, "pastores, non percussores esse meminert."¹⁸³

iii. Attitudes of those being judged

Above all these attitudes, was the comportment of the bishops when their decrees were challenged. The synod of Sardica (347) laid

¹⁸⁰ Ibid., Vol. 4, p. 64: Council of Paris (829), canons 19, 23.

¹⁸¹ Ibid., Vol. 6, p. 232: Council of Bourges (1276), canon 4.

¹⁸² Ibid., Vol. 6, p. 834: Council of Salamanca (1335), canon 2.

¹⁸³ J. Waterworth, op. cit., p. 274: Council of Trent, Session XXV, Chapter XVII (on reform); Session XIII, Chapter I.

down a principle that is still valid: "The bishop who, rightly or wrongly has decreed the excommunication shall not take it amiss that the affair should be investigated, and his sentence confirmed or amended."¹⁸⁴

The Codex Canonum Ecclesiae Africanae contained two canons that described both attitudes to challenge and, at the same time, indicated the essential external forum nature of true Church law:

Canon 132: If a bishop says that someone has confessed a certain crime to him privately, and the person denies it, and will perform no penance, the bishop shall not consider it an insult if his word alone is not believed, even though he says that his conscience will not allow him any longer to hold communion with such a liar.

Canon 133: If, nevertheless, the bishop excommunicates such an (sic) one, so long as he maintains this excommunication, the other bishops shall hold no communion with him (the bishop), in order that all bishops may be careful not to make any statements against a person which they cannot prove.¹⁸⁵

The Council of Hippo (393) reminded judges of first instance that no offence should be taken if their judgements were challenged.¹⁸⁶ These attitudes can be carried over to matters of administration that are challenged, since this is one area of Church life open to human error and hence to systems of correction. The ultimate choice of attitude is either that of adversary relationship or of cooperative relationship. While the former follows the secular

¹⁸⁴ C.J. Hefele, op. cit., Vol. 2, p. 149.

¹⁸⁵ Ibid., Vol. 2, p. 475; C. Munier, Concilia Africae: A.345 - A.525, p. 232.

¹⁸⁶ Hefele-Leclercq, op. cit., Vol. 2, p. 87: Council of Hippo (393), canon 14.

model, the latter pertains to a new vision of justice within the framework of the Church's communion.

iv. Guidelines for administration

By the end of the eighth century sources indicate the development of a general administrative policy for bishops. The Council of Lombardy (782) legislated that bishops who refused to render justice were to be punished in the manner determined by other bishops.¹⁸⁷ At the same time, it was clearly understood that administration should be undertaken in accordance with the canonical regulations established by the councils. The principle that upheld the effectiveness of the bishop's administration was sustained in that any excommunicated petitioner could not demand communion until the matter had been investigated and decided. The reasonable commands of the bishop were to be obeyed and any attitude of hastiness or pride in the petition was to be reprimanded, since no bishop was bound to tolerate arrogance or unjust blame.¹⁸⁸

E. Significance of early Church procedures

Important principles and guidelines that should be considered in any future development of procedures for recourse against acts of

¹⁸⁷ Ibid., Vol. 3, pp. 983-984: Council of Lombardy (782), canon 6.

¹⁸⁸ C.J. Hefele, op. cit., Vol. 2, p. 149: Synod of Sardica, (347), canon 14.

administrative superiors emerge from the legal experience of the early Church. The right to appeal, even in areas that were of an administrative nature, was recognized implying a certain degree of accountability on the part of bishops. Implicit in the hierarchical judgement was the principle that no one should be judge in his own case.¹⁸⁹ The possibility of recourse against harmful effects or damage received from the administrative activity of a bishop was guaranteed in law, so that there was to be no prevention of justice despite the personality involved.

While recognising the importance of the bishops' courts, it was only within the framework of the synod that an effective basis was established for judgement of bishops. The disciplinary powers exercised by the synod were broad. The principle of St. Ambrose that bishops should judge bishops was generally upheld, although the use of priests as arbitrators of their causes was vindicated.

The friendly resolution of conflict was encouraged and procedures outside the synod were recommended with this purpose in mind. Causes of minor importance could be handled with a summary process. The availability of eventual recourse to the Holy See was a general feature that emerged from this period, likewise, the gratuitous nature of any proceedings.

Where merely ecclesiastical matters were concerned, secular judges had no jurisdiction. Neither clerics nor laity were to take ecclesiastical superiors before secular courts without episcopal

¹⁸⁹ Codex Justinianus, Lib. III, tit. V, lex 1.

approval. The autonomy of the ecclesial legal system was upheld, as was the autonomy of the local Church to resolve administrative problems.

The fact that unjust sentences of a bishop were considered invalid and the importance placed on confirmation of the bishop's sentences by the clergy indicate a growing awareness of the need for solidarity, subsidiarity and participatory coresponsibility. The attitudes fostered in the parties to a conflict, while not always of a strictly juridical nature, appear to have a perennial value for a christian resolution of conflict.

The authority of the synodal solutions was nothing more than the expression of the solidarity of the communion of the local Church. The authority of the bishops in provincial synod rested as much in their union of hearts, minds and emotions as in the observance of legal formalities, although these were not overlooked.¹⁹⁰

When serious conflicts were settled with other procedures at the behest of the synod, they were normally subjected to some form of arbitral decision. This use of these systems of compromise and an examination of the nature and effectiveness of such solutions will be examined in the following chapter.

¹⁹⁰ G. Moroni, *op. cit.*, p. 278. While the right to an appeal was emphasized, the appeal itself did not automatically mean that the final judgement would be better than the original. This is the reason why Ulpianus did not insist too much on the device; he realized that the final stage could be worse than the first. (Digest, Lib. XLIX, tit. 1, lex 1.)

CHAPTER II:
PROCEDURES OF COMPROMISE FOR THE RESOLUTION OF CONFLICT

The exhortations of Saints Matthew and Paul together with the legislation and practice of the early Church urged the faithful to avoid secular judgements and seek rather peaceful or equitable solutions to conflict within their local community. The procedures adopted in early Church practice have remained until this time as part of the Church's law.

Two fundamental extrajudicial ways to resolve conflict have survived virtually intact from Roman Law.¹ They were known to Roman Law as transactio and compromissum inter arbitros, but have come to us as "conciliation" and "arbitration". Transaction was the private resolution of conflict negotiated directly by the parties, while arbitration, to use the general English term, meant recourse to another so that he might put an end to the dissension.²

For the sake of simplicity, we can refer to both transaction and arbitration as procedures for a compromise solution to conflict.

¹ A. Julien, "Evolutio historica compromissi in arbitros in iure canonico", in Ap., 10(1937), p. 189; hereinafter cited as "Evolutio"; F.X. Wernz, Ius decretalium, Vol. 5, p. 311, points out that besides the "arbitrium boni viri vel Episcopi, ex natura rei primis christianis, ut lites ipsorum dirimentur, confugiendum fuit ad amicabilem compositionem vel transactionem ex legibus romanis bene illis notam."

² A. Forcellini et al., Lexicon totius latinitatis, Vol. 4, p. 770, where transactio is defined as "[...] pactio inter litigantes de re dubia et lite incerta neque finita [...]"; R. Naz, "Transaction", in D.D.C., Vol. 2, cols. 1314-1315

Compromise is the genus, the various forms of transaction and arbitration are species. In this chapter, then, we will examine the nature, value, development and uses of these forms of compromise which have been maintained in the 1983 Code (canons 1713-1716), with an evaluation of the effectiveness and possible application of these procedures.

A. Transaction

Transaction, in Roman Law, was regarded as a pact negotiated by the parties themselves to settle a dispute. While as a juridical device, it had no set form or conditions, there was, however, a requirement that it be centred on an object contested by the parties on disputed or doubtful grounds. Since the resolution of the conflict involved reciprocal concessions, transaction was regarded as an onerous contract. The emperors Diocletian and Maximian and the Caesars declared that "a transaction is of no effect unless something is given, retained or promised".³ Ulpianus had previously clarified the more general characteristics of the process by contrasting it with an agreement:

Whoever transacts, does so as if were about something which is in doubt, or about a trial which is pending or not yet concluded. Whoever, on the other hand, makes an agree-

³ Codex Justinianus, Lib. II, tit. IV, lex 38: "Transactio nullo dato vel retento seu promisso minime procedit."

ment, surrenders by way of donation through liberality, something which is certain and undisputed.⁴

1. The nature of transaction

The subject matter of the transaction was considered as placing a burden on the parties in that a compromise position had to be reached. Both parties entered the transaction aware that they would not receive all they wanted. The subject matter, however, was to be doubtful and controverted. If certain knowledge existed about a disputed matter, then the transaction would be either invalid or rescindible. If the petitioner transacted knowing the object of dispute belonged to the other party, the transaction was considered automatically null even in the external forum. If, however, the respondent knew that the object certainly belonged to the petitioner, then the transaction was not null, but the petitioner could ask to have it rescinded.⁵

Transaction was a process used when the parties believed that some disputable questions were incapable of being settled judicially in a way satisfactory to both, or that the suit pending or contemplated would be injurious or of interminable duration. An agreement was made to forego part of the claims in order to close the matter

⁴ Digest, Lib. II, tit. XV, lex 1: "Qui transigit, quasi de re dubia et lite incerta neque finita transigit. Qui vero paciscitur, donationis causa rem certam et indubitatum liberalitate remittat."

⁵ A. Reiffenstuel, Ius canonicum universum, Vol. 2, p. 68.

finally. The pact was based on the premise that each party would incur some loss.⁶

a. Juridical significance of transaction

While transaction was a form of pact or contract, its foundation was the free goodwill of the parties. The remedy was available to anyone of sound mind who was legally capable of making a transaction.⁷ There was a presumption that the person transacting was mature enough not to want the contract rescinded,⁸ and so, no person could be forced to enter into transaction. If an official should force such an action, he was liable to make good the losses sustained by the injured party.⁹

⁶ S. Amos, The History and Principles of the Civil Law of Rome, p. 188; W.W. Buckland, A Text-Book of Roman Law from Augustus to Justinian, p. 525: Here the author defines transaction: "Essentially, compromise of a dispute at law, impending, existing or already decided, if an appeal of any kind is still admissible. It was the abandonment of a claim in consideration of being allowed to retain something. In the former, the usual case, there would be an Aquilian stipulatio, and an acceptilatio or a pact not to use, the former extinguishing the claim altogether, the latter giving an exceptio pacti. It was the usual practice, either as alternative to the formal release, or in addition, to stipulate for a penalty upon disregard of the agreement."

⁷ Codex Justinianus, Lib. II, tit IV, lex 13.

⁸ Ibid., Lib. II, tit. IV, lex 27.

⁹ Constitutiones Justiniani, Collectio IX^a, tit. VII, c. 4.

Transaction could not give rise to an action unless strengthened by a device known as stipulatio.¹⁰ Certain capital offenses and public crimes, however, were considered outside the realm of transaction.¹¹

The general principle invoked was that, once terminated, a transaction could not be revived: "It is prohibited by an Imperial rescript to revive any case of litigation which has been terminated by lawful transaction."¹² The juridical foundation appeared to be the mature behavior expected among adult citizens and the importance of being able to trust and accept the word of another citizen:

It is with good reason held that no less authority attaches to transactions than to matters which have been judicially decided: and indeed nothing is so agreeable to the good faith of human nature as for men to abide by the agreement which they have entered into [...].¹³

¹⁰ P. Bonfante, Istituzioni di diritto romano, p. 510; cf. also A. Berger, Encyclopedic Dictionary of Roman Law, Vol. 43, p. 716, under Stipulatio: "An oral solemn contract concluded in the form of a question (interrogatio by the creditor: "spondesne centum dare?!) and an affirming answer (responsio) of the debtor ("spondeo" + "I promise"). The answer had to agree perfectly with the question; any difference or restriction (addition of a condition) made the stipulatio void. Presence of both parties was required, and any interruption between question and answer was inadmissible. [...] A promise made through stipulatio was suable if the oral exchange of question and answer was performed, without regard as to whether there was a ground for the obligation or not. [...] In Justinian law the stipulatio appears as a written act, without any formal requirements. For an oral stipulation certa verba were no longer a condition of its validity [...]."

¹¹ Codex Justinianus, Lib. II, tit. IV, lex 18.

¹² Ibid., Lib. II, tit. IV, lex 16.

¹³ Ibid., Lib. II, tit. IV, leges 5,6,10,12,13,20,25,39.

The legal force of the transaction followed the seriousness with which the agreement was treated. The execution of the agreement could be demanded or the penalty collected.¹⁴

b. Transaction with superiors

Although transaction was a process that proved effective between individuals of equal rank, it is important for our purposes to determine the function it served in relation to disputes between those harmed and those in positions of authority. In the Republican era of Roman Law (509-27 B.C.), a form of intervention, extra ordinem, of the magistrate was accepted in the field of administration. Roman Law was not able to conceive that the State (the civitas, the populus Romanus) could enter into a juridical relationship on an equal footing with private individuals. In every act in which the State was involved, even through the magistrate, it brought with it this sovereign character. The relative relationship of the two parties always remained the same.¹⁵

¹⁴ Ibid., Lit. II, tit. IV, lex 40.

¹⁵ G. Grosso, Lezioni di storia del diritto, p. 401. The magistrate of the civitas did not intervene in the controversies of private individuals so much because it was held to be a function of the State to render justice, but more for the purpose of safeguarding public peace. Cf. ibid., p. 140. The magistrate decided interventions, causa cognita, without recourse to a formula or to a judge.

c. Reserved cases of transaction

Ulpianus declared that anyone could accept a transaction, but certain transactions could only be entered into with the authority of the Praetor or the Emperor. Persons of high rank in government were not excluded from transacting, but for their own protection as well as that of the State, they needed the authority of the Emperor: "It is not lawful for an Imperial Procurator to make a compromise without the authority of the Emperor."¹⁶

While other devices such as "supplication" could be used in cases where persons were harmed by acts of authority, the juridical device of transaction was also available as a means to avoid judgement and a way of reaching a friendly resolution of conflict. The infrequent use of transaction with authorities had its roots in the standards of the society at a given time.

2. Transaction from Gratian to the 1917 Code

Since Canon Law did not emerge as a recognized independent scientific discipline until the time of Gratian,¹⁷ it is within the context of the Corpus Iuris Canonici and its subsequent development that we find the notion of transaction which, with minor

¹⁶ Digest, Lib. II, tit. XV, leges 2,8,13. The Praetor needed to hear a sufficient cause to authorise a transaction.

¹⁷ C. Lefebvre, "Historia iuris canonici", in D.M.C., Vol. 2, p. 546.

modifications, has remained part of Church law until the present time. The contributions of the Corpus Iuris Canonici in this matter closely followed the Roman Law, concentrating on both the process and the spirit behind it. Gratian presented a theologically based judicial background for the resolution of conflict, while Gregory IX recommended the intervention of the judge at any point of the judicial process to urge the peaceful composition of conflict. This approach applied for all judgements except those in which the law did not allow transaction to take place.¹⁸

a. The communion context of transaction

Calling on the legislation of the early Church Councils, Gratian placed the settlement of disputes within the context of Church unity. For him, the seriousness of disunity meant that whoever was not at peace with his brother was considered "proven" to be outside the Church. So grave was his conception of this disunity that he believed even martyrdom would not wipe out the stain.¹⁹ The offerings of brothers in disagreement were not to be received, nor gifts from those who oppressed the poor, those who loved quarrels and dissension and prolonged them with murmuring were also condemned.

¹⁸ c. 11, X I, 36: "Poteris etiam ad componendum interponere partes tuas, [...] exceptis nimirum casibus, qui compositionis sive dispensationis remedium non admittunt, utpote coniugii sacramentum [...]."

¹⁹ c. 3, Dist. XC: "Tales etiamsi occisi in confessione nominis Christi fuerint, macula ista nec sanguine abluitur. Inexpiabilis et gravis culpa discordiae et passione purgatur."

Those who refused to return to harmony or be reconciled were to be repelled from the Church community. The overall tone was to seek peace and harmony and avoid judgements in cases involving dissident members of the faithful.²⁰

b. Decretal law on transaction

It was Gregory IX who treated explicitly of the juridical device of transaction. He assumed much from Roman Law and placed limitations on the use and effects of transaction. He spoke principally of its use in cases where intervention of a third party was required for the juridical perfection of an act. Transactions without the authority or consent of the bishop remained 'personal' and did not oblige any successor. Transactions regarding benefices, involving a danger of simony, or spiritual subjection were not to take place.²¹

Gregory IX was the first Pope to mention the figure of the "mediator" in a transaction,²² but the overall emphasis of his writing was the duty of the judge to immerse himself in promoting a solution through transaction in all cases except those not allowed by law. Development of juridical theory on this matter was gradual, but can be considered as having reached its fulness by the time of A. Reiffenstuel (1642-1703) and F. Schmalzgrueber (1663-1735) whose

²⁰ c. 2,4,5,7,12, Dist. XC.

²¹ c. 3, c. 4, c. 5, c. 6, c. 7, c. 8, c. 9, c. 10, X I, 36.

²² c. 6, X I, 36.

writings on the subject encapsulate the basic teaching of this entire pre-Code period.

c. Transaction - a broader definition

Both Reiffenstuel and Schmalzgrueber spoke of transaction in the broad sense as any act that brought about the resolution of a negotiation whether it be through a decisory oath, sentence of the judge, a friendly settlement or any other manner that puts an end to an action. In the more strict and proper sense, transaction was seen as the solution by which a doubtful and controverted matter was resolved by the consent of the parties, with something given, promised, withheld or returned. Authors defined transaction as "a non gratuitous pact about a doubtful and controverted matter, entered into while the outcome of the trial was both uncertain and the procedures were not yet finished."²³

Transaction was considered a species of pact. It differed from a gratuitous pact in that it had its costs. It also differed from friendly composition or settlement where there were no conditions for an agreement. In the broad sense, these terms were often

²³ F. Schmalzgrueber, *Ius ecclesiasticum*, Vol. 1, pars II, p. 319; A. Reiffenstuel, *op. cit.*, p. 319: "[...] pactio non gratuita de re dubia, et controversa, sive lite incerta, et nondum finita"; F.X. Wernz, *op. cit.*, p. 31: "Pactio onerosa de re dubia et lite incerta neque finita, aliquo dato vel retento sive promisso."

found to overlap.²⁴ The essential requirement for transaction was that a person was to have the free administration of his own or another's property and the power to alienate. Infants, the insane and those unable to consent were considered unable to transact. A judicial sentence could be brought down on both willing and unwilling alike, but transaction was different in that it only took place between willing parties. An oath might have the force of a transaction, but it did not share its nature. Pacts and contracts were also different inasmuch as every transaction was a pact or a contract, but the opposite was not always true.²⁵

d. Availability of transaction

A peaceful resolution of conflict was considered so important that transaction could be used at any stage, before the trial, during it, or even after the trial as long as the sentence had not become a res iudicata. Even after the sentence, transaction was still possible whenever an appeal was available. If the possibility of restitutio in integrum was available for the Church or a minor who had been harmed, or if the ruler admitted a supplication, or if in any

²⁴ A. Reiffenstuel, op. cit., pp. 69-70. This author considers transaction in Roman Law terms as "[...] contractus onerosus, et innominatus, 'Facio ut des, do ut facias,' etc., hoc est, abstineo a lite, ut des; do, ut abstineas a lite, et ius omne, quod in re litigiosa praetendis, mihi cedas, etc."

²⁵ F. Schmalzgrueber, op. cit., pp. 321-322.

way the res iudicata nature of the case remained in doubt, then transaction was still possible.²⁶

Transaction was possible for a variety of reasons, but Schmalzgrueber mentions three occasions where it should be insisted upon. The first, when the parties were completely equal and the trial so intricate that only with difficulty could a decision be reached. The second, if continuation of the trial could bring a danger of resorting to arms or fear of a disturbance of the peace. The third case occurred if the trial was about something over which the judge had power to dispose.²⁷

e. Subject matter excluded from transaction

The limitations of transaction were seen in the lists of subject matters that emerged which were not open to the juridical device of transaction. The following are generally considered the major examples: 1) those matters considered to be certain, since transaction was essentially about a doubtful matter; 2) matters considered res iudicata, since the final judgement clarified any doubt and so put an end to the dispute; 3) the inheritance of someone still living, since it was considered contrary to good custom and destructive of the liberty of the testator; 4) the dispositions of a will, unless it had been previously inspected; 5) questions of future

²⁶ Ibid., pp. 327-328; A. Reiffenstuel, op. cit., pp. 68-69.

²⁷ F. Schmalzgrueber, op. cit., p. 328.

maintenance, where the authority of a judge was required; 6) cases of public crime whose punishment did not require death, since the public good demanded that crime be punished; 7) spiritual matters, or matters connected with the spiritual if the transaction included simony. This included the right to tithe, matters concerning benefices, spiritual subjection and the ius patronatus; 8) questions concerning the marriage bond, because there could be no interference in what was established by divine authority.²⁸

In Roman Law, no transaction was possible for non-capital crimes. Since the Church had no capital crimes, a dispute arose regarding the possible use of transaction in the matter of crimes and punishment in Church law. Because of similarity of effect and analogy of law, the more probable opinion, sustained by Reiffenstuel, was that some penalties of Church law could be considered equivalent to capital punishment, for example infamy. It followed that transaction was possible in such a case.²⁹ A similar device in common law today would be "plea bargaining".

f. Types of transaction

Transaction was considered "real" when it concerned things. The resolution of the transaction was considered as affecting the successors as well as the possessor involved. A transaction was considered "personal" when questions of personal rights were invol-

²⁸ Ibid., pp. 323-327; A. Reiffenstuel, op. cit., pp. 70-72.

²⁹ A. Reiffenstuel, op. cit., p. 73.

ved; it endured during the lifetime of the transactor and was extinguished with his death.³⁰ Since the most frequent uses of transaction involved property, transaction was considered as a species of alienation and the laws regarding alienation became an essential element in most cases.³¹ The Pope alone could change the nature of a transaction from personal to real when he confirmed it ex certa scientia. In this rare event the transaction which of its nature should only oblige the individual, received a special strength by which successors were also obliged.³²

g. The effects of transaction

The effects of transaction were an indication of its ultimate value as a juridical device to avoid trials effectively and resolve disputes within the Church. Authors agreed generally on the following effects: 1) transaction was equivalent to a sentence, putting an end to a trial that had been moved or was to be moved. It

³⁰ F. Schmalzgrueber, op. cit., p. 320.

³¹ L. Ferraris, Bibliotheca canonica iuridica moralis theologica necnon ascetica polemica rubricistica historica, Vol. 7, p. 506; Extravagantes communes, 3.4.1; A. Reiffenstuel, op. cit., p. 77: "Transactio est species alienationis nec fieri potest in rebus Ecclesiae immobilibus aut pretiosis absque solemnitatibus iuris."

³² A. Reiffenstuel, op. cit., p. 78; normally a personal transaction would follow the 'regula iuris VII': "Privilegium personale personam sequitur, et extinguitur cum persona", but with the intervention of the Holy See, 'regula iuris XVI' gives a personal transaction a "real" status: "Decet concessum a principe beneficium esse mansurum." Cf. Regulae Iuris in VI^o.

had the force of a res judicata;³³ 2) where transaction had taken place legitimately, it could not be revoked or rescinded while one of the parties remained unwilling. Not even a rescript from the ruling authority was able to change the transaction if one party was unwilling; 3) all future actions, obligations, proofs, instruments and other rights of parties brought forward contrary to the transaction were considered invalid and worthless on the grounds that the most recent agreements removed prior agreements. The pretext of new or newly discovered documentary evidence could not be used to rescind a transaction; 4) transaction normally gave rise to the peremptory exception litis finitae which could be applied before or after the trial. More rarely it could give rise to a civil action if it had been made by handing over something (rei traditio) or by the use of stipulation; 5) if a transaction was "special", then its effects were not transferable to other cases. If it was of a "general" nature then it could be applied to particular cases covered.³⁴

While the peaceful resolution of conflict was important to the life of the Church, the juridical effects of this resolution were important to order and justice within the people of God. Pre-Code

³³ F. Schmalzgrueber, op. cit., pp. 328, 331; A. Reiffenstuel, op. cit., p. 75; Codex Justinianus, Lib. II, tit. IV, lex 20: "Non minorem auctoritatem transactionum quam rerum iudicatarum esse recta ratione placuit, si quidem nihil ita fidei congruit humanae, quam ea quae placuerant custodiri, nec enim ad rescindendum pactum sufficit, quod hoc secunda hora noctis intercessisse proponas, cum nullum tempus sanae mentis maioris quinque et viginti annis consensum repudiet."

³⁴ F. Schmalzgrueber, op. cit., pp. 328-329; A. Reiffenstuel, op. cit., p. 75; F.X. Wernz, op. cit., pp. 40-42; R. Naz, loc. cit., col. 1318; Lib. II, tit. III, c. 1, c. 2, in VI^o.

Canon Law like Roman Law recognised a special stability for the juridical device of transaction. The difficulty in rescinding a transaction was a reflection of the seriousness in which the pact was regarded.

h. Remedies against transaction

Authors generally agree that a transaction could be rescinded for any of the following reasons: 1) the mutual agreement of the transacting parties;³⁵ 2) grave fear, unjustly inflicted. A transaction was not considered valid when the fear was such as to threaten life or bodily harm;³⁶ 3) if the transaction was extorted by fraud;³⁷ 4) if the transaction was entered into because of false documentation; however, it was not possible to raise newly discovered documentary evidence to rescind a compromise;³⁸ transactions based on forged documents were to be annulled in full or in the part affected when the falsity of the documents was discovered;³⁹ 5) because of substantial error which would take away consent; 6) where

³⁵ F. Schmalzgrueber, op. cit., p. 330.

³⁶ Codex Justinianus, Lib. II, tit. IV, lex 13; F. Schmalzgrueber, op. cit., p. 329.

³⁷ Codex Justinianus, Lib. II, tit. IV, lex 19; F. Schmalzgrueber, op. cit., p. 329: "[...] si dolo extorta sit, tunc enim per replicationem doli, vel per actionem, de doli rescinditur [...]"; A. Reiffenstuel, op. cit., p. 76: "In iure dolus ex proposito, et dolus re ipsa aequiparantur."

³⁸ Codex Justinianus, Lib. II, tit. IV, lex 29; F. Schmalzgrueber, op. cit., p. 330.

³⁹ Codex Justinianus, Lib. II, tit. IV, lex 42.

transaction had been undertaken on behalf of wards, minors or those equivalent in law (the Church and juridical persons) who had the benefit of an action for restitutio in integrum if they suffered from the transaction.⁴⁰

If one of the parties failed to observe the transaction, it was possible to urge the execution or demand the penalty that applied for non-fulfillment of the transaction. One question remained disputed in the area of damages: whether there existed a level of damage where it became automatically possible to rescind the offending transaction. Authors generally agreed that fiscal damages infra dimidium did not give rise to an action for rescission. The question of damages ultra dimidium created a division among canonists. Only if the damage was absolutely enormous (enormissima) could the transaction be rescinded according to Schmalzgrueber and Wernz who followed his opinion.⁴¹ Reiffenstuel and Ferraris provided for an action de doli and rescission of the transaction if damages over half occurred.⁴²

3. Transaction in the 1917 Code

The 1917 Code accepted the substance of the juridical device of transaction from pre-Code law, under the title of "Ways to avoid

⁴⁰ F. Schmalzgrueber, op. cit., p. 330.

⁴¹ F.X. Wernz, op. cit., p. 42; F. Schmalzgrueber, op. cit., p. 330.

⁴² A. Reiffenstuel, op. cit., p. 76; L. Ferraris, op. cit., p. 50.

contentious judgements". The placement of canons 1925-1928 between the general treatise on judgements, in which the legislator spoke of contentious judgements of a private order, and the special section on judgements not subject to transaction, confirmed the extrajudicial nature of the process while indicating its limitations.⁴³

a. Preference for peaceful resolution

The Church's preference for a peaceful resolution of contentious conflict⁴⁴ where the matter concerned the private good of the parties emerged in the first canon. While according to the law of the Decretals, the judge could intervene at any time before the final judgement to recommend transaction, the 1917 Code imposed an obligation to exhort the parties to seek a solution to their conflict through transaction whenever there was hope that it could be resolved in this way (canon 1925, s1). The judge was able to fulfill this duty at any time, before or during the trial, whenever the exhortation appeared opportune and likely to be fruitful (canon 1925, s2).

The first major change of the 1917 Code was the introduction of the "conciliator", the juridical figure charged with the task of facilitating the conciliation or resolution of the conflict. The

⁴³ A. Julien, "Compromissum inter arbitros iuxta Codicem Iuris Canonici", in Ap. 10(1937), p. 544, hereinafter cited as "Compromissum inter arbitros".

⁴⁴ c.7, Dist. XC: "[...] ad pacem magis quam ad iudicium cohortantur."

canon was specific in recommending that the judge not undertake this role, but that the task be given to a priest or more preferably to one of the synodal judges (canon 1925, s3). The reason for prescribing the non-intervention of the judge was to provide for the case where his efforts could be frustrated and the matter returned to him unresolved. In such instances the exception of suspicion could be raised if he had favoured one of the parties in attempting transaction.⁴⁵ The use of synodal judges provided for equity which would be easier to observe when one knew the law.⁴⁶

b. A broader base for transaction

The 1917 Code (canon 1925) made no subdivision or distinctions when it spoke of transaction. Whereas the onerous nature of the pre-Code strict expression reduced its use to questions of finances, wills, maintenance questions and contracts, transaction was now given a broader base. The more general use became that of a gratuitous nature in terms of conciliation. The introduction of the conciliator allowed for a broader interpretation. In this new sense, we can speak of two people who "strike a deal" about something. There is a quid pro quo, an exchange that may take on a multiplicity of forms. So it is as a process of conciliation that the notion of

⁴⁵ F.M. Cappello, Summa iuris canonici in usum scholarum concinnata, Vol. 3, p. 249; M. Conte a Coronata, Institutiones iuris canonici, Vol. 3, p. 366.

⁴⁶ A. Blat, Commentarium textus Codicis Iuris Canonici, Liber. 4, p. 443.

"transaction" has developed since the 1917 Code. The changes came partly as a result of civil law experience and partly because of the broader basis of the 1917 Code which included canonisation of civil law procedures.

c. Canonisation of civil law

Because pre-Code law generally followed Roman Law in matters involving transaction, any transaction undertaken produced effects within both civil and ecclesiastical law. In a changing world, it was important that many transactions be recognised by both Church and State; thus civil law was accepted with some modifications necessitated by the very nature of the Church. No norm or decision contrary to divine or ecclesiastical law would be acceptable (canon 1926).⁴⁷ Furthermore, since both transaction and arbitration came under the general title of contracts, a new canon recognised the civil law and its effects:

What the civil law of a country determines with regard to contracts, general and specific, named and nameless, as well as payments, shall be observed also in ecclesiastical law and with the same legal effects, unless the civil laws run counter to divine law, and, unless the canons provide otherwise.⁴⁸

The cases excluded from transaction in pre-Code law remained the same and were specifically mentioned in canon 1927. Transaction could not be used in criminal cases, nor in contentious cases invol-

⁴⁷ A. Julien, "Compromissum inter arbitros", pp. 544-545.

⁴⁸ Translation of canon 1529 from C. Augustine, A Commentary on the New Code of Canon Law, Vol. 6, p. 590.

ving marriage dissolution, nor about benefices when the title of the benefice was in question (unless legitimate authority intervened), nor in spiritual matters if payment with temporal goods intervened.⁴⁹ If a dispute concerned the temporal goods of the Church, or goods which, although annexed to spiritual things, could nevertheless be considered separately, then transaction was possible where the subject matter necessitated it, provided the formalities of law for alienation of ecclesiastical goods were observed (Canon 1927, s2).⁵⁰ Other cases excluded from transaction or procedures of conciliation depended on the civil law of the place where the transaction was to occur (Canon 1926).

Since nothing was said regarding capacity for transaction, the prescriptions of civil law were to be followed. The presumptions of Roman Law that one had the capacity to alienate, that minors were incapable and that sanity was required were part of most civil law presumptions.⁵¹ Freedom to act in one's own name, a mandate to act on behalf of another or authorisation to act from the superior of a religious were requirements for validity of various forms of transaction in Canon Law.

⁴⁹ S. Woywod, The New Canon Law, p. 37: A poor translation here indicates that legitimate authority can intervene to approve transaction of spiritual matters even when payment with temporal goods intervenes, but simony can never be approved; cf. also, Regulae Iuris, I, in VI^o: "Beneficium ecclesiasticum non potest licite sine institutione canonica obtineri."

⁵⁰ The list provided in this canon is not taxative; cf. P.J. Noval, Commentarium Codicis Iuris Canonici, Liber 4, p. 472.

⁵¹ Codex Justinianus, Lib. II, tit. IV.

d. Effects of the compromise of transaction

The form of the transaction was not prescribed by the 1917 Code, but by civil law. Since the civil law of many countries tended to develop more a system of conciliation, many cases could be treated under this broader umbrella where conflicts that were not strictly cases of transaction could be processed. Lack of jurisprudence in this area precludes discussion of the use of this device.

The 1917 Code (canon 1928, §1) spoke of the effects of transaction as settlement and harmony. The English language renders this by "conciliation" of the parties. It was from this end result that the process had become known as "conciliation".⁵² The juridical effects of the process were those recognised by civil law. The remedies available were equally those of civil law. Further developments will be discussed when the provisions of the 1983 Code are outlined, following our study of arbitration.

B. Settlement of conflict by compromise with arbiters

In the preparation for the 1983 Code, the Commission addressed the subject of compromise with arbiters: "[...] which, rather than a way of avoiding judgement, is an extraordinary system leading to the

⁵² We will discover in the development of the arbitration process an area that is basically a process of conciliation. This will allow for a double division: conciliation that is transaction in the strict sense, and conciliation a part of a peacemaking process.

same judgement."⁵³ As this institution has proved effective since apostolic times, we now investigate the questions surrounding its sources, uses, spirit, nature, development and effectiveness for our times.

The system of compromise with arbiters, commonly called "arbitration", draws practically all its norms from Roman Law.⁵⁴ This juridical device is the most ancient form of rendering justice and was found at the beginnings of most civilisations.⁵⁵ It harmonises with the spirit of reciprocal charity, peace and concord which the Church seeks to foster in an endeavour to avoid the use of the judicial forum.⁵⁶ The laws that govern arbitration have remained unchanged in essence from the promulgation of the Liber Sextus of Boniface VIII until the 1917 Code.⁵⁷ It is because of this common source and for the sake of simplicity that the development in this chapter unites both Roman Law and decretal law sources.

⁵³ Communicationes, 9(1976), p. 198.

⁵⁴ F.X. Wernz and P. Vidal, Ius canonicum, Vol. 6, p. 628.

⁵⁵ A. Amanieu, "Arbitrage", in D.D.C., Vol. 1, col. 862.

⁵⁶ A. Julien, "Evolutio", p. 187.

⁵⁷ F.X. Wernz and P. Vidal, op. cit., p. 628; A. Julien, "Evolutio", p. 187; A. Amanieu, loc. cit., cols. 866-867.

1. Sources of law on arbitration⁵⁸

Roman Law doctrine was reproduced almost in its entire form in the Decretals. Any changes were inspired by christian ideals that suited better the nature of the Church better.⁵⁹ Solutions given by the Popes to cases proposed were invariably little more than an application of Roman Law, although in them this law was accomodated to the nature of the Church and ecclesiastical affairs.⁶⁰

Gratian distinguished two types of judges. The first were the ordinary ones who enjoyed apostolic or imperial power, the second were the arbitrarii or arbiters who had no power but were chosen by the litigants who sought a compromise and who subjected themselves to the decision of the arbiter.⁶¹ The effects of the compromise depended on the status of the arbiter. If he was simply an arbiter without any legitimate power, then no appeal was allowed from his

⁵⁸ The term "arbitration" will be used throughout this chapter although it has a restrictive sense in Canon Law. Latin has several concepts such as arbitrium, arbitramentum, laudum, arbiter, arbitrator, amicabilis compositor, and, arbiter compromissarius which are not easily rendered in English. For this reason, where there is need for clarification the latin terms will be used. The term "arbitration" will normally be used in its more general sense to embrace all forms of the compromissum inter arbitros. The latin term arbiter will be maintained throughout in its correct sense and the word arbitrator will keep its specific canonical meaning rather than that of Common Law.

⁵⁹ A. Amanieu, loc. cit., col. 866-867.

⁶⁰ A. Julien, "Evolutio", p. 205.

⁶¹ c. 33, C. II, q. vi.

decision.⁶² If, however, he was an ordinary judge acting as an arbiter, then an appeal was possible as from a decision given by a judge.⁶³

a. The use of arbitration

The arbiter was given capacity inasmuch as the limits of his jurisdiction were set by the participants. The wise person chosen did not have to be the bishop, but could be any lay person.⁶⁴ In practice, the resolution of conflict by the arbiter was a task that fell almost automatically to the bishop due to the respect in which he was held.⁶⁵ The juridical background of the new Christians favoured the use of arbitration since it was used universally by Jews, Greeks and Romans.⁶⁶

⁶² c. 36, C. II, q. vi: "Arbitrarii tantum sunt qui nullam legitimam potestatem acceperunt, a quibus appellari non licet, qui eis inputandum est qui sibi tales elegerunt."

⁶³ c. 36, C. II, q. vi.

⁶⁴ L. Sotillo, "La potestad arbitral y judicial de la Iglesia en las causas temporales entre los cristianos de los primeros siglos", in M.C., 1(1943), p. 208, argues from reason for the juridical value of sentences in the early Church: "[...] se hace encreíble que por más de trescientos años que duró la prohibición de demandar los cristianos a sus correligionarios ante las jueces cristianos no produjeron por sí mismas efectos jurídicos en ambos fueros y que los cristianos fueran en esto de peor condición que los paganos, y que la Iglesia les impidiera el ejercicio justo de su derecho sin garantizárselo plena y seguramente y que Cristo no dotara de poder suficiente para ello." He reaches the conclusion that the early Church tribunals were truly judicial and enjoyed the power of jurisdiction (p. 220).

⁶⁵ G. Vismara, Episcopalis audientia, 1837, p. 6.

⁶⁶ G. Le Bras, Histoire du droit et des institutions de l'Eglise en occident, Vol. 2, pp. 573-579.

Following the fall of the Roman Empire in the West (476 A.D.), the bishops alone remained the bastion to which their people could turn as the last vestige of the old order. The Lex Romana Visigothorum generally admitted only the tribunals of the State, administered with a new set of laws. So it was that at the beginning of the Middle Ages, the practice of christians taking their cases to the bishops flourished again. This new law contained little concerning the judgement of arbiters save the constitution of Constantine of 318 which was included in the Breviarium Alarici. It was the Councils that promoted or even made obligatory in some cases recourse to arbiters.⁶⁷

b. Constant practice of the Church

The writings of Ambrose and Augustine indicated the burden placed on bishops as they became the judges of causes that were many and varied. St. Ambrose indicated his preference to be an arbiter rather than a judge.⁶⁸ The activity of Augustine and deductions from his writings indicate that much of his activity was also that of

⁶⁷ A. Julien, "Evolutio", p. 201: The Third Council of Aurelia (538), c. 12, ordered that trials to recuperate possession of ecclesiastical goods illicitly alienated should be decided through means of public judgement or the judgement of elected arbiters - cf. Mansi, IX, 15. L. Sotillo, loc. cit., p. 205: "[...] sus sentencias, aunque no sean reconocidas por la autoridad civil, producen efectos juridicos; [...], and again "[...] es increible que San Pablo hablara asi, si se tratara sólo de tribunales de amigabiles componedores o arbitros [...]"'. What Sotillo fails to grasp is that juridical effects within the Church can be obtained in quasi-juridical ways that are more in tune with the nature of the Church.

⁶⁸ Epistula 82 Sancti Ambrosii, in P.L., Vol. 16, 1276: "[...] recepi cognitionem, ita tamen ut compositionis essem arbiter."

an arbiter rather than a judge.⁶⁹ The canons of the Councils clearly indicated a preference for reconciliation. Canon 9 of the Council of Chalcedon (451) established that quarrels of clergy should be terminated either by the bishop or by arbiters elected by the mutual consent of the parties who order or consent to the termination.⁷⁰ The second Council of Tours in 567 laid down principles for disputes between bishops. The first step was transaction. If this proved unsuccessful, they were to have recourse to priests as arbiters to settle their dispute. If they neglected efforts at reconciliation, they were to be penalised by the Synod.⁷¹

The writings of Gregory the Great (540-604) show clearly that these canons were a living law in the sixth century. His pontificate demonstrates a wide-ranging and proficient use of arbitration as the first choice for justice. Normally, the bishop was the one who should give judgement. Where he was suspected of bias, he could

⁶⁹ Sancti Aurelii Augustini Hipponensis Episcopi Opera Omnia, in P.L., Vol. XXXII, (1841), c. xix, 49-50: Augustine states clearly: "[...] se malle inter incognitos, quam inter amicos causas audire: eo quod de incognitis, pro quo arbitra(ta) aequitate judicaretur, amicum posset acquirere; de amicis vero unum esset, contra quem sententia proferretur, perditurus; cf. also, Enarratio II, in Ps. 25, n. 13, in P.L., Vol. 36, 195: here the text clearly indicates the formalities of arbitration: "Veniunt ad iudicem. Antequam proferatur sententia, ambo dicunt; Amplectimur iudicium tuum; quidquid iudicaveris, absit ut respuamus. quid et tu dicis? Judica quidvis, tantum iudica; prorsus si in aliquo repugnvero, anathema sim."

⁷⁰ A. Julien, "Evolutio", p. 201.

⁷¹ Concilium Turonense II, in Mansi, IX, c. 2, 792-793.

select a commissioner to see that the litigants chose referees or arbiters so that the case could be settled by arbitration.⁷²

2. The nature and development of arbitration

The Digest of Justinian, using the words of Paulus, indicated the general nature of arbitration: "Arbitration is conducted in the same manner as a trial in court, and it is intended to put an end to litigation".⁷³

Despite the unity of doctrine on "arbitration", there was a certain confusion among authors because of overlapping terminology. Barbosa, with most Decretal Canonists, distinguished two types of arbiters. The first were arbiters of law (arbitri iuris) who were appointed and proceeded by force of law. The second he termed compromissary arbiters elected by agreement and free will of the

⁷² J. Richards, Consul of God, The Life and Times of Gregory the Great. Sancti Gregorii Papae I. cognomento magni, Opera Omnia, Vol. 2: (Registri Epistolarum), Liber I, Epist. xxxviii, 527-528; here Saint Gregory imposes necessary arbitration; ibid., Liber I, Epist. xlvi, 542-543; here the Pope proposes an arbitral judgement without appeal; ibid., Liber VI, Epist. xi, 799-800; also cf. ibid., Liber IX, Epist. xlii, 957-958: The pope makes clear that nothing can be defined in the absence of one of the parties, that delays should be avoided and that arbiters should be elected as soon as possible; ibid., Liber IX, Epist. vii, 931-932: This text provides for a choice: The judicial solution or election of arbiters by mutual consent; in a dispute on boundaries in 594 Gregory provided: "[...] let it be set at rest peaceably and legally by arbitrators chosen for the purpose." Cf. A Select Library of Nicene and Post-Nicene Fathers of the Christian Church, Vol. 12, pt. 2, p. 77; Sancti Gregorii Papae I. cognomenti magni, op. cit., Vol. I, Liber IX, Epist. iii, 926-927; here Gregory urges conciliatory processes; ibid., Liber IX, Epist. xii, 939-941; Gregory also established a special bureau for difficult cases.

⁷³ Digest, Lib. IV, tit. VIII, lex 1.

parties; for this reason they were often called voluntarii. Barbosa distinguished two types: the arbiter, elected by the parties, who followed the order of law to solve a conflict, and the arbitrator, elected by the parties who was not bound to follow the law but settled the matter in a friendly way.⁷⁴

a. The necessary arbiter

Part of the essence of arbitration appeared to be the free choice of arbiters on the part of the parties in dispute.⁷⁵ A clear exception was the arbiter iuris seu necessarius, who, being a judge could not refuse to accept the position of arbiter. Parties were held to arbitrate with the arbiter iuris either by necessity of law or the coercive power of the judge. The arbiter iuris had jurisdiction and coercive power from the law. He was able to cite parties, call witnesses and examine them and punish those who were disobedient. His jurisdiction was considered either "quasi-ordinary" or delegated. Equity demanded that any party claiming to be harmed by his judgement should be able to appeal.⁷⁶

In decretal law, three principal cases emerged where the use of a necessary arbiter or arbiter iuris was imposed: 1) the case

⁷⁴ A. Barbosa, Collectanea Doctorum... in Ius Pontificium Universum, Vol. 1, In libro I Decretalium, tit. XLIII, n. 10, pp. 339-340.

⁷⁵ Digest, Lib. IV, tit. VIII, lex 3(1).

⁷⁶ A. Reiffenstuel, op. cit., p. 152; L. Ferraris, op. cit., pp. 362-363.

where suspicion was raised against the judge, 2) where there was a doubt about who was the true judge when several were delegated successively, and 3) in the case involving a bishop and a cleric subject to him.⁷⁷

b. Compromissary arbiters

The compromissary or voluntary arbiters enjoyed only private jurisdiction. Their power came from the parties and had its limits set by them. Arbiters elected by the parties could only investigate those causes proposed to them and any matters inseparably connected.⁷⁸ The parties determined the object of the controversy and the manner of procedure which was binding under penalty of nullity. Since the parties who entered into a compromise before arbiters obliged themselves by that fact to stand by the decision of the arbiter, no appeal was granted. When the judge recognised that the arbiter had proceeded according to the norms of the compromise and the prescripts of law, he was able, because of this legitimacy to give this decision executive force even to the point of forceful legislation if needed.⁷⁹

⁷⁷ c.39, X I, 29; c.14, X I, 8; c.46, C.XI, 9,1; A. Amanieu, loc. cit., col. 867.

⁷⁸ Digest, Lib. iv, tit. VIII, lex. 32,15. Innocent III clarified the limits of arbitration from which it is clear that no case can be recalled: "[...] quum arbitri iudicare non valeant nisi de his tantum, super quibus in eos exstiterit compromissum."; Cf. c. 6, X I, 43.

⁷⁹ A. Julien, "Evolutio", pp. 218, 224-225; Digest, Lib. IV, tit. VIII, lex 27(2): "de ea re dixerit, sive aequa sive iniqua sit: et sibi imputet qui compromisit."

c. The arbitrator

From Roman Law emerged the arbiter iuris seu necessarius, the arbiter compromissarius seu voluntarius and the device known as the arbitrium boni viri. Decretal canonists interposed two other figures, the arbitrator and the amicabilis compositor.⁸⁰

The arbitrator emerged as one who examined a dispute but was not constrained to use judicial rules or procedures, or to render his decision according to strict justice. He proceeded ex bono et aequo or from the standpoint of equity. In Roman Law this was the role of the person who pronounced the arbitrium boni viri. The bonus vir or reasonable man had less power, but more freedom than the judge. He was able to research details where a judge might not consider this his duty nor within his power. He could take account of facts that did not have the value of proofs and so could not influence a judge. Although not sanctioned by an action in law, the decision of the

⁸⁰ E. Gonzalez Tellez, Commentaria perpetua in quinque libros Decretalium Gregorii IX, Vol. 1, p. 760; Gonzalez Tellez clarified the introduction of the term arbitrator into canon law, a term not found in Roman Law or the decretals. He saw it as an abuse of interpretation by canonists and demonstrated that arbitrators were never received in law to decide a trial, although they were used to solve extrajudicial conflicts as simple mediators. His rejection of the origins and association of the notions of arbiter and arbitrator, though seemingly correct, has not prevented the term remaining in law, but has brought confusion among commentators; cf. c. 1929 CIC; Examples of the confusion are seen in P.J. Noval, op. cit., pp. 475-476, where he combines the arbiter compromissarius and the arbitrum boni viri and indicates that no appeal is possible, at the same time he admits an appeal against the arbitrator; F.M. Cappello, op. cit., p. 252, makes a similar mistake; A. Amanieu, "Arbitrateur", in D.D.C., Vol. 1, col. 896, says that Gonzalez Tellez was wrong in his condemnation, and that the introduction of the term was a simple accommodation that has clarified a previously complicated law.

bonus vir was even more rigorously imposed by public opinion, since it could even bring about a certain infamy of fact stronger than that imposed by law. It was even possible for a citizen to be degraded in class or entirely removed from the list of citizens. This non-judicial solution was effective and suited the nature of the Church.⁸¹

Like the compromissary arbiter, the arbitrator's decision was to be accepted by the parties and no appeal was available. In this way he was distinguished from the conciliator who made no decision, but supervised the decision made by the parties themselves. If the decision of the arbitrator was manifestly unjust, the office of the judge could be sought to have it reduced to the level of an arbitrium boni viri. Equity was the guiding principle of the arbitrator's decision.⁸²

d. The conciliator

The friendly compositors in the strict sense, were those persons of goodwill, who, by themselves, without a mandate or a previous compromise, came to the parties in dispute and set themselves up to bring about a friendly solution.⁸³ Some authors tend to reduce the task of the arbitrator to this position. For Lega, the

⁸¹ A. Amanieu, loc. cit., col. 896-897.

⁸² A. Reiffenstuel, op. cit., pp. 151-152; L. Ferraris, op. cit., pp. 363-364.

⁸³ A. Amanieu, loc. cit., col. 899; A. Reiffenstuel, op. cit., p. 151.

arbitrator was not the judge of the controversy, but rather an upright man and an expert, who, when a doubt arose, gave his sought opinion for the right solution of a practical difficulty. He gave the office several titles, including "arbitrator", "friendly compositor", "expert" or "mediator". In this way he reduced one form of arbitration to a type of conciliation or transaction with use of an arbitrator. It is in this sense that most students of "common law" would view the position of the "conciliator".⁸⁴

The end result of all forms of transaction and arbitration was to be the conciliation of the parties. The reduction of the arbitrator, by some authors, to the level of a friendly compositor or mediator indicated a need for such a person in the composition of conflicts.⁸⁵

Four distinct figures, then, emerged from a combination of Roman and decretal law: the arbiter iuris, the arbiter compromissarius, the arbitrator and the conciliator (to use a term that embraces the figures of amicabilis compositor, mediator and the person who delivers the arbitrium boni viri). Of special interest to this study is the arbiter and the arbitrator, or in English terms that lack this clarity, arbitrators who use legal procedures and arbitrators who follow equity.

⁸⁴ M. Lega, Commentarius in iudicia ecclesiastica iuxta Codicem iuris canonici, Vol. 3, pp. 135-136, 143.

⁸⁵ Ibid., p. 135.

3. The components of arbitration

There are aspects of arbitration that regulate the total process: norms regarding the person of the arbiter and the parties, the type of cases acceptable for arbitration, the effects of entering, concluding or abandoning an arbitration and the remedies available against such decisions. We now examine these aspects individually.

a. The person of the arbiter

The essence of arbitration rested in the freedom of the parties to choose arbiters to put an end to their dispute.⁸⁶ This freedom was not restricted so long as the public good was not involved.⁸⁷ A number of persons were excluded from the function of arbiter. This exclusion was to be interpreted strictly, since rights were threatened here. Because of strict interpretation, these restrictions would not apply to arbitrators, but only to arbiters.⁸⁸

Where a party was judge in a case, he was forbidden to act as arbiter in the same case. The reason given was that he might favor one party and be held as suspect if the case returned to trial.⁸⁹

⁸⁶ c. 1, X I,43; A. Julien, "Evolutio", p. 211.

⁸⁷ Digest, Lib. IV, tit. VIII, lex 7: Ulpianus: "Nihil enim refert eum qui arbitrium suscipit, an sit integrae fama, an ignominiosus."

⁸⁸ M. Lega, op. cit., p. 140.

⁸⁹ Digest, Lib. IV, tit. VIII, lex 9.

This prohibition did not apply to the arbitrator: it was possible even to act in one's own affair so long as the judgement was just.⁹⁰ This practice, however, would seem to move the case out of the realm of arbitration into the realm of transaction or conciliation.

Women in Roman and decretal law were excluded from the role of arbiter, although it was possible to act in this capacity if they enjoyed some jurisdiction. One such case was the arbitration undertaken by the Queen of the Franks.⁹¹ In decretal law, religious were not permitted to undertake the task of arbiter without permission of their superior.⁹² The excommunicati vitandi were also excluded as arbiters in decretal law on account of the general prohibition to communicate with them. However, if a compromise did take place with a woman, a religious or this type of excommunicated person, it was considered valid, since only private jurisdiction was invoked in this form of arbitration.⁹³

Canon Law of the decretals contained exclusions that were not found in Roman Law. The laity were not to be arbiters in spiritual matters or strictly ecclesiastical matters. There was no prohibi-

⁹⁰ L. Ferraris, op. cit., p. 364.

⁹¹ A. Potthast, Regesta Pontificum Romanorum, Vol. 1, n. 1749: "[...] arbitrium [...] ab A (lienoride) regina Francorum in quam fuit utrinque compromissum consilio episcoporum promulgatum sit, observent, cum iuxta consuetudinem pro lege servatam in partibus Gallicanis feminae in subditos suos ordinariam iurisdictionem habere noscantur"; c. 4, X I, 43.

⁹² c. 35, C. XV, q. 1.

⁹³ c. 39, 59, X V, 39.

tion, however, against using the laity in cases involving the clergy since the jurisdiction of the arbiter was only personal.⁹⁴ Because this matter required strict interpretation, there was no prohibition against the laity acting as arbitrators in spiritual matters since they did not treat the spiritual matters in a judicial way.⁹⁵

b. The parties to arbitration

Roman Law defined those who were incapable of entering a compromise, but said nothing explicit about the capacity required to enter one. The mad and insane were declared incapable, as were slaves. Wards and minors were incapable without the authority of their guardians. Women, even though capable of acting for themselves, were not to act for others. Debtors incapable of meeting their debts were also excluded from compromise.⁹⁶

The principle guiding our understanding of the capacity required for arbitration came from decretal law. It was a principle analogous to one found in Roman Law when it declared that only those who had the free administration of their own goods could compromise or be

⁹⁴ c. 8, X I, 43; c. 2, X II, 1, where the laity are forbidden to treat of ecclesiastical affairs. They may, however, be involved in cases of the clergy which are not strictly ecclesiastical affairs; cf. A. Julien, "Evolutio", pp. 212-213.

⁹⁵ This is a common opinion shared by M. Lega, op. cit., p. 54, and A. Julien, "Evolutio", pp. 213-214.

⁹⁶ Digest, Lib. IV, tit. VIII, 17 pr., 32(2), 32(8), 35, 48, 4; Lib. IV, tit. xviii, 27(5); c. 4, X I, 43.

subject to arbitration. The analogy was made with transaction which was forbidden to those who had no power to alienate.⁹⁷

c. Matters subject to arbitration

It is important to clarify which matters could be subjected to the process of arbitration and which could not, since the efforts of the arbiter would be null in the latter case. As a general principle, one could arbitrate about all matters of civil, private or temporal order.⁹⁸ All cases against which there was no prohibition were able to be subjected to arbitration. However, all cases involving public law and which were of their nature difficult or subject to great prejudice, such as major causes, required judges and public authority; they were not subject to arbitration.⁹⁹

The law of the decretals presented a clear list of cases that were not to be handled by arbiters: marriage cases, cases involving freedom or the status of persons, and criminal causes, since they all called for the decision of a judge. Cases involving restitutio in integrum were also to be treated by the ordinary judge who had power of administration, or by a judge delegated by him.¹⁰⁰

⁹⁷ Codex Justinianus, Lib. V, tit. LXXI, lex 4: "Quum quid una via prohibetur alicui ad id alia non debet admitti"; c. 9, X I, 43.

⁹⁸ A. Amanieu, loc. cit., col. 895.

⁹⁹ F.X. Wernz and P. Vidal, op. cit., Vol. 6, p. 631.

¹⁰⁰ Digest, Lib. IV, tit. VIII, lex 32(7); A. Julien "Evolutio", p. 217.

d. The effects of entering arbitration

When parties entered a compromise with the use of arbiters, certain effects followed in law. The judge's jurisdiction was suspended until such time as the arbitral decision was reached. The right remained to resume the process before a judge in the event of failure of the arbitration. The acts of the arbitral process could be used by the parties before the ordinary judge if the case was returned to him. During the compromise attempt there was an interruption to any possible prescription. After the failure to reconcile the parties, the arbiters were obliged to submit their opinion, and so assumed the role of experts before the ordinary judge.¹⁰¹

Four obligations were placed on the arbiter during the arbitration: 1) to conduct the case according to and within the limits of his mandate; 2) to bring this task, which could not be delegated to another, to completion; 3) to pronounce his decision within the time allotted; and 4) to cease all activity in this area once the decision had been rendered, so that no reconvention was possible.¹⁰² Once the decision had been given, the arbiter was unable to change his arbitral sentence, even if he was appointed by mandate of the Pope.¹⁰³

¹⁰¹ F. Della Rocca, Canonical Procedure, pp. 371, 374, 376.

¹⁰² E. Regatillo, Institutiones iuris canonici, Vol. 2, p. 267; c. 6, X I, 43.

¹⁰³ c. 11, X I, 43.

e. Effects of the arbitral decision

Where the decision of the arbiter was expressly received, or there had been a silence of ten days, the pronouncement was considered homologatum or definitive. An exception, being of its nature perpetual, could be proposed at any time, and an action to petition the execution of the decision was also available.¹⁰⁴ Where the decision had not yet been received, an action for "interest" was available against the reluctant party. A nudum pactum, or one entered without the stipulation of penalty or an oath, was made equivalent to a stipulation in such cases. Decretal law, like Roman Law, permitted an action for interest.¹⁰⁵

f. The termination of arbitration

While arbitration followed either the judicial form or the extrajudicial "equity" approach to the resolution of a dispute, it could be terminated in a variety of ways that had their origins in Roman and decretal Law: 1) by a definitive decision; the laudum or sentence was considered homologatum or equivalent to a res iudicata ten days after its pronouncement. This could occur with acceptance of the parties, or silence on their part, provided no other action or

¹⁰⁴ L. Ferraris, op. cit., pp. 362-363.

¹⁰⁵ A. Berger, "Id quod interest", in Encyclopedic Dictionary of Roman Law, p. 512: "[...] the judge had to estimate the claimant's losses and his material situation which would have resulted if the fact for which the defendant was liable would not have occurred"; cf. Digest, Lib. XLVI, tit. VIII, lex 13.

exception intervened; 2) by the lapse of time, when a date for termination had been set in the compromise. Extensions of time were possible in Roman and decretal Law. The agreement of those who made the compromise was the determining factor; 3) when the arbiter or arbiters refused to continue with the case in a definitive way; 4) when one of the parties accepted the penalty rather than the decision; 5) when the case was removed from the arbiter and taken before an ordinary judge. This included cases of non-acceptance or legitimate refusal for a variety of reasons involving the arbiter and the legitimacy of his actions; 6) when a special pact or transaction intervened to settle the dispute; 7) when the matter in dispute was removed, renounced or ceased to exist; 8) when the death of one or both of the parties intervened, the compromise did not go to the heirs. This included acts similar in law to civil death such as religious profession or a long absence of one of the parties preventing the action of the arbiter. It was important to note that moral persons did not die and another representative could always be chosen.¹⁰⁶

g. Remedies against an arbitral sentence

Roman Law admitted one sole remedy against the decision of an arbiter, the exceptio doli or an exception of fraud. In this remedy,

¹⁰⁶ L. Ferraris, *op. cit.*, p. 371; B. Ojetti, *Synopsis rerum moralium et iuris Pontificii*, Vol. 1, col. 288; A. Julien, "Evolutio", pp. 230-231.

Roman Law made no distinction between arbiters and arbitrators.¹⁰⁷ The decision of the arbitrator, since it was not judicial, did not appear subject to this remedy. It was, however, possible to petition the ordinary judge, normally competent in the case, for the decision of the arbitrator to be reduced to an arbitrium boni viri or decision of a reasonable man. This meant that it would be considered as a decision of an ordinary judge whenever it appeared to be iniquitous or harmful to the party. As a personal law, this privilege could be sought for thirty years without being subject to prescription.¹⁰⁸

Authors agreed generally on cases in which the observance of a decision did not oblige. There were judgements which were automatically null and could not be considered binding: 1) when the arbiter did not follow the proper form of the compromise, and 2) when the decision was contrary to the divine law or the canons of ecclesiastical law. There were other decisions which could be rescinded and whose observance did not oblige until the doubt was settled: 1) when fraud intervened on the part of the arbiter, 2) when a party was gravely harmed by the decision, 3) when the iniquity of the decision was notorious, and 4) when the damage incurred was considered ultra dimidium - although this area was disputed by authors.¹⁰⁹

¹⁰⁷ Digest, Lib. IV, tit. VIII, lex 32.

¹⁰⁸ A. Julien, "Evolutio", p. 225.

¹⁰⁹ L. Ferraris, op. cit., p. 373.

4. Arbitration in the 1917 Code

While an exhortation from the judge to the parties to solve their dispute through transaction was an obligation (Can. 1925, §1), processes of arbitration were presented in the 1917 Code only as one of the possible ways to avoid judgements. The juridical figure of the arbiter iuris seu necessarius was abrogated from the law. For those cases where his services were required other methods were provided.¹¹⁰ This abrogation purified the notion of arbitration since the figure of the arbiter iuris was something of an anomaly, being a delegated judge against whose sentence an appeal was possible.¹¹¹

Canon 1929 maintained two juridical figures, the arbiter and the arbitrator. The arbiter was the arbiter compromissarius seu voluntarius of pre-Code law to whose judgement the parties committed their case and who judged according to the norm of law. The arbitrator, equally elected by the parties treated the case and judged it with equity and was not bound by the norm of law.

¹¹⁰ Canons 1572, §2, 1614-117 (CIC).

¹¹¹ F. Della Rocca, op. cit., p. 375-376; A. Blat, op. cit., Liber 4, p. 447: The reason for dropping necessary arbitration from the 1917 Code according to Della Rocca was that compulsory arbitration assumes the aspect of a real and proper organism of special jurisdiction. It sets in motion a highly complex play of interference between parts of private and public law and so does not fit well in the general framework of arbitration.

a. Canonisation of civil law

Arbitration, like transaction, followed the civil law of the place unless those laws were contrary to divine or canon law (Canon 1930). The same limitations on causes subject to transaction applied to arbitration (Canon 1927). The effects from the civil law process were recognised in Canon Law and the remedies against the judgement were generally accepted as those of Canon Law rather than those of civil law.¹¹²

Some authors viewed compromise by arbitration as a contract while others tended to view the process as a judicial sentence. In reality, arbitration contained both elements. The contract was in the compromise of the parties to submit their case to an arbitrator and to accept his decision. Compromise was a contract whose object was determined by the laudum or decision of the arbiter. Against the unwilling party an action ex contractu was available. Most legislations allowed the laudum to be executed like a judicial sentence although it was not of the essence that it have the force of a

¹¹² A. Julien, "Compromissum inter arbitros", p. 564, does not think that any other remedies than those proposed in Canon Law can be used. He does not agree that the legislator intended innovations in procedural law such as recourse to "cassation". The remedies normally provided in the Code were correction of the sentence as long as it has not been deposited in the tribunal, appeal in those cases foreseen by civil law, querela nullitatis sanabilis, querela nullitatis insanabilis, oppositio tertii which does not apply in arbitration and restitutio in integrum. Since no limitation appeared in canon 1926, one could equally justify using the remedies of civil law. The "praxis" of the Rota indicates that the remedies of Canon Law applied; cf. S.R.R. c. Jullien, in S.R.R. Dec., 21(1929), Dec. 5, p. 49; S.R.R. c. Grazioli, in S.R.R. Dec., 23(1931), Dec. 40, pp. 342-352.

judicial sentence.¹¹³ Della Rocca took this concept a step further when he said that compromise by arbitration: "is a contract which concerns disposition of rights and thus, in order to be valid, must observe all substantive and formal requirements prescribed by the code with regard to contracts in general."¹¹⁴

Since the civil law was canonised, the force of the arbiter's decision was the same in civil and ecclesiastical law. Generally, the decision obtained the force of a judicial sentence as long as the necessary conditions were fulfilled, even though in essence it was always the mere pronouncement of private persons who had no public authority.¹¹⁵

b. The components of arbitration

Apart from the prohibitions of civil law, those of canon law also applied regarding the person of the arbiter. The laity in ecclesiastical causes, the excommunicated and those branded with infamy by a declaratory or condemnatory sentence, and religious without permission of the superior were prohibited from assuming the

¹¹³ A. Julien, "Compromissum inter arbitros", p. 562.

¹¹⁴ F. Della Rocca, op. cit., p. 451.

¹¹⁵ A. Julien, "Compromissum inter arbitros", p. 562: It is important to be aware that in some civil law systems, the arbitrator does have some special authority beyond that of a private person and akin to the jurisdiction of a judge.

function of arbiter (Canon 1931).¹¹⁶ The same limitations that applied for matters capable of subjection to transaction applied to arbitration in both its forms (Canon 1930). The 1917 Code did not impose a certain number of arbiters but left the matter to the dispositions of civil law.¹¹⁷

There was no provision in the 1917 Code for those places which did not have any civil law covering transaction or arbitration. Arbitration in the form that did not follow law but equity would be available, but the use of transaction and the judicial form of arbitration would have to return to the pre-Code law for direction. No civil effects would be recognised, but the negotiations would have the juridical value of a private contract in Church law.

The debarment of persons exercising the function of arbiter according to canon law did not apply to the person chosen as an arbitrator. The value and civil effects of his decisions were established in civil law.

The key issue for this study is the juridical value of the arbitral sentence in canon law. One case judged at the Rota indicated the juridical force obtained through arbitration:

¹¹⁶ These are the same prohibitions as those of decretal law; cf. c. 35, C. XVI, q. 1; cc. 4,8,9, X I, 43; cc. 2,3,X II, 1. These prohibitions do not affect validity; cf. c. 12, X I, 43.

¹¹⁷ R. Naz, Traité de droit canonique, p. 395; c. 12, X I, 43 raises the point of the election of a third arbiter by the other two arbiters. It appears that a form of radical nullity could be involved here in that there might never be agreement and the matter could remain perpetually unresolved.

A bond of strict justice is drawn between the compromising parties, that is a juridical obligation to stand by the arbitral sentence. When this is given, the party who later regrets is not given the faculty to attack the decision, but it should be executed if the other party demands it, except, in fairness, for the remedies of law which are an action for nullity or restitutio in integrum.¹¹⁸

c. Significance of the arbitral decision

Lega claimed that an arbitral judgement was not sufficient to satisfy the administration of justice, since arbiters did not have the authority necessary to study and define a conflict completely. He believed there would always be need for judges who enjoyed the complete authority necessary to handle every aspect of the case.¹¹⁹ Roberti made a key distinction: the decision of the arbiter had no obligatory force in itself, the obligation came not from the arbiters but rather from the compromise and existed from the time of the compromise agreement. The determination of the object of the compromise was merely a logical judgement without force since the element of a judicial sentence was missing. The simple logical judgement was not sufficient, it should receive recognition and executory force from a public authority. Civil law did this in its own way, the 1917

¹¹⁸ S.R.R. c. Jullien, in S.R.R.Dec., 21(1929), Dec. 5, p. 49: "Inducitur ergo inter partes compromittentes vinculum strictae justitiae, nempe obligatio juridica standi sententiae arbitrari; qua prolata, non datur parti, serius poenitenti, facultas eam recusandi, sed locus est executioni, si altera pars petit, salvis, ut par est iuris remediis, ut sunt actio ob nullitatem, aut restitutio in integrum."

¹¹⁹ M. Lega, op. cit., p. 134.

Code did it by recognising the civil law effects of the arbitral judgement.¹²⁰

C. Recent proposals for resolution of conflict

Civil law procedures in both transaction and arbitration presumed a knowledge of law not often possessed by canon lawyers. There was, then, a danger inherent in the 1917 Code law that procedures used would be invalid or that little or no use could be made of these processes.¹²¹ No local procedures were available for cases involving the bishop and clergy with the demise of the arbiter iuris and a growing dissatisfaction with the situation lead to a movement for change in the late 1960's and early 1970's. Episcopal conferences, urged on by their local canonists sought new procedures of conciliation and arbitration or other solutions to solve disputes and put an end to conflict. A key issue in this development was generally to find some local system to handle administrative disputes with bishops or other administrators of the Church. Among the major contributions in this field have been the "Due Process" system of the United States, the conciliation procedure of England and Wales, the Forum Arbitrii Conciliationis of West Germany and the Ombudsman approach proposed by New Zealand.

¹²⁰ F. Roberti, De processibus, Vol. 2, p. 169; A. Julien, "Compromissum inter arbitros", p. 557.

¹²¹ The one case (Rimouski) presented in two instances before the Rota from 1917 until the present day indicates a deficiency that brought nullity to the decision. Because of the semi-private nature of the use of arbitration little other evidence is extant regarding its use.

1. "Due Process" in United States particular law

The Canon Law Society of America approved a report on "Due Process" in October 1969. This was subsequently approved by the National Conference of Catholic Bishops in November of the same year and published in April 1970 by the Conference. The proposals were approved for experimental use by the Secretariate of State with some modifications, "Until other provisions are made."¹²²

a. The conciliation process

The document on "Due Process" provides processes for conciliation, arbitration and the structuring of administrative discretion. In the conciliation process, provision is made for the formation of a Council of Conciliation within the Diocese, the choice of a conciliator by the parties, the establishment of time limits and the resolution of questions of non-cooperation and non-resolution of the problem. Where agreement is reached, the member of the Council who has acted as conciliator prepares a summary statement of the problem

¹²² Secretariate of State, letter, 30 October, 1971, C.L.D., Vol. 7, pp. 899-901.

and its resolution which is approved and signed by the participants.¹²³

b. The arbitration process

The document on "Due Process" proposes a process of arbitration for the resolution of disputes not resolved by conciliation. The document defines arbitration this way:

Arbitration is defined as the reference of a dispute, by voluntary agreement of the parties, to an impartial person or persons for determination on the basis of evidence and arguments presented by such parties, who agree in advance to accept the decision of the arbitrator or arbitrators as final and binding.¹²⁴

There is a presumption with this form of arbitration that parties in dispute have already explored every avenue of negotiation and settlement. Arbitration is seen as the "last resort" when the parties call upon impartial persons for a definitive decision and agree to abide by their decision. The document calls for a regional

¹²³ N.C.C.B., On Due Process, pp. 13-15, 18-23. This document contains the changes which were a condition of acceptance by the Secretariate of State. One of the major difficulties with "Due Process" is the choice of the name. M. McManus, "A Critique of the Report of the Canon Law Society of America on Due Process", in T.C.L., 16(1970), pp. 335-344, points out rightly that conciliation and arbitration are not "Due Process", nor are the suggestions for the structuring of administrative discretion. McManus (at p. 336) claims that equating due process with conciliation and arbitration leads to confusion, especially where the report fails to demand due process in the proceedings of conciliation and arbitration.

¹²⁴ N.C.C.B., op. cit., p. 15.

panel of arbitrators so that the basis is broader than the diocese.¹²⁵

The document also suggests withdrawing arbitration from the civil law procedures proposed by the 1917 Code and developing diocesan procedures for arbitration by adapting the suggested provisions of its "Appendix B" to local needs. There is no clear distinction between the process of arbitration and the judicial process undertaken by the tribunal as the document suggests that ordinaries delegate jurisdiction to existing diocesan tribunals or to newly created experimental tribunals.¹²⁶ There is no appreciation expressed of the need for an independent tribunal or the underlying separation of powers required for administrative procedures.¹²⁷

c. The office of arbitration

For the process of arbitration, each diocese should have an Office of Arbitration whose members select their own Chairman. The office should select a sufficient number of qualified persons to be arbitrators, accept complaints made in writing when competent to do so, and assist in selection of the arbitrator. The task of the office is to supervise, administer and interpret the program and rules of procedure.¹²⁸ Parties to the arbitration are required to

¹²⁵ Ibid., pp. 15-16.

¹²⁶ Ibid., pp. 16-17.

¹²⁷ M. McManus, loc. cit., p. 338.

¹²⁸ N.C.C.B., op. cit., pp. 23-24.

submit a written statement, setting forth the nature of the dispute and the remedies sought. All evidence is to be taken in the presence of all the arbitrators and all parties, except where a party is absent in default or has waived the right to be present. Decisions of arbitrators are taken by majority vote. The award is to be rendered promptly by the arbitrators unless otherwise agreed by the parties, and this is not later than thirty days from the closing of the hearings. The award is to be in writing and signed by the arbitrators.¹²⁹

d. Disputes with administrative superiors

The process of arbitration extends to disputes between individuals or groups within the Church in ecclesiastical matters, to disputes between a person and a diocesan administrator or administrative body where there is a contention that an act or decision (including administrative sanctions and disciplinary actions) has violated Church law or natural equity. The process is also available for disputes between administrative bodies of the diocese involving conflicts of competence.¹³⁰

¹²⁹ Ibid., pp. 25-27.

¹³⁰ Ibid., p. 28.

e. Review of decisions

Apart from the office of administration, each diocese is to have a Court of Administration exercising the function of a board of review. This task may be undertaken by the Diocesan Tribunal. If the review favors nullity of the decision, the court can order a rehearing before the same arbitrators or new arbitrators. Where the petition attacking the arbitration is denied, then the court confirms the award.¹³¹ The document advises that the parties sign a specific agreement regarding the details of the arbitration and commit themselves to accept the decision of the arbitration as binding.¹³²

No comprehensive study has been completed on the value of this system nor on its efficiency and usefulness. It appears in some ways to be a reintroduction of necessary arbitration, but when compared with Roman Law and decretal law lacks definition in that many aspects need refinement. It is noteworthy that at their 1982 conference, members of the C.L.S.A. voted overwhelmingly to introduce the proposed administrative tribunals that were expected with the 1983 Code.¹³³

¹³¹ Ibid., pp. 29-30

¹³² Ibid., p. 31.

¹³³ C.L.S.A., Proceedings of the Forty-fourth Annual Convention, 1982, pp. 370-371.

2. The conciliation procedure of England and Wales

The matter of informal and friendly procedures for airing grievances arising out of abridgement of rights was first raised by the Canon Law Society of Great Britain and Ireland in May, 1971. At the invitation of the bishops and with their approval, the Canon Law Society produced in April, 1975, procedures which were made available for general use within the Church in England and Wales.¹³⁴

The preface to the document which sets the tone and is longer than the norms provided, indicates that while the then proposed administrative procedures (Schema 1972 of Code) were concerned solely with grievances of subjects arising from extra-judicial decrees of superiors, it was basically inapplicable to situations which involved two equal subjects. The purpose of the conciliation procedure was the pastoral and charitable settlement of such disputes which were normally problems submitted to the bishop. While it was not meant to preclude recourse to the Apostolic Signatura or Roman Congregations, the process had the advantage over other procedures in that it was speedy, friendly, and because of its informal nature might achieve more beneficial results.¹³⁵

The process has two phases. The first is simple conciliation with one conciliator whose selection may vary according to diocesan norms. If no agreement can be reached, the second phase involves a

¹³⁴ C.L.D., Vol. 8, pp. 1020-1022.

¹³⁵ Ibid., pp. 1022-1023.

panel of three, with two "mediators" selected by the parties and a Chairman chosen by the mediators from a provincial list of suitable persons. Although not called arbitration, the procedure terminates in recommendations that are closely allied to arbitration procedures: "Assuming that both parties have agreed to the use of the procedure, it is thought that both parties would regard themselves as being bound in honour to observe the terms of the RECOMMENDATIONS."¹³⁶

The key advantages of these conciliation procedures spring from their informal nature, the confidentiality of the proceedings, the spirit of charity that animates the whole approach and the provision "that as a norm the entire Conciliation Procedure would have been completed within one month" (Art. 11). The disadvantages spring from the approximation of the processes of conciliation and arbitration and the moral pressure to accept the recommendations of the mediators. The Conciliation Panel (Art. 8) appears more as a quasi-judicial board of enquiry with power to take testimony of witnesses and view documentary evidence leading to the formulation of their recommendations. There is no explanation given for the change of terminology from conciliator (phase I) to mediator (phase II) in the norms.

While the "Due Process" guidelines made provisions for conciliation and arbitration processes that could involve bishops, the English and Welsh conciliation procedure appears to leave the bishops outside their scope. The end result is a system that is rarely

¹³⁶ Ibid., p. 1026.

used. The simplicity of handing the problem to the bishop who solves it in an administrative way is generally chosen over the use of other procedures. There is a certain lack of logic here when this same approach is not deemed sufficient in cases involving administrative difficulties with bishops.

3. The Forum Arbitrii Conciliationis of West Germany

After some five years of preparatory work, the Synod of the Dioceses of the Federal Republic of Germany on November 19, 1975 approved a decree concerning the Fora Arbitrii Conciliationis and Administrative Tribunals. The Synod sought the introduction of the administrative law proposed for the Code or the faculty for the Episcopal Conference of West Germany to introduce it. The faculty to introduce administrative justice according to the norms laid down by the Synod was also sought.¹³⁷

Forum Arbitrii Conciliationis is not to be confused with transaction (c. 1925), nor with compromissum inter arbitros (c. 1929). It is not a freely chosen process depending on the will of the parties or the judge, but an integral part of German administrative justice within the Church. In the same style as a tribunal, the president, assistants and parties gather evidence and examine the facts and law of the case. An arbitrium is then proposed by the president and his assistants. It is not imposed like a sentence, but

¹³⁷ P. Wesemann and K. Lüdicke, "De organis iustitiae administrativae in diocesis Reipublicae Foederalis Germaniae statutis", in Per, 67(1978), p. 731-732.

proposed. If the parties accept the arbitrium freely, then it attains the force of a definitive sentence. If one of the parties is not willing to accept it, then the second instance of administrative justice is held before the Administrative Tribunal.¹³⁸

When the administrative tribunal accepts a cause, it undertakes that cause according to rules which are similar to the procedural norms of civil administrative tribunals in Germany. These tribunals in Germany are known as organs of the third power since they are totally independent of active administration. Because this administrative tribunal is the first judicial instance, appeals from decisions are possible to the one superior administrative tribunal that exists for all dioceses of the Episcopal Conference of Germany.¹³⁹

In essence, the process outlined is closely allied to the approach proposed by the 1980 Schema of the Code (cc. 1688-1715). The first necessary step in both is to seek an equitable solution. The proposed canons of the 1980 Schema wisely left the possibilities open; the German choice though seemingly restricted, combines all these possibilities in a process that is brief, efficient and not imposed. In both systems, the second step can be the administrative tribunal, although the 1980 Schema included the possibility of

¹³⁸ Ibid., pp. 732-733.

¹³⁹ Ibid., pp. 732-733 .

hierarchical recourse. Although not expressly mentioned, this possibility is presumed in all solutions.¹⁴⁰

4. The Ombudsman approach of New Zealand

Because of their happy experience with the civil figure of the Ombudsman, the New Zealand Hierarchy rejected the "Due Process" approach to the resolution of grievances in the Church. They opted at least in theory for something akin to the figure of the Ombudsman within the Church. The Parliamentary Ombudsman was a figure introduced to Sweden by the Constitution Act of 1809 and later adopted by Finland (1919), Denmark (1953) and Norway (1962). New Zealand, influenced by the Danish model, introduced the Commissioner for Investigations, to be called the Ombudsman, on October 1, 1962.¹⁴¹

While procedures for appointment and dismissal, qualifications required, terms of office and other minor details may vary from country to country, there is a basic similarity in the principal duties of the Ombudsman that flow from the Swedish model: "To supervise the observance of laws and statutes as applied by the

¹⁴⁰ Pontificia Commissio Codici Iuris Canonici Recognoscendo, Schema Codicis Iuris Canonici iuxta animadversiones S.R.E. Cardinalium, Episcoporum, Dicasteriorum Curiae Romanae, Universitatum Facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecratae recognitum, (Patribus Commissionis reservatum), Libreria Editrice Vaticana, 1980, pp. xxiii-381.

¹⁴¹ K. M. Weeks, Ombudsmen around the world: A Comparative Chart, pp. 4-5.

Courts and public officials and employees."¹⁴² The New Zealand version was slightly broader:

To investigate any decision or recommendation made (including any recommendation made to a Minister of the Crown), or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity.¹⁴³

In some countries the Ombudsman has power to initiate complaints (Denmark, Fiji, Finland, Guyana, New Zealand, Norway, Sweden and Tanzania), while in others (United Kingdom) he has no such power.¹⁴⁴ The figure of the Ombudsman in ecclesiastical circles would be one of a person who listened to complaints and advised superiors when he judged a case had some merit. While a bishop or superior cannot be expected to listen to every complaint, he would be obliged to listen to his Ombudsman. There is possibly a need to avoid the term Ombudsman because of certain civil law implications it may carry with it in various countries.¹⁴⁵

A special role similar to that of the Ombudsman is not totally new within the Church. A similar role appeared in the provisions of the Diocesan Synod under Benedict XIV:

¹⁴² Ibid., p. 68.

¹⁴³ Ibid., p. 62.

¹⁴⁴ Ibid., pp. 50-77.

¹⁴⁵ G. Robinson, "The Resolutions of Conflicts in the Church: Some Theological and Practical Considerations", in Proceedings of the Annual Conference of the Canon Law Society of Australia and New Zealand, (Canberra, A.C.T.), 1980, p. 61. Although the role of the Ombudsman may appear only as a function of civil law, there is no uniformity about the titles given this position. The range includes "Parliamentary Commissioner", "Commissioner for Investigations", "Public Counsel", "Commissioner for Complaints" and "Public Procurator". Cf. K.M. Weeks, op. cit., pp. 4-5.

To avoid disturbances and forestall rebellion that certainly would ensue if permission were given single members of the clergy to oppose publicly decrees promulgated in the Synod, it was customary for the bishop to appoint a procurator for all the clergy, who in the name of all, would present to the Synod those matters, which modesty and reverence allowed, that displeased the clergy, whatever seemed difficult or harsh in matters decided or to be decided. At the same time he would suggest a way in which he hoped the matter could leave the clergy appeased. Whatever he petitioned in the name of the clergy, had to be handed to the secretary of the Synod in writing.¹⁴⁶

In essence, the Ombudsman is an independent public officer who is appointed to receive complaints from citizens about abuses, unreasonable acts or dealings with government agencies. He investigates the complaints, reports his findings and recommends solutions. His investigations are conducted in private and are informal. Within ecclesiastical circles, where an Ombudsman is not satisfied because his recommendations have been rejected, he could then refer the matter to the hierarchical superior of the administrator. If the dispute is not settled, compulsory arbitration is suggested.¹⁴⁷

The advantage of the Ombudsman in the role of conciliator is that he is neither a judge nor an executive. He is more closely allied to the role of a conciliator as one who facilitates a most efficient way of avoiding judgements. The civil experience has been that his intervention is normally associated with the termination of the matter and few grievances progress beyond his interventions. His role is principally that of an instrument to foster conciliation and

¹⁴⁶ Benedicti XIV, Pont. Opt. Max., Operum editio novissima, Vol. 11, pp. 88-89.

¹⁴⁷ M. Quinlan, "De schemate commissionum administrativarum in Britannia et de sic dicto Ombudsman a Nova Zelanda proposito", in Per, 67(1978), pp. 623-625.

preserve administrative justice in a way that is impartial, informal, and the fruit of private investigation. The question of the next step in cases of failure is controverted, but rarely necessary. The essence of the approach lies in the power of intelligent reasoning.¹⁴⁸ One difficulty could arise if the power of the civil Ombudsman to initiate investigations is transferred to the ecclesiastical forum. This might tend to be an encroachment upon episcopal authority, and challenging acts of omission would be totally new to Church law.¹⁴⁹

D. Conciliation and arbitration in the 1983 code

The 1983 Code unlike the 1917 Code places the section on ways to avoid judgements at the conclusion of the section on certain special processes. The systems or processes to avoid judgements are not immediately clear. Canon 1713 appears to give two possibilities, 1) transaction (also now called reconciliation), and 2) the judgement of one or more arbiters. Canon 1714 follows with a triple division; transaction, compromise, arbitral judgement, while canon 1715 produces a new division of transaction or compromise.

To interpret this doubtful division which in canon 1714 appears to use the word "compromise" to mean arbitration or judgement ex bono et aequo, while in canon 1715 it appears to embrace both the

¹⁴⁸ K. McKone, "Ecclesiasticus Ombudsman tanquam conciliator", in Per, 67(1978), 737-739.

¹⁴⁹ M. Quinlan, loc. cit., p. 624.

tasks of the arbiter and the arbitrator, we follow the principle of interpretation of canon 17, returning to the 1917 Code and pre-Code law. Compromise here refers to the general process which includes both the procedures which follow the norm of law and those based on equity. Since the English language uses the one general term "arbitration" to cover both forms of compromise, it appears more simple to speak of conciliation, then judicial and non-judicial arbitration.

1. Norms governing conciliation and arbitration

In the 1983 Code, transaction (transactio seu reconciliatio), judicial and non-judicial arbitration may follow one of three possible courses (Canon 1714). The first choice is to follow the norms selected by the parties. If the parties do not do this then they are to follow the law set down by the Episcopal Conference, if one exists. If there is no particular law regarding these matters, then the final choice is the civil law of the place where the conciliation or arbitration takes place.

The move away from civil law is a distinct change from the 1917 Code (Canons 1926, 1930). This change was necessitated by the general lack of knowledge of civil law prescriptions possessed by Church canonists and the danger of invalidating the process.¹⁵⁰ The development of a local application of law in this area appears to receive both recognition and encouragement not only from canon 1714, but also from canon 1733, s2 where the Episcopal Conference may

¹⁵⁰ Cf. footnote 121.

legislate for the establishment of a stable office or council in each diocese for this purpose. Since attempts at a peaceful solution are to be encouraged before administrative recourse is entered, the development of this particular law has taken on a new importance.

The possibility for the parties to choose their own norms for the three processes is something new in this area of law and has no precedent. Yet it does not appear to give the parties the possibility to confect their own law which could place the party who knows law in a "no lose" position. Rather it seems to open up possibilities of choice of already existing systems in both civil and canon law systems. As better systems emerge, the limitations of a particular local Church system can be overcome by using another with equal juridical effects. Again, choice can be limited according to the civil law advantages and recognition required by an agreement.

2. Matters subject to conciliation and arbitration

Canon 1715 clarifies briefly that conciliation, judicial arbitration and non-judicial arbitration may not be used in cases where the public good is involved, nor in those matters over which the parties do not have control or free disposition (Canon 1715, §1). Where ecclesiastical goods are concerned, the solemnities established by law regarding alienation are to be observed where the need arises (Canon 1715, §2). The exclusions of pre-Code law and the 1917 Code remain in force regarding those cases involving the public good. The power to alienate appears to be the only requirement for entering the

processes of conciliation and arbitration when ecclesiastical temporal goods are involved. The exclusions of the previous law regarding the person of the arbiter (Canon 1931 CIC), are totally abrogated although some, like religious who need permission of a superior are indirectly affected by another law (Canon 671, CIC 1983).

3. Juridical value of arbitral decision

A surprising use of the principle of analogy of law is introduced with canon 1716 regarding the juridical force of the arbitral sentence. If the civil law does not recognise the force of the arbitral sentence unless it is confirmed by a judge, then to have force in canon law, an arbitral sentence about an ecclesiastical matter needs the confirmation of the ecclesiastical judge of the place where it was given. This introduces a new relativity to the process of arbitration where identical sentences in different law systems could yield results where one has force in canon law and the other lacks it because of a factor external to the whole process. Positively, it may be deduced that the Church's desire is that wherever possible, all decisions should have full juridical value in both civil and canon law.

4. Remedies available

The remedies provided in the 1983 Code do not depend on the nature of the process, but on the civil law of the place. If the civil law permits a challenge to the arbitral sentence, then the same

challenge can be proposed in the canonical forum before the ecclesiastical judge competent in the first instance (Canon 1716, §2).

Authors agree generally that the 1917 Code did not intend to introduce new remedies, grounds for nullity or processes to handle attacks on an arbitral sentence.¹⁵¹ The 1983 Code clearly establishes a new approach. The latin text of the canon "in foro canonico eadem impugnatio proponi potest coram iudice ecclesiastico", indicates not any challenge, but the same specific challenge that is provided by the civil law of the place. This novelty of law may bring difficulties for the canonical practitioner, but may be the opening needed for new developments in particular law.

5. Significance of procedures of compromise

In his commentary on canon 1733, CIC 1983, Lombardia voices his opinion that processes of arbitral compromise should not be admissible in cases involving administrative superiors.¹⁵² While there are questions that involve the public good or the rights of administrative authorities that can never be the subject matter for arbitration, there are, nevertheless, as testified by this historical study, many areas where an administrative authority may choose to

¹⁵¹ A. Julien, "Compromissum inter arbitros", p. 564.

¹⁵² Código de Derecho Canónico, (Edición anotada), Pamplona, Ediciones Universidad de Navarra, 1983, p. 1038: commentary on canon 1733: "En cambio, opinamos que no es admisible en estas materias el compromiso arbitral, por el que la autoridad administrativa haría dejación de su derecho y deber de velar por el bien general, en manos de unas personas que no son ni el superior jerárquico ni la Signatura Apostólica, competentes para resolver estos conflictos."

subject his decision to arbitration. Since processes of conciliation do not include the necessity to make a decision, they are available for all parties who wish to use them. The processes of arbitration, however, would depend entirely on the will of the administrative authority to subject his decision to such a process in determined questions.

The systems of compromise for the resolution of conflict pre-date the origins of the Church and are the only processes that have remained part of the ecclesiastical legal structure since apostolic times. As preliminary attempts at an amicable resolution of conflict situations, conciliation and arbitration provide an effective means for the peaceful resolution desired by the Church and have been universally acceptable. The procedures are local, voluntary, and available for a variety of conflicts, whether between equals or between the faithful and administrative superiors for determined questions. Expertise required is not on the same level as that required in a judge, so, greater subsidiarity is made possible as conflicts are resolved where they originate.

Whenever these systems fail, or prove to be inadequate for a particular case, it is essential to justice that other effective courses of juridical action be made available. One such course of action, the "extrajudicial appeal", survived for several centuries. An understanding of this system is important to our study, not only to appreciate the developments that followed it, but because of attempts by certain canonists to have it reintroduced in one form or another. The "hierarchical recourse" that replaced and survived

"extrajudicial appeal" is part of the current law in different forms. We turn our attention, then, to these two systems, to examine what our legal system can provide for those cases where procedures for compromise fail or are not sufficient.

CHAPTER III
EXTRAJUDICIAL APPEAL AND HIERARCHICAL RECOURSE

While the processes of conciliation and arbitration are in harmony with the peace-seeking intentions of the Church, there are occasions where the complicated nature of a conflict or the attitudes of the parties requires a more determined approach for the resolution of grievances. Mandatory arbitration which was used in causes between clergy and their bishops was based on delegated judicial power, but did not survive the 1917 Code. In this chapter, we now examine the judicial approach of the "extrajudicial appeal" and the administrative approach of "hierarchical recourse" that eventually replaced it. The emphasis in these two systems gradually moves us into a new perspective of Church law that is more interested in the area of conflict with administrators than with grievances between individuals.

A. The extrajudicial appeal

Justinian (527-565) treated extensively the matter of appeals from judicial sentences, but realised the limitations of this device and accepted a practice called "supplication", which by the fourth and fifth centuries had become an established feature of Roman Law.¹

¹ Digest, Lib. XLIX, tit. I-V, lex 5: "Non recepta appellatione, si quidem principem appellari oportuit, principi erit supplicandum, sin vero alius appellabatur quam princeps, ille erit adeundus"; Codex Justinianus, Lib. I, tit.XIX; Novella CXIX, c. 5.

This procedure provided a means for obtaining a special imperial favor in cases where the law made no provisions for complete justice. Regulations guiding supplication indicate that it was something more than a petition for favors. The supplication was not considered a true appeal, but on occasions was considered equivalent to, or sufficient for the joining of issues.²

1. From supplication to extrajudicial appeal

Supplication was considered to be a "last resort" and was not permitted during the trial, nor allowed to revive a suit terminated by reference to the emperor.³ The normal processes and remedies of law were first to be exhausted and then appeals made, where possible. Those who failed to take the ordinary means of defense were to remain silent or be branded with infamy.⁴ Favours obtained by a false petition were considered invalid and the perpetrators denied further supplication even though the device was available for most criminals. Any attempt at bribery was outlawed and those who abused the privilege of supplication were to be punished.⁵

Supplication had its basis in justice and equity: where a person had no further means of redress at his command, the kindness

² Codex Theodosianus, 8.4.26; 1.2.10; Codex Justinianus, Lib. I tit. XX, lex 1.

³ Codex Theodosianus, 11.30.6.

⁴ Codex Justinianus, Lib. I, tit. XX, leges 1-3

⁵ Codex Theodosianus, 1.2.6; 9.26.3; 9.40.4; 10.10.21; 11.7.15; 12.1.36; 16.1.4.

of the sovereign allowed one more hearing of the case. As an extraordinary means of redress, supplication did not operate with a suspensive effect; therefore administration in general and the administration of justice in particular were not impeded or threatened by it. Supplication was available both in judicial and non-judicial matters alike. An analogous judicial device emerged in twelfth century canon law known as "extrajudicial appeal". While supplication in its various forms remained in pre-Code law, today it has been supplanted by hierarchical and administrative recourse with the last resort being the "beneficium novae audientiae" granted by the Pope.⁶

a. Supplication and appeal

Pre-Code canonists made a clear distinction between an appeal and supplication. An appeal was made to a higher authority while supplication could be addressed to the same authority who pronounced the sentence or decree. The appeal was the ordinary remedy against a judicial sentence, while supplication was an extraordinary remedy

⁶ H. Pihring, Ius canonicum in V. libros Decretalium, Lib. II, tit. 28, n. 8; A. Reiffenstuel, Ius canonicum universum, Lib. II, tit. 28, n. 18; J. McClunn, Administrative Recourse, pp. 6, 7, 13: notes that supplication is normally made to the Pope and only occasionally to the metropolitan; F. Schmalzgrueber, Ius ecclesiasticum, Lib. II, tit. 28, sl, n. 2, provides a triple division of supplication. In the broadest sense, it is a plea to the judge or superior for justice or for a favour. In the broad sense, it is a petition for restitutio in integrum when other reasons besides damages intervene such as cases involving the favour of the Church or an embecile. In the strict sense, the party alleging harm asks the judge to review a case where no remedy of law remains, and this as a favour.

to be used only when no other form of redress was available. An appeal for redress against an injury could be invoked during the trial, while supplication was possible only after a definitive sentence. Normally two appeals were available, whereas only one supplication was permitted.⁷ Appeal had a suspensive effect while supplication did not suspend the execution of a sentence or decree.⁸ An appeal should be made within ten days of the sentence, a supplication within two years.⁹

b. Appeal: judicial and extrajudicial

The definition of appeal used by most pre-Code canonists was broad enough to include both the appeal from a judicial sentence and the "extrajudicial appeal": appeal was commonly defined as "that provocation made from a lesser or inferior, to a greater or superior as judge, by reason of harm done or to be done".¹⁰

While a judicial appeal was an action taken against a sentence, an extrajudicial appeal arose as the defense available from acts or extrajudicial decrees by which someone was harmed or could be

⁷ F. Schmalzgrueber, op. cit., Lib. II, tit. 28, n. 5; H. Pihring, op. cit., Lib. II, tit. 28, n. 7; A. Reiffenstuel, op. cit., Lib. II, tit. 28, n. 22; J. McClunn, op. cit. p. 7.

⁸ Novella, CIX, 5.

⁹ Codex Justinianus, I, 7, 42, 1; Gloss c. 4, X I, 41.

¹⁰ H. Pihring, op. cit., Lib. II, tit. 28, n. 1.

harmed.¹¹ Thus, the extrajudicial appeal presented a broader basis for justice. The range of matters that could be appealed extrajudicially was almost limitless, since such actions covered every type of extrajudicial injury and was available against superiors or equals. The injury could be one already suffered, or merely a threatened or feared future injury.¹²

Extrajudicial appeals although addressed to a judge, were not appeals in the strict sense, since there was no previous sentence from which to appeal. Pope Alexander III (1159-1181) pointed out that extrajudicial appeals were more appropriately called "provocationes ad causam" or a summons or citation to commence a cause.¹³

c. Right to defense

The general principle of pre-Code law was that an appeal was available for anyone, including an interested party, who was harmed by a sentence. It was thus available to the condemned parties,¹⁴ to interested persons, as long as the sentence was not directly against

¹¹ F. Schmalzgrueber, op. cit., Lib. II, tit. 28, n. 5; C. Oviedo Cavada, Teoria general del recurso extrajudicial, p. 27, gives a most varied list of examples.

¹² c. 51, X II, 28; J. McClunn, op. cit., p. 4; Hostiensis Commentaria in quinque Decretalium libros, Lib. II, tit. de appellationibus, cap. 50, n. 12, fol 188: "[...] appellatio fit in iudicio, provocatio vero extra iudicium".

¹³ c. 5, X II, 28; J. McClunn, op. cit., p. 2.

¹⁴ c. 3, X I, 41; c. 16, X I, 6; c. 7, X II, 28.

them,¹⁵ and to those who acted in the process in the name of another.¹⁶ Gratian (d. 1160) made clear that an appeal was open for all the oppressed,¹⁷ and accepted extrajudicial appeals as part of this general right to self defense. Pope Innocent III (1198-1216) granted this right even to the excommunicated, since the purpose of the appeal was not to grant a favor to the excommunicated, but rather to ensure the justice of the judge. Excommunication interdicted the right to an action, not the right to defense which was a right of anyone accused or harmed.¹⁸

Pope Boniface VIII (1294-1303) not only recognised the right to an extrajudicial appeal, but established some of the areas in which it was to be available as well as the time limits and other remedies of law that could be applied, such as: elections, postulations, provisions of offices and any other extrajudicial acts in which persons believed themselves harmed. To have the act revoked, ten days were allowed for the appeal. This time would not flow while

¹⁵ c. 17, X II, 27.

¹⁶ c. 55, X II, 28; A. Reiffenstuel, op. cit., Lib. II, tit. 28, nn. 36, 38, 41; F. Schmalzgrueber, op. cit., Lib. II, tit. 28, nn. 7ss.

¹⁷ c. 3-10, 12, 15-17, C. II, q. 6.

¹⁸ c. 5, 8, X II, 25.

other remedies of law were tried.¹⁹ After the initial appeal, the appellant had one year in which to prosecute and finish the case.²⁰

d. Reception of the extrajudicial appeal

Since the extrajudicial appeal was not an appeal from a previous sentence, but rather from an act posited outside the judicial realm, there remained to be determined who was the person before whom such an appeal could be lodged. As a provocatio ad causam, the extrajudicial appeal should be interposed before the judge immediately superior to that person who was the cause of the grievance against which the appeal was lodged.²¹ This action had to be made in writing and express specifically a reasonable cause for the

¹⁹ c.8,II,15, in VI^o; "[...] statuimus, ut ab electionibus, postulationibus, provisionibus, et quibuslibet extrajudicialibus actibus, in quibus potest appellatio interponi, quisquis ex eis, gravatum se reputans, per appellationibus beneficium gravamen illatum desideravit revocari, infra decem dies, postquam sciverit, si velit appellet; post decendum vero eidem aditus non pateat appellandi. Sed si per contradictionem debitam vel alia iuris remedia petierit, revocari gravamen; ei, dummodo medio tempore his non consenserit, lapsus decendii non obsistat."

²⁰ c. 3, II, 12, in Clem: "Sicut appellationem iudicialem, sic et extrajudicialem infra annum a die interpositionis ipsius vel a die illati gravaminis, ubi a futuro gravamine appellatur, prosecui et finire tenetur appellans. Quod si iusto impedimento cessante non fecerit: debet eius appellatio deserta censi."; Panormitanus, Lectura super quinque libros Decretalium, Vol. 5, fol. 110: "Appellans habet annum ad proseguendam, vel finiendam appellationem et ex causa biennium."

²¹ Panormitanus, op. cit., Vol. 5, fol. 149: "Appellatio extrajudicialis non potest fieri nisi ad illum superiorem qui potest adiri per viam querelae"; C. Oviedo Cavada, op. cit., p. 26.

appeal, otherwise it was considered invalid.²² Once accepted and processed, the case became truly judicial and was subject to all available judicial remedies.²³

M. Lega speaks of the extrajudicial appeal as a "novae causae institutio" as distinguished from the "causae prosecutio" of formal appeal. The normal process of appeal against a bishop would be to the metropolitan. Before him, the extrajudicial negotiation would take on a contentious judicial nature.²⁴ The procedures used were those followed in ordinary contentious judicial cases, and once introduced, there was no further basis for a distinction between the judicial and extrajudicial, since all judicial remedies were available.²⁵

²² Clem., Lib. II, tit. XII, c. 5; c. cordi nobis I, de appellatione in VI^o; Panormitanus, op. cit., Lib. II, cap. XVIII, n. 1, p. 123: "Appellatio generalis respectu cuiuslibet gravaminis non valet nisi restringitur ad certam causam."

²³ Panormitanus, op. cit., Vol. 5, fol. 113: "[...] facta extrajudicialia non transeunt in rem iudicatam."

²⁴ M. Lega and V. Bartocchetti, Commentarius in iudicia ecclesiastica, Vol. 2, p. 1011: "[...] foto coelo distat appellatio iudicialis ab extraiudiciali; et hanc improprie appellationem vocari, 1) cum non sit causae prosecutio apud iudicem superiorem sed novae causae institutio[...]"; D. Bouix, Tractatus de iudiciis ecclesiasticis, offre, Vol. 2, p. 262: "Siquidem clericus, qui, putans se gravatum esse ex. gr. in concursu parochiali, appellat ad Metropolitanum, provocat seu convenit Episcopum apud Metropolitanum ei responsurum de legitima vel minus collatione beneficii parochialis, et ita adducitur in contentiosum iudiciale negotium hactenus extrajudiciale."

²⁵ J. Traserra, La tutela de los derechos subjetivos frente a la administracion eclesiastica, p. 54.

e. Grounds for an extrajudicial appeal

In the extrajudicial appeal, two aspects were considered inseparable. It was not sufficient to show the nullity of the act that was challenged, the plaintiff also had to prove that an injustice had been done. While one could appeal on the basis of probable or seemingly true grounds in an extrajudicial appeal, it remained necessary to prove two things: the truth of the matter and the legitimacy of the cause.²⁶

The right to defense from extrajudicial acts was based on the existing or threatened harm, or on "gravamen". Extrajudicial appeal was available whether the harm was great or small.²⁷ The question of legality centred more on the existence of the harm than on the legality of the act that caused it, although injustice and nullity were normally inseparable.²⁸

²⁶ Panormitanus, op. cit., Vol. 5, fol. 164: "Habes enim semper notare quod appellans nulla non obtinet in causa appellationis probando nullitatem sententiae: nisi justificet appellationem probando eam legitime fuisse interpositam." It emerges clearly that the appellant must show the injustice in the case and not just the nullity. Id., Cap. LI, n. 1, fol. 147: "Qui extra iudicium appellat ex veresimilibus et probabilibus causis, ne in possessione molestetur, si postea spoliatur, restituitur ante omnia in statum in quo erat ante appellationis emissae." The suspensive effect of the appeal is clear, but it remains necessary to prove the truth and legitimacy of the claims: Hostiensis, op. cit., Lib. II, Cap. LX, n. 13, p. 197: "appellans duo probare tenetur, quod causa sit legitima, et veritatem."

²⁷ c. 2, C. II, q. 6: "[...] ab omni gravamine, sive magno, sive minimo allato [...]"; M. André, Dictionnaire de Droit Canonique, Vol. 1, p. 113.

²⁸ Panormitanus, op. cit., Vol. 5, fol. 148: "[...] in appellatione extrajudiciali est necesse probare prius veritatem causae antequam revocetur attentatum": cf. also Vol. 5. fol. 164

f. The effects of extrajudicial appeal

The effects that applied to the ordinary appeal were applicable in an analogous way to the extrajudicial appeal: 1) the appeal suspended the sentence in a judicial case and suspended the decree or decision in the case of an extrajudicial appeal, 2) the jurisdiction of the judge was suspended for the whole case even if the appeal was only from one article, while that of the administrator was equally affected regarding the question challenged, 3) in a judicial case, the presumption in favor of the sentence was suspended; in an extrajudicial one, the executive nature of the administrative act was denied.²⁹ Any attempt to interfere directly with the extrajudicial appeal was invalid and should be rebuked by the authority who received the appeal.³⁰

Three benefits of the formal appeal were equally applicable to the use of the extrajudicial appeal: 1) the reparation of harm unjustly inflicted by the sentence or extrajudicial act; 2) correction of malice or lack of skill in the judge, or harm or excess on the part of the administrator; and 3) for injured or defeated parties: in a judicial case, an opportunity to repair their own

²⁹ Ibid., Vol. 5, fol. 107

³⁰ Ibid., Vol. 5, fol. 147: "Appellatio extrajudicialis ex probabilibus causis facta adeo devolvit causam ad superiorem ut omnia postea contra eam attentatam revocentur."; F. Schmalzgrueber, op. cit., Lib. II, tit. 28, n. 5: "Iudicialis praeterita suspendit, eaque pendente, acta invalida sunt, et per viam attentati revocentur; non ita invalida sunt gesta, pendente appellatione extrajudiciali, nisi forte ipsi appellationi repugnent"; C. Oviedo Cavada, op. cit., p. 41; J. McClunn, op. cit., p. 3.

ignorance or personal failure with a renewed presentation of the cause and availability of new proofs, while, in extrajudicial cases, an opportunity to seek for and obtain administration that was just and equitable and did no harm to the recipients.³¹

g. The suspensive effect of extrajudicial appeal

Since they followed the ordinary rules of appeal, extrajudicial appeals were initially considered as having an equally suspensive effect. To clarify this point it is important to appreciate the two possible effects, suspensive and devolutive (in devolutivo) that could follow an appeal:

The suspensive effect is that the appeal immediately binds the hands of the judge 'a quo' and suspends his jurisdiction so that he may not procede to the execution of the sentence he has given [...]

The devolutive effect is that the appeal hands over the total cause and its appendages to the judge 'ad quem', so that he, taking cognizance of the justice of the appeal, may examine the principal cause with its appendages, and if need be, deliver a new sentence [...]³²

³¹ A. Amanieu, "Appel", in D.D.C., Vol. 1, col. 766.

³² "Effectus suspensivus est, quod appellatio statim liget manus iudicis a quo, et eius iurisdictionem suspendat, ut ad executionem sententiæ a se latae procedere non possit [...]"

Effectus devolutivus est quod appellatio totam causam cum suis accessoriis devolvat ad iudicem ad quem, ita ut is, cognita iustitia appellationis, possit causam principalem cum suis accessoriis examinare, et si opus fuerit, novam sententiam ferre [...]" Cf. L. Ferraris, Bibliotheca canonica iuridica moralis theologica, Vol. 1, p. 324.

The devolutive effect allowed the judge or administrator to execute the sentence or decree, but only in a provisional manner.³³ A multiplicity of references in decretal law indicates directly and indirectly that extrajudicial appeals suspended the executive force of any decree or action that was challenged.³⁴ Although not often distinguished by authors, not all extrajudicial appeals had a suspensive effect from the outset of decretal law. There was, for instance, no appeal in disciplinary matters unless there was some excess or abuse on the part of the administrator.³⁵ The administrative authority of the bishop was accepted as executive in matters of correction and reform; otherwise, many crimes would go unpunished through abuse of the judicial system and endless suspensions.³⁶

It was possible to make an extrajudicial appeal against a superior who was too rigorous, or one who corrected not out of jus-

³³ M. André, op. cit., Vol. 1, p. 118: "L'effet de l'appel dévolutif est de permettre au juge d'exécuter sa sentence par provision, comme lorsqu'il s'agit de discipline et de correction; ce qui n'empêche pas de déférer ensuite la cause au juge supérieur qui peut l'examiner avec tous ses accessoires, et, si il est nécessaire, porter une nouvelle sentence". The Lateran Council under Innocent III in the canon 'Irrefragabili' ordered that judgements rendered in matters of discipline, correction and reformation should be executed provisionally despite appeal, which in this case would not have a suspensive effect but be 'in devolutivo'.

³⁴ c. 10, X I; c. 16, X I, 6; c. 19, X I, 6; c. 28, X I, 6; c. 33, I, 6, in VI°; c. 46, X II, 28; c. 51, X II, 28.

³⁵ Hostiensis, op. cit., Lib. II, cap. LX, 14, Cap. III, 6, fol. 171; c. 13, X I, 13; C. Oviedo Cavada, op. cit., pp. 35-36.

³⁶ c. 13, X I, 13: "Ut autem correctionis et reformationis officium libere valeant exercere, decernimus, ut executionem ipsorum nulla consuetudo vel appellatio valeant impedire, nisi formam in talibus excesserint observandam"; C. Oviedo Cavada, op. cit., pp. 35-36.

tice but out of some form of hatred.³⁷ This reference to excess or abuse of authority did not imply any deliberate intention on the part of the superior, but simply that there was an error of law.³⁸ What emerged clearly is that in principle, it was not the person of the superior who was challenged, but rather his acts. No exception could be raised against a bishop while he was tolerated in office, and even a notoriously criminal prelate must be obeyed under normal circumstances.³⁹ Special allowance was made for the discretionary power of administrators in those areas where they were not bound by law but left to follow their conscience. In these cases no appeal was available, but the injured party could have recourse to the superior of the administrator.⁴⁰ This recourse, in decretal law, was considered as having the same suspensive effect as the appeal and was generally known as "supplication".⁴¹

The key issue in extrajudicial appeal was always the damage suffered or feared by the party who then had a right to self-defense

³⁷ Panormitanus, op. cit., Vol. 5, fol. 131.

³⁸ Ibid., Vol. 5, fol. 163.

³⁹ Ibid., Vol. 5, fol. 131.

⁴⁰ Ibid., Vol. 5, fol. 150.

⁴¹ Ibid., Vol. 5, fol. 150-151.

and reparation of the damage done.⁴² The suspensive nature of the extrajudicial appeal seems to flow logically not only from the analogy with the ordinary appeal, but also from the desire to avoid harm. However abuses of the system and harm to the government of the Church soon brought changes.

2. Changes in the structure of extrajudicial appeal

Saint Bernard (1090-1153) complained about the confusion and abuse of appeals indicating that their suspensive effect was the cause of the problem. If judgements and decrees could have been executed in a provisional manner, there would have been no confusion or abuses.⁴³ Pope Alexander III (1159-1181) made clear that the remedy of the appeal was not intended to allow someone the opportunity to

⁴² Ibid., Vol. 5, fol. 119: "Appellari potest de iure canonico quandoque pars sentit se gravatam."; H. Pihring, op. cit., Lib. II, tit. 28, n. 1: "Appellatio communiter definitur, quod fit a minore, seu inferiore, ratione gravaminis illati, vel inferendi, ad maiorem, seu superiorem, tanquam iudicem, facta provocatio."; F. Schmalzgrueber, op. cit., Lib. II, tit. 28, s4, n. 37: "Appellatio est ab inferiore ad superiorem iudicem facta provocatio ratione gravaminis illati vel inferendi." The classical example of extrajudicial appeal would be from the future damage to be done in an election; cf. C. Oviedo Cavada, op. cit., p. 26.

⁴³ St. Bernard, "De consideratione", Lib. III, cap. II, nn. 7, 11; C. Oviedo Cavada, op. cit., p. 36.

avoid the observance of order and religion.⁴⁴ Abuses took on a variety of forms as people formed vague appeals without foundation, appealed not only from injuries suffered, but from future harm, and made appeals that were protracted for several years.⁴⁵ Thus, the effectiveness of Church administration was limited and serious inconveniences affected ecclesiastical discipline in such a way that reform was inevitable. The first major changes came with the Council of Trent (1545-1563) and the Apostolic Constitution of Sixtus V "Immensa Aeterna Dei" (1587) giving new form to the Roman Curia.⁴⁶

a. The Council of Trent and the extrajudicial appeal

The Council of Trent provided several remedies in an effort to overcome the abuses that affected both judicial and extrajudicial

⁴⁴ Alexander III in c. 3, C. II, q. 6; here the author warns against abuses: "Remedium appellationis non ideo est inventum ut alicui a religionis et ordinis observantia exorbitanti, debeat in sua nequitia patrociniū exhibere."

⁴⁵ M. André, "Appel", in Dictionnaire de Droit Canonique, Vol. 1, p. 114; C. Oviedo Cavada, op. cit., p. 46; M. Lega and V. Bartocetti, op. cit., Vol. 2, p. 1011: "Equidem gravia incommoda ex hisce appellationibus seu recursibus in disciplinam ecclesiasticam promanaverunt, cum exinde praepediretur expeditus usus potestatis administrativae Episcoporum, quare compescere studuit harum appellationum abusum Concilium Trid. praecipue in ses. 24 cap. 10; quod decretum authentice interpretatus est Benedictus XIV Const. Ad militantis in qua declarantur potiores casus in quibus appellatio extra iudicium interposita suspensivum non habet effectum. In suspensivo effectu enim potissimum subest periculum ne exinde intercipiatur salutaris Ordinariorum pastoralis sollicitudo et administratio."

⁴⁶ p. Palazzini, "Curia Romana", in D.M.C., Vol. 1, pp. 1013-1014.

appeals. In providing a solution, the Council indicated the nature of abuses extant at that time:

Whereas, therefore, those guilty of crimes, ordinarily, in order to avoid punishment, and to evade the judgements of their bishops, affect to have subjects of complaint and grievances, and, under the subterfuge of an appeal, impede the process of the judge, (this Synod) in order to prevent a remedy which was instituted for the protection of innocence, from being abused to the defence of wickedness, and that this their craft and tergiversation may be met, hath ordained and decreed that: In causes relative to visitation and correction, or to competency or incompetency, as also in criminal causes, there shall be no appeal, before the definitive sentence, from the bishop or his vicar general in spirituals, against any interlocutory sentence, or other (alleged) grievance, whatsoever; neither shall the bishop, nor his vicar, be bound to defer to any such appeal, as being frivolous; but they may proceed to ulterior measures, that appeal, or any inhibition whatsoever emanating from a judge of appeal, as also every usage and custom even immemorial, to the contrary notwithstanding; except it be that the said grievance cannot be repaired by the definitive sentence, or that there is no appeal from the said definitive sentence; in which cases the statutes of the ancient canons shall remain untouched.⁴⁷

The decrees of the Council of Trent did not abolish the extrajudicial appeal,⁴⁸ but greatly diminished its effects and at the same time increased the discretionary power of the bishops:

Bishops [...] shall, in all things which regard visitation and correction of manners, have the right and power, even as

⁴⁷ Council of Trent, Session XIII, chapter I (on reformation), in J. Waterworth, The Canons and Decrees of the Sacred and Ecumenical Council of Trent, pp. 85-86; a reply from the Sacred Congregation of the Council in June 1589 indicates a limitation to this decree, in that it applies to the time of visitation; see Fontes n. 2208, Vol. 5, p. 160; a decree of October 16, 1600 with the approval of Pope Clement VIII reiterated that in cases issuing from the visitation of the Ordinary, the effect was to be devolutive, except in the case of irreparable damage from a decision, or when the visitor proceeded judicially when the effect would be suspensive. Examples given are undue imprisonment, torture or excommunication. While the cause of appeal was pending, the appellant would remain in prison until the judge ad quem having seen the acts and examined the case decreed otherwise; see Fontes, n. 1586, Vol. 4, p. 688.

⁴⁸ C. Oviedo Cavada, op. cit., p. 47.

delegates of the Apostolic See, of ordaining, regulating, correcting and executing, in accordance with the enactments of the canons, those things which, in their prudence, shall seem to them necessary for the amendment of their subjects, and for the good of their respective dioceses. Nor herein, when visitation and correction of manners are concerned, shall any exemption, or any inhibition, or appeal, or complaint, even though interposed to the Apostolic See, in any way hinder, or suspend the execution of those things which shall have been by them enjoined, decreed, or adjudged.⁴⁹

Trent made provision for the judgement of bishops in criminal cases. Where the cause was gravely criminal, such as cases of heresy, the bishop was to be judged by the Pope alone. Where the cause had to be committed outside the Roman court, metropolitans or bishops would be chosen by the Pope to take cognizance of the facts, draw up the process and transmit it to the Pope to whom sentence was reserved. In lesser criminal causes, the decretal law was maintained and the matter was to be examined and decided by the provincial council or by persons deputed by it.⁵⁰

The basic effect of the prescriptions of Trent was to uphold the administrative authority of the bishop. While there was a denial of the right to appeal with a suspensive effect, there was no

⁴⁹ Council of Trent, Session XXIV (on reformation), c. 10, in J. Waterworth, op. cit., p. 215; a reply of the Sacred Congregation of the Council, June 14, 1594, clarified that this decree only prohibited the appeal with a suspensive effect and not that with a devolutive effect to the metropolitan; see Fontes n. 2269, Vol. 5, p. 179; another reply from the same Congregation on November 28, 1602, clarified that when the bishop does not proceed with a process or judicial form, the execution of his commands and decrees would not be impeded; see Fontes, n. 2347, Vol. 5, p. 200; on August 24, 1605, the same Congregation in another reply clarified that an appeal was possible if the bishop was excessive, but the decree of visitation would not be suspended. It also stipulated that only one visitation should take place each year unless something emerged that required a repeated visit; see Fontes n. 2358, Vol. 5, p. 203.

⁵⁰ Council of Trent, Session XXIV (on reformation), c. 5, in J. Waterworth, op. cit., p. 212.

denial of the right to self defense. Appeals could still be made but the administrative act of the superior would, in the meantime, be executed in a provisional way only.⁵¹

b. Introduction of administrative resolution of conflict

In 1587, Pope Sixtus V (1585-1590) stabilised the Roman Curia with the institution of fifteen Congregations. The bull "Immensa Aeterna Dei" spelled out clearly the administrative nature and function of these Congregations. A distinction of competence for judicial and administrative matters emerged:

To avoid confusion of judgements, we wish that each Congregation, when any cause, question or consultation is taken to it, should diligently consider whether investigation and decision of the matter belongs properly to the Congregation and if it is not the Congregation's affair in any way, it should be deferred to the ordinary judges or sent to the proper Congregation.⁵²

Judgements belonged only to the judiciary and each Congregation was to act within its boundaries of administrative competence. However, a subsequent declaration in May of the same year allowed for causes to be heard either judicially or in an administrative manner. Four declarations clarified the relationship between the Congregations and the judiciary: 1) a party called before a Congregation

⁵¹ Cf. supra, footnotes 47 & 49.

⁵² Bullarium Romanum, Vol. 8, p. 997: "Ad iudiciorum vero confusionem evitandam, volumus ut unaquaeque Congregatio, quando aliqua causa, quaestio vel consultatio ad eam delata fuerit, diligenter perpendat an ad ipsam proprie eius causae cognitio et expeditio pertineat, et si ad se minime spectare cognoverit, eandem ad iudices ordinarios vel ad propriam Congregationem remittat."

which had not commenced judgement, if unwilling to have the case heard by the Congregation, was able to take the case before a judge; 2) if judgement had commenced before a judge, and the parties were in agreement, they could have their case decided by the Congregation; 3) if the case had commenced before the Congregation and something unexpected emerged, then the Congregation could treat the emerging problem, even if the case had commenced, 4) where the Congregation's decision required a supplication or a brief, then mention was to be made of the fact that the case was completed before the Congregation.⁵³

c. Gradual removal of suspensive effect

In 1600, under Pope Clement VIII (1592-1605) a declaration of the Sacred Congregation of Bishops, "Ad tollendas ambiguitates", declared that in cases involving the visitation of the bishop or correction of morals, only a devolutive effect would be admitted. This applied unless the harm done by a definitive action should prove to be irreparable, or it was shown that the visitor proceeded judicially when the appeal should have been given suspensive

⁵³ Ibid., p. 999. The fifth declaration involved the use of the secular arm of the law.

effect.⁵⁴ In 1742, Pope Benedict XIV (1740-1758) made further changes in the suspensive nature of the extrajudicial appeal. In his constitution, "Ad militantis ecclesiae", he continued and amplified the prescriptions of Trent and made clear that in the future, appeals in extrajudicial matters would be "in solo devolutive".⁵⁵ However, he did make allowance for special cases. When a case was judged by a hierarchical superior to need a suspensive effect because of its seriousness, a special clause to this effect was to be added to the rescript to indicate this fact. A rescript without this clause was not considered to have any force.⁵⁶

d. Civil law influences

In 1809, Napoleon incorporated the Papal States to the Empire suppressing Pontifical organisms and imposing French laws and institutions. After the fall of Napoleon and the Congress of Vienna

⁵⁴ Clement VIII, "S.C. Ep. et Reg., decr. 16 oct. 1600", in Fontes, n. 1586, ss8-9, Vol. 4, pp. 687-688: "In causis vero visitationis ordinariorum aut correctionis morum, quod effectum devolutivum tantum admittantur, nisi de gravamine per diffinitivam irreparabili agatur, vel cum visitator citata parte et adhibita causae cognitione iudicialiter procedit, tunc enim appellationi locus erit etiam quoad effectum suspensivum. 9. Cum a gravamine quod per diffinitivam reparari nequit, ut indebitae carcerationis vel torturae aut excommunicationis etiam comminatae appellatur, non nisi visis actis ex quibus evidentiter appareat de gravamine, appellatio admittatur, aut inhibitio, vel provisio aliqua concedatur."

⁵⁵ Benedict XIV, "Constitutio: Ad militantis ecclesiae", March 30, 1742, in Fontes, n. 326, s38, Vol. 1, p. 730.

⁵⁶ Ibid., n. 326, s49, Vol. 1, p. 730; a letter without the following clause was not considered to have any force: "Iuribus, et supplici libello Nobis praesentatis, atque in actis exhibitis, sic, ut praefertur, inhibendum esse, speciali rescripto mandavimus."

(1814), Pius VII (1800-1823) was left with the task of restoration. It was not possible to return to the previous position, so after a provisional period he issued the motu proprio, "Quando per ammirabile", to decree a general and uniform juridical reform for the Papal States. The French influence was visible with a clear distinction made between "justice" and "administration". Pius VII restored the Signatura Justitiae and gave it the character of a supreme civil tribunal in the style of the French Court of Cassation. This restoration continued under Popes Leo XII (1823-1829) and Pius VIII (1829-1830), although new confusion emerged as ecclesiastical and temporal powers overlapped.⁵⁷

Under Pope Gregory XVI (1831-1846), the clear French distinction between the judicial and administrative orders was more deeply inserted into the law of the Papal States. In his motu proprio "Elevati appena" of 1834, Gregory XVI harmonised the laws concerning judicial organisation and procedures. Magistrates of the judicial order were declared incompetent to judge the acts of the dicasteries which possessed power of decision in the administrative order.⁵⁸ He established that administrative decisions should be respected and held as valid by the tribunals thus giving them executive force, even if the object was really within the competence of the tribunal;

⁵⁷ J. Traserra, op. cit., pp. 32-34.

⁵⁸ Gregorius XVI, "Elevati appena", in Acta Gregorii Papae XVI, Vol. 4, p. 299, followed by "Regolamento legislativo e giudiziario", pp. 300-410; p. 404: "s1698: I magistrati dell'ordine giudiziario sono incompetenti a conoscere e giudicare intorno agli atti dei dicasteri che hanno potestà di decidere in via amministrativa: non potranno interloquire in qualunque modo sulle loro decisioni e sugli oggetti in esse compresi."

Judges were to declare themselves incompetent until such time as an administrative decision was legally annulled.⁵⁹

e. Division of powers within the Papal States

The "Regolamento legislativo e giudiziario" of Gregory XVI in 1834 was completed by the "Raccolta delle leggi e disposizioni di pubblica amministrazione nello Stato Pontificio" issued in 1835. Although produced for the Papal States, this collection forms part of the legal background to the theory of separation of powers that would later be recognised in the law promulgated by Pius X.

Controversies regarding certain administrative acts of public administration could emerge either from the dicasteries or from the magistrature. They were only subject to the new contentious jurisdiction exercised by the administrative power. Controversies regarding the interest of private persons outside the area of public protection, were to be part of the competence of the ordinary judiciary. Exceptions of nullity against administrative activity could be taken before the ordinary judiciary on the level of appeal, but not before the Apostolic Signatura. Tribunals were to declare themselves incompetent when difficulties arose concerning administrative matters, and administrative powers were likewise to declare them-

⁵⁹ Ibid., p. 404: "s1699: Le decisioni amministrative dovranno sempre osservarsi dai tribunali, e ritenersi come valide ed eseguibili, ancorche l'oggetto delle medesime fosse di competenze dei magistrati dell'ordine giudiziario: in ogni caso dovranno questi, anche per ufficio, dichiararsi incompetenti fintantoche la decisione amministrativa non sarà legalmente annullata."

selves incompetent in matters pertaining to the judicial powers. Orders emanating from the two supreme dicasteries of the State were subject neither to the judicial nor to the administrative authority, but recourse to the Pope alone was available. In the first instance, administrative decisions were subject to appeal. Those of second instance were not subject to appeal unless the decision revoked the previous decision totally or in part. There was to be no appeal from decisions of the third instance. No suspensive effect was to be granted against the executive force of an administrative act that was appealed unless that suspension was ordered for a special reason.⁶⁰

In 1834, Gregory XVI also established a Supreme Council composed of the Dean of the Sacred College, the president of the Congregation of Revision, the Cardinal Secretary for the internal affairs of the State and three prelates selected by the Pope from among the auditors of the Rota. Their task was to resolve administrative conflict. In 1846, under Pius IX (1846-1878), this competence was transferred to the tribunal of the Rota which was to conduct the process according to the existing norms. So it appears

⁶⁰ Raccolta delle leggi e disposizioni di pubblica amministrazione nello Stato Pontificio emanate nell'anno 1835, Vol. 2, pp. 64-67.

that during the reign of Pius IX the Rota enjoyed both judicial and some type of administrative power.⁶¹

The occupation of Rome in 1870 brought about the cessation of the tribunals of the Rota and Signatura both as civil and ecclesiastical tribunals. However, the administrative organisation continued to resolve civil administrative conflicts in the Papal States.⁶² In 1882, Pope Leo XIII (1878-1903) instituted two commissions to constitute first and second instances to resolve administrative conflicts and fill the lacuna that had developed. The third instance was to be composed of these two commissions united.

Although these provisions were for the Papal State, they were handled by the Roman Curia in such a way that a double system of laws was operating. The principle of the separation of powers was entren-

⁶¹ E. Cerchiari, Capellani Papae et Apostolicae Sedis, Vol. 3, pp. 645-646, 654-655; Vol. 1, pp. 157-158: "Constituerat enim Gregorius XVI anno 1834 aliqua ac certa dicasteria praedita potestate decidendi 'in via amministrativa' et anno 1835 speciale 'ordinamento' a celebri cardinali Gamberinio edi et promulgari iussit, quo omnia rite definiuntur quoad iurisdictionem contentiosam in materiis administrativis. Quo ordinamento, seu edicto, supremum iudicium harum contentionum ferri deberi sancitum est a Consilio supremo, cuius in membra tres eligi debebant Auditores Rotae. Hoc supremo Consilio, anno 1846, varias ob causas silente, contentiones ab eo dirimendae, Rotae commissae fuerunt"; in 1834, Pope Gregory XVI also declared that all judges and tribunals of the Vatican State, including those of the Sacred Roman Rota and the full Chamber were subject to the Supreme Tribunal of the Signatura. At the same time he gave immunity to the Sacred Congregations who were not to be subjected to the Signatura. See Raccolta delle leggi e disposizioni di pubblica amministrazione nello Stato Pontificio dal 1 gennaio al 31 dicembre 1834, Vol. 3, n. 336, p. 96; n. 385, p. 108.

⁶² J. Traserra, op. cit., p. 37.

ched in the Papal States, but no reason was given why this approach was not accepted into Canon Law at the time.⁶³

f. Decline of extrajudicial appeal

Between the bull "Immensa aeterna Dei" of Sixtus V (1587) and the apostolic consitution "Sapienti consilio" of Pius X (1908), the extrajudicial appeal was in a state of decline for two principal reasons. The loss of the suspensive effect was the first; it reduced extrajudicial appeal to something like an administrative recourse as far as the effects were concerned. The second reason was that the Congregations, in exercising vicarious papal power, were considered to have greater dignity than the Rota. There was no use of judges, nor was an appeal or judicial recourse available and decisions were rendered more quickly than those given in the judicial process. Coupled with other historical reasons, the end result was that the

⁶³ Leonis XIII Pontificis Maximi Acta, Vol. 3, pp. 75-76; C. Lefebvre, "De recursibus administrativis in iure canonico: lineamenta historica", in M.E.,99(1974), p. 217.

Rota ceased to function as a tribunal from 1870 until 1908 when Pius X brought about new reforms.⁶⁴

B. "Sapienti consilio" and the hierarchical appeal

By the end of the nineteenth century the clarity of the division of powers that had been a feature of the Papal States had diminished leaving practical confusion in its wake. Although not expressed as part of its mandate, the Sacred Congregation of the Council exercised contentious power in virtue of a custom and with tacit papal approval.⁶⁵ Almost all judicial affairs were resolved by the

⁶⁴ C. Lefebvre, loc. cit. pp. 207-212; E. Labandeira, "La Signatura Apostolica y los tribunales administrativos", in I.C., 21 (1981), pp. 667-668; J. Traserra, op. cit., pp. 56, 59-60, on p. 42 this author cites M. Lega, Praelectioniones in textum iuris canonici de iudiciis ecclesiasticis, Vol. 2, P. 87: "[...] quo factum est ut tot haberentur tribunalia quot officia publicae potestatis; tot iudices quot magistratus" hereinafter cited as Praelectioniones; F. Roberti, Codicis iuris canonici schemata, Vol. 4, De processibus I, De iudiciis in genere, pp. 432-433; Roberti indicates in Schemata "A" and "B" that the issue of extrajudicial appeal was still alive in 1907 (Schemata of Noval and Many); also see F. Roberti, "Codicis iuris canonici schemata de processibus", in Acta Congressus Iuridici Internationalis, (Romae, 12-17 Novembris 1934), Vol. 4, pp. 27-42. The omission of any mention of this topic in other schemata indicates the total change introduced into law through "Sapienti consilio" of Pius X in 1908.

⁶⁵ G. Varsanyi, De competentia et procedura Sacrae Congregationis Concilii ab origine ad haec usque nostra tempora, p. 112: "Quod S. Congregatio Concilii suam potestatem contentiosam revera saltem a fine saec. XVII, si non ex iure expresso, de facto tamen ex consuetudine et usu tacite probato exercuerat, omnes concedunt."

Congregations, and both judicial and administrative procedures were used within individual Congregations.⁶⁶

1. Reformation of the Roman Curia

In the preliminary period of preparation for the 1917 Code, there was a desire to reinstate "extrajudicial appeal" as a normal process of recourse against extrajudicial acts of superiors. The first schema (1907) contained one canon to cover the topic, while the second presented eleven canons that were a simple summary of all previous juridical practice in this field.⁶⁷ Removal of this title from subsequent drafts of the proposed 1917 Code clearly indicated the effect of the 1908 reformation of Pius X and so extrajudicial appeal disappeared from the law.

Schema "A" of the 1917 Code contained other proposals for a court of "cassation" similar to that of European States. Within the competence of this court would have been the cassation of sentences where no other remedy was available, as well as the decisions of

⁶⁶ A. Jullien, "Il beato Pio X e i Tribunali della Segnatura Apostolica e della S. R. Rota", in *Ap.*, 25(1952), p. 160: "All'alba del sec. XIX quasi tutti gli affari giudiziari ecclesiastici, nella Curia Romana, venivano risolti dalle Sacre Congregazioni, particolarmente dalla S.C. del Concilio. Alla Sacra Rota non resto che la specifica competenza assegnatale dall'ordinamento di Gregorio XVI per l'appello delle sentenze emanate in cause civili o ecclesiastiche dentro i confini dello Stato Pontificio."; D. Bouix, *Tractatus de Curia Romana*, pp. 175-181, 225-226, where the author attests to differing procedures within the same Congregation.

⁶⁷ F. Roberti, *op. cit.*, Vol. 4, pp. 432-433; *ibid.*, pp. 34-35: here the author indicates that Noval was responsible for the first draft and P. Many for the second, both produced in 1907.

arbiters and "decisions or extrajudicial dispositions causing harm against which appeal or action for harm was not available."⁶⁸ In the later schema "C" (can. 55, s2), after the idea of the court of "casation" had been dropped, we find a proposal that the Apostolic Signatura should judge, with delegated power, questions of restitutio in integrum against a decision issued by a Sacred Congregation, with a previous commission of the Pope in each case. The eventual legislation, after the reform of Pius X, emerged in the opposite sense, making clear that a judicial power could not judge any administrative activity.⁶⁹

a. "Sapienti consilio"

Pius X (1903-1914) brought about a major reform of the Roman Curia with three legislative documents: 1) the Apostolic Constitution on the Roman Curia, "Sapienti consilio", 2) the "Lex propria Sacrae Romanae Rotae et Signaturae Apostolicae", and 3) the "Ordo servandus in Sacris Congregationibus Tribunalibus Officiis Romanae Curiae".⁷⁰ While the Rota and Apostolic Signatura were restored, their competence and that of the Congregations was clearly established and

⁶⁸ F. Roberti, op. cit., can. 415, s3, p. 454.

⁶⁹ S. Goyeneche, Romana Curia a Pio X Sapienti Consilio reformata, p. 131ss.

⁷⁰ Pius X, "Constitutio Apostolica De Romana Curia, Sapienti consilio, in A.A.S., 1(1909), pp. 7-19; Id., "Lex propria Sacrae Romanae Rotae et Signaturae Apostolicae", in A.A.S., 1(1909), pp. 20-35, hereinafter cited as "Lex propria"; Id., "Ordo Servandus in Sacris Congregationibus Tribunalibus Officiis Romanae Curiae", in A.A.S., 1(1909), pp. 36-108, hereinafter cited as "Ordo servandus".

limited. Distinction of powers was now a permanent feature of ecclesiastical law one that would be consolidated with its introduction to the 1917 Code of Canon Law.

b. Separate organisms for the resolution of conflict

One canon of the Lex propria (canon 16) brought about the end of extrajudicial appeal within the Church and separated judicial and administrative resolution of conflict:

Against the dispositions of Ordinaries which are not given in the judicial form of a sentence, no appeal or recourse to the Sacred Rota is available, but cognizance of these matters is reserved to the Sacred Congregations.⁷¹

The formulation of this norm received even more clarity in the 1917 Code as Canon 1601. In this new law, the Ordinaries were given an immunity to judgement similar to that granted to the Roman Congregations in 1834:

Against the decrees of Ordinaries, there is no appeal or recourse to the Sacred Rota; but the Sacred Congregations exclusively take cognizance of such recourses.⁷²

In handling cases in an administrative and disciplinary way, the Congregations did not engage in a trial; there was no examination of witnesses nor of writings of advocates. The interested parties were heard and the documents produced by them were examined. Once a question of an administrative or disciplinary nature had been submitted to the Congregation, with approval of the parties, or at

⁷¹ "Lex propria", c. 16; p. 24, C. Lefebvre, loc. cit., p. 218, footnote 150.

⁷² Canon 1601 CIC.

least without objection to its procedures, then the parties were unable to institute a strictly judicial action. However, a judicial approach was possible once the decision had been rendered. Moreover, the Congregation could at any stage of the proceedings remit the case to the ordinary judges.⁷³

The Ordo servandus provided that, in complaints to the Holy See, if the libellus was sent to the Sacred Rota, the Dean with two auditors was to determine whether it should be treated in an administrative and disciplinary manner or subjected to formal judgement. It was then to be sent to the competent Congregation or the proper judges according to law.⁷⁴ It was this particular norm that some matters could be treated judicially and others administratively that brought a confusion to subsequent law that has lasted even until the present time.

The power of the Congregation was equivalent to that of a hierarchical superior. Competence extended not only to the legitimacy of acts but also included examination of the merit or discretionary power of the authority involved. The Congregation had the power not only to confirm or annul a provision of an inferior authority, but also to revoke it or reform it, since the hierarchical superior was considered able to intervene and substitute for the

⁷³ "Ordo servandus", loc. cit., pp. 64-65.

⁷⁴ Ibid., p. 61.

author of the act, since he had the same power.⁷⁵ There was considerably more than a simple judgement involved in this process the procedures varied somewhat from one Congregation to another.

c. The "Ius subiectivum - Interesse" dispute

In his commentary on "Sapienti consilio", Ojetti reintroduced some concepts of pre-Code legislation and civil law that many subsequent commentators have retained. Instead of looking to the source of the act impugned, the judicial or administrative organism from which it emanated, he turned to the act itself and the harm it produced. Ojetti determined that if there was a lesion of a subjective right, then the matter should be subject to the ordinary

⁷⁵ P. Ciprotti, "Stato attuale e prospettive della giustizia amministrativa canonica", in M.E., 98(1973), p. 357: "Infatti, è previsto che il superiore gerarchico, avendo competenza non solo di legittimità ma anche di merito, nel decidere il ricorso possa di regola non solo confermare o annullare il provvedimento impugnato, ma anche revocarlo o riformarlo, sostituendosi così all'autore dell'atto, (egli ha, in altre parole, gli stessi poteri che ha l'autore dell'atto, salvo che le legge disponga altrimenti) [...]."

tribunal; whereas, if it was merely a matter of "interest",⁷⁶ it was to be treated by the Roman Congregations.⁷⁷

Practically, this meant that cases were still presented to the Rota where subjective rights were in question or damages had occurred, even after promulgation of the 1917 Code.⁷⁸ A reply from Cardinal Gasparri, the president of the Code Commission on May 22, 1923 clarified the issue. It was asked whether according to the norms of canons 1552-1601, a judicial action could be instituted against the decrees, acts and dispositions of Ordinaries which related to the administration of the diocese, and, whether because of such acts a judicial action could be instituted for damages. The reply to both questions was in the negative and the mind of the Commission expressed: "[...] the cognizance of such decrees, acts,

⁷⁶ Although an example of "legitimate interest" will be offered in this chapter, it is a concept of Italian civil law that lacks clarity as attested by D. Staffa, "De distinctione inter iurisdictionem ordinariam et administrativam in iure canonico", in E.I.C., 31(1975), p. 210: "E a tutti ben noto, dicit S. Satta, che la discriminazione del concetto di interesse legittimo dal diritto soggettivo ha costituito e costituisce il cruccio degli studiosi di diritto pubblico e si potrebbero elencare cinquanta definizioni, nessuna delle quali sicuramente appagate."

⁷⁷ B. Ojetti, De Curia Romana, pp. 21-23, 368-369; C. Bernardini, "Problemi del contenzioso amministrativo canonico specialmente secondo la giurisprudenza della Sacra Romana Rota", in Acta congressus iuridici internationalis, (Romae 12-17 Novembris 1934), p. 369: "La lesione di un diritto subiettivo autorizza l'azione giudiziaria, quella di interessi (semplici o legittimi che siano) soltanto il ricorso amministrativo."

⁷⁸ J. Traserra, op. cit., pp. 131-182.

dispositions as well as damages which someone claims from them belongs exclusively to the Sacred Congregations."⁷⁹

The option of the law was clearly to look to the source of the impugned act rather than to its nature or its effects on subjective rights or interest of the party affected.⁸⁰ Exceptions to this rule confused the matter further since some matters that had their origin in an administrative decision were to be treated judicially. Major causes and grave criminal causes have traditionally been included in this category.⁸¹

If the emphasis is placed on rights alone, then the division produced by those authors who followed Ojetti and later, Bernardini, appears quite logical. "Ius", or "right" is described as an

⁷⁹ Pont. Commissio ad Codicis Canones Authentice Interpretandos, "Dubia soluta ab Emo. Praeside Commissionis", 22 maii 1923, in A.A.S., 16(1924), p. 251: "1° Utrum ad normam cann. 1551-1601 institui possit actio iudicialis contra Ordinariorum decreta, actus dispositiones, quae ad regimen seu administrationem dioecesis spectent, ex. gr. provisionem beneficiorum, officiorum, etc., aut recusationem seu denegationem collationis beneficii, officii, etc. Et quatenus negative, 2° Utrum ob eiusmodi decreta, actus, dispositiones, actio iudicialis institui possit saltem ratione refectionis damnorum; et proinde Ordinarius conveniri possit, ad normam can. 1557, § 2 et 1559, § 2, penes Tribunal Sacrae Romanae Rotae. Resp.: Negative ad utrumque et ad mentem. Mens est: exclusive competere Sacris Congregationibus cognitionem tum huiusmodi decretorum, actuum, dispositionum, tum damnorum, quae quis praetendat ex iis sibi illata esse."

⁸⁰ K. Morsdorf, "De actibus administrativis in Ecclesia", in Ius Populi Dei, Vol. 3, p. 14; here the author presents the opposing opinion: "Ad actum iudiciale igitur ab actu administrativo discernendum non interest a quo, sed solummodo quid et quomodo agatur. Salva unitate potestatum agitur de distinctione conceptuali diversarum functionum, quae et formaliter et materialiter determinatae sunt."; S. Ragazzini, La potestà nella Chiesa, 1963, p. 217, agrees with Morsdorf.

⁸¹ J. Traserra, op. cit., p. 118.

inviolable moral faculty to do, demand or omit something. "Interesse" or "interest" is an improper use of the term "right" that brings with it a certain usefulness and advantage that accrues to one's personal good but does not include inviolability.⁸²

The removal of an irremovable pastor involves questions of "subjective rights" (canons 2142-2194 CIC). A pastor, removable "ad nutum", does not have any right to stay in the parish, but has, according to the authors, a "legitimate interest". The faithful in this case would be considered as having a "simple interest". According to the authors of this opinion, the irremovable pastor would have a right to a judicial action, the pastor removable "ad nutum" would only have a right to hierarchical administrative recourse. The faithful would have no action available, unless one considers an indirect action through the recourse of the affected party.⁸³

2. Distinction between judicial and administrative power

In an effort to determine the difference between judicial and administrative power, authors turned to the nature of the act in question. They considered that some matters of their nature were judicial and others administrative. The law provided no certain, fixed and clear norms for making distinctions. J. Johnson argued

⁸² J. Johnson, "De distinctione inter potestatem iudicalem et potestatem administrativam in iure canonico", in Ap., 11(1936), p. 265.

⁸³ Ibid., pp. 265, 268.

that there must be an internal criterion used by the Congregations to determine when a case should be transferred to the competent tribunal. Equally, the Rota was to declare itself incompetent to treat administrative questions and return the case to the competent Congregation.⁸⁴

Roberti bases his approach on the nature of the act itself, but with a technical provision. Questions of private rights which suppose, or derive from, an administrative act were to be defined by tribunals. If the private nature of the conflict outweighed the public interest, the matter could be submitted to the tribunals. A decision should be made according to the degree to which the public good is affected. While the prohibition against submitting administrative acts to the judiciary was not absolute, Roberti noted that such could only take place with the permission of the administrative authority, since the norm is that judicial power in the Church cannot coerce administrative power.⁸⁵

Bertrams extended Roberti's thought to justify the treatment of a judicial matter before a Congregation in an administrative and disciplinary way when accepted by the parties or at least when this

⁸⁴ F.X. Wernz and P. Vidal, Ius canonicum, Vol. 2, n. 487; J. Johnson, loc. cit., p. 262; Normae peculiares, cap. III, 10, in A.A.S., 1(1909), p. 64.

⁸⁵ F. Roberti, De processibus, Vol. 1, pp. 114-115: "Ex his omnibus patet, non absolute prohiberi iure canonico quominus actus administrativi potestate iurisdictionali subiciantur; sed tantum hoc fieri non posse sine consensu ipsius potestatis administrativae (cf. c. 247 s3, 249 s3, 250 s5, 251 s2, 257 s3) quia potestas iurisdictionalis in Ecclesia non habet finem potestatem administrativam coercendi."

way of acting was not rejected by them.⁸⁶ He proposed that this was so because of the double nature of the matter discussed. It was not only a question of a personal and private right alone, but also a social matter that affected the common good, and for this reason it could be submitted to the authority of the administrative superior. Social or common good seems to prevail over personal good in this presumption.⁸⁷

a. The division of powers or functions

The novelty introduced into Canon Law with "Sapienti consilio" was a recognition of the division of powers. Since power in the Church belonged to the Pope and Bishops, it possessed a certain unity

⁸⁶ W. Bertrams, "De potestate iudiciali-administrativa in Ecclesia", in Per. 34(1945), pp. 218-219; "Sapienti consilio", in A.A.S. 1(1909), p. 15: "[...] per Sacras Congregationes non amplius recipi nec agnosci causas contentiosas, tam civiles quam criminales, ordinem iudicarium cum processu et probationibus requirentes."; "Normae peculiare", cap. I, 3, in A.A.S. 1(1909), p. 61; ibid., p. 65: "Quaestio semel instituta penes Congregationem aliquam administrationis ac disciplinae tramite, et a partibus admissa aut saltem non recusato hoc agendi modo; his iam non licet eadem de causa actionem stricte iudicalem instituere."

⁸⁷ W. Bertrams, loc. cit., pp. 220-221.

that made a strict division of powers impossible.⁸⁸ Many authors preferred to speak of a division of functions. The Pope and Bishops, sharing in the priestly, prophetic and royal dignity of Christ, have three basic powers, to sanctify, to teach and to govern. In the government of the Church they have the power to legislate, to judge and administer to the needs of their people. While the 1917 Code introduced implicitly a distinction between legislative, judicial and administrative powers, the distinction was not always a clear one since some Congregations were still able to exercise administrative and judicial power and provision was made for the same person to exercise both judicial and administrative power in dioceses where priests were scarce.⁸⁹

Authors generally agreed in admitting to the separation of powers or functions within the Church, but differed in determining

⁸⁸ G. Lobina, La natura giuridico-pastorale e l'ampiezza dell'esame di merito da parte dell'autorità amministrativa superiore di un provvedimento amministrativo, p. 3: "[...] non è possibile ammettere nella Chiesa una divisione di la diversità e divisione di funzioni e di organi amministrativi, ai quali attraverso la 'sacra potestas' conferita da Cristo ai pastori da lui costituiti nella Chiesa, derivano anche poteri di controllo sull'attività delle pubbliche autorità amministrative della Chiesa."; W. Onclin, "L'organisation des pouvoirs dans l'Eglise", in Actes du Congrès de droit canonique, (Paris 22-26 avril 1947), p. 370: "[...] le pouvoir de gouvernement de l'Eglise est un pouvoir fondamentalement un et indivisible, parce que son but est unique, à savoir le bien commun spirituel ou plus exactement le bien commun religieux des fidèles." Onclin, at this stage saw administration as part of legislative power.

⁸⁹ F. Roberti, De processibus, Vol. 1, pp. 111-112. Here Roberti gives examples of the confusion of administrative and judicial functions. The Holy Office functions as both a Congregation and a Tribunal, Congregations by mandate of the Pope can judge marriage cases reserved to the Pope (c. 1962 CIC), and a double function is possible for the Vicar General where the shortage of personnel indicates that need (c. 1573 sl CIC).

the reasons or foundations for these differences. The debate on the nature of the differences between judicial and administrative organs is still an on-going one, but the aspects that have emerged from the debate provide a partial picture of the evolving separation of powers or functions within the Church.⁹⁰

Canon 335, §1 of the 1917 Code introduced a partial division of powers to Church law. The theory was not developed at that time and so the canon spoke of legislative, judicial and coercive power. Thus, the practical use of this division of powers within the law emerged ahead of the theory. M. Lega was the first to use the triple division of legislative, judicial and executive power. He was closely followed by Cavagnis and Cappello.⁹¹ The triple division gained wider acceptance when Pius XI introduced it in "Quas primas", in 1925.⁹² Although Gaudium et spes, n. 75, recommended this

⁹⁰ S. Goyeneche, "De distinctione inter res iudiciales et administrativas in iure canonico", in A.G., 69(1955), p. 422; C. Lefebvre, "De exercitio potestatis iudicialis per organa administrativa seu 'verwaltungsgerichtsbarkeit' ", in A.G., 69(1955), p. 453, states that the distinction of powers can never be absolute but becomes rather a criterion of prevalence. S. Ragazzini, op. cit., pp. 199, 207, 210-217; here the author indicates that the notions introduced by Montesquieu and Locke do not correspond adequately with the nature of the Church. While he sees an affinity between judicial and administrative activity, since both have concrete forms and share the same purpose, to assure the execution of the law, his efforts to reach a clear distinction remain unfulfilled sharing the fate of all authors who have attempted this task.

⁹¹ M. Lega, Praelectiones, Vol. 1., p. 61; F. Cavagnis, Institutiones iuris publici ecclesiastici, Vol. 1., p. 66; F. Cappello, Summa iuris publici ecclesiastici, p. 18; W. Onclin, loc. cit., p. 371.

⁹² Pius XI, Encyclical letter: "Quas primas", in A.A.S., 17(1925), p. 593.

division with civil societies in mind, Church law has accepted the division in practice and established in it law.⁹³

b. Nature of the different organisms

Some authors attempt to explain the difference between judicial and administrative activity simply by the fact that different organisms are used. The judicial organism is seen as independent, externally free from the precepts of a superior, internally independent too, since no one can be a judge in his own case. The administrative organism, however, possesses a relationship of dependence where the inferior administrator is obliged by the precepts of the superior. The judicial function is an obligatory one and depends on the petitioner (ubi nullus actor, ibi nullus iudex) to whom the judge must respond when the instance is legitimately begun. The administrator is never forced to act, his action may flow from a petition or be "motu proprio" for the common good. The judge has a strict obligation to act according to procedural norms. If these are neglected, the acts may be null, in serious cases even the sentence itself could be null. Administration generally has a different order of procedure, proceeding with more freedom in a spirit of equity adapted to the circumstances and purpose of the administrator.⁹⁴

⁹³ Canon 135, CIC 1983.

⁹⁴ S. Goyeneche, loc. cit., p. 422; K. Morsdorf, "De relationibus inter potestatem administrativam et iudicalem in iure canonico", in A.G., 69(1955), p. 402.

c. The essential difference between the processes

Most authors place the essential difference between judgement and administration in the diverse human faculties from which the activity emerges. Judgement is seen to originate specifically in the intellect taking on something of the form of a syllogism in such a way that the primary purpose is the application of the objective law. The judicial sentence is a decision rendered according to the law. Administrative activity is most often involved with the application of the law, not as the end purpose but rather as a means to an end, the common good. In this way an administrative decision is usually one made according to prudent free choice from a variety of options within the law.⁹⁵

The end purposes of the judicial and administrative processes for the resolution of conflict are also at variance. The judicial power has as its immediate and direct purpose the good of the party whose rights are justified in the sentence; a mediate and indirect purpose or fruit of the sentence is the good of the community that comes from the restored balance between rights and duties of the members. Administrative power has for its primary purpose the procurement of the good of the community or the "salus animarum".

⁹⁵ K. Morsdorf, "De relationibus inter potestatem administrativam et judicialium in iure canonico", p. 403; L. Uprimny, "De la distinction entre las funciones judicial et administrativa", in A.G., 69(1955), p. 478; K. Morsdorf, loc. cit., in Ius Populi Dei, Vol. 3, p. 15.

A mediate and indirect fruit of administrative decisions is the good of the individual members.⁹⁶

The differing nature of the functioning of judicial and administrative organisms allows for a difference in the force of the judicial sentence and the administrative decision. As the fruit of an intellectual process, a judgement is based on what is true and just and must of necessity become definitive. From the nature of judgement the doctrine of res iudicata emerged. However, since a decision of the will can change with time and circumstances, the determinations of a particular time may, in another time be seen as harmful. There is no room for res iudicata in such a process. When the hierarchical administrative recourse has been terminated within the Congregations, there is no further recourse available except

⁹⁶ F. Romita, "Fondamenti teologico-giuridici della giustizia amministrativa nella Chiesa dopo il Vaticano II", in M.E., 98(1973), pp. 328-329. Romita distinguishes administrative activity into three categories: materia normativa which studies and prescribes whatever is necessary to implement the constitutive law; materia graziosa which grants faculties, dispensations, etc., to help facilitate reaching the salvation of souls either for the global community or for individual members, materia contenziosa in which the administrative power attempts to remedy tensions in the Church between groups or individuals always with the spiritual good of the whole community in mind; F. Roberti, De processibus, Vol. 1, p. 112; here Roberti includes another technical aspect of difference in powers: "[...] cum potestas administrativa sit directa et primaria, iurisdictionalis contra secundaria ac substitutiva activitatis privatorum."

gracious recourse to the Holy Father.⁹⁷ Administrative acts not challenged within ten days take on a special juridical firmness, so that the administrative power of the administrator is upheld. In practice the juridical value of both judgement and decision are equally respected.⁹⁸

d. The ultimate distinction

When trying to reach a criterion for distinction of matters to be referred either to the judicial or to the administrative process, the total context of the act must be taken into consideration. The origins of the act appear to constitute this general criterion. If

⁹⁷ P. Tocanel, "Litterae circulares ad Archiepiscopos et Episcopos Dioecesanos", in Ap., 51(1978), pp. 22-55. The right for any member of the faithful to take their case to the Holy See at any stage of judgement or conflict remains firm. This special recourse is considered extraordinary and does not suspend the exercise of jurisdiction in the lower judge or administrator unless there is a special intervention of the Pope. Tocanel names four possible types of recourse to the Pope: a) extrajudicial, inasmuch as the matter has not been presented before any judge, b) judicial, when the case is pending before a judge of first or second instance, c) appeal, when one of the parties calls on a tribunal of the Holy See from the sentence of an inferior judge for reason of damages (gravamen) inflicted or feared, omitting the tribunal of appeal, d) after the decision or sentence, when there is no right to an appeal and the party calls directly on the Pope to change the decision or sentence that might cause harm or for restitutio in integrum.

⁹⁸ R. Bidagor, "De relationibus potestatem administrativam inter et iudiciariam quaestio peculiaris", in M.C., 15-1(1951), p. 194: "[...] apparet iudicata S.S. Congregationum non esse veras sententias, nec ex iis proinde oriri posse res iudicatas in sensu iuris, contra quas datur remedium quod dicitur restitutionis in integrum"; F. Roberti, De processibus, Vol. 1, p. 116, footnote 10: "Etsi decisio numquam transeat in rem iudicatam, nihilominus eadem elapsis statutis terminis, generatim post decem dies, fit irrevocabilis[...]"; K. Morsdorf, loc. cit., in A.G., 69(1955), p. 402.

judicial acts within the judicial structure are to be challenged, then the normal process will be judicial and procedures for these challenges are clearly spelt out within the canons on procedures.⁹⁹ If the source of a decree is clearly administrative, then administrative hierarchical recourse is the only remedy unless there arises a contentious cause of major importance such as a question of marriage or ordination to the priesthood or grave criminal causes.¹⁰⁰ The deliberate choice of the parties to have a matter, of its nature judicial, submitted to an administrative decision is another exception.¹⁰¹ So the criterion includes both the source of origin of the act, as well as its intrinsic nature, both must be taken into account so that an appeal is initiated in judicial matters and "recourse" in administrative matters under normal circumstances.¹⁰²

The distinctions emerge clearly when we turn to the practice of both tribunals and administrative organisms. The matters that are submitted to judicial power are: 1) conflicts of rights between

⁹⁹ Canons 1552-2194, CIC; Canons 1400-1712, CIC 1983.

¹⁰⁰ J. Traserra, op. cit., p. 118; S. Goyeneche, loc. cit., pp. 427-429.

¹⁰¹ "Normae peculiare", cap. III, 10, in A.A.S., 1(1909), p. 65: Quaestio semel instituta penes Congregationem aliquam administrationis ac disciplinae tramite, et a partibus admissa aut saltem non recusato hoc agendi modo; his iam non licet eadem de causa actionem stricte iudicalem instituere."

¹⁰² "Sapienti consilio", in A.A.S., 1(1909), p. 15: "[...] per Sacras Congregationes non amplius recipi nec agnosci causas contentiosas, tam civiles quam criminales, ordinem iudicarium cum processu et probationibus requirentes."; "Normae peculiare", cap. I, 3, in A.A.S., 1(1909), p. 61: "[...] ad proprios iudices ac sua tribunalia deferatur ad normam iuris communis definienda."

individuals, 2) questions of private good, even though these may be submitted to an administrative authority, 3) questions between private persons which have a public nature (marriage and ordination), and 4) penalties imposed in a judicial manner. Matters submitted to administrative authority for decision are: 1) all acts by which public authority, directly, in virtue of the public good, orders its own activity or that of inferiors, or ministers of the Church or the faithful (e.g. in the administration of the sacraments, Church teaching, offices, benefices, discipline of clerics, christian instruction of the laity, etc.), 2) administrative provisions (e.g. removal of pastors, privation of a benefice), and 3) imposing penalties by means of a precept or declaring them. In none of these latter cases is an appeal to a tribunal available.¹⁰³

C. Relative value of judicial and administrative procedures

The administrative functions within the Church appear to favour efficient government and speedy resolution of conflict situations; they also serve the common good more efficaciously. Superiors have more freedom to act, are able to apply prompt remedies, stamp out abuses and apply sanctions. The judicial function has the advantage that it is more secure, being conformed to strict justice and consonant with the recognition and vindication of rights. By comparison, the administrative function is more open to abuses given the discretionary power of administrators and the

¹⁰³ F. Roberti, De processibus, Vol. 1, pp. 113-114.

perpetual emphasis placed on respect for the common good. In matters concerning the administrative resolution of conflict, emphasis appears to be placed more on the unconditioned respect for authority than on the right of defense on the part of the petitioner.¹⁰⁴

1. The system of single jurisdiction

The system ordinarily known as "extrajudicial appeal" or "provocatio ad causam" was in use during the period from Alexander III in the twelfth century until "Sapienti consilio" in 1908. Extrajudicial appeal ceased at this time and was excluded from the 1917 Code.¹⁰⁵ These eight centuries of use of extrajudicial appeal have come to be known as the period of "single jurisdiction".¹⁰⁶ During these centuries, administrative conflicts were tried before the ordinary tribunals. The normal judicial hierarchy of the time was Archdeacon, Bishop of the Diocese, Metropolitan and Holy See. The competent judge was the immediate superior of the person who

¹⁰⁴ S. Goyeneche, loc. cit., p. 432; J. Traserra, op. cit., pp. 10-11; A. Ranaudo, "Il contenzioso amministrativo canonico", in M.E., 93(1968), p. 551: "La legislazione ecclesiastica per tutti questi anni trascorsi ha posto l'accento, per la risoluzione del problema, sull'autonomia e l'incondizionato rispetto dell'autorità, piuttosto che sulla difesa del ricorrente."

¹⁰⁵ C. Oviedo Cavada, op. cit., x-102 pp; in this thesis the author argues that extrajudicial appeal has remained in Church law, but he remains virtually alone against the opinion of most major authors and the clear demise of extrajudicial appeal in the drafts of the 1917 Code; see supra footnote 67.

¹⁰⁶ T. Molloy, The Document of the National Conference of Catholic Bishops of the United States on Due Process, p. 85; I. Gordon, "De iustitia administrativa ecclesiastica", in Per., 61(1972), pp. 253-281.

placed the extrajudicial act being challenged.¹⁰⁷ In the case of challenge to a bishop or his vicar general, it was the metropolitan to whom an appeal was made.

The principal advantage of this approach to administrative justice was with the person whose rights were to be protected rather than with the authority challenged. Since extrajudicial appeal suspended the execution of his act, the public authority was placed in a disadvantaged position. Restrictions soon followed limiting the suspensive effects of such appeals.¹⁰⁸

2. The system of superior-judge

The second period from "Sapienti consilio" in 1908 until "Regimini" in 1967 introduced the system known as "superior-judge" to replace extrajudicial appeal. The notion of "recourse" rather than "appeal" was introduced to law and the system involved an examination and decision rather than a strict judgement.¹⁰⁹ Since the Congregations were considered the hierarchical superiors of local ordinaries and religious superiors, the term "superior-judge" was given to the system introduced by "Sapienti consilio" for the

¹⁰⁷ I. Gordon, loc. cit., pp. 264-265, footnote 21.

¹⁰⁸ T. Molloy, op. cit., p. 85ss.

¹⁰⁹ W. Bertrams, loc. cit., pp. 212-213, 227: Bertrams investigated the nature of the power used by the Congregations, to determine whether it was truly judicial since many of the procedures follow a judicial form. He deduced that it was not judicial power from the triple viewpoint of procedures, the object treated and the power invoked (p. 227). He concluded that judicial procedures are used to give greater certitude in deliberations.

vindication of rights of an administrative nature within the Church.¹¹⁰ Administrative justice was no longer the realm of the ordinary judicial process but that of a purely administrative or disciplinary process of an administrative superior.¹¹¹ Improved speed, a simple process, lower costs, greater efficiency and the possibility of permitting access to the judiciary if the plaintiff was not completely satisfied, made the hierarchical administrative recourse of "Sapienti consilio" and the 1917 Code most acceptable.¹¹²

While the system of single jurisdiction favoured the individual over authority, the system of "superior-judge" favoured the administration. Hierarchical administrative recourse was a process that avoided a danger inherent in the judicial process: the publication of the acts, by which Ordinaries could be easily embarrassed or even unable to defend themselves because of secrets or

¹¹⁰ I. Gordon, loc. cit., pp. 281-303.

¹¹¹ Ibid., pp. 302-303.

¹¹² C. Lefebvre, "Pouvoir judiciaire et pouvoir exécutif dans l'église postconciliaire", in Ap., 43(1970), p. 355: "[...] l'on préfère généralement au moins, recourir aux S.S. Congrégations plutôt qu'aux Tribunaux, montre que cette préférence leur est assurée raisonnablement par leur célérité à apprécier et par les faibles frais demandés, sans parler de leur efficacité [...] enfin, et c'est là une garantie supplémentaire en cas de violation des droits subjectifs, les S.S. Congrégations n'hésitent pas à permettre éventuellement le passage à la voie judiciaire, si le Plaignant estime que ses droits n'ont pas été suffisamment considérés."

documents of a private nature.¹¹³ One major defect raised involved the hierarchical unity between the Ordinary and the Congregations. Decisions regarding public administration were left in the hands of the same public administration and directly or indirectly the public administration of the Church was both judge and party to the case.¹¹⁴

3. A movement for change

The administrative resolution of conflict was favoured over the judicial approach initially because of its simplicity and effectiveness.¹¹⁵ Bernardini, however, continued the confusion introduced by Ojetti with the separation of the concepts of ius subiectivum and interesse, insisting that questions regarding the former could be taken to the ordinary tribunals. Resting on a strict

¹¹³ I. Gordon, "De tribunalibus administrativis", in Per., 57(1968), p. 626: "Accedit quod in via iudiciali omnes probationes publicandae sunt; sed, ut accurate exponitur in una c. Parillo, die 30 aprilis 1923, 'nulla lege obstringuntur Episcopi, quinimmo prohibentur, secreta officii pandere, extraiudiciales informatores prodere, documenta sua natura occulta in iudicio exhibere (can. 1823, §1; 2309, §5[...])'"

¹¹⁴ A. Ranaudo, Note circa il contenzioso amministrativo canonico e gli atti amministrativi canonici, pp. 6-7; I. Gordon, "De tribunalibus administrativis", Per., 57(1968), p. 623: "[...] diximus esse systema transitorium et quidem natura sua; quod idem significat ac esse per se insufficiens ad intentum scopum obtinendum, sc., tutelam efficacem iurium subjectivorum contra administrationem, siquidem ipsa administratio activa est pars et iudex in eadem causa."

¹¹⁵ Acta Congressus Internationalis Iuris Canonici, (Romae, in aedibus Pont. Universitatis Gregorianae 25-30 Septembris, 1950), 244 p.; Acta Congressus Iuridici Internationalis, (Romae, 12-17 novembris, 1934), Vols. 1-5, 1935-1937; C. Lefebvre, "Pouvoir judiciaire et pouvoir exécutif dans l'Eglise postconciliaire", in Ap., 43(1970), p. 353.

interpretation of Canon 1667 CIC which stated that each right had an action available for its defense, he construed the 1923 authentic interpretation as only prohibiting presentation of a case to the Rota and not to the ordinary tribunals.¹¹⁶

The movement for change grew from 1953 on with C. Lefebvre proposing a judicial-administrative approach for the solution of administrative conflict, claiming that it was not out of tune with the nature of the Church.¹¹⁷ At the same time, Goyeneche raised the question of the need within the Church for a superior organism such as the Signatura Apostolica to which a person could have recourse in cases of evident violation of law or notorious injustice. He made clear, however, that this was not a call for a tribunal in the style of civil models.¹¹⁸ Other authors, like Arza, favoured the judicial solution.¹¹⁹

Among the major reasons for a desired change must be included the changing ecclesiology proposed by Vatican II. I. Gordon affirms this indirectly when he states that the administrative recourse to the Congregations was in agreement with the spiritual and paternal

¹¹⁶ C. Bernardini, loc. cit., p. 408: his position is also ratified in Id., "De administratione tribunalium i.e. de exercitio potestatis administrativa in ambitu tribunalium", in A.G., 69(1955), pp. 447-455.

¹¹⁷ C. Lefebvre, "De exercitio potestatis iudicialis per organa administrativa seu 'verwaltungsgerichtsbarkeit'", in A.G., 69 (1955), p. 436.

¹¹⁸ S. Goyeneche, loc. cit., pp. 432-433.

¹¹⁹ J. Traserra, op. cit., p. 119.

character of ecclesiastical government of an earlier time.¹²⁰ The principles guiding the formulation of the 1983 Code, approved by the Synod of Bishops in October 1967, although they were subsequent to the institution of the Second Section of the Apostolic Signatura with Regimini Ecclesiae Universae, voice what can be considered a universal dissatisfaction with the system of "administrator-judge". Apart from expressing this dissatisfaction, they expressed the desire for change and the introduction of administrative tribunals to the local church.¹²¹

The desired change was to find its first step in the establishment of the Second Section of the Apostolic Signatura. This major new step made possible a clearer vision of the inadequacies of the previous system of the "administrator-judge", so much so that Cardinal Staffa could say: "The imperfection of a juridical order in

¹²⁰ I. Gordon, "De tribunalibus administrativis propositis a Commissione Codici I.C. recognoscendo et suffragatis ab Episcoporum Synodo", in Per., 57(1968), p. 627: "Ad id etiam contulit quod hoc systema valde congruebat cum indole spirituali ac paterna gubernii ecclesiastici."

¹²¹ Pontificia Commissio Codici Iuris Canonici Recognoscendo, "Principia quae codicis iuris canonici recognitionem dirigant", in Communicationes, 1(1969), p. 83: "[...] communis opinio canonistarum censet recursus administrativos non parum deficere in ecclesiastica praxi et administratione iustitiae. Exinde necessitas ubique persentitur ordinandi in Ecclesia tribunalia administrativa secundum gradus et species, ita ut defensio iurium in eisdem habeat propriam et canonicam proceduram quae apud auctoritates diversi gradus apte evolvatur."

which the public administration itself judges its own acts all the way to the final instance is evident."¹²²

One of the major tasks of the new system for the resolution of administrative conflict would be to avoid favouring either the petitioner or the administrative authority. We will study this new approach in the following chapter when we examine the Second Section of the Apostolic Signatura that grew out of the systems of "single jurisdiction" and "administrator-judge".

¹²² D. Staffa, "Dissertationes de administratione iustitiae in Ecclesia", in Per., 61(1972), p. 20: "Evidens enim est vitium ordinationis iuridicae, in qua publica ipsa administratio usque ad ultimam instantiam sua acta iudicet."

CHAPTER IV

THE SECOND SECTION OF THE APOSTOLIC SIGNATURA

With the Apostolic Constitution "Regimini Ecclesiae Universae" of August 15, 1967, Pope Paul VI introduced a Second Section to the Apostolic Signatura.¹ With this came a new approach to administrative justice, a partial response to canonists who saw a lacuna in the existing law, and a first step for bishops who asked for local administrative tribunals.² While the Second Section attempts to meet the juridical needs of a changing Church, it also reflects the influences of various civil law systems such as the Italian and French administrative courts, though it does not exercise jurisdiction to the same extent.³

In the pastoral constitution Gaudium et spes, n. 75, the Fathers of the Second Vatican Council spoke, with civil society alone in mind, of "a positive juridical order providing for a suitable division of public functions and institutions, and an efficient and independent system for the protection of rights." It was this

¹ Paulus VI, Constitutio Apostolica De Romana Curia "Regimini Ecclesiae Universae", August 15, 1967, in A.A.S., 59(1967), pp. 885-928; hereinafter cited as Regimini.

² "Principia quae Codicis Iuris Canonici recognitionem dirigant", in Communicationes, 1(1969), p. 83. Although the principia postdate the establishment of the Second Section, the sentiments expressed are an indication of the judgement of bishops and canonists that preceded the introduction of Regimini.

³ J. Pinna, "Const. Ap. Regimini Ecclesiae Universae praesentatur et illustratur ab. Exc.mo Joanne Pinna a Secretis Commissionis", in Ap., 43(1970), pp. 55-56.

division of functions within the Church that made possible a similar protection of rights:

It was in the light of these presuppositions that the Constitution Regimini Ecclesiae Universae, which dealt with the reform of the Curia, decreed the establishment of a Second Section within the Supreme Tribunal of the Apostolic Signatura that has authority to settle cases arising from the exercise of ecclesiastical administrative power that have been referred to it because of a recourse or appeal against a decision of the competent department, whenever it is contended that the act itself violates some law.⁴

The purpose of this chapter, then, is to review the competence, procedures, essence and value of this new approach to administrative justice in the Church. This task is undertaken with the ultimate intention of determining the feasibility of introducing such a system at the level of the local Church.

A. Competence of the second section

The distinct nature and competence of the Second Section are spelled out in Regimini Ecclesiae Universae of August 15, 1967 and the Normae Speciales in Supremo Tribunali Signaturae Apostolicae ad experimentum servandae of March 25, 1968.⁵

⁴ John Paul II, "The Judicial Function in the Life of the Church", Address to the Sacred Roman Rota, February 17, 1979, in I.P.S., 24(1979), p. 219; cf. also A.A.S., 71(1979), pp. 422-427; Communicationes, 11(1979), pp. 10-12.

⁵ Normae speciales in Supremo Tribunali Signaturae Apostolicae ad experimentum servandae, March 25, 1968, Typis Polyglottis Vaticanis, 1968, hereinafter cited as Normae speciales; published also in Ap., 53(1970), pp. 249-280; in I.C., 9(1969), pp. 501-520; in Per., 59(1970), pp. 71-161. The last document contains an introduction, sources and observations by I. Gordon.

1. Competence from Regimini

The Apostolic Constitution Regimini established the parameters of the competence of the Second Section:

Through its Second Section, the Apostolic Signatura puts an end to contentions arising from the exercise of ecclesiastical administrative power submitted to it in appeal or recourse against a decision of a competent dicastery as often as it is contended that the act itself violated some law. In these cases it judges both the admission of the recourse and the illegitimacy of the act challenged.⁶

Msgr. Giovanni Pinna, the secretary of the commission that drafted the Apostolic Constitution, indicates three areas of difference between the contentious administrative process introduced to the Church and other civil models. In this new system, recourse is possible only when one assumes that an act of administrative authority has violated a law. Secondly, one may not approach the Second Section of the Signatura directly, but must first go to the competent administrative dicastery. A third difference is that recourse is not had to an administrative tribunal but to a Second Section erected within the Supreme Tribunal of the Signatura.⁷

⁶ "Per Alteram Sectionem Signatura Apostolica contentiones dirimit ortas ex actu potestatis administrativae ecclesiasticae, et ad eam, ob interpositam appellationem seu recursum adversus decisionem competentis Dicasterii, delatas, quoties contendatur actum ipsum legem aliquam violasse. In his casibus videt sive de admissione recursus sive de illegitimate actus impugnati." Cf. A.A.S. 59 (1967), p. 921.

⁷ J. Pinna, loc. cit., pp. 55-56.

2. Competence from the Normae Speciales

The competence of the Second Section was spelled out in a slightly different way in the Normae speciales in Supremo Tribunali Signaturae Apostolicae ad experimentum servandae issued on March 25, 1968. These norms were given originally on an experimental basis for three years but have been extended until a final revision is achieved.⁸ Article 96 of the Normae speciales indicates the competence of the Second Section:

Through the Second Section, the Apostolic Signatura takes cognizance of 1) contentions that have arisen from an act of administrative ecclesiastical power, referred to it by an appeal or recourse placed against a decision of a competent dicastery, whenever a violation of law is alleged [...]

In Regimini, the competence was defined as contentiones dirimit, or to put an end to the grievance, while in the Normae speciales it seems to be reduced to "knowing" or reviewing the administrative act because of the use of the expression cognoscit. This competence, however, appears broad enough to include grievances brought by the general faithful as well as challenges by administrative authorities

⁸ F. Della Rocca, "Il Concilio Vaticano II° e i problemi della giustizia ecclesiastica", in Lex Ecclesiae, p. 546: "Con questa sezione è in corso un esperimento ed è per questo che sono state dettate dal S. Pontefice norme provvisorie che regolamentano la nuova attività della Segnatura? Si è così potenziata ulteriormente, secondo la tradizione, la Signatura Justitiae rispetto alla Signatura Gratiae."; as internal developments take place, some norms have been updated in the internal functioning of the Second Section, but these are not available for public scrutiny.

⁹ "Per sectionem alteram Signatura Apostolica cognoscit: 1) Contentiones ortas ex actu potestatis administrativae ecclesiasticae, ad eam delatas ob interpositam appellationem seu recursum adversus decisionem competentis Discasterii, quoties allegetur legis violatio." Cf. Normae speciales, art. 96.

themselves against a dicastery that has issued a decision contrary to an inferior authority or overturned one.¹⁰

3. Competence as understood from the jurisprudence of the
Second Section

The decisions of the Second Section show that recourse was rejected during the early days of operation because decisions submitted were given by dicasteries before the law of Regimini came into effect. These cases were considered outside the competence of the

¹⁰ Regarding the possibility of the bishop appealing against the dicastery which overturned his administrative act, A. Ranaudo, "Il contenzioso amministrativo canonico", in M.E., 93(1968), p. 562, gives a negative opinion, while I. Gordon, "Normae speciales Supremi Tribunalis Signaturae Apostolicae, Editio, aucta introductione, fontibus et notis", in Per., 59(1970), p. 102, states that both types of appeal are possible, if not, the position of the one in authority would be worse than the one who impugned the decree; Z. Grocholewski, "L'autorità amministrativa come ricorrente alla Sectio Altera della Signatura Apostolica", in Ap., 55(1982), pp. 752-779, also replies affirmatively based on opinions of authors, jurisprudence and reasoned argumentation showing that the provisions of the Normae speciales are not taxative and include this possibility. P.V. Pinto, La giustizia amministrativa della Chiesa, p. 220; P. Valdrini, Conflicts et recours dans l'Eglise, p.22; and C. Lefebvre, De iustitia administrativa in Ecclesia, (pro manuscripto), Romae, (Studium Rotale), 1975, p. 88, all deny the possibility of the bishop's appeal, Pinto in particular emphasises the unity of power as the principal objection. G. Lobina, "La competenza del Supremo Tribunale della Segnatura Apostolica con particolare riferimento alla 'Sectio Altera' e alla problematica rispettiva", pp. 110-111; D. Staffa, "De Supremo Tribunali Administrativo seu de secunda Sectione Supremi Tribunalis Signaturae Apostolicae", in Per., 61(1972), pp. 23-24; both hold that the bishop may have recourse against the dicasteries.

Second Section.¹¹ Other cases of recourse were rejected because they were not against decisions of the dicasteries of the Roman Curia.¹² While the first three decisions published from the Second Section¹³ indicate that the law came into effect on March 1, 1968 and that no decisions previous to that time could be within its competence, it is interesting to note that decision 10 cites January 1, 1968 as the commencing date of the new law.¹⁴

A case that appeared to be outside the competence of the Second Section arose out of a decision given on July 14, 1965. The fact that it was not communicated to the party concerned until March 27, 1969 meant that the act was not complete until that date and the recourse could be received.¹⁵

¹¹ Decisions of May 10, 1968 and May 21, 1968, in Per., 60(1970), pp. 328-330; the reason why the law does not apply to previous cases is an application of the principle of non-retroactivity of law; cf. P. Garcia Manzano, "Problematica del recurso contentioso-administrativo en la Iglesia," in I.C., 12-1(1972), p. 83; A. Vitale, "Differenze e convergenze dei principi della giustizia amministrativa civile e canonica", in M.E., 98(1973), p. 360, criticises the restricted interpretation of nonretroactivity adopted by the Second Section by refusing to take into consideration recourses related to illegality and abuses perpetrated by administrative authorities before the introduction of the new law; G. Delgado, "La actividad de la Signatura Apostolica en su Seccion Segunda", in I.C., 12-1(1972), p. 68, states that the norms governing the function of the Second Section came into force on March 1, 1968. This followed an extension of time from the initial date intended, but meant that any administrative resolution previous to this date could not be subjected to the remedies the new law offered.

¹² Decisions of July 25, 1968 and March 24, 1969, in Per., 60 (1971), pp. 330-331.

¹³ Decisions 1-3, in Ap., 43(1970), pp. 465-466.

¹⁴ Decision 10, in Ap., 44(1971), p. 26.

¹⁵ Decision of January 8, 1972, in Per., 62(1973), pp. 600-606.

a. Conditions regarding acts received

Decision 14 of December 1, 1970 includes a definition of the type of acts that may be submitted to the Second Section:

Administrative canonical acts are understood as those which concern ecclesiastical government, and so are placed by lawful superiors in the Church, whether they be physical persons such as the Roman Pontiff, Bishops and their vicars and delegates, or moral persons, such as Episcopal Conferences or the permanent council of the Episcopate or its offices, v.g., the General Secretariate of the Episcopate acting as such.¹⁶

The same decision speaks of the principle whereby, in Canon Law, administrative acts are not subject to judicial tribunals. The reason given is based on the public nature and the discretionary character of the administrative act which would mean submitting them to a tribunal and having procedures instituted for acts of private individuals.¹⁷

Another decision specifies further conditions necessary before an administrative act can be submitted to the Second Section. The Second Section can act:

A. not against any act, but only against acts coming from the exercise of administrative ecclesiastical power; B. not against any act of whatever administrative power, but against the decision of the competent dicastery, after recourse to the competent dicastery regarding contentions arising from an act of administrative ecclesiastical power of an inferior;

¹⁶ Decision 14, in *Ap.*, 44(1971), p. 612; "Actus administrativi canonici intelliguntur illi, qui ad ecclesiasticam gubernationem spectant, ideoque ponuntur a legitimis in Ecclesia Superioribus, sive sint personae physicae, sicut Romanus Pontifex, Episcopi eorumque vicarii ac delegati, sive sint personae morales, sicut Conferentiae Episcopales aut Consilium permanens Episcopatus eorumve organa, v.g., Secretarius Generalis Episcopatus, qua talis agens."

¹⁷ *Ibid.*, pp. 612-613.

C. as often as it is alleged that the act itself violated some law.¹⁸

b. The parties

Most cases presented to the Second Section already involve at least the plaintiff, the Ordinary or Superior and the competent dicastery of the Roman Curia. In a declaration of November 9, 1970, the Signatura clarified the position of the parties in a case:

It is true that recourse supposes two parties; the one having recourse and the one opposing it. The opposing party in this case is not the Dicastery which issued the impugned decision, but the Ordinary or Superior who placed the administrative act from which the contention arose.¹⁹

While the action appears to be taken against the Dicastery which issued the final decision, it is the original author of the decree, whose action was confirmed, who remains the opposing party to the one who has recourse. The ultimate responsibility rests with the

¹⁸ Decision of November 11, 1969, in *Per.*, 60(1971), p. 332: "A. non adversus quemcumque actum, sed solum contra actus provenientes ex exercitio potestatis administrativae ecclesiasticae; B. non contra quemcumque actum cuiusvis potestatis administrativae, sed adversus decisionem competentis Dicasterii, praevio recursu ad competens Dicasterium ob contentiones ortas ex actu potestatis administrativae ecclesiasticae inferioris; C. quoties contendatur actum ipsum violasse legem aliquam."

¹⁹ Decision of November 9, 1970, in *Per.*, 60(1971), p. 349: "Verum est recursum duas supponere partes; recurrentem et resistentem. Pars vero resistens, in casu, non est Dicasterium quod impugnatam decisionem tulit, sed Ordinarius vel Superior qui actum administrativum posuit ex quo contentio orta est."

local administrative authority and no appeal is available from the decision of the Second Section.²⁰

c. Suspensive effect

The jurisprudence of early decisions reveals the use of analogy of law to establish when a suspensive effect should be granted against the act that was challenged. The terminus a quo of this effect is established as the moment when the recourse is legitimately made and so suspension commences before the acceptance or rejection of the case.²¹

d. Judgements indicate limits of competence

While the law has its own stability, decisions in practical cases depend more on circumstances. The interpretation of law through jurisprudence can and in general does safeguard against the rigor of law.²² The formulation of decisions indicates the

²⁰ "Pratique administrative ou judiciaire des dicastères de la Curie Romaine", in A.C., 16(1972), p. 81: "[...] le recours à la seconde section de la Signature n'est pas à considérer comme une question à résoudre entre la Signature et la Congrégation, qui avait repoussé le recours fait par l'intéressé. En effet, l'opposant au recours n'est pas le dicastère qui a émis la décision attaquée, mais celui dont provient l'acte administratif attaqué; le cas n'est pas identique à celui d'un Tribunal d'appel."

²¹ Decisions 21 and 22 of July 26, 1972, and August 9, 1972, in Ap., 45(1972), pp. 401-402.

²² C. Lefebvre, "L'importanza della giurisprudenza nella difesa dei diritti soggettivi", in La collegialità Episcopale per il futuro della Chiesa, pp. 150-151.

parameters within which the Second Section operates. Recourse is rejected with the formula: "Recursum esse reiciendum, utpote manifeste carentem fundamento."²³ A foundation in law is basic to every case received. Even if the lack of foundation is discovered after acceptance, the recourse will be rejected.²⁴

The more general formula used in decisions reads as follows: "Constare de violatione legis sive in procedendo sive in decernendo [...]", or may be reduced to violation of law "in procedendo" or "in decernendo" alone. Another common formula for decisions is: "[...] irritum esse ob errorem iuris sive in procedendo sive in decernendo [...]". No clear distinction appears to be made between a declaration of nullity of a decree and an annulment of a decree in these formulas. Violation of law alone is the sole reason considered for removing any juridical effect of the administrative act impugned. Since sometimes the violation lies clearly in matters of procedure or in the judgement, or in both, in many cases a more general formula covers both possibilities.

²³ Decision 18, in Ap., 45(1972), p. 396.

²⁴ Decision 10, in Ap., 44(1971), p. 27: In this unique decision given on July 28, 1970, the recourse was admitted for judgement by a decision in Congresso on June 22, 1970. The advocate of the respondent intervened against this admission and it was overturned, so that the recourse already admitted was now rejected. In both cases article 116 of the Normae speciales was cited.

4. Nature of the Second Section

While Pinna did not see Regimini as introducing an Administrative Tribunal to the Church, but rather as organizing a specialised section of the Supreme Tribunal, most subsequent authors hold a variety of opinions on the matter. Card. D. Staffa, the first Prefect of the reorganized Signatura, saw the Second Section as filling a gap in the juridical order of the Church. He made clear that there was no doubt about its status as a tribunal, even calling it the "Supreme Administrative Tribunal".²⁵ For I. Gordon, the sense of the word "Tribunal" was broadened with the introduction of the Second Section, so that one can speak of an organism that is judicial in its first section and administrative in the second.²⁶ Straub sees the position of the Second Section as a compromise when one examines its competence.²⁷ For Spinelli, it is an organism of

²⁵ D. Staffa, "Dissertationes de administratione iustitiae in Ecclesia", in Per., 61(1972), pp. 19-21.

²⁶ I. Gordon, "Normae speciales Supremi Tribunalis Signaturae Apostolicae, Editio, aucta introductione, fontibus et notis", in Per., 59(1970), pp. 90-91.

²⁷ H. Straub, "De obiecto primario competentiae supremi organismi contentioso-administrativi", in Per., 67(1978), p. 550.

special jurisdiction,²⁸ while Coppola²⁹ and Ranaudo³⁰ share a similar opinion. Graziani claims that the Second Section represents the media via between the systems of "single jurisdiction" and "administrator-judge".³¹ Let us examine these various opinions to see what practical conclusions can be drawn.

a. System of double jurisdiction

Bishop Z. Grocholewski speaks of the introduction of a system of "double jurisdiction": one part for controversies between private parties; the other for controversies arising between individuals and public administration.³² P. Valdrini claims that it is called a system of double jurisdiction because of the existence of two separate jurisdictions to judge contentious causes of different na-

²⁸ L. Spinelli, "Sul concetto di funzione amministrativa in diritto canonico", in Studi in onore di Magliocchetti, Vol. 3, p. 1015.

²⁹ R. Coppola, "Normae speciales: Riflessioni sulla istituzione della Seconda Sezione della Segnatura Apostolica", in Ap., 43 (1970), p. 365.

³⁰ A. Ranaudo, "Considerazioni su alcuni aspetti dell'attività amministrativa canonica", in M.E., 93(1968), p. 332.

³¹ E. Graziani, "De supremi organismi contentioso-amministrativi natura", in Per., 67(1978), p. 539.

³² Z. Grocholewski, "La 'Sectio Altera' della Segnatura Apostolica con particolare riferimento alla procedura in essa seguita", in Ap., 54(1981), p. 67, hereinafter cited as "La Sectio Altera".

tures:³³ the first Section of the Signatura constitutes control of judicial activity in the Church, the Second Section control of administrative activity.³⁴

b. Judicial or administrative debate

Authors are divided in their opinions about the nature of the Second Section, some claiming that it is judicial in nature, while others that it is essentially an administrative process.³⁵ While some aspects of its structure and procedures may appear judicial and others administrative,³⁶ the question is one that can only arise out

³³ P. Valdrini, op. cit., p. 65, footnote (6): "On l'appelle 'système de double juridiction' en raison de l'existence de deux juridictions séparées pour connaître des causes contentieuses de nature différente."

³⁴ G. Lobina, "La giustizia amministrativa", in La legge per l'uomo: una Chiesa al servizio..., p. 397: "Con l'istituzione del 'contenzioso amministrativo canonico' si introduce nel nostro ordinamento il sistema della doppia giurisdizione e cioè del foro giudiziale per le cause che vengano trattate ad apicem iuris e che riguardino i diritti soggettivi, del foro amministrativo per le contese derivanti da un atto di potestà amministrativa inferiore e cioè contra i decreta ordinariorum di cui parla il can. 1601, e che sono la maggior parte dopo l'esaurimento della via gerarchica al Superiore Dicastero, posto all'apice della gerarchia ecclesiastica."

³⁵ Authors who hold for the judicial nature of the Second Section are P. Moneta, Il controllo giurisdizionale sugli atti dell'autorità amministrativa nell'ordinamento canonico, pp. 47-50; R. Baccari, "La giurisdizione amministrativa locale nel diritto canonico", in M.E., 98(1973), p. 379; E. Graziani, "De supremi organismi contentioso-amministrativi natura", in Per., 67(1978), pp. 537-544. Those who see the process as administrative are: I. Gordon, "De iustitia administrativa ecclesiastica", in Per., 61(1972), pp. 305-311; P.V. Pinto, op. cit., pp. 41-43, 150-151; and Z. Grochowski, "La Sectio Altera," p. 69.

³⁶ The procedures followed within the Second Section are clearly judicial while the structure of the Congresso and possibility of a non-motivated decision make it more similar to a Congregation.

of pre-conceived categories that are no longer applicable because of the newness and unique nature of this juridical device. It is simply a new category. It may be described in general terms as "judicial-administrative" or "administrative-judicial", but is neither purely judicial nor purely administrative. It is held to be an administrative tribunal by most authors, but is not a copy of any existing civil or ecclesiastical system.

In administration, it is commonly held that the immediate and direct purpose or end of activity is the common good. The mediate and indirect end or purpose is the private good. In judicial activity, however, the immediate and direct end or purpose is the private good of the individual, while the mediate and indirect purpose is the common good.³⁷

With this basis, measured against the compromise position taken by establishing the Second Section of the Signatura, we discover a juridical device that assumes an intermediate position. The immediate and direct purpose of the judgement of legitimacy in the Second Section is to assure the legitimacy of the act and the correctness of administration. The mediate and indirect purpose places both the good of the individual and the common good on the same level, as they are ideally meant to find their proper place in the balance that comes from a guarantee of good administration within the Church.

³⁷ F. Romita, "Fondamenti teologici-giuridici dell'amministrazione ecclesiastica", in M.E., 99(1974), p. 28.

c. A new category

It is not sufficient to speak of a "special jurisdiction" without identifying its specific difference as well as the source of its power. While the recognition of the unity of power in the Pope and Bishops and the separation of legislative, judicial and administrative functions is now accepted in law, this "special jurisdiction" remains an enigma. It is one of the difficulties that emerge from a division of powers or functions that is of its nature imperfect.³⁸

Since a judicial process is normally excluded for most recourses against acts of administrative ecclesiastical power, then the process is clearly not in the line of judicial jurisdiction. But, the process is also beyond the normal administrative processes of the competent dicasteries of the Roman Curia, so it must be classed outside normal administrative recourse. The action of the Second Section is clearly not legislative, so it must then be considered as a very special type of administration. The "Normae speciales" indicate clearly that the Second Section does not have the power of a hierarchical superior over the acts of inferior administrators, but only the right to declare null or rescind their acts of administration and in some cases award damages.

Three possible functions are envisaged in this power, 1) the power to declare an act of administration null, 2) the power to nul-

³⁸ p. Marcuzzi, "Distinzione della 'Potestas Regiminis' in legislativa, esecutiva e giudiziaria", in Sal., 43(1981), pp. 275-304.

lify or rescind an act that otherwise is valid, and 3) the power to award damages. While such power comes under the general title of administration, it is not total administrative power. Specifically, it is the power of "control". Even more specifically it appears to be in the form of a "negative control". Administrative acts are either declared null or annulled, they are not confirmed.³⁹ In some cases damages are awarded, but only when the question of nullity is determined, even though this nullity may not be the principal action. The "control" aspect is intimately linked with the negative decision. Decisions of the Second Section, though final, do not carry with them the executive force of judicial judgements or administrative decisions. They appear to have a "negative executory force" inasmuch as the act impugned, once a negative decision has been given, is considered to have no force in law. The full restoration of justice then, is the task of the original administrator; the task of the Second Section, in this sense is indirect. To be more specific, then, the category of power into which the Second Section appears to fit can be best described as "indirect negative administrative control".

³⁹ The initial norms were broad enough to admit "confirmation" of administrative activity, and early commentaries on the proposed new law included this possibility at the local level; cf. Communications, 4(1972), p. 38: "[...] tribunal administrativum autem potest tantum actum confirmare vel irritum declarare [...]." However, A. Sabattani, "Iudicium de legitimitate actuum administrativorum a Signatura Apostolica peractum", in I.C., 16-2(1976), p. 232, clarifies that "confirmation" is outside the scope of the Second Section: "Nullo modo, enim, iustificatur ex parte organi iurisdictionalis confirmatio provisionis administrativa; eadem confirmatio nihil operaretur nisi confusionem inter distinctas functiones potestatis canonicae; imo periculosa videtur, quia eadem administrativa provisio posset dein illegitima probari ex capite antea non adducto, inde Signatura adigeretur ad irritandum actum a seipsa confirmatum."

B. Procedures before the Second Section

The total process before the Second Section of the Apostolic Signatura has many facets and requirements. While it is the essence of the process that concerns us most particularly here, an overall view of the procedures provides an orientation and perspective of what the system attempts to achieve, indicates some of the limitations, and offers insights for future development of law.

Presuppositions of the present law for cases presented before the Second Section are 1) an act of a competent dicastery that is definitive, and 2) an allegation of violation of law in that act.

1. General aspects of the process

Among the notable characteristics of the procedure are the following: it is secret for all except the parties and their advocates, it is a written process except for a summary oral hearing which is part of the proceedings, and, finally, it is a process that takes on a judicial form although of a somewhat summary nature. Parties appear only through their chosen advocates or those appointed by the Secretary of the Second Section. For the notification of acts, the parties or their advocates should elect a domicile in Rome or the Vatican; otherwise they may be advised through the chancery of the Signatura. Time limits imposed by law are to be observed,

although the Secretary may establish special times in more urgent cases.⁴⁰

2. Introduction of the case

For the recourse to be examined by the Second Section, it must be presented within thirty days from the notification of the act which is the cause of the grievance. For this reason, acts of the Congregations will not be confirmed by the Pope until thirty days have elapsed, so that allowance may be made for an eventual recourse.⁴¹

Specific requirements are indicated for the recourse: 1) the name, domicile or place of residence of the one having recourse, or the title by which one person represents another, 2) the administrative act or decree in question and the date the notification was received, 3) a summary exposition of the facts, the grounds on which the recourse rests, the laws reputedly violated and conclusions, 4) the signature of the party having recourse or of the advocate with a

⁴⁰ Normae speciales, arts. 97-103; E. Labandeira, "El procedimiento contencioso-administrativo ante la Signatura Apostolica", in I.C., 22-1 (1982), pp. 241-245; Z. Grocholewski, "La Sectio Altera," pp. 65-87, p. 77: Grocholewski claims that the process is public for the parties and secret for third parties.

⁴¹ "Regolamento generale della Curia Romana," February 22, 1968, in A.A.S., 60(1968), pp. 129-176, Art. 122: "Le decisioni passibili di ricorso alla II sezione della Segnatura Apostolica, non possono essere sottoposte all'approvazione papale prima che siano trascorsi trenta giorni dalla notifica delle medesime." G. Lobina, "La motivazione dei decreti amministrativi", in M.E., 108(1983), pp. 293-294. Here Lobina claims that Canon 1737,^{s2} CIC 1983 changes the norm of the Regolamento generale della Curia Romana, reducing the time to 15 days for recourse.

special mandate, and in the latter case, proof of the mandate. Without this signature, the recourse is considered invalid; likewise, if the one having recourse or the object of the recourse are not certain. It is the task of the Secretary to assure that the recourse is not null.⁴²

3. Admission or rejection of recourse

The Secretary notifies the ecclesiastical authority involved and other interested parties of the fact of the recourse and invites them to respond to the recourse and provide within thirty days all relevant acts and documentation regarding the case. The one making a recourse is given the opportunity to see the replies and prepare another written statement within thirty days, after which the resisting party has twenty days to provide a new defense. The promotor of justice then gives his votum, pro rei veritate within thirty days. This is communicated to the parties who then have ten days to reply. After twenty days the Congresso meets to decide whether the recourse should be admitted.⁴³

If the recourse is admitted, the next step is the summary oral process whose purpose is to determine the dubium to be answered. If the recourse is rejected, it is because it lacks foundation in a manifestly clear way. The recourse could be 1) null, when one of the

⁴² "Normae speciales, arts. 104-107; Z. Grocholewski, "La Sectio Altera", pp. 88-89.

⁴³ Z. Grocholewski, "La Sectio Altera", p. 91.

essential requisites for recourse is missing, 2) unacceptable, because lodged outside previously accepted time limits, or because the act itself is not subject to this process, or 3) it may manifestly lack foundation in law. Recourse against rejection is made to the judging college and there is no remedy against their decision.⁴⁴

4. Judgement on the recourse

Allowances are made for the Secretary to order further investigations. The dissenting parties may have recourse to the judging Cardinals against this decision. The Cardinal Prefect may request the opinions of legal experts. With due allowance for the technicalities that may arise in individual cases, the College of Judges has sixty days to render its decision from the time the acts of the case are complete. If all the questions cannot be defined, further evidence may be sought and time limits extended so that the decision may be just.⁴⁵

A calculation of time limits indicates that from the act impugned until judgement, the normal time limit is 240 days (See Fig. 1, Appendix).

⁴⁴ E. Labandeira, "El procedimiento contencioso-administrativo ante la Signatura Apostolica", in I.C., 21 (1981), p. 254; Normae speciales arts. 116-117.

⁴⁵ E. Labandeira, loc. cit., pp. 255-256; Normae speciales, arts. 117-123.

5. Execution of judgement

The Normae speciales speak of the judgement of the College of Cardinals, but nothing is indicated regarding the execution of this judgement. Article 126 indicates that for matters not expressly foreseen in the norms, the procedural norms of Book IV, part one, section one, titles III and XIII of the 1917 Code should be applied as far as possible. Neither of these titles refers to the execution of the sentence.

Because of the silence on the part of the legislator, Ranaudo claims that he would not know which juridical institute to approach to give executive force to the decisions of the Second Section of the Signatura as he assumes this to be necessary. He mentions the possibility of going to the hierarchical superior, but has difficulty with this approach since we are dealing with administrative and not juridical power.⁴⁶ Staffa speaks of the disciplinary powers of the Second Section:

As often as it is clear that an authority, neglecting warnings, pertinaciously resists wanting to execute the sentence, the Second Section can also use disciplinary measures or make intercession to the Supreme Pontiff.⁴⁷

⁴⁶ A. Ranaudo, "Brevi note sul giudizio d'illegittimità degli atti amministrativi canonici", in Ap., 44(1971), p. 421.

⁴⁷ D. Staffa, "Dissertationes de administratione iustitiae in Ecclesia", in Per., 61(1972), p. 29: "Quoties revera constet, illam auctoritatem neglectus monitionibus, pertinaciter obsistere velle exsequendae sententiae, Secunda Sectio vias quoque disciplinares adhibere potest aut impetrare a Summo Pontifice."

Coppola also indicates a gap in the law, since no organ is indicated to care for the execution of sentences of the Second Section. He raises another difficulty when he questions what authority might be available to force the Congregations to act in executing decrees of the Second Section.⁴⁸

There is a natural presumption that the parties be informed of the judgement, but no provisions in law are made for this notification. Some argue that if an inferior authority refused to comply or recognise the judgement of the Second Section, this would call for intervention of the competent dicastery of the Roman Curia. As the law stands, it would be theoretically possible for the inferior administrative authority to continue to repeat the acts and have them continually challenged ad infinitum.

Gordon appears to support Staffa in recognising an inbuilt executive force possessed by the Second Section and strengthened by its competence to award damages.⁴⁹ In reality, the respect for the supreme organism of administrative control and its decisions provides a type of automatic executive force to any decision issued. If the decisions do not have more than the force of "indirect negative admi-

⁴⁸ R. Coppola, "Annotazioni in margine all'interpretazione autentica sulla giurisdizione di legittimità nel diritto canonico", in I.D.E., 83(1972), p. 393.

⁴⁹ I. Gordon, "La responsabilità dell'amministrazione pubblica ecclesiastica", in M.E., 98(1973), p. 419: "Finalmente, se l'amministrazione attiva in un modo o nell'altro si rifiutasse di ottemperare alla decisione del Supremo Tribunale, datur recursus ad Apostolicam Signaturam, addita, si res postulet, actione de damnis coram eadem Secunda Sectione."

nistrative control" then a more positive approach could certainly be found if ever it were needed. Present indications are that this form of control is sufficient to make decisions of the Second Section effective.

C. Essence of the process before the Second Section

To understand the essence of the process before the Second Section of the Apostolic Signatura, we need to investigate both the ultimate purpose of this process and the ways this purpose is achieved. The specific nature of the process would distinguish it clearly from the ordinary judicial and administrative processes and provide a vision of what the Church hopes to achieve with this relatively new juridical device.

1. The question of harm

Since the question of harm or damage to the party having recourse has always been an integral part of any previous judicial or administrative process, it is important to establish whether this concept is still included in the provisions of the Second Section. If the concept of harm is excluded, then the process would have no precedent in Church law.⁵⁰

⁵⁰ Ibid., p. 418, footnote 21; Gordon also develops this question of harm in his article "De obiecto primario competentiae 'Sectionis Alterius' Supremi Tribunalis Signaturae Apostolicae", in Per., 68(1979), pp. 505-542; J. Traserra, La tutela de los derechos subjetivos frente a la administracion ecclesiastica, pp. 131-179; here Traserra demonstrates the historical truth of this assertion.

Article 96, 1 of the Normae speciales speaks only of "contentiones" which have arisen out of an act of administrative authority as often as a violation of law has been alleged. The article dealing with the question of the nullity of the act (Art. 103) looks only to the essential elements that make up an administrative act with no mention of extraneous matters. However, among the requirements for a valid recourse, article 106, 3 includes a summary exposition of the facts, reasons supporting the recourse, the laws allegedly violated, and conclusions. There is a clear distinction here between facts, law, and motives that support the recourse. The reasons are not specified, but could be interpreted broadly enough to include harm or serious inconvenience with no need to specify what type of right or interest is affected.

There is a general presumption of some harm, damage, inconvenience or hardship behind every recourse. It appears, in principle, that a challenge could be made solely on the grounds of lack of legality, a provision that could open the door to a new style of legalism. However, the previous mandatory processes before the Sacred Congregations would seem to make this a remote possibility.

Provisions available for possible suspension of execution of an administrative act allow for the recognition of serious motives or furnishing of documents (Art. 108). Again, neither the type of motive nor the seriousness of the motives are specified. In this area there is a need to balance out the good of the community and the

possible irretrievable harm to the individual if the decree is not suspended.

2. Subjective rights and legitimacy

Two separate schools of thought have developed regarding the "primary object" of the process before the Second Section of the Apostolic Signatura. There are those who claim that the competence is double, involving both questions of subjective rights and legitimacy, while the predominant view is that the competence is a determination of the question of legitimacy alone.⁵¹

⁵¹ The principal authors who defend the position that decisions of the Second Section of the Apostolic Signatura are based on legitimacy alone are: E. Bernardini, "L'istituzione della Sectio Altera del Supremo Tribunale della Segnatura Apostolica", in Ius Populi Dei: Vol. 3, p. 49; P. Ciprotti, "La patologia dei provvedimenti amministrativi", in M.E., 99(1974) pp. 101ss; R. Coppola, "Annotazioni in margine all'interpretazione autentica sulla giurisdizione di legittimità nel diritto canonico", in I.D.E., 83(1972) pp. 381ss; G. Delgado, "La actividad de la Signatura Apostolica en su Seccion Segunda", in I.C., 12(1972), pp. 67-82; C. de Diego-Lora, "El control judicial del gobierno central de la Iglesia", in I.C., 11(1971), pp. 340-348; P. Gismondi, "Alcuni problemi sulla giustizia amministrativa nell'ordinamento canonico", in I.D.E., 85(1974), p. 320ss; J. Herranz, "Autorità, libertà e legge nella comunità ecclesiale", in La collegialità Episcopale per il futuro della Chiesa, pp. 100ss; E. Labandeira, "El objeto del recurso contencioso-administrativo en la Iglesia y los derechos subjetivos", in I.C., 20(1980), 2, pp. 151-166; G. Lobina, La competenza del S.T. della Segnatura Apostolica con particolare riferimento alla "Sectio Altera" e alla problematica rispettiva, pp. 61ss; P. Moneta, Il controllo giurisdizionale sugli atti dell'autorità amministrativa nell'ordinamento canonico, pp. 8, 131, where he promotes the generally accepted opinion, while in a later article he claims that legitimacy alone is not sufficient, cf. "Nova configuratio obiecti primarii competentiae supremi organismi contentioso-administrativi", in Per., 67(1978), p. 566ss; P.V. Pinto, op. cit., pp. 127-193; J.M. Pinto Gomez, "Verba 'error iuris in procedendo sive in decernendo' in responso Pontificiae Commissionis Interpretationis", in Per., 67 (1978), pp. 649-655; A. Ranaudo, "Brevi considerazioni su 'l'oggetto

Gordon admits that the opinion of those who hold for only a judgement of legitimacy by the Second Section is in possession at the present time.⁵² He argues that the Second Section has a dual competence, but in fact exercises only one of these competences.⁵³ The basic arguments of Gordon and this first school of thought are based on 1) the constant approach to these matters throughout previous systems, where gravamen or harm was the foundation for any action, 2) the value placed on the analogy with the tribunal used within the Second Vatican Council, 3) an interpretation of the articles of Regimini Ecclesiae Universae, and 4) the practice of the Signatura in the first three years of its operation.

⁵¹ (Cont'd) primario' della competenza spettante alla 'Sectio Altera' della Segnatura Apostolica", in M.E., 105(1980), pp. 102-119; D. Robleda, "Dialogus", in Per., 67(1978), pp. 575-576 stated: "Commissio excludit a competentiā Sectionis alterius meritum in sensu 'discretionality', non autem in sensu facti controversi seu 'laesionis iuris subiectivi'; ac consequenter supponit Sectionem Alteram ita cognoscere quaestionem legitimitatis, ut tamen sinceram defensionem iuris, quod dicitur laesum, non omittat."; F. Romita, "Fondamenti teologico-giuridici della giustizia amministrativa nella Chiesa dopo il Vaticano II", in M.E., 98(1973), p. 341ss; A. Sabattani, "Iudicium de legitimitate actuum administrativorum a Signatura Apostolica peractum", in I.C., pp. 229-243; J. Souto, "El reglamento del Tribunal Supremo de la Signatura Apostolica", in I.C., 9(1969), pp. 528ss; D. Staffa, "Giurisdizione ordinaria e giurisdizione amministrativa", in Ap., 48(1975), p. 443ss; P. Valdrini, op.cit., pp. 75-76.

Those principal authors who hold that the competence of the Second Section of the Apostolic Signatura is both the question of subjective rights and legitimacy are: I. Gordon, "De obiecto primario competentiae 'Sectionis Alterius' Supremi Tribunalis Signaturae Apostolicae", in Per., 68(1979), pp. 503-542, hereinafter cited as "De obiecto primario," even though he admits that the other opinion is in possession (p. 521); H. Straub, "De obiecto primario competentiae Supremi Organismi contentioso-administrativi", in Per., 67(1978), pp. 547-557; J. Traserra, "Dialogus", in Per., 67(1978), pp. 573-574; to these may be added a variety of opinions of those who propose that changes are needed.

⁵² I. Gordon, "De obiecto primario," in Per., 68(1979), p. 521.

⁵³ Ibid, p. 538, footnote 3.

Gordon and Traserra,⁵⁴ together with all who have studied the historical development of defense of rights in the Church reach a clear conclusion that previous systems of justice found their basis in some gravamen or harm. Despite the deficiencies of processes before the Congregations where there was no publication of acts or use of advocates, the basis remained the same. These writers argue from texts of Vatican II, the principia enuntiated for the new Code and the desires of the Synod of Bishops, that the basic purpose must be the "defense of rights".⁵⁵ While the clear mandate is the defense of rights harmed by administration, the manner, direct or indirect, in which they are defended is a separate question, so the defense of rights and the primary object of the Second Section need not necessarily be the same, yet the end result can still be defense of rights.

Because the Secretary (Pinna) of the Pontifical Commission which drew up Regimini ecclesiae universae, alluded to its similarity with the Tribunal used within the Second Vatican Council, Gordon argues that the Second Section like this one, has a dual compe-

⁵⁴ J. Traserra, op. cit., 202 p. The author, a student of Gordon, develops this idea throughout the historical period from 1814-1967 in this doctoral thesis.

⁵⁵ It is to be noted that the approval of the principia followed shortly after the introduction of the "Second Section", so cannot be considered the guiding motivation behind its development. However, the contemporary nature of "Regimini ecclesiae universae" and the principia indicate a unity of intent that existed at that time and still continues. The vote of the bishops was in favor of procedures to safeguard subjective rights, it was not an imposition of a particular system, but rather a directive guideline; cf. Communicationes, 1(1969), pp. 99-100.

tence.⁵⁶ The analogy does not indicate that the procedures followed should be identical and is only partial in that the Second Section may only receive cases after they have run their course through the dicasteries of the Roman Curia. The tribunal of the Council was administrative but had a much broader and only temporary competence.

Gordon argues that articles 96, 118, 120 and 122 of the norms make no reference to a competence of legitimacy, but only to "violation of law" as the necessary prerequisite for introduction of a case. Where art. 122, §1 speaks of deliberation on "merit" and about giving decisions on all petitions, Gordon understands this to mean the resolution of controversies on subjective rights. But clearly, "merit" here has a second sense meaning investigation of the facts.⁵⁷

Gordon's final argument is taken from the jurisprudence of cases between 1968 and 1971 which he claims dealt with subjective rights. The experimental nature of the norms guiding the Second Section meant that changes and gradual clarifications were to be part of its mandate. The practice of the early years does not indicate the definitive nature of the emergent organism whose mandate was given ad experimentum.

The fact that judicial power normally resolves conflicts directly and immediately does not mean that the Second Section must

⁵⁶ I. Gordon, "De obiecto primario", pp. 532-535.

⁵⁷ A. Ranaudo, "Brevi considerazioni su l'oggetto primario della competenza spettante alla Sectio Altera della Segnatura Apostolica", in M.E., 105(1980), pp. 106-107.

do it this way. The expectations of the Synod of bishops regarding both the Second Section's defence of rights and its actual practice, defense of rights by control over acts of administration, differ clearly. This brings us to a deeper question concerning the nature of the process based on legitimacy alone.

3. Legitimacy or violation of law as the basis

The anomaly of human religious law is that it tries to combine the objectivity of law with the subjectivity of the christian life. Law, as a normative expression of social order needs the security of being objective and formal, but at the same time is faced with the dilemma of providing for the subjective freedom and religious spontaneity of its members. A point of balance must be found between the lack of truth of a juridical system based on freedom of religious option and the lack of authenticity of a christian life capable of being contained in objective norms.⁵⁸

a. A choice for objective law

The Church has traditionally chosen an objective approach to law, not to deny subjective rights, but because it has seen the measure of subjective rights to be found in objective law as lived by a

⁵⁸ J. Setién, "Persona umana e tutela dei suoi diritti nell'ordinamento canonico", in La collegialità episcopale per il futuro della Chiesa, pp. 115-119.

particular person.⁵⁹ The anomaly of law and freedom is overcome by the Church's strong emphasis on "equity" and an insistence on the "pastoral" nature of its law and judgements.⁶⁰

Since no systematic and complete formulation of the rights of persons exists within the Church, we have a situation where the gaps in law indicate a lack of doctrinal and legislative maturity. Setién speaks of the metajuridical quality of the fundamental rights of the human person. To treat the metajuridical could open the law to arbitrary processes that refer to unwritten or non-formulated norms. The approach of positive law overcomes this accusation of arbitrariness.⁶¹

The approach of the Second Section is that of positive law. All reference to a determination of the subjective rights of the parties is suppressed and the sole object of the Second Section revolves around the question of the legitimacy of the administrative act.⁶² The violation of objective law is the basis because of the

⁵⁹ R. Schwarz, "Circa naturam iuris subiectivi", in Per., 69 (1980), pp. 193-194: "[...] mensura iuris subiectivi semper in iure obiectivo habetur, scilicet in re dumtaxat iusta quae ultimam fundatur in hominis natura sociali a Deo creata et reparata."; p. 195: "Ius subiectivum est relatio, facultas exigendi, pars iuris obiectivi."; A. Van Hove, Prolegomena ad Codicem Iuris Canonici, Vol. 1, p. 6: "Sensu subiectivo est illud ipsum ius obiectivum prout existit in aliqua persona et ad ipsam pertinet."

⁶⁰ Paul VI, "The Value of Canonical Equity", Address to the Rota, February 8, 1973, in I.P.S., 18(1973-1974), pp. 75-82.

⁶¹ J. Setién, loc. cit., p. 113.

⁶² E. Labandeira, "La Signatura Apostolica y los Tribunales administrativos", in I.C., 20-2(1980), p. 681.

virtual impossibility of determining all subjective rights.⁶³

b. Meaning of "violation of law"

In the interpretation of the meaning of "violation of law", early commentators brought an element of confusion as they adopted the Italian terminology in which "violation of law" was just one of three categories that also comprised incompetence and abuse of power.⁶⁴ The use of Italian terminology brought a restrictive understanding of violation of law.⁶⁵ Since a restrictive understanding could mean restriction in defense of rights, most authors have adopted a broad interpretation of "violation of law".⁶⁶

Gordon, aware of the prehistory of the Second Section claims that the solution proposed in this system, the jurisdiction of legitimacy, is a compromise solution that explains the obscurity of article 106 of Regimini ecclesiae universae.⁶⁷ Arias Gomez agrees that

⁶³ C. de Diego-Lora, Poder jurisdiccional y función de justicia en la Iglesia, p. 116.

⁶⁴ I. Gordon, "Normae speciales Supremi Tribunalis Signaturae Apostolicae, editio, aucta introductione, fontibus et notis", in Per., 59(1970), p. 104.

⁶⁵ P. Moneta, "L'illegittimità del provvedimento amministrativo canonico", in E.I.C., 28(1972), p. 186, hereinafter cited as "L'illegittimità".

⁶⁶ C. Morviducci, "La violatio legis nel diritto amministrativo ecclesiastico", in Ap., 52(1979), pp. 479-480; among the principal proponents of the broad interpretation of "violation of law", Morviducci cites Ranaudo, Moneta, Ciprotti, Coppola and Staffa.

⁶⁷ I. Gordon, "De obiecto primario competentiae", pp. 511, 521.

there was no previous body of law that had as its mandate to examine the principle of legality.⁶⁸

The authors who hold that the competence of the Second Section rests on the question of "legitimacy" base their arguments on the clarity of Regimini ecclesiae universae and the Normae speciales. To this they add the clarifications of the Commission for interpretation in 1971,⁶⁹ the writings of those closely involved with the Second

⁶⁸ J. Arias Gomez, "El principio de legalidad en la reforma del libro V del C.I.C.", in I.C., 18(1978), p. 317: "[...] no existía un cuerpo de doctrina sobre la incidencia de principio de legalidad en el ordenamiento canónico [...]."

⁶⁹ Pontificia Commissio Decretis Concilii Vaticani II Interpretandis, "Responsa ad proposita dubia" (11 ianuarii 1971), in A.A.S., 63(1971), pp. 329-330: "1) D. - Utrum recurri possit ad Supremum Signaturae Apostolicae Tribunal - Sectionem Alteram - adversus decisionem competentis Dicasterii, quoties defuerit decisio ex parte auctoritatis ecclesiasticae inferioris. R. - Affirmative. 2) D. - Utrum admissio ad disceptationem illico communicanda sit parti dumtaxat ex adverso interesse habenti, an etiam competenti Dicasterio, quod impugnatam decisionem tulit. R. - Negative ad I^{um}; affirmative ad II^{um}; seu admissionem ad disceptationem illico communicandam esse, praeter quam parti ex adverso interesse habenti, etiam competenti Dicasterio, quod impugnatam decisionem tulit. 3) D. - Quid intelligendum sit per comma quoties contendatur actum ipsum legem aliquam violasse, de quo in n. 106 Constitutionis Apostolicae Regimini Ecclesiae Universae. R. - Pro violatione legis intelligi errorem iuris sive in procedendo sive in decernendo. 4) D. - Utrum in casu de quo in dubio tertio, Supremum Signaturae Apostolicae Tribunal - Sectio Altera - videat tantummodo de illegitimitate actus impugnati an etiam de merito causae. R. - Affirmative ad I^{um}; negative ad II^{um}; seu Supremum Signaturae Apostolicae Tribunal - Sectionem Alteram - videre tantum de illegitimitate actus impugnati."

Section,⁷⁰ the totally new nature of the process not modelled on any civil law system,⁷¹ and finally, the jurisprudence of the Second Section itself.⁷²

An investigation or judgement of legitimacy places limitations on the comprehensive nature of the judgement before the Second Section. Only the elements that constitute the administrative act are subject to judgement. What is excluded is the discretionary power of the bishop. The convenience, opportunity, or prudence of a bishop's actions are outside the scope of a judgement of legitimacy.⁷³

A clarification of article 106 of Regimini in the authentic interpretation of 1971 indicates that for "violation of law" is to be

⁷⁰ D. Staffa, "De Suprema Tribunali Administrativo seu de Secunda Sectione Supremi Tribunalis Signaturae Apostolicae", in A.K.K., 140(1971), pp. 507-514; id., "Dissertationes de administratione iustitiae in Ecclesia", in Per., 61(1972), pp. 3-29; id., "De tutela iudiciali administrativa i.e. de iustitia administrativa apud S. Tribunal Signaturae Apostolicae deque ordinatione Tribunalium Interdiocesanorum", in Per., 63(1974), pp. 169-177; id., "Giurisdizione ordinaria e giurisdizione amministrativa", in Ap., 48(1975), pp. 441-447; id., "De distinctione inter iurisdictionem ordinariam et administrativam in iure canonico", in E.I.C., 31(1975), pp. 209-213; id., "Supremus organismus contentioso-administrativus", in Per., 67(1978), pp. 523-524; A. Sabattani, "Iudicium de legitimitate actuum administrativorum a Signatura Apostolica peractum", in I.C., 16-2(1976), pp. 229-243; P. Felici, "Norma giuridica e 'pastorale'", in I.C., 16(1976), pp. 15-22; Card. Felici was also the author of the 1971 reply; Z. Grochowski, "La Sectio Altera", pp. 65-110.

⁷¹ There is considerable confusion generated as many canon lawyers interpret the provisions of the Second Section of the Signatura using civil law terminology.

⁷² Cf. Bibliography of this thesis for a complete list of jurisprudence available.

⁷³ A. Sabattani, loc. cit., p. 231.

understood an error of law either in procedures or in judgement.⁷⁴ Sabattani attests that, despite the comments of Gordon on judgements previous to the authentic interpretation⁷⁵ that strayed from this interpretation, any subsequent decision is to be made purely on the basis of the question of legitimacy.⁷⁶

According to Baccari, the jurisdiction of legitimacy is not exercised in deciding which of the parties is entitled to a particular right, but rather, in examining the administrative act itself. This act may be opportune for the common good, although the formalities of the law were not carried out or were violated. When rescinded by the Second Section the administrative decree may be carried out anew, but according to the law in a way that avoids this illegitimacy.⁷⁷

Sabattani, following the lead provided by Moneta,⁷⁸ gives what may be considered the most comprehensive list of the extent of laws that are to be considered when a judgement of violation of law is in question.⁷⁹ He mentions the following:

⁷⁴ Cf. supra, footnote 69.

⁷⁵ I. Gordon, "De iustitia administrativa ecclesiastica", in Per., 61(1972), pp. 329-339.

⁷⁶ A. Sabattani, loc. cit., p. 233.

⁷⁷ R. Baccari, "Dialogus", in Per., 67(1978), p. 577.

⁷⁸ p. Moneta, Il controllo giurisdizionale sugli atti dell'autorità amministrativa nell'ordinamento canonico, pp. 155-162; id., "L'illegittimità", p. 200.

⁷⁹ A. Sabattani, loc. cit., p. 237.

- a) canonical laws from any authority endowed with legislative power,
- b) civil laws canonised by canon law,
- c) concordats entered into by the Holy See with individual nations,
- d) customs within the stated limits,
- e) principles of positive divine and natural law which may not be contained expressly in Church law,
- f) suppletory norms of canon law,⁸⁰
- g) properly approved statutes and constitutions or precepts given to individuals,
- h) orders or regulations, norms given by administrative authorities in the concrete application of law.

iii. Linking violation of law and rights

J. Herranz defines the principle of legality as: "the submission to law of those who are governing in the exercise of their power in order to avoid abuse of power, indifference or dereliction in the exercise of authority."⁸¹ This definition contains the notion of a responsibility that is juridically accountable in the exercise of government. Traditionally, administrative activity has been the area

⁸⁰ P. Moneta, "L'illegittimità", p. 203: Moneta indicates that recourse to supplementary norms can prove to be difficult provoking continuous uncertainty about the legality of administrative action.

⁸¹ J. Herranz, "De principio legalitatis in exercitio potestatis ecclesiasticae", in Acta Conventus Internationalis Canonistarum, (Romae 20-25 mai, 1968), p. 224: "Nomine principii legalitatis intelligimus submissionem gubernantium erga ius in exercitio potestatis, ita ut vitetur tum abusus potestatis tum incuria et derelictio in exercitio auctoritatis. Hoc principium secum fert ideam responsabilitatis iuridice exigibilis in activitate gubernii [...]."

considered to enjoy its proper spontaneity and freedom in procedures and, in contradistinction to the judge, the administrator could not be forced to act. This freedom favours arbitrariness, so the safeguarding of the possession and exercise of the rights of the faithful demands guarantees that can be supplied by the principle of legality.⁸²

In mentioning the two presuppositions for recourse to the Second Section, the definitive act of a competent dicastery and alleged violation of law, Staffa focuses on the administrative act that brought about the conflict and which can be attacked. He then speaks of violatio legis seu iuris as if the violation of the law and of someone's right were synonymous. It is this identification of violation of law and rights that appears to be the underlying presumption of this new law.⁸³ Straub objects:

Legislation which makes the question of subjective right depend on the question of illegitimacy, causes confusion and does not correspond to the true necessity of protecting subjective rights.⁸⁴

Straub claims that every violation of a subjective right is a violation of law, but the contrary is not necessarily true.⁸⁵

⁸² Ibid., p. 234.

⁸³ D. Staffa, "Supremus organismus contentioso-administrativus in Ecclesia", in Per., 67(1978), p. 523.

⁸⁴ H. Straub, loc. cit., p. 553: "Legislatio quae quaestionem iuris subiectivi a quaestione illegitimitatis dependere faceret, revera confusionem gigneret nec verae necessitati iura subiectiva tuendi corresponderet."

⁸⁵ Ibid., p. 556: "Omnis enim violatio iuris subiectivi est violatio legis, non necessario autem viceversa."

Robleda counters that if there is a violation of law, and if the recourse is admitted, it is because in one way or another there is harm done to a subjective right.⁸⁶ Diego-Lora goes even further to say that a violation of a norm of objective law that is not also a violation of a subjective right does not give rise to judicial action.⁸⁷ Labandeira unites the two aspects making them inseparable in administrative law:

[...] in canon law, the impugned administrative acts almost always affect subjective rights; however at one time the subjective right is the principal question on which the legitimacy of the act depends; at other times, the legitimacy of the act is the principal question on which the subjective right depends.⁸⁸

Subjective rights, then, are assured as a consequence of the legitimacy of the administrative act.⁸⁹ The decision covers both legitimacy and subjective rights. Any defects in the system are corrected in the awarding of damages.⁹⁰

⁸⁶ O. Robleda, "Dialogus", in Per., 67(1978), pp. 575-576: "Proinde videtur quod ex violatione alicuius legis, si admittatur recursus est quia uno vel alio modo laesio alicuius iuris subiectivi habetur."

⁸⁷ C. de Diego-Lora, Poder jurisdiccional y funcion de justicia en la Iglesia, p. 110.

⁸⁸ E. Labandeira, "El objeto del recurso contencioso-administrativo en la Iglesia y los derechos subjetivos", in I.C., 20-2(1980), p. 157: "[...] en el Derecho canónico los actos administrativos impugnados casi siempre afectan a derechos subjetivos; pero unas veces el derecho subjetivo es la cuestión principal, de la cual depende la legitimidad del acto; y otras, la legitimidad del acto es la cuestión principal, de la que depende el derecho subjetivo."

⁸⁹ Ibid., pp. 162-164.

⁹⁰ Communicationes, 4(1972), p. 37.

Paul VI opted for a Second Section rather than an ordinary tribunal. Regimini ecclesiae universae and the Normae speciales suppressed all reference to the subjective juridical situation of those under administration and limited the object of the Second Section to judgement of the legitimacy of the act alone.⁹¹

Staffa states that the purpose of the Second Section is to safeguard efficiently the rights of individuals and the correct observance of law by executive power.⁹² Moneta makes the logical deduction that in this form of control, administration is the primary focus, justice is secondary.⁹³ Coppola meanwhile, sees the "jurisdiction of legitimacy" as a system that does not compromise the communion of the Church as was the case in the systems of "single jurisdiction" and "administrator-judge" which favoured either the appellant or the administration, at least in theory.⁹⁴

⁹¹ E. Labandeira, "La signatura Apostolica y los tribunales administrativos", in I.C., 21(1981), p. 681.

⁹² D. Staffa, "Dissertationes de administratione iustitiae in Ecclesia", in Per., 61(1972), p. 20: "[...] cuius est efficaciter singulorum iura tueri rectamque a potestate exsecutiva legis observantiam."

⁹³ P. Moneta, "I collaboratori e i responsabili del provvedimento amministrativo", in M.E., 99(1974), pp. 81-95.

⁹⁴ R. Coppola, "Annotazioni in margine all'interpretazione autentica sulla giurisdizione di legittimità nel diritto canonico", in I.D.E., 83-1-2(1972), p. 383.

4. Discretionary power

Strictly connected with the concept of common or public good, or good of souls, is the concept of "responsible discretionary power". It is in the public interest that administrators, working in the most varied sectors have the maximum elasticity and possibility of adaptation to any particular situation encountered. This indicates a wide possibility of choice where the juridical order makes no determinations or does not establish in detail the means, time nor ways to handle a particular negotiation. The responsible use of discretion keeps in mind the public good, taking into account all the circumstances inherent in the concrete situation. This discretion entails prudence and wisdom and is a question of evaluation of the opportunity and usefulness of an administrative act:⁹⁵

[...] the complexity of administrative activity is not exhausted in the application of technical norms and norms of good administration. It is imbued with political and spiritual values which foreshadow these norms and determine the parameters of their application.

In other words, there are basic choices that cannot be determined 'a priori', but derive from concrete attitudes of responsible offices and influence the executive activity or that of government.⁹⁶

⁹⁵ G. Lobina, La natura giuridico-pastorale e l'ampiezza dell'esame di merito da parte dell'autorità amministrativa superiore di un provvedimento amministrativo, pp. 9-11.

⁹⁶ "[...] La complessità dell'attività amministrativa non si esaurisce nella applicazione di norme tecniche e di buona amministrazione, ma è imbevuta di valori politici o spirituali preesistenti alle stesse norme e ne determinano l'ambito d'applicazione.

Perciò, non esiste una regola previa che stabilisca a priori quale sia il comportamento preferibile che la Pubblica Amministrazione deve adottare." Cf. ibid., p. 11.

a. Errors - an ordinary part of administration

Administration in the Church is part of the human activity that of necessity is subject to all the foibles of human nature. Within this framework, there exist human factors that are controllable and must be corrected to guarantee justice. There are other human factors that of necessity are not subject to control.

The Directory on the Pastoral Ministry of Bishops presents many guidelines for the exercise of Episcopal authority that incorporate the virtues of good administration.⁹⁷ But to err is human,⁹⁸ and even with the best of intentions the rights of those who are subject to administrative authority may be harmed.⁹⁹ Justice demands that rights harmed should be restored, so the Church administrator must expect the possibility of having his administration challenged to be a built-in part of a healthy administrative system.

Within the processes of the Second Section, a way has been found to challenge acts of administration prescinding from all questions of guilt. The jurisprudence makes no mention of intentional or

⁹⁷ Sacred Congregation for Bishops, Directory on the Pastoral Ministry of Bishops, (May 31, 1973), (English Translation), Ottawa, Canadian Catholic Conference, 1974, Articles 32-38, pp. 21-23.

⁹⁸ G. Lobina, op. cit., p. 13.

" ⁹⁹ D. Staffa, "Dissertationes de administratione iustitiae in Ecclesia", in Per., 61(1972), p. 19: "Fieri enim potest, ut variae partes administrationis, quamvis sincerissima fide rectaque intentione operentur, iura laedant sive Christifidelium sive membrorum cleri diocesani vel religiosi."; p. 24: "[...] S. Dicasterium potest - omnes errare possumus! - ius alicuius violare, id est, incidere in legis violationem ad quam reparandam Secunda Sectio instituta est [...]."

unintentional violation of law, it judges only the facts. A decision of the Congresso, on November 22, 1969, established that the vice of the will is absorbed in the general definition of "error of law".¹⁰⁰

Lobina claims that the purpose of administrative justice is to assure the good use of discretionary power. Once an act is outside the limits of a just discretionary power it is subject to challenge.¹⁰¹

b. Activity outside the scope of control

It is eminently clear that the personality and attitudes of administrators are outside the scope of juridical control. It is equally clear that this is the area where many unresolvable problems seem to occur. Apart from personality and attitudes, there is an area where the administrator must be free. There are occasions when he must use his discretion or prudence; there are times when he must make a choice between two or more actions any of which fulfill the law. Local conditions, secret knowledge, a special set of conditions sometimes permit, sometimes demand, that his administration be exercised within certain boundaries of freedom. In law, this discretionary power is referred to as a question of "merit", and is not directly subject to judgement within the processes of the Second

¹⁰⁰ M. Cardinale, "L'error iuris nella giurisprudenza della Sectio Altera", in Ap., 54(1981), pp. 119-120.

¹⁰¹ G. Lobina, "La giustizia amministrativa", in La legge per l'uomo: una Chiesa al servizio..., p. 384.

Section except by Papal Commission, although it is subject to processes before the dicasteries of the Roman Curia.

In replying to those who wanted to see some moderation of the discretionary power of bishops, Sabattani stated that this was impossible:

[...] for the judgement of appropriateness, opportunity and prudence in any decision to be given cannot be prescribed; only the limits of legitimacy can be determined and within these limits more than one decision can emerge.¹⁰²

The superior who does not exceed these limits, will never be disquieted by the Apostolic Signatura nor any future Administrative Tribunal, because discretionary power belongs to him, that is the faculty of selecting among possible provisions which satisfy a particular condition of things, that act of government which he judges most apt in his pastoral prudence.¹⁰³

Coppola gives as justification for exclusion of the judgement of merit, the need for the judge not to prejudice the actions of the dicasteries of the Roman Curia.¹⁰⁴ Because discretionary power should not be arbitrary, it is the task of the hierarchical superior to make the judgement of the "merit" of the act and deal with any

¹⁰² A. Sabattani, loc. cit., p. 231: "[...] nam iudicium congruentiae, opportunitatis et prudentiae in aliqua decisione ferenda non potest praefiniri; possunt tantummodo determinari fines legitimitatis intra quos tamen non una tantum decisio enasci potest."

¹⁰³ Ibid., p. 242: "Superior qui huiusmodi fines non excedit, nunquam inquietari poterit a Signatura Apostolica vel ab aliis futuris Tribunalibus Administrativis, quia illi competit potestas discretionalis, seu facultas seligendi intra possibiles provisiones, quibus satisfit alicui rerum conditioni, illum actum gubernii quem aptiorem iudicat in sua pastorali prudentia."

¹⁰⁴ R. Coppola, "Annotazioni in margine all'interpretazione autentica sulla giurisdizione di legittimità nel diritto canonico", in I.D.E., 83(1972), p. 395.

vices which emerge. It is not the task of the Second Section to make judgements of the exercise of prudence.

The sense of "merit" that is included in administrative cases before the Second Section includes a profound investigation of the facts that form the basis of the impugned act. This includes facts that are essential to the case and the real conditions or circumstances surrounding the act, all of which must be analysed for a correct judgement.¹⁰⁵

D. A new approach to administrative justice

Although the canonical tradition was different before the 1917 Code,¹⁰⁶ current canon law recognises two basic forms of nullity. An act that is null must have that nullity declared; an act that otherwise is valid, can, under certain circumstances be rescinded or annulled.

¹⁰⁵ A. Ranaudo, "Brevi considerazioni su 'l'oggetto primario' della competenza spettante alla 'Sectio Altera' della Segnatura Apostolica", in M.E., 105(1980), pp. 102-103, 106-107; p. 116: "[...] merito equivale a conoscere tutto cio che puo riguardare l'eventuale error iuris sive in procedendo sive in decernendo [...]."

¹⁰⁶ P. Valdrini, Injustices et protection des droits dans l'Eglise, pp. 155-346; the author elaborates in depth the varying approaches through the centuries with special emphasis on questions of nullity and error.

1. Nullity and rescindibility in law

Roberti describes a null act as one that has the appearance of an act, but because of the vice under which it labours cannot be upheld nor bear juridical effects.¹⁰⁷ If an act is null, it is because of reasons expressed in law: "Only those laws are to be considered invalidating or incapacitating which expressly prescribe that an act is null or that a person is incapable."¹⁰⁸ Sabattani indicates that this nullity must be declared by a judge, otherwise the lapse of time, or tacit approval, or consent of those involved may lead to its sanation.¹⁰⁹

Both the 1917 and 1983 Codes give reasons for the possible rescission of an act that in itself is valid. Fear, deceit, ignorance and error can all constitute grounds for rescinding an act. The canons are clear:

Can. 125 s2, CIC 1983: An act performed as a result of fear which is grave and unjustly inflicted, or as a result of deceit, is valid, unless the law provides otherwise. However, it can be rescinded by a court judgement, either at the instance of the injured party or that party's successors in law, or ex officio.

Can. 126, CIC 1983: An act is invalid when performed as a result of ignorance or of error which concerns the substance of the act, or which amounts to a condition sine qua non; otherwise it is valid, unless the law provides differently. But an act done as a result of ignorance or error can give rise to a rescinding action in accordance with the law.

¹⁰⁷ F. Roberti, De processibus, Vol. 1, p. 621, n. iv: "Nullus dicitur actus qui specie quidem apparet, sed ob vitium quo laborat, non sustinetur, nec parit effectus iuridicos."

¹⁰⁸ Canon 10, CIC 1983.

¹⁰⁹ A. Sabattani, loc. cit., p. 233.

Apart from these provisions, the 1983 Code has a provision repeated from canon 162 §2 CIC which appears to be based not so much on fear, deceit, ignorance or error, but rather on respect for the rights of the individual as well as good order in the Church. The question regards elections:

If someone who should have been summoned was overlooked and was therefore absent, the election is valid. However, if that person insists and gives proof of being overlooked and of absence, the election, even if confirmed, must be rescinded by the competent authority, provided it is juridically established that the recourse was submitted within no more than three days of having received notification of the election.¹¹⁰

The election, duly confirmed, must be considered valid. The overlooked summons provides an example of an administrative act omitted or incomplete that is harmful to a person's right to elect. The presumption of validity according to canon 124 §2 CIC 1983, is upheld, but yields to the challenge that is proven and permitted in law. The general law regarding a quorum for elections protects from major abuses. If more than a third of the voters were overlooked, the election is invalid, unless those overlooked were actually present.¹¹¹ In this whole process, based on a question of legitimacy, no question of guilt is raised, but rights are restored by a new legitimate process of election.

In the 1917 Code, provisions were even made for actions involving fear, fraud and error where damage from contracts was ultra dimidium. These actions were to take place within two years. Resti-

¹¹⁰ Canon 166 §2, CIC 1983.

¹¹¹ Canon 166 §3, CIC 1983.

tutio in integrum could be petitioned before the ordinary judge in cases of damage involving minors up to four years from the attainment of majority.¹¹² These provisions are not included in the 1983 Code.

2. Nullity and rescindibility in the Second Section

If we look to the practice of the Second Section, we find that the question of nullity is fundamentally a declaration. Under normal circumstances, the expertise of the Sacred Congregations would rarely be expected to allow such a case of nullity to pass their scrutiny and reach the Second Section.¹¹³

The Normae speciales do not speak of the double possibility of, 1) a declaration of nullity, or 2) rescission of illegitimate acts. The terms are more general:

The nullity of any processual act then, may only be declared when those elements are lacking in the act itself which are necessary for it to achieve its purpose [...]¹¹⁴

Staffa indicates that not every violation of procedural law brings about a nullity of the procedural act.¹¹⁵ Article 103 of the norms states that if an act achieves its purpose, it is not to be

¹¹² Canons 1684-1689, CIC.

¹¹³ A. Sabattani, loc. cit., pp. 233-234.

¹¹⁴ Normae Speciales, art. 103.

¹¹⁵ D. Staffa, "Supremus organismus contentioso-administrativus in Ecclesia", in Per., 67(1978), p. 529.

challenged.¹¹⁶ A determination, then, of the basis for action appears to become more restricted.

a. Basis for rescission or annulment of acts

At first sight, it appears that the basis for rescission or annulment of an administrative act, apart from cases of clear nullity, must lie in the harm done to the party. However, there is no objective measure for determining harm and no requirement in law that real harm be suffered. Staffa makes a logical presumption that the reason for the recourse is the harm suffered and any other reason would only introduce a concept of legalistic gymnastics whose motivations are totally foreign to the purposes of the law.¹¹⁷

Labandeira cuts through the many problems of other authors by distinguishing a subjective and an objective basis for recourse. The subjective basis or motivating force is the existence of harm or damage to a person's right or the fact that someone feels harmed by a decision. The objective basis is the alleged violation of law. The fundamental basis required for acceptance by the Second Section is the fumus boni iuris relating to the alleged violation of law or illegitimacy of an administrative act. The conditions, that the act

¹¹⁶ Normae Speciales, art. 103: "Nullitas alicuius actus processualis tunc tantum potest declarari, quando in actu ipso ea deficient, quae ad finem assequendum sunt necessaria, nunquam vero si actus reapse finem attigerit ad quem ordinatus est."

¹¹⁷ D. Staffa, "Dissertationes de administratione iustitiae in Ecclesia", in Per., 61(1971), p. 26: "Ad Secundam Sectionem recurrere potest quisque [...] suum ius violatum censeat actu potestatis administrativae ecclesiasticae."

emanating from the activity of administrative ecclesiastical power be subject to a decision of a competent dicastery of the Roman Curia and also be a definitive act, are presumed.¹¹⁸

b. A new form of invalidity

Since the only requirement is that there be a violation of law, and no question of the seriousness of the law is raised, the logical deduction is that even the most minute violation of law could be sufficient to overturn the act of an administrator. This appears to be legalism in the extreme, given the human factor in Church administration. It could conversely be construed as an absolute guarantee of correctness in Church administration.

In the 1917 Code, an act that was in itself valid could only be rescinded under certain circumstances involving fear, fraud or

¹¹⁸ E. Labandeira, "El objeto del recurso contencioso-administrativo en la Iglesia y los derechos subjetivos", in I.C., 20-2(1980), p. 153; P. Garcia Manzano, "Problematica del recurso contencioso-administrativo en la Iglesia", in I.C., 12-1(1972), p.84.

error.¹¹⁹ The rescissory action of the Second Section incorporates a total change from this position. It is not a simple extension of this provision where the basis for rescission is the harm done to the party. There is no need to prove that harm has been done, but only that the act was illegitimate. It appears that a totally new law has been introduced to the Church. Moneta holds that canon 11 CIC¹²⁰ cannot be applied to the legitimacy of acts emanating from administrative authority after the institution of the Second Section. This special form of nullity finds its positive regulation only in the laws which govern the Second Section. The administrative act is to be considered illegitimate every time it violates a disposition of law. There is no element that leads us to hold that such a violation should involve a lex irritans which contains expressly or equivalently a threat of nullity. A full understanding of this new juridical figure of "administrative illegitimacy" has yet to be developed.¹²¹

3. The question of rights

The process before the Second Section avoids all questions of rights. Yet, it does not deny the existence of such rights, nor that they can be harmed by acts of administrative authorities. The 1917

¹¹⁹ Canons 104, 1684-1684, CIC.

¹²⁰ "Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus actum esse nullum aut inhabilem esse persona expresse vel aequivalenter statuitur."

¹²¹ p. Moneta, "L'illegittimità," 211-212.

Code affirmed that they could only be handled in an administrative way before a competent dicastery of the Roman Curia.¹²² The Second Section treats them indirectly and only under the aspect of legitimacy of administrative action. In centering its judgement on the legitimacy of administration, the Second Section avoids specifying the type of right or interest harmed; it provides a guarantee of good administration and of justice as the fruit of that guarantee.¹²³

There is an unwritten presumption of law that the proper implementation of law guarantees the maximum rights of those that it is called to serve. Personal rights and legitimacy of administrative activity are inseparably intertwined as a result.¹²⁴ We can say then that the formal element in processes before the Second Section is the question of violation of law. The material element is the damage or harm done by an act of administrative power. The primary purpose of the process emerges as a guarantee of correct administration within the Church. The secondary purpose is the restoration of rights with equity. The attempts by various authors to make subjective rights the object of the administrative tribunal is seen by Baccari as a return to the task of the ordinary tribunal. He argues that if this

¹²² Canon 1601, CIC.

¹²³ C. Morviducci, "La violatio legis nel diritto amministrativo-canonico", in Ap., 52(1979), p. 483; D. Staffa, "Giurisdizione ordinaria e giurisdizione amministrativa", in Ap., 48(1975), p. 411; A. Ranaudo, "Brevi considerazioni su 'l'oggetto primario' della competenza spettante alla 'Sectio Altera' della Segnatura Apostolica", in M.E., 105(1980), pp. 105-106.

¹²⁴ E. Labandeira, "El objeto del recurso contencioso-administrativo en la Iglesia y los derechos subjetivos", in I.C., 20-2 (1980), p. 157.

is the case the administrative tribunal would lose its purpose as a specialised section of an ordinary tribunal.¹²⁵

E. The value of the judgement of legitimacy

The Second Section of the Apostolic Signatura has opened up a totally new category of law for the Church. It is an area of extreme delicacy since the authority of bishops is the focal point.¹²⁶ The very existence of administrative justice within the Church may be said to represent a concession of some sort that is based on a changed model of the Church and the will of the Popes to guarantee justice in ecclesial administration.¹²⁷

[...] the protection of rights and the corresponding control exercised over the actions of public administrators constitute for the public authorities themselves an assurance

¹²⁵ R. Baccari, "De iustitiae administrativae indole ac eius functione participativa", in M.E., 101(1976), pp. 336-338.

¹²⁶ F. Della Rocca, "Il Concilio Vaticano II° e i problemi della giustizia ecclesiastica", in Lex Ecclesiae, pp. 546-547: "La Giustizia Amministrativa, così detta perché attiene al governo della Chiesa, è di estrema delicatezza in quanto incide su situazioni aventi al centro l'autorità del Vescovo: pilastro, per volere divino, dell'intero sistema teologico-giuridico della Chiesa. Questa autorità deve ovviamente restare alla base del sistema. Essa è uscita, anzi e provvidamente, rilanciata con la collegialità episcopale."

¹²⁷ D.K. Allen, A Comparison between the Nature and Scope of the General Principles of French Administrative Law and Their Counterparts in English Administrative Law, p. vi; A. Vitale, "Differenze e convergenze dei principi della giustizia amministrativa civile e canonica", in M.E., 98(1973), p. 363; G. Lobina, "La giustizia amministrativa", in La legge per l'uomo: una Chiesa al servizio..., p. 386: "[...] la volontà dei Pontefici in merito all tutela dei diritti attraverso il sistema di 'giustizia amministrativa' è non solo costante ed univoca, ma offre l'apertura ad un completamento organico dell'attuale sistema per una sempre più efficace tutela giuridica dei diritti dei fedeli."

that is of indisputable value. In the context of a possible rupture of ecclesial communion and of the strict requirement that it be restored, procedural law, along with the various general principles and norms that are to be applied (such as 'equity', 'tolerance', 'arbitration', 'concession', etc.), is something the Church has created in order to weather conflicts and resolve them.¹²⁸

1. Relative value of systems

If we examine the two systems for the vindication of administrative rights that preceded the Second Section, we find that extra-judicial appeal favored the appellant who, at least in earlier times, was able to impede the activity of administrators because of the suspensive effect accompanying his recourse. With hierarchical administrative recourse before the Congregations, it was the administrative authority that was in a position of favor. With the system before the Second Section, neither party is favored. There is a recognition that public good and private good are inseparable. There is an objective measure, a guarantee of administration out of which flows a restoration of rights.¹²⁹ The autonomy of the administrator is respected, for it is the original author of the decree who must rectify any error of law.

¹²⁸ John Paul II, "The Judicial Function in the Life of the Church", Address to the Sacred Roman Rota, February 17, 1979, in I.P.S., 24(1979), p. 220.

¹²⁹ R. Baccari, "La giurisdizione amministrativa locale nel diritto canonico", in M.E., 98(1973), p. 378: "[...] la giurisdizione amministrativa di legittimità è di diritto oggettivo. [...] il ricorrente, il cui interesse coincide con quello ecclesiale, agisce per la reintegrazione della comunione, animata dalla carità, che è lesa dall'atto amministrativo illegittimo."

a. Benefits beyond the administrative decision

No question of guilt or moral judgement is made; the system avoids questions of personalities by limiting itself to judgement of acts alone. It seems that only one human problem remains unsolved, that is, the difficulty in the interpersonal relationship between the one who has recourse and the administrator, especially when that administrator's act has been judged to be in violation of law. One could surmise that this difficulty will gradually vanish as the practice becomes part of the ordinary experience of Church administrators.

An indirect benefit of the availability of this process is that administrators should be encouraged to take greater care with their administrative decrees; this in turn involves greater participation of advisors and cooperators at the local level. Since the judgements of the Second Section are based on objective law, then a responsibility devolves on administrators to align their administration not only with laws in the strict sense, but also to all existing juridical norms that govern the exercise of administrative activity in the Church.¹³⁰

The jurisdiction of legitimacy in canon law is of objective law and affirms objective law rather than satisfying individual inte-

¹³⁰ p. Moneta, "L'illegittimità," p. 200.

rests.¹³¹ Baccari emphasises that in the process before the Second Section, both parties seek justice by discovering the truth. In the administrative judgement the one who has recourse and the respondent do not act in conflict seeking disparate interests, but rather seek the same thing, theoretically, the legitimacy of the act. In the last analysis, both parties seek the efficiency of ecclesiastical administration for the good of souls within the framework of the Church's communion.¹³²

The process is spared the risk of becoming subjective or dependant on the awareness of a particular judge, since there is no need to determine individual rights nor promote private over public law. Insistence on objective law provides indirectly for the rights of all concerned.

b. Communion context of administrative procedures

Looking at administrative justice in the context of the communion of the Church, Baccari sees more than a safeguarding of the rights of the individual. Administrative justice is seen as an instrument of participation for the faithful in correct ecclesial admin-

¹³¹ R. Baccari, "La giustizia amministrativa canonica in funzione partecipativa", in Studi in onore di P.A. d'Avack, Vol. 1, p. 174.

¹³² Ibid., p. 175.

istration.¹³³ What the Church has provided with this process is a negative, but nonetheless real participation of the christian faithful in the task of Church governance. The ability of the faithful to demand proper governance takes on a juridical reality never before available in the Church to the same extent. The faculty of the Second Section to grant or deny suspension of an administrative decree in those cases where suspension is not automatic, allows for checks and balances between effective administration and individual rights.

Vitale makes the point that many criticisms of the judgement of legitimacy come from an individualistic conception of administrative justice that is totally unacceptable to the Church.¹³⁴ The framework of communion adds a unique dimension to ecclesial administrative justice since any type of justice arising from a challenge to administrators will exist only in the context of ecclesial communion. The individual discovers a true place in this ordered and fruitful coexistence, the common good, or good of souls is also guaranteed:

[...] for the purpose of this law is to bring about an ordered and fruitful coexistence in which the human-Christian person can come into being and mature in an integral way. The human-Christian person can, in fact, find itself only to the extent that it surrenders any individualistic claim to exclusiveness, since its vocation is communal as well as personal. Canon law makes possible and fosters this character-

¹³³ R. Baccari, "La continuità del diritto canonico nel rinnovamento legislativo", in Liber amicorum Monseigneur Onclin: thèmes actuels de droit canonique et civil, p. 129.

¹³⁴ A. Vitale, "Differenze e convergenze dei principi della giustizia amministrativa civile e canonica", in M.E., 98(1972), p. 370.

ristic fulfillment insofar as it helps to overcome individualism.¹³⁵

2. Deficiencies of the Second Section

As a juridical organ intended to give the faithful better protection against the workings of the ecclesiastical bureaucracy, the Second Section is generally accepted as an improvement on the system which only allowed for hierarchical recourse.¹³⁶ But as a human system it suffers from deficiencies in theory and practice. Two major difficulties indicated by Delgado are that there is only one such institution for the whole Church and there is serious inconvenience because of the slowness of the process.¹³⁷

a. Lack of development in administrative law

The most serious of the difficulties springs from the lack of development in administrative law. Cardinal Staffa indicated the serious gap regarding legislation on the invalidity of administrative acts: "As for the effect of violation, it is to be noted that a principle or general norm on the invalidity of the administrative act

¹³⁵ John Paul II, loc. cit., p. 218.

¹³⁶ Z. Grocholewski, "The Function of the Sacred Roman Rota and the Supreme Court of the Apostolic Signatura", in Concilium, 127-7(1979), p. 50.

¹³⁷ G. Delgado, "La actividad de la Signatura Apostólica en su Sección Segunda", in I.C., 12-1(1972), p. 70.

is missing in canon law."¹³⁸ This difficulty has been largely overcome with the new administrative legislation of the 1983 Code.¹³⁹

Paul VI warned that juridical institutes of civil society could not without danger be brought into the Church.¹⁴⁰ The administrative tribunal is clearly a device of civil law that has been partially accepted into canon law. Many difficulties have arisen as canonists adopted Italian civil law terminology to explain the Second Section; even more difficulties appear to derive from expectations of the faithful that come from their civil law experience of administrative justice.¹⁴¹ Moneta promoted the importance of working from within the canonical order to find elements that lead to a more

¹³⁸ "Quoad effectus violationis adnotandum est in iure canonico deesse principium seu normam generalem de invaliditate actus administrativi." Cf. D. Staffa, "Supremus organismus contentioso-administrativus in Ecclesia", in Per., 67 (1978), p. 529.

¹³⁹ Canons 29-95, CIC 1983.

¹⁴⁰ Paulus VI, "Iis qui Gregoriana Studiorum Universitate 'Cursui renovationis canonicae pro iudicibus aliisque Tribunalium administris' interfuerunt", in A.A.S., 64(1972), p. 781: "[...] iuridica instituta societatis civilis nequeunt sine discrimine in Ecclesiam transferri."

¹⁴¹ Speaking of consumer protection in civil law, D.K. Allen, op. cit., p. vi, indicates: "For the citizen, this is not enough; for him there is no logical difference between a tort committed against him by his neighbour and a tort committed against him by the state. He expects fair play." We may add to these expectations, the "impeachment mentality" that is prevalent in some modern states and totally alien to the intentions and mentality of the Church.

original and authentic definition of the vice of violation of law more in keeping with the needs of life in the Church.¹⁴²

The problems of the Second Section commence with the lack of clear distinction between administrative and judicial procedure in canonical theory.¹⁴³ There is no precedent for this in canonical tradition¹⁴⁴ and so a system of pathology of the administrative act is still in the process of development.¹⁴⁵ This lack of precision in law has led to a lack of determination in decisions of the Second Section and so the jurisprudence is still struggling with the development of a theory of "error in procedendo et in decernendo".¹⁴⁶ The lack of clear norms has been a grave obstacle for efficient administrative justice in the Church.¹⁴⁷

¹⁴² P. Moneta, "L'illegittimità," p. 188: "Riteniamo invece che si debba partire dall'interno dell'ordinamento canonico e, attraverso un'indagine in larga misura autonoma, cercare di raccogliere in questo ordinamento quegli elementi e quegli spunti che consentono di arrivare ad una definizione del vizio di legis violatio più originale e forse con maggiori probabilità di corrispondere alle esigenze proprie della vita della Chiesa."

¹⁴³ D. Lazzarato, L'Iter del diritto canonico, p. 211: "[...] nessuna disposizione pontificia e nessuna argomentazione canonica precisa la netta distinzione tra procedura amministrativa e giudiziale."; H. Straub, loc. cit., in Per., 67(1978), p. 556: "Sine dubio in hac materia ius canonicum adhuc multas lacunas habet."

¹⁴⁴ A. Ranaudo, "Brevi note sul giudizio d'illegittimità degli atti amministrativi canonici", in Ap., 44(1971), p. 403.

¹⁴⁵ C. Morviducci, "La violatio legis nel diritto amministrativo ecclesiastico", in Ap., 52(1979), p. 493.

¹⁴⁶ M. Cardinale, "L'Error Iuris' nella giurisprudenza della Sectio Altera", in Ap., 54(1981), pp. 117-118.

¹⁴⁷ P. Moneta, "L'illegittimità," p. 203.

b. Areas where clarification is needed

Grocholewski presents a summary of difficulties where clarification is still needed in the workings of the Second Section. The first is in the understanding of administrative power in the Church. The concepts of "illegitimacy" and "violation of law" are still far from clear. He questions whether the judgement should be based on legitimacy alone or should include the question of "merit". The existence of subjective rights in the Church and their nature needs clarification. He asks whether administrative justice can be extended to all rights offended and whether public or private interest is safeguarded in administrative justice.¹⁴⁸ Grocholewski questions whether the Signatura should be composed of Cardinals in view of the specific preparation required.¹⁴⁹ The anomaly of the position of the Promotor of justice and the question of the independence of Cardinals needs modifying.¹⁵⁰ He claims that the public nature of the process and lack of motivation does not blend with the "principia" or spirit of Pope Paul VI.¹⁵¹

Vitale criticises the limitations involving advocates. Only consistorial advocates and procurators of the Sacred Palaces may be

¹⁴⁸ Z. Grocholewski, "La Sectio Altera", p. 75.

¹⁴⁹ Ibid., p. 104.

¹⁵⁰ Ibid., pp. 105-107.

¹⁵¹ Ibid., pp. 107-108.

used, and the fact that they are trained in the Roman Curia hints at a lack of true independence.¹⁵²

Grocholewski claims that the process is not in harmony with canonical tradition or oriental law and may degenerate into an expression of power not supported by charity. The structure of the Second Section is like that of a Congregation and the object of the decision should be broadened.¹⁵³ In this final point, Grocholewski, who is the Secretary of the Second Section of the Signatura, is joined by the major canonical experts in this field.¹⁵⁴ An analysis of writings indicates that authors would turn the Second Section approach from a judgement of legitimacy into ordinary jurisdiction. This in essence appears to be a call for a return to pre-1917 Code conditions and reintroduction of the extrajudicial appeal.

¹⁵² A. Vitale, loc. cit., p. 369.

¹⁵³ Z. Grocholewski, "La Sectio Altera", pp. 108-110.

¹⁵⁴ Z. Grocholewski, "La Sectio Altera", p. 110; P. Moneta, "L'illegittimità", p. 184, footnote 2; argues for an extension of power to cover the question of "merit"; C. de Diego Lora, "El control judicial del gobierno central de la Iglesia", in I.C., 11(1971), pp. 340-351, argues that the present extension of control in the Second Section is insufficient and should be extended; G. Delgado, "La actividad de la Signatura Apostolica en su Seccion Segunda", in I.C., 12-1(1972), p. 75, does not believe that the extension of power of the Second Section is sufficient for true justice; R. Coppola, "Annotazioni in margine all'interpretazione autentica sulla giurisdizione di legittimità nel diritto canonico", in I.D.E., 83-1-2(1972), p. 396: "De iure condendo, comunque, le ragioni che hanno determinato l'esclusione della giurisdizione di merito potrebbero essere eliminate attribuendo ad essa natura giurisdizionale,"; I. Gordon, "De obiecto primario", p. 538, footnote 63: claims that the Second Section already has a double competence, but in fact only uses one, the judgement of "legitimacy". His conclusion is that the competence of the Second Section should be "subjective rights" (cf. pp.541-542); A. Vitale, loc. cit., p. 370.

3. Anomalies of existing procedures

The aberrations of our ecclesiastical tribunal system must now be faced squarely. Romita indicates the anomaly present in our system where tribunals deal almost uniquely with marriage cases, while the faithful must turn to ecclesiastical administrators, whose task is to promote the common good, for questions that regard rights or interests of an essentially private nature.¹⁵⁵

Souto sees the creation of administrative tribunals as totally unnecessary. He believes that the ordinary canonical process should not be the civil process, but the administrative one, for it is here that most problems emerge in the life of the Church. There is rarely a collision of subjective rights between individual private persons. Subjective rights normally enter into collision with ecclesiastical organisation. He too points to the anomaly of a system out of control. Marriage cases, which require a special competence have pride of place while questions of justice are made secondary. To overturn this anomaly he contends that the ordinary competence should be administrative.¹⁵⁶

In conclusion we may say that, juridically, the Second Section is a compromise solution, a media via, an objectively based system of indirect, negative control of administration.

¹⁵⁵ F. Romita, "Fondamenti teologico-giuridici dell'amministrazione ecclesiastica", in M.E., 99(1974), p. 28.

¹⁵⁶ J. Souto, "Algunas cuestiones basicas en torno a una posible ley de procedimiento administrativo", in I.C., 14-2(1974), pp. 22-23.

tive tribunal in the broadest sense, since it cannot be approached directly but only after recourse to dicasteries of the Roman Curia. In avoiding the questions of rights and personalities involved, it provides a basis for resolution of administrative conflict that respects the autonomy of the original administrator, combining this with a guarantee of administration that is in accordance with law.

Theoretically, the process is still in an experimental stage of development and many aspects of ecclesial administrative law have yet to be perfected. A clear development of theory is essential to overcome the diversity of opinions and confusion among authors and remove the ecclesiastical administrative tribunal from the realm of imitation of civil systems.

In practice, several anomalies regarding the structuring of the process, personalities involved and their functions, and the time taken for the process need revision. A jurisprudence regarding awarding of damages is still to be developed and the possibility of local implementation of such tribunals still remains an open question.¹⁵⁷

We turn now to the provisions of the 1983 Code for administrative recourse and an examination of the possibility for implementation of local procedures for administrative justice.

¹⁵⁷ The proposals of the preparatory schemata of the 1983 Code for local administrative tribunals were rejected and the intentions of the principia guiding the formulation of the new law were not totally fulfilled in the final draft.

CHAPTER V
THE 1983 LAW AND PRINCIPLES FOR FUTURE DEVELOPMENT

In this chapter, we wish to consider the ways in which administrative acts can be judged under the provisions of the 1983 Code and examine possible extensions of these provisions that might permit the introduction of local administrative tribunals. To help in this investigation, we will also examine the proposals for the new Oriental Code.

A. The 1983 provisions for administrative recourse

One of the questions that arises when examining the text of the 1983 Code is whether a bishop is accountable for his acts.

Bishops can be judged in a variety of ways, they can be subject to judgement as a person for criminal activity or in contentious cases, as a representative of a juridical person or in questions concerning their administrative activity.

The eventual judgement of a bishop's criminal activity is reserved to the Holy Father who has a right to hear the case per se or per alios as is usually the case, depending on the gravity of the matter.¹ All contentious cases involving bishops are subjected to the Roman Rota.² When a matter arises concerning a juridical person for which the bishop is representative, it is normally referred to the second instance ordinary tribunal since the bishop cannot be

¹ Can. 1405, §1, 3, CIC 1983.

² Can 1405, §3, 1, CIC 1983.

judge in his own case.³ The review of administrative activity, including questions of merit, is referred to the hierarchical superior of the bishop, a Congregation of the Roman Curia.⁴ Only after the decision of the Congregation can the matter be referred to the Church's one administrative tribunal, in the Second Section of the Apostolic Signatura, which judges the legality of the acts and is empowered to award damages.⁵

1. Procedures in administrative recourse

Despite the guidelines of the Principia guiding the reform of the Code,⁶ the wishes of the 1967 Synod of Bishops,⁷ the hopes of

³ Canons 393, 1276, 1419, s2, 1438, CIC 1983.

⁴ Canons 1732-1739, CIC 1983.

⁵ Can. 1445,s2, CIC 1983; "Regimini Ecclesiae Universae", in A.A.S., 59(1967), Art. 106, p. 921; "Normae speciales", in I.C., 9 (1969), pp. 501-520. Schematically, see Fig. 2 in Appendix.

⁶ Communicationes, 1(1969), p. 83; "Nostri Codicis pariter erit statuere quaenam in concreto actiones concedantur apud tribunalia administrativa experiendae, processus administrativi regulas definire, necnon organa stabilia constituere, quae eosdem cognoscere valeant."

⁷ G. Caprile, Il Sinodo dei Vescovi, p. 127: "Da tutti è stato accolto favorevolmente quanto è detto nel testo in esame circa la procedura in difesa dei diritti soggettivi (appello, tribunali amministrativi); attenti, però, che non ne risultino indeboliti il principio e la pratica dell'ubbidienza."

Pope Paul VI,⁸ and the various preparatory schemata to introduce administrative tribunals to the local Church,⁹ the 1983 Code did not provide directly for local administrative tribunals. Instead, eight canons (1732-1739) of the 1983 Code provide a modified form of hierarchical recourse as the normal defense available against administrative decrees.

a. Activity subject to administrative recourse

The provisions of canons 1732-1739 are for administrative recourse alone, so that all singular administrative acts or decrees of any ecclesiastical administrator, except those of the Roman Pontiff or the Ecumenical Council come within the scope of these procedures.¹⁰ The singular administrative acts whose nature and norms are determined in canons 35-93 are the only matter submitted to these procedures.

Valdrini argues that administrative authorities are those who hold ordinary power: the diocesan bishop and those equivalent in law, the vicars general, episcopal vicars and major superiors for

⁸ Paulus VI, "Ad Praelatos Auditores et Officiales Tribunalis Sacrae Romanae Rotae", (4 februarii, 1977), in A.A.S., 69 (1977), pp. 147-153; p. 152: "Admittuntur in novo Codice etiam recursus quoad actus administrativos in tribunali administrativo. Qua quidem ex parte praesumitur et requiritur moderatio, ne ea, quae defensionem iustitiae destinantur, in contrariam vertantur."

⁹ Communicationes, 2(1970), pp. 191-194; 5(1973), pp. 235-245; 6(1/4), pp. 32-33; 112, 219; 8(1976) pp. 198-199; 11(1979), p. 68; the Schemata available were published in 1972, 1978, 1980 and 1982.

¹⁰ Canon 1732, CIC 1983.

institutes of consecrated life.¹¹ To this may be added those who carry out acts of administration with delegated power, and parish priests who enjoy ordinary power of administration within their territory or jurisdiction. Within modern Church structures, the bishop may also grant limited ordinary power of administration to others in a variety of fields meant to meet the needs of the local Church.

b. An equitable solution

The Church's desire to avoid contentious trials is reflected in canons 1443, s2, 3, and 1733. When a person feels injured by a decree, efforts should be taken to avoid contention and reach an equitable solution by mutual consultation between the person and the author of the decree. The use of serious-minded mediators is encouraged. The episcopal conference can prescribe the establishment of a permanent office or council in each diocese for the purpose of seeking and suggesting equitable solutions. Where this is not required, the bishop may act alone to establish such an office or council in his diocese (can. 1733). The conference is also empowered to draw up norms for such processes of conciliation (can. 1714).

Whenever the prospect of a satisfactory outcome is discerned, can. 1733, s 3 provides that the superior who would have to decide the recourse is to encourage the parties to seek an equitable

¹¹ p. Valdrini, Injustices et protection des droits dans l'Eglise, p. 16, footnote 2.

solution. This attempt at reconciliation should be encouraged by the office or council, principally when revocation of the decree is sought and the time for recourse has not elapsed. This does not mean that the work of what we may call the council for conciliation cannot continue throughout the process. Indeed efforts at conciliation can and should continue.¹² However, no allowance is made for an interruption of time as in pre-code law. Since efforts at conciliation could be interminable, it seems better that the ordinary means of achieving justice be taken concurrently.¹³

While the council for conciliation is not imposed by the law, the very fact that it is mentioned indicates the clear intention of the legislator. The intention is to establish a body with juridical stability rather than form one for each conflict.

The competence of the office or council for conciliation is limited. It has no power over the act in question and no authority to take decisions. The Bishop is to take the ultimate decision in cases where he submits to such procedures, since the normal rules for procedures of conciliation are to be followed here.¹⁴ Some matters, however, because of their nature, may not be submitted to processes of arbitration. In cases involving bishops, this would include the

¹² Ibid., p. 23.

¹³ The Bishop can allow an extension of time for conciliation by provision of a new decree if all fails. This decree could be challenged like the original. Since the clear intention of ecclesiastical legislation is to avoid trials, more flexibility would appear to be needed at this stage of any administrative conflict.

¹⁴ P. Valdrini, op. cit., pp. 22-23.

limitations the bishop himself imposes, as well as those matters excluded by canon 1715:

Can. 1715, s 1. Agreements and mutual promises to abide by an arbiter's award cannot validly be employed in matters which pertain to the public good, and in other matters in which the parties are not free to make such arrangements.

s 2. Whenever the matter concerned demands it, in questions concerning temporal ecclesiastical goods, the formalities established by the law for the alienation of ecclesiastical goods are to be observed.

c. Procedures for recourse

Two types of recourse are envisaged in the 1983 procedures for administrative recourse. A preliminary petition or recourse¹⁵ to the author of the act seeking revocation or amendment of the decree precedes the administrative recourse. This is followed by the administrative recourse itself.

i. The preliminary recourse

The preliminary recourse must be made within a peremptory time-limit of ten days from the time the decree was lawfully notified. The petition must be in writing and must seek either the revocation of the administrative decree or its amendment. Whether

¹⁵ The term "preliminary recourse" is used here since it appears to specify more adequately the nature of the petition. Cf. P. Valdrini, *op. cit.*, p. 17: "En fait, il s'agit d'un véritable recours puisque la personne concernée poursuit la réformation ou la rétractation de l'acte et se voit contrainte de passer par cette première voie de contestation."

specifically mentioned or not, this petition is understood to include implicitly a request for suspension of execution of the decree:

Can. 1734, s 1. Before having recourse, the person must seek in writing from its author the revocation or amendment of the decree. Once this petition has been lodged, it is by that very fact understood that the suspension of the execution of the decree is also being sought.

This preliminary recourse or petition is not required, 1) when recourse is had to the bishop against authorities who are subject to him, 2) in having recourse against the decree by which a hierarchical recourse is decided, unless the decision is given by the bishop himself, since the obligation only applies to the first recourse and not against subsequent decisions; 3) when a new decree is issued or a delay ensues that in law is equivalent to a negative reply to the petition.¹⁶

ii. Administrative recourse

The administrative recourse that follows the preliminary petition is to be placed within a peremptory time-limit of fifteen days (can. 1737, s 2). If the preliminary petition is not required, this time-limit begins to run from the day the decree was notified. In cases where such a preliminary petition is required, the limit commences from the time of the decree in response, or if there is no

¹⁶ Canons 1734, s3; 57; 1735, CIC 1983. This recognition of the juridical value of the silence of the administrator is totally new to Canon Law as an adaptation from Italian administrative law.

reply within the thirty day time-limit, from the thirtieth day.¹⁷

In this latter case the reply is presumed to be negative:

Can. 1735. If, within thirty days from the time the petition mentioned in can. 1734 reaches the author of the decree, the latter communicates a new decree by which either the earlier decree is amended or it is determined that the petition is to be rejected, the period within which to have recourse begins from the notification of the new decree. If, however, the author of the decree makes no decision within thirty days, the time-limit begins to run from the thirtieth day.

This recourse can be placed with the author of the decree or directly with the hierarchical superior. The author who is inferior is obliged to forward the recourse to the competent superior. Reasons for recourse are much broader than those before the Second Section of the Apostolic Signatura: "A person who contends that he or she has been injured by a decree, can for any just motive have recourse to the hierarchical Superior of the one who issued the decree." (Can. 1737, sl, CIC 1983). The emphasis is clearly placed on harm rather than the question of legality of the decree. A just motive is required, indicating the need to justify the recourse that goes beyond mere legalism.

¹⁷ It is important to note the time-limit difference between canon 57, CIC 1983, which allows a three month delay and canon 1735, CIC 1983, which allows only thirty days. The difference is explained in that the first canon speaks of decrees which are by law to be issued, or decrees which are petitioned. The initiating factor is the law or the petitioner. The administrative authority needs time to prepare a suitable decree and the law allows three months. Canon 1735, CIC 1983, however, presumes that the bishop has prepared the decree with care and forethought. When this decree is challenged, he is only allowed 30 days in which to reply.

iii. Suspension of execution

An automatic suspension of execution of the decree in those matters in which ordinary hierarchical recourse has a suspensive effect is provided by canon 1736, s 1. This effect commences with the preliminary petition. If the author of the decree has not suspended the execution of the decree within ten days of receiving the preliminary petition, an interim suspension may be sought from the author's hierarchical Superior. The decree can be suspended only for serious reasons, taking care that the salvation of souls suffers no harm. This practice applies in cases where the law does not provide for an automatic suspension of the effects (Canons 1736, s2; 1737, s3).

When the suspension of execution of the decree is decided in the preliminary stages, the superior who decides the outcome of the recourse must determine whether the suspension is to be confirmed or revoked, taking care that the salvation of souls suffers no harm (Canons 1736, s3, 1737, s3). Where no final recourse is proposed against the decree within the established time-limit, the interim suspension lapses automatically (Can. 1736, s4).

iv. Assistance available

In contrast to ordinary hierarchical recourse, administrative recourse provides that the person using such means has a right to the services of an advocate or procurator. The law provides further that

an advocate is to be appointed ex officio if the person does not have one and the superior involved considers it necessary. To the superior, however, is reserved the right to order the one having recourse to appear in person to answer questions. With these special arrangements the law includes a warning that the person having recourse is to avoid futile delays (Can. 1738).

2. Powers of the hierarchical Superior

The powers of the hierarchical superior within the process of administrative recourse are clearly delineated. The Superior who must decide the recourse can, 1) confirm the decree; 2) declare it to be invalid; and also 3) rescind or revoke it. If it seems more expedient, he can 4) amend the decree, 5) substitute another decree for the one challenged, or 6) abrogate the decree partially and propose a new decision.

A hierarchical superior, then, has the same powers over the administrative act as does its author. Whether this power should be used directly or indirectly depends on individual personalities and circumstances involved. It seems better, in the light of the principle of subsidiarity and for harmonious relations, to suggest changes to decisions or propose other choices, rather than call for direct intervention in local administration.

An administrative recourse may terminate within the diocese or become a challenge against the final decree of the Bishop before the competent dicastery of the Roman Curia. A thirty-day time-limit is

allowed in which to challenge the final decision of the competent dicastery before the Second Section of the Apostolic Signatura. This process is the last regular resort. Beyond this there is available only a gracious recourse to the Holy Father, known as "beneficium novae audientiae".¹⁸

a. Rights and damages

The procedures for administrative recourse make no mention of rights. Rather, the process is meant to guarantee administration according to the law. The presumption that the common good and individual rights are in mutual harmony, and both guaranteed by good administration, appears to be its basis. Nor is the question of damages raised in the canons. However, if we do search beyond these canons we find a partial answer in Canon 128 which states: "Whoever

¹⁸ Pius X mentioned the beneficium novae audientiae in the "Ordo servandus in Sacris Congregationibus Tribunalibus Officiis Romane Curiae", in A.A.S., 1(1909), Cap. IV, art. ii, p. 68; Paul VI maintained the practice in "Regolamentao generale della Curia Romana," in A.A.S., 60(1968), art. 119, pp. 166-167: "s1. Avvenuta la notifica oppure la comunicazione delle risoluzioni ad eventuali parti, quella di esse che si sente gravata, puo chiedere, entro dieci giorni, il beneficio della nuova udienza, sempre che esibisca nuovi e gravi argomenti e salvo il diritto di ricorso alla II Sezione della Segnatura Apostilica, a norma della Costituzione Regimini Ecclesiae Universae, n. 106. s2. Spetta al Cardinale Preposto, udito il Congresso, concedere o meno il beneficio della nuova udienza, secondo la valutazione degli argomenti addotti. s3. Soltanto la Congregazione ordinaria e la plenaria possono concedere il beneficio della nuova udienza, quando la risoluzione sia munita della clausola: amplius non proponatur."; the "Normae speciales", make no mention of this faculty after conclusion of the process before the Second Section. For a schematic understanding of this type of administrative recourse, see Figs. 3 and 4 in Appendix.

unlawfully causes harm to another by a juridical act, or indeed by any other act which is deceitful or culpable, is obliged to repair the damage done."

This canon indicates a personal obligation, but does not provide a process for the imposition of damages. Another canon partially covers the matter when it deals with the lack of effect of acts that cause harm. Canon 38 reads as follows:

An administrative act, even if there is a question of a rescript given Motu proprio, has no effect in so far as it harms the acquired right of another, or is contrary to a law or approved custom, unless the competent authority has expressly added a derogatory clause.

We could argue that if no effect is produced by an administrative act then there is no question of damages. However, in reality, damages are possible and although not mentioned as part of the competence of the hierarchical superior, it appears that he may award such without the need of approaching the Apostolic Signatura.¹⁹ If the final decree of the Congregation is challenged before the Second Section, damages may be awarded at this level.

¹⁹ Although this competence is not among those mentioned in the canons for administrative recourse, it is a traditional competence of the hierarchical superior and to be presumed applicable to administrative recourse.

b. Judging the "merit" of the case

The hierarchical superior has the power to judge the discretion, that is, the choice of intervention made by the inferior administrator. He may judge the decree inopportune, a decision not verbalised in every case, but covered often in the change made or proposed by the hierarchical superior, or in a suggested different course of action.²⁰

3. Significance of the 1983 provisions

The 1983 provisions for administrative recourse are in essence a form of hierarchical recourse. The administrative recourse is restrictive in that time-limits are imposed; but it is more equitable, inasmuch as provision is made for the use of an advocate or a procurator. The major advantage rests in the emphasis on preliminary attempts at reconciliation with provisions for both a preliminary recourse and an office or council to foster equitable solutions to conflict. Although not specific, the provisions appear to indicate an openness to self-defense not included in the ordinary hierarchical appeal, even if this openness is not mandated in the procedures.

²⁰ P. Valdrini, op. cit., pp. 27-28, footnote 29.

a. Limitations of provisions

While conditions, time limits and instances are indicated, the new provisions contain no procedures and no provisions are made for defense of rights, presentation of a person's case, or right to reply. One could argue that these procedures are presumed, but the fact that they are not spelled out in law indicates that they are not guaranteed, even when the process reaches the competent dicastery of the Roman Curia. However, this lack of determined procedures can also provide greater scope for juridical initiative. There is within the canons an underlying hope that solutions will be found based on justice, equity and charity at the local level. An openness to development of particular law in the areas of conciliation and arbitration provides avenues where a majority of cases could be solved in a fraternal spirit without recourse to outside authorities or to trials. While conciliation may bring a permanent or even temporary resolution to a particular conflict, it does not normally provide a juridical guarantee, jurisprudence, nor precedent in law that benefits the general administration of the Church.

Administrative recourse does not fulfill the call for local administrative tribunals. It continues, rather, the system of the administrator-judge, that was so heavily criticised by the principia and the 1967 Synod of Bishops.²¹ As a system, administrative recourse remains open to the same danger of arbitrariness as

²¹ Communicationes, 1(1969), p. 83: "[..] communis opinio canonistarum censet recursus administrativos non parum deficere in ecclesiastica praxi et administratione justitiae."

hierarchical recourse. The system rests on the power of the hierarchical superior and provides no guidelines for discernment. In cases involving the administrative activity of the bishop, the first recourse is to the Holy See. The principle of subsidiarity or the need to resolve problems at the most appropriate level is overlooked.²² The system of administrative recourse leaves the Church with a sole administrative tribunal in the Second Section of the Apostolic Signatura. Administrative justice is only available through a tribunal as the last resort.

b. Non-acceptance of the administrative tribunal

The 1983 provisions implicitly include a rejection or non-acceptance of the proposed law to introduce administrative tribunals to the local Churches. Although no definitive reasons have been given, a certain rationale for the rejection of the various schemata proposing the local administrative tribunal could be considered. For instance, one principal reason is deduced readily from the writings of canonists prominent in the field of administrative law: the lack of a consistent and properly developed theory of ecclesiastical administrative law. Every subsequent reason rests ultimately on this lack of development. The various schemata proposed and the variety

²² Ibid., pp. 80-81.

of changes they underwent indicate many difficulties with the theory of administrative law.²³

Furthermore, certain pastoral reasons outside the draft proposals for the 1983 Code could also have provided the basis for the non-acceptance of the proposed administrative tribunals. Among these might figure the need for previous experimentation,²⁴ the desire for a gradual implementation of the process or practical pastoral difficulties such as the difficulty of universal implementation or the desire to avoid promotion of a new contentious process within the Church. Since an enumeration of these difficulties would be speculative, we turn instead to examine the internal difficulties of the proposed law. These internal difficulties must be examined and answered if administrative tribunals are to have a place in the future law of the Church.

²³ The variety of proposals including diocesan administrative tribunals, lay judges, transfer from one recourse to another, the grounds proposed, the use of civil law terminology by commentators (cf. Communicationes, 4(1972), p. 38; 5(1973), p. 241, and the use of ius subiectivum and interesse distinctions), and the question of the obligatory nature of introducing these processes, are among some of the many aspects that changed considerably throughout the various drafts. The Code Commission had even considered issuing a Motu proprio for the implementation of its early proposed law. This was under consideration by Pope Paul VI in 1974; cf. Communicationes, 6(1974), pp. 32; 112.

²⁴ Communicationes, 4(1972), p. 36: "[...] mens est Summi Pontificis ut antequam materia in novo Codice edatur, eadem per peculiare documentum, experimenti causa, aptis normis ordinetur, consultis prius tamen tum Conferentiis Episcopalibus tum Sacris Curiae Romanae Dicasteriis." Despite this wish of the Holy Father, Cardinal Felici made no mention of the experimental implementation of the process in his letter to the Episcopal Conferences.

c. Internal difficulties

From an analysis of the text of the 1983 law on administrative recourse, we can deduce that the reason for rejection of the final draft of the proposed law did not lie in those aspects maintained in the administrative recourse of the new law. It seems unlikely that those proposals incorporating procedures that are used in the Second Section of the Apostolic Signatura would be rejected. So we must look, rather, to the major specific differences proposed regarding persons, procedures, incidental provisions or grounds.

Such differences between the norms governing the Second Section of the Signatura and the proposed law as it appeared in the 1982 draft, and which could have provided reasons for non-acceptance, are the following:

- 1) the local administrative tribunals were to stand alone and were not proposed as a section of an existing tribunal;
- 2) they could be established by the episcopal conference (Can. 1737, §1);
- 3) a second instance was possible (Can. 1738, §1);

- 4) appeals were possible to a second instance administrative tribunal, or to the Second Section of the Apostolic Signatura proposed now as a first instance tribunal for cases involving decrees of episcopal conferences and particular councils (Can. 1738, s2; 1739).
- 5) judges and the promotor of justice were to be priests independent of the decree and the diocese of its origin (Can. 1740);
- 6) the possibility of transferring a case from hierarchical recourse to the administrative tribunal and vice-versa was proposed (Can. 1745);
- 7) a dichotomy was proposed whereby hierarchical recourse alone was available against decrees of authorities subject to the bishop, while recourse could be hierarchical or administrative against decrees of the bishop himself (Can. 1752).

Many other specific differences appeared in earlier proposals for the 1983 Code, but were subsequently eliminated. These included the possibility of a panel of three bishops from the episcopal conference for a particular Church hierarchical appeal,²⁵ provision for diocesan rather than supra-diocesan administrative tribunals,²⁶ and

²⁵ Communicationes, 2(1970), p. 93: "[...] proponitur ut adversus episcopi eiusve delegati actus recursus hierarchicus proponi possit, praeter quam ad Sedem Apostolicam, ad consilium trium episcoporum a conferentia episcopali nationali constitutum; item, ut unaquaeque conferentia episcopalis constituere debeat tribunal trium iudicum [...]".

²⁶ Ibid., 5(1973), pp. 237; 240.

a seemingly broader list of grounds for recourse than those provided in the Second Section of the Apostolic Signatura.²⁷

Having considered these reasons, we could now turn our attention to some positive values that could eventually be incorporated in some future procedure. Since the proposals of the draft for the Oriental Code are still current at this time, it would be opportune to consider them and their specific differences with a view to discovering insights that might make possible the future implementation of the local administrative tribunal.

B. Oriental Law proposals for administrative justice

Like the drafts for the 1983 Code, the proposals of the Oriental Law for administrative justice²⁸ seek for local

²⁷ Ibid, 4(1972), p. 37: "[...] competentia tribunalium administrativorum augetur: nam praeter competentiam, quam habet Sectio Altera Signaturae Apostolicae, videndi scilicet de legitimitate actus administrativi, potestas quoque datur videndi de reparatione damnorum; [...] datur quoque ius videndi utrum generalia iuris aequitatisve canonicae principia servata sint et utrum motiva in decreto allata sint vera[...]." In the 1972 Schema on administrative procedure, four grounds were provided against administrative decrees: 1) error of law; 2) violation of a procedural law; 3) non-observance of the general principles of law or canonical equity; and, 4) the motives alleged in the decree were untrue; cf. Schema canonum de procedura administrativa, Typis polyglottis Vaticanis, 1972, p. 13, canon 17, sl. The two grounds of the final 1982 draft (canon 1750, sl): "[...] propter legis violationem in decernendo vel in procedendo, vel propter motiva non vera in actu administrativo allata" (Cf. P. Valdrini, op. cit., pp. 371-376, "Schéma préparatoire au Code de 1983 sur la procédure administrative (1982)"), are essentially the grounds used by the Second Section of the Apostolic Signatura.

²⁸ Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo, "De recursibus adversus decreta administrativa", in Nuntia, 14(1982), pp. 17-18; 99-106.

implementation of the existing system and procedures of the Second Section of the Apostolic Signatura. However, the specific differences of the most recent draft appear to provide alternative approaches to those proposed by the 1982 draft for the Latin Code.

1. Specifically different proposals

The principles guiding the proposed Oriental Law on administrative recourse appear broader in scope than those for the Latin Code: "Safeguarding rights of persons of any state and degree in the Church should be perfect and equal for all, none excepted."²⁹ There is no dichotomy in the Oriental proposals, the administrative tribunal recourse is available for cases involving authorities subject to the bishop as well as against decrees of the bishop himself (Can. 381). Administrative justice is the task of the administrative tribunals, but parties are also free to choose hierarchical recourse (Can. 370).

Emulating the norms and structure of the Second Section of the Apostolic Signatura, the Oriental proposals provide not for a separate tribunal, but for an administrative section within all tribunals,³⁰ or even an administrative section alone, for individual recourses where no formal tribunal exists (Can. 380). Where the 1982 draft for the Latin Code proposed priests as judges, the Oriental norms establish a clear principle: "A bishop may never be judged by a

²⁹ Ibid., p. 18.

³⁰ Ibid., p. 18.

non-bishop in these recourses."³¹ The administrative tribunals proposed for the Latin Code were to have been erected by the episcopal conference, while in the Oriental Code proposals, they are to be established by the law.

While provisions are made for cases involving decrees of administrative authorities subject to the bishop, the Oriental proposals turn to the Synod of bishops of the particular ritual Church for cases involving bishops themselves. The contested decree is submitted to one bishop in the first instance or to three who judge collegially in the second instance within the Patriarchal territory of the Church. The Holy See is to judge recourses of the other local hierarchs even if they are aggregated to the Patriarchal Church (Can. 382).

A special tribunal may be erected for cases against the administrative decrees of Patriarchs according to the particular law developed in each ritual Church, unless the question is submitted to the Roman Pontiff. Decrees of the Synod of Bishops are to be submitted to the Roman Pontiff (Can. 383).

The motives for recourse, judgement of legitimacy, procedures and time limits for recourse are essentially modelled on norms of the Second Section of the Apostolic Signatura, although the length of the process follows the oriental principle outlined and should normally be brief.³² As in the proposals for the 1983 Latin Code, provision

³¹ Ibid., p. 18.

³² Ibid., principle 7, p. 18.

is made for the transferral of the case from one type of recourse to another (Canons 378, 398).

2. Advantages of the Oriental Proposals

The major advantage of the Oriental proposals is that they are still proposals under consideration. While still subject to change, they in essence appear to reflect more clearly a respect for traditional approaches to law despite their novelty.

There can be no argument with the basis for judgement and the general procedures proposed since these already exist in the Second Section of the Apostolic Signatura. Nor should one argue with the fact that the system is a local one, since there are strong precedents for this in the Oriental Churches.

The Oriental proposals overcome the inequality of systems of justice proposed in the 1982 Schema for the Latin Code. There is equality for all in the procedures available. A side benefit of this equality before the law is true subsidiarity at a more basic level, one that tends to highlight a certain autonomy for administrative authorities subject to the bishop. Although more complicated and burdensome than a simple hierarchical decision, the administrative recourse to the administrative tribunal provides the advantage that justice is seen to be done equally for all.

3. Difficulties with the Oriental Proposals

Any difficulties that emerge from the Oriental schema have the advantage of being able to be changed before they enter into law. Practical difficulties in the implementation of any new procedures are to be expected and must be answered at the local level. Theoretical difficulties must be taken into account, but can be circumvented in practice until such time as they are clarified.

The obligatory nature of the introduction of the administrative tribunal provided by canon 380 of the Oriental schema is a major theoretical departure from the stance taken by the Latin Code proposals that made this introduction facultative. The impasse is overcome if one accepts the proposal as indicating the mind of the Church and the implementation as a response according to the capabilities and needs of the local Church. The erection of diocesan administrative tribunals creates another theoretical difficulty. Many theoreticians argue that since the lower authorities act in the name of the bishop, and the judges give decisions in his name, then the bishop would be judge in his own case.³³ The practicalities of achieving absolute independence, on the other hand, would render diocesan tribunals incapable of rendering administrative justice. The proposals for the Latin Code had foreseen that the judge would be independent of the diocese and

³³ B. Gangoiti, "De tribunalibus competentibus et quidem iure divino quoad actus administrativos episcoporum residentialium", in Per., 17(1978), p. 727.

the formulation of the decree.³⁴ The Oriental proposals make no provision for this independence.

C. Directives emerging from this study

In this study, so far, many different approaches to the resolution of conflict in general and the resolution of administrative conflict in particular have been presented. The principles, guidelines, ideals and particular aspects of these various approaches are now examined in an effort to find directives that might serve as a foundation for future development in the theory and practice of local administrative justice.

1. The christian approach to administrative justice

The contribution of the experience of the early Church in the resolution of conflict situations does not offer so much a system of procedures that can be used today, but rather, presents us with guidelines, attitudes and a spirit of law that indicate the christian background for the resolution of administration conflict.

St. Matthew presented a graduated approach, a double system that provided for a private and peaceful resolution of conflict with legal procedures as a last resort. The emphasis of St. Paul stressed the autonomy of the local Church in resolving situations of conflict. Early Christian writings and councils confirmed this

³⁴ 1982 Schema, canon 1740.

autonomy, and recognized the right to challenge the bishop in certain cases,³⁵ but allowed for intervention of higher authority in more difficult cases. The synodal resolution placed the affair in the context of the broader local communion capable of providing justice even against the harmful activity of the bishop. The permanent synod gave juridical recognition to the fact that conflict is a constant reality in the Church

Within this early Church context, attitudes to authority, the duty to seek for and encourage peaceful resolution of conflict, provision of justice at the local level and the possibility of outside intervention in serious cases, all appear to be part of the christian background to the resolution of conflict. The directives emerging from these historical precedents indicate that the autonomy of the local Church should be respected, and, as a general principle the resolution of administrative conflict can and should be local. The systems used for this resolution throughout history each have a contribution to make that must be seen within the context of the communion that provided the framework for any resolution of conflict reached in the early Church.

³⁵ P.A. Caron, I poteri giuridici del laicato nella Chiesa primitiva, pp. 214-215: "Da questo passo si può implicitamente dedurre che Clemente riconoscesse alla comunità (e quindi anche ai laici) il potere di deporre il vescovo, allorchè questi, anzichè essere stato, come in quel caso, modello di specchiata virtù, avesse dato invece fondato motivo a gravi rimproveri da parte dei suoi sudditi."

2. Directives emerging from the systems used

Preliminary processes to find an equitable resolution of conflict have been an element of any ecclesiastical process since apostolic times. The perennial use of conciliation and arbitration, either alone, or as preliminary attempts to resolve conflict, confirms the need and usefulness of procedures that are local, simple and in harmony with the Church's desire to seek a peaceful resolution of conflict.

The independent nature of these procedures, the emphasis of reconciliation of the parties as well as resolution of the conflict, have brought us systems that have remained virtually unchanged from the beginnings of the Church. Conciliation and arbitration have been accepted in the 1983 Code as the recommended preliminary steps to be taken in the resolution of all administrative conflict (canons 1713, 1733). While effective for the reconciliation of parties, these systems of compromise are limited inasmuch as they are not applicable in certain conflict situations where the bishop alone must make the ultimate decision.

The directives that emerge from the historical use and effectiveness of such systems indicate that conciliation and arbitration should be encouraged in every conflict where they are applicable. However, because of the nature of these procedures which require the goodwill of the parties, such attempts are to be promoted and suggested rather than imposed.

Taking into account the christian attitudes that are to be expected of the parties in conflict, there appears to be a presumption in law that most situations of conflict should be settled with these simple procedures. From this presumption emerges a directive that systems of conciliation should be promoted at the level of the local Church. This promotion of guidelines and councils for conciliation is already a feature of the 1983 Code (canons 1713-1716, 1733).

From the period that gave us the extrajudicial appeal (12th century - 1908), we discover the effectiveness of a judicial approach to the resolution of administrative conflict. We also see the inadequacy of a system that suspended the acts of administrators and rendered their administration ineffective. Conversely, however, we discover the need for a system that does not impede the effectiveness of administration, except where grave harm or rights are in question. The directive emerging from this period indicates the importance of a system that does not favour the one who makes the appeal over the superior administrator; a system that upholds the value of administration, but allows for suspension of decrees where grave harm could result; a process in which the decisions have executive force without the need for external confirmation.

The system of hierarchical recourse (1908 - 1967), while effective, is generally rejected as defective. It pertains to a model of the Church that is not considered current or in tune with the ecclesiology presented by Vatican II and, so, appears in theory

to favour the hierarchical superior over the one who has recourse. The right to know one's accuser, to answer accusations, to defense and legal representation appear to be overlooked in this non-judicial resolution of conflict that is conducted secretly and outside the place of the conflict.

Directives emerging here indicate that any future system should be public in essence if not in every aspect, and provide the rights to confront one's accuser, to defense and to legal representation. Above all, any future system should be local and swift. Since hierarchical recourse is ultimately a process before the Holy See, this denial of the principle of subsidiarity has been a major difficulty. However, while as a general principle, indications are that justice should be achieved locally, hierarchical recourse should remain available for more difficult cases. This balance between local and hierarchical procedures brings difficulties in administrative theory that still require deeper investigation.

The procedures of the Second Section of the Apostolic Signatura bring us a system that is objective, independent and favours neither the administrative superior nor the one having recourse as it judges only questions of legality. Such a system is not only possible, but a functioning reality in the Church. This intermediate system with the limitations that come with the "judgement of legitimacy" remains a process available only as a last resort, accessible only for difficult and complicated cases as the final step in several lengthy processes.

Given the fact that the majority of areas of conflict within the Church stem from administrative activity, this approach to judgement appears, in principle, to provide a possible process for the resolution of most conflict situations within the Church. As a possible choice for the future, it can, and has been combined with procedures for conciliation and arbitration and with hierarchical recourse. However, this would make approach to the administrative tribunal the fourth in a series of possible processes to resolve administrative conflict. The steps through conciliation, arbitration, hierarchical recourse and finally access to the Second Section of the Apostolic Signatura appear to be too much to ask of someone who is seeking simple and swift justice in a situation of local conflict.

Again, the directives emerging from this experience indicate the need for a local process that ideally would be preceded by some attempt at conciliation. A broader view of justice indicates that a local administrative tribunal should be available to award damages and resolve administrative conflict where it originates. Such administrative tribunals could provide the normal form of justice within the Church of the future.

The administrative recourse provided in the 1983 Code is essentially the hierarchical recourse of the 1917 Code that was classed as deficient by the 1967 synod of bishops and the principia guiding the formulation of the Code. This administrative recourse is more circumscribed than previous hierarchical recourse and includes

specifically promotion of attempts at equitable preliminary resolution of conflict. The new provisions appear to be more public and rights to defense and legal representation are implicitly included. The system remains defective in that any administrative conflict with a bishop must be resolved with recourse to the Holy See to the exclusion of local procedures except possible attempts at conciliation.

The proposals of the Oriental schema, though still in need of some modification and clarifications of administrative theory, appear to answer some of the difficulties raised by rejection of the 1982 schema for administrative tribunals. The proposal for a process that provides the same procedures for all administrative recourse brings a unity and simplicity to administrative justice that was lacking in the schemata for the Latin Code. Provisions for judgement of bishops before a tribunal of the synod sidestep some difficulties of administrative theory while the implementation of diocesan administrative tribunals raises the question of the nature of independence required. Any future implementation of the local administrative tribunal would need to circumvent such areas of administrative theory that are still to be defined. This single process, available for all cases of administrative conflict with all administrative superiors appears to be more equitable than separate procedures against bishops and inferior administrators.

3. An objective comparison of Systems

If we consider the objective requirements for a system of administrative justice that spring from these directives, we could consider the following among the most evident: 1) that the process should be a local one; 2) that preliminary processes for an equitable solution should be included; 3) that the system should be independent and impartial; 4) that the process be objective, favouring neither party; 5) that the process be available for all cases of administrative conflict with all administrative superiors; 6) that the process should provide swift justice; 7) that decisions emerging from the process should have executive force; 8) that the right to self-defense be provided; 9) that legal representation be available; 9) that damages may be awarded where necessary; 10) that the process be in essence a public process; and finally, 11) that the activity of administrators should not be impeded by the process except for grave reasons.

If these requirements are measured objectively against the systems of conciliation, arbitration, extrajudicial appeal, hierarchical recourse, judgement of legality before the Second Section of the Apostolic Signatura, the administrative recourse of the 1983 Code and the Oriental Law proposals, we find that all are present in the Oriental Law proposals alone (see Fig. 5 in Appendix).

4. Evaluation of systems

While the objective comparison of systems indicates that the Oriental Law proposals appear to fulfil all the requirements emerging from the directives in the development of administrative justice within the Church, it does not necessarily mean that these proposals suit the needs of administrative justice in the best way. There are many ways to evaluate systems. The difficulties that confront us here are the fundamentally different approaches of the systems. Conciliation or arbitration must qualify highly where the process sought is in line with the peaceful solution required by the Church. Extrajudicial appeal qualifies highly as a judicial system, but fails in principle to respect the person and administration of the bishop. The hierarchical recourse solution solves the conflict but can alienate the superior and the subject, and is not a local process in cases involving administrative acts of bishops. The Second Section of the Apostolic Signatura takes an intermediate path that, combined with the conciliatory attempts and processes through the dicasteries of the Roman Curia, is only a last resort. The system in principle, is ideally suited for resolution of administrative conflict but is impractical because of distance from the local churches and because it can include up to three other processes; furthermore, it generally does not provide swift justice.

The comparative chart indicates that the administrative recourse of the 1983 Code has overcome some of the difficulties inherent in ordinary hierarchical recourse. It is effective and swift,

but still remains a non-judicial, semi-closed system that appears in theory to favor the hierarchical superior.

The Oriental Law proposals provide a basis on which administrative tribunals can be introduced into the local Church, whether on the diocesan or supra-diocesan level may be open to dispute. The proposals, while different from those of the 1982 Schema for the Latin Code, have within them possibilities for gradual implementation and future development. As the theory of administrative law develops any changes could be easily incorporated. As the surviving proposal in a long evolution of systems for administrative justice within the Church, the hope for future implementation must surely lie in this direction.

The evaluation of a system that is unique can only be measured fully from the practice. The essential theory is already contained in the Second Section of the Apostolic Signatura; the full implementation should become possible when the difficulties in theory are resolved; in the meantime a limited, gradual, experimental implementation appears to be feasible.

D. Possible future administrative tribunal

The elimination of the local administrative tribunal in the 1983 Code dealt a strong blow to those who awaited a new era of justice in the Church. History was repeated, since a similar rejection had taken place when other proposals were put aside with the introduction of the 1917 Code. The question now to be asked is:

"does the administrative tribunal have a future at the local level of the Church?"

The 1983 Code speaks of particular Churches as "principally dioceses"(Can. 368). The Code speaks too of an episcopal conference as an assembly of bishops from a country or a certain territory (Can. 447). When we speak of "local" Church, we intend that country or territory over which an individual episcopal conference is established. It is in this sense that we speak of the "local" administrative tribunal. Since the general law did not provide for the establishment of the local administrative tribunal, the alternatives appear to be to wait for another Code, or turn to the episcopal conference as the body capable of introducing experimentation in this field.

1. Canonical indications for the future

Two canons in the 1983 Code indicate that there is a place for the administrative tribunal in developing law. The first, canon 149, §2, speaks of rescission of the administrative act of provision of an ecclesiastical office:

The provision of an ecclesiastical office to a person who lacks the requisite qualities is invalid only if the qualities are expressly required for validity by universal or particular law or by the law of the foundation; otherwise it is valid, but it can be rescinded by a decree of the competent authority or by a judgement of an administrative tribunal.

The only administrative tribunal capable of this action at the moment is the Second Section of the Apostolic Signatura, which

should have been named specifically in this canon if the intention of the legislator was not to introduce other administrative tribunals. In speaking of trials in general, the 1983 Code again makes reference to the administrative tribunal in canon 1400, s2: "Disputes arising from an act of administrative power, however, can be referred only to the Superior or to an administrative tribunal.

The 1983 Code, speaking of the tribunals of the Apostolic See, mentions the competence of the Apostolic Signatura. The Second Section of the Apostolic Signatura is not named or referred to as an administrative tribunal, although its competence is mentioned in canon 1445, s2, which states: "This same Tribunal deals with controversies which arise from an act of ecclesiastical administrative power, and which are lawfully referred to it."

With no administrative tribunals mentioned in the Code apart from reference in canons 149, s2 and 1400, s2, we appear to be faced with a dilemma. Either the inclusion of these canons was an oversight, as they are canons which should have been removed when the legislation on local administrative tribunals was excluded; or they are included with a view to future development in administrative law. Given the serious nature of the Code of Canon Law, and following Cardinal Casaroli's list of errors which failed to mention these canons,³⁶ it appears difficult to argue for an oversight. For this reason, an argument in favour of a provision made for future development appears acceptable.

³⁶ A.A.S., 75(1983), Pars. II, Appendix, pp. 321-324.

Another canon (Can. 1413) appears at first sight to include a return to extrajudicial appeal. It states that a party can be brought to trial: "1^o in cases concerning administration, before the tribunal of the place in which the administration was exercised." However, canon 1419, s2 adds another dimension: "If the case concerns the rights or temporal goods of a juridical person represented by the bishop, the appeal tribunal is to judge in first instance." These canons help establish the important difference between "acts of administration" and "administrative acts" which are normally decrees.

Transactions concerning the administration of the Church's goods are not administrative acts and matters of conflict in this area are normally to be taken to the tribunal of the place of administration or in the case of the bishop, to the appeal tribunal. By reason of connection, however, cases of administration in which an administrative decree is challenged would not be taken to the above tribunals, but rather be subjected to administrative recourse with the possibility of further recourse to the Second Section of the Apostolic Signatura (canons 1414, 1400, s2). While competent for acts of administration, the ordinary tribunals are not competent to treat administrative acts.

This administrative distinction and the tenor of the two previous canons seem to permit two possible future developments: 1) the interim introduction of a universal law for local administrative tribunals, or, at least, 2) an opening for limited experimentation with the local administrative tribunal.

2. Reasons favouring introduction of the local administrative tribunal

Apart from the deductions permitted by the canons of the 1983 Code, other arguments continue to favour the introduction of the local administrative tribunal. Foremost among these is the express desire of the 1967 synod of bishops which reflected the thinking of the Church at large.³⁷ Two principles guiding the formulation of the 1983 Code still remain valid. One principle called for the establishment of such tribunals and expressed dissatisfaction with hierarchical recourse. The second principle was a call for subsidiarity. If this principle is followed, then the resolution of local administrative conflict should take place at the most appropriate level, in this case, with local administrative procedures.³⁸

The implementation of the local administrative tribunal seems to be a requirement if the legal system of the Church is to be complete. Pope Paul VI, a canonist of enormous stature, had a vision of Church law far beyond his times, he was a firm advocate for a complete system of justice and gave his support to the introduction of the local administrative tribunal.³⁹ However, Paul VI suggested

³⁷ G. Caprile, Il Sinodo dei vescovi, pp. 94-112; here the Synod Fathers express their wishes concerning local administrative tribunals.

³⁸ Communicationes, 1(1969), pp. 80-82.

³⁹ Paulus VI, Allocutiones de Iure Canonico, pp. 5-170, more specifically, "Ad Praelatos Auditores et Officiales Tribunalis Sacrae Romanae Rotae", (4 februarii 1970), p. 157.

that experiments be carried out before the new law was promulgated; his insights went unheeded.⁴⁰

The interest, promotion and writings of major canonists analysed in this study alone confirms the need, relevance and desirability of the administrative tribunal at the level of the local Church. The existence of one such tribunal in the Second Section of the Apostolic Signatura indicates that the system is workable and with adequate protection could be implemented at the local level.

The argument of Cardinal Sabattani, prefect of the Apostolic Signatura is equally contemporary. He justified the procedures of the Second Section as a counterbalance to the broader faculties and discretionary power given to bishops by Vatican II. Against superiors who abused these more ample concessions, a challenge to their decrees was now possible. The difficulties he foresaw in the local implementation were the composition of the tribunal and the preparation of the judges.⁴¹

3. Conditions required for implementation

Jurisprudence of the Second Section of the Apostolic Signatura indicates that some administrative cases require an expertise in law

⁴⁰ Communicationes, 4(1972), p. 36.

⁴¹ A. Sabattani, "Iudicium de legitimitate actuum administrativorum a Signatura Apostolica peractum", in I.C., 16-2(1976), p. 231.

possessed only by specialists.⁴² Since there are few local churches fully capable of handling the increasing number of tribunal marriage cases with sufficiently trained personnel, we can argue, a fortiori, that even fewer experts in the 1983 Code administrative law are available with sufficient expertise to judge the administrative decrees of bishops. So, while the theory of administrative tribunals has developed, the practical issues regarding administrative expertise, though not insurmountable, have become key factors in the consideration of implementing local administrative tribunals.

Given the stance of the 1983 Code on qualifications required of tribunal personnel,⁴³ the seriousness of preparation for members of administrative tribunals must be taken into account. Since questions of administrative activity cover so many aspects of Church government, a broader expertise than that required for the marriage tribunal would appear to be required. Without this fundamental legal preparation, there can be no meaningful indult or approval by the bishops for experimentation in procedures for administrative justice in the local church.

The primary purpose of education in administrative law is to ensure the right of the people of God to receive an administration that is carried out according to the universal and particular law of the Church. Only when this fails, the secondary purpose, vindication of rights through the administrative tribunals, provides a guarantee

⁴² Cf. Bibliography of this thesis on jurisprudence of the Second Section of the Apostolic Signatura.

⁴³ Canons 1420, s4; 1421, s3, CIC 1983.

for the faithful. Both aspects of administrative law are important. Expertise in both fields is required at the level of the local church if the law is to be implemented and guaranteed effectively.

Within this total context of education for justice, the administrative tribunal finds a unique place. Only when it is adequately understood, will it be accepted and effective. When administrative law is properly implemented at the level of the local church, then the administrative challenge to the decrees of administrative authorities should diminish drastically.

The sudden implementation of a complete and totally new system for administrative justice that has not been subjected to trial on the local level may be counterproductive, be open to errors and misinterpretation and may produce a variety of possibly harmful effects. The tendency to place the new provisions under older categories,⁴⁴ civil law expectations of ecclesiastical administrative tribunals, the need for a new mentality towards a new type of justice counsel prudence and a gradual experimental introduction of the local administrative tribunal.

4. A proposal for gradual implementation

In a sense, we can claim that step one of the proposal for a graduated introduction of local administrative tribunals has already

⁴⁴ John Paul II, Allocution to the Rota, "The Task of the Church Tribunal", in Or., 13(1984), pp. 583-585; here the Pope cautions against interpreting the new law as if it were the old one.

been implemented. It is the provision of an administrative tribunal for the Universal Church in the Second Section of the Apostolic Signatura. Even here, early mistakes were made as decisions emerged that appeared beyond the competence and scope of the charter, so even greater care must be taken in local implementation.⁴⁵

The second step is included in the 1983 Code. The desire of the legislator has been expressed, that in particular Churches, episcopal conferences set up guidelines for some form of "council for conciliation" and provide procedures for conciliation (Canons 1733, s2; 1714). Since the mind of the Church has been expressed, there should be few exceptions to the establishment of these councils, and only for the most serious reasons. Ideally, most areas of conflict can be resolved with these procedures, since they are essentially private and harmonise well with the Church's desire to find equitable solutions by mutual consultation and avoid contentious trials.

Out of this experience with the use of "councils for conciliation" should emerge an awareness of the need for a better juridical system to handle more serious and difficult cases. It is at this point that particular Churches could establish their own administrative tribunals, modelled essentially on the Second Section of the Apostolic Signatura with the use of the specific differences provided by the Oriental Law proposals wherever there is no question of dispute. It appears that the episcopal conference would need an

⁴⁵ I. Gordon, "De iustitia administrativa ecclesiastica", in Per., 61(1972), pp. 329-339.

indult or at least confirmation of their decree for this experimental implementation, not because the conference lacks the power, but to sidestep this power structure issue which still needs of clarification.⁴⁶ To avoid this issue could prove counterproductive.

a. Introduction of a limited administrative tribunal

Gradual implementation of the local administrative tribunal on an experimental basis must be carefully planned so that local conditions, education of judges and the people of God and future adaptation following development and clarification of administrative theory are all taken into account. While a variety of schemes for gradual implementation could be suggested, the following might serve as a model subject to many possibilities of change.

i. First stage

Since the major area of administrative conflict hinges on the activity of the bishop, it seems logical that the first local stage should introduce procedures for cases involving administrative decrees of bishops. Following the principle of the Oriental Law that bishops should not be judged by non-bishops, the first instance tribunal should be composed of a bishop-judge or panel of bishop-judges appointed by the episcopal conference. This tribunal

⁴⁶ B. Gangoiti, loc. cit., pp. 715-730, presents some of the major theological and juridical difficulties to be overcome in the judgement of the administrative decrees of bishops.

would be competent for all cases within the territory of the episcopal conference. A tribunal of second instance could be erected at the same time to ensure that administrative justice in essence remains a local church affair. During this experimental period, the administrative recourse provided by the 1983 Code would remain available for cases against administrative authorities subject to the bishop.

ii. Second stage

Stage two in the gradual implementation of administrative tribunals would introduce administrative sections to the ordinary supra-diocesan or regional tribunals. Here priests would be the judges with competence for all cases against administrative authorities subject to the bishop from the region of the tribunal. The provision should also be made for tribunals of second instance to introduce a special section for administrative appeals, so that local resolution remains possible for most conflicts.

A deliberate choice has been made for a section of the ordinary tribunal over a separate tribunal, since this better indicates the unity of the system of justice while allowing for a diversity in power structure and procedures. Practical considerations, such a availability of canonists and the structure of the local Church also indicate this need for unity. There is a presumption taken from the Latin Code draft of 1982, that members of the tribunal judging a case

have no connection with the issuing of the decree in question and do not belong to the diocese from which it originated (can. 1740).

Future steps in the implementation of local administrative tribunals will depend on practical and theoretical considerations. Since a choice exists at both levels of the administrative recourse, an evaluation will need to be made of the extent of use of the administrative tribunals compared with the choice for hierarchical administrative recourse. Further considerations will follow clarifications in the theory of administrative justice. The process can develop in several directions depending on the nature of these clarifications.

iii. Third stage

Presuming a gradual clarification, the third stage of the implementation could be a choice for the parties. Where one of the parties is a bishop, a choice could be allowed: either appear before bishop-judges or before priest-judges. The use of lay judges is another question that needs clarification in cases of judgement of priests and of bishops. However, education, clarification of theory and local acceptability are elements that need time to mature and the growth of a more complete system of justice for the local church depends on these and many other intangible factors.

b. Advantages of a gradual implementation

Many practical advantages are foreseen with a gradual implementation of the administrative tribunal on the level of the particular Church. Among the major advantages foreseen are the following:

- 1) there is an avoidance of the "culture shock" that may follow the introduction of what essentially is a revolutionary approach to administrative justice in the Church;
- 2) a time allowance is granted to gain expertise required in the management of such tribunals;
- 3) a deeper understanding of the new system is possible for the local Church through the educational efforts that explain each step taken;
- 4) time is allotted for particular Churches to see administrative tribunals in practice, to evaluate them and learn from their expertise and errors;
- 5) time becomes available to resolve questions of administrative theory and to overcome fears and anxieties about the system;
- 6) a gradual amplification of grounds for judgement, improvements in procedures and clearer guidelines for development on the local level should follow advances in the theory of administrative law;
- 7) an awareness of the burdens of administrative challenge must ultimately lead to greater participation in Church government at the level of the diocesan Church, and finally,

8) a solid basis is provided by this experimentation for the legislator to formulate and introduce a universal law for administrative justice.

Previous systems in this study were subjected to abuses. They commenced with a broad basis and had to be restricted subsequently. The advantages presented by a gradual implementation on an experimental basis mean that all necessary refinements of procedures, grounds and personnel involved can take place before a universal law is promulgated.

CONCLUSION

The variety of systems outlined in this study have shown us procedures used by the Church for the resolution of conflict in general and the resolution of administrative conflict in particular. While the ultimate aim of each system is the resolution of conflict, the procedures and their effects differ. The evaluation of the advantages and disadvantages as well as consistent patterns of each system has led to a gradual clarification and development of administrative law and now gives indications for future development.

Examples of confusion and abuses that existed in the early Church when bishops and clergy were cited to appear before the secular courts about merely ecclesiastical matters remains with the Church nearly 2000 years later. This difficulty is not removed by threatening excommunication, but rather with the provision of adequate local procedures to guarantee administrative justice. The call of St. Paul for autonomy in the resolution of situations of local conflict was heeded and practiced by the synods and councils for several centuries; however, that autonomy has now been assumed in law by a system of external intervention to the detriment and confusion of the ecclesial legal system. Abuses cannot be condemned so long as the Church fails to provide adequate procedures for the defense of rights within the local Church.

From the origins of the Church, only the systems of conciliation and arbitration have remained constant as the solutions most capable of bringing about the peaceful resolution desired by the Church. Since these are in harmony with the Church's desire to avoid contentious trials, the first conclusion of our study must be that such systems are to be universally encouraged as the ideal approach to the christian resolution of conflict.

However, experience tells us that conciliation and arbitration do not meet the needs of all cases. While a party can be brought to trial before the ordinary tribunal in cases concerning administration (Can. 1413 CIC 1983), the only remedy provided by the law against administrative acts of bishops is essentially external intervention in local church affairs with administrative recourse to the dicasteries of the Roman Curia.

The existence of the administrative tribunal in the Second Section of the Apostolic Signatura and the theory developing from this administrative control indicate that an administrative tribunal is possible at the level of the local Church. Difficulties in unresolved questions of administrative theory impose some limitations on the full implementation of the local administrative tribunal, but indicate that a limited application is possible as the theory evolves.

Establishment of the local administrative tribunal or procedures for local administrative justice presumes much more than the physical erection of a tribunal. The following recommendations could be included in any eventual legislation for the introduction of such tribunals:

- 1) an education program should be initiated to help bishops appreciate the broader questions of justice associated with their administrative activity;
- 2) to assist the bishops, canonists will need to be adequately trained in all aspects of the Church's new administrative law;
- 3) guidelines should be furnished to facilitate the administrative activity of bishops;
- 4) structures for participation and guidance in administrative decision making at the diocesan level should be encouraged;
- 5) the episcopal conference should prepare guidelines for procedures of conciliation and arbitration (can. 1714, CIC 1983);
- 6) bishops, encouraged by the episcopal conference, should establish councils or offices for conciliation in their dioceses (can. 1733 §2 CIC 1983);
- 7) a continuous evaluation of the need and effectiveness of the council for conciliation should be undertaken;
- 8) since the procedures of conciliation and arbitration do not answer every need, the episcopal conference should, after adequate preparation, establish administrative tribunals of first and second instance within the episcopal conference for cases against bishops;
- 9) priests and other trained canonists could be used in such tribunals to draw up the acts of the case, even though the bishops alone would initially act as judges;
- 10) after the establishment of such tribunals, consideration could be given to supra-diocesan administrative tribunals for cases against administrative authorities subject to the bishops of the region; and finally,

- 11) the introduction of each stage should be accompanied by promotion of procedures for the peaceful resolution of conflict and an education program to inform the christian-faithful of their rights and the procedures available to guarantee justice.

The basis for judgement of administrative activity in the administrative tribunal would be essentially that followed in the Second section of the Apostolic Signatura. Practical considerations such as the composition of the tribunal and the juridical preparation of the judges would be determined at the local level. Allowance for development and change of procedures would be part of the experimental nature of introduction of the administrative tribunal. This experiment does not preclude the right to use the administrative recourse provided by the 1983 Code. The provision of such a choice gives greater credibility to the system and may determine future development when choices are evaluated.

The overall context within which this question should be viewed is within the framework of a complete system of justice for the Church. The local Church should be seen as a reflection of the universal Church possessing all the elements that give it the autonomy to be expected at the local level. In this context the introduction of the administrative tribunal is necessary.

APPENDIX
TIME SCHEDULE FOR ADMINISTRATIVE RECOURSE
Figure 1

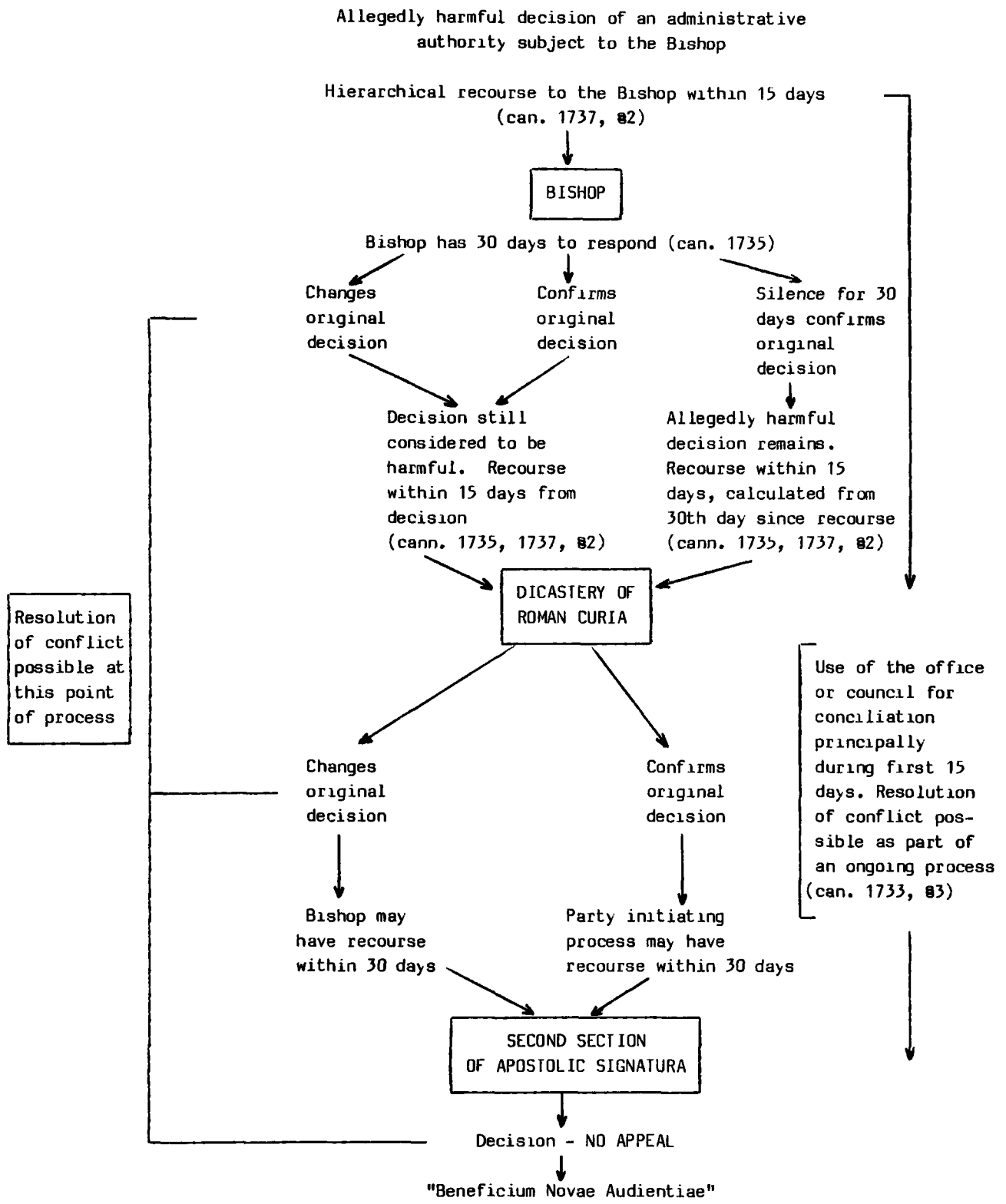
NORMAL TIME SCHEDULE	<u>MAJOR ACTS OF THE PROCESS</u>	TIME FOR EXTRAORDINARY ACTS
	A. <u>Introduction of recourse</u>	
	1. The administrative act	
30 days	2. Request for copy (Art. 110) (15 days)	
	3. Challenge to act by recourse (Art. 105 §1)	
30 days	4. Secretary advises ecclesiastical authority and requests documentation (Art. 113)	
	5. Time allotted to appoint the advocate (art. 113)	
	6. Response to request for suspension of decree. Promotor of Justice has 10 days to submit <u>votum</u> (Art. 113 §2) Decision must be given within 60 days (Art. 113 §3)	60 days
	7. The advocate may ask for time limits to be calculated from the moment he accepted his mandate (Art. 114 §1)	30 days (maximum)
	8. Time to gather extra evidence (Art. 114. §1)	30 days
20 days	9. Contrary recourse of resisting parties (art. 114 §1)	
20 days	10. <u>Votum</u> of promotor of justice (Art. 115 §1)	
	B. <u>Admission or rejection of recourse</u>	
20 Days	11. <u>Congresso</u> accepts or rejects resource (Art. 116).	
	12. Possible recourse against rejection (Art. 116)	10 days for recourse more for hearing
30 Days	13. Summary oral process - determination of the <u>dubium</u> (Art. 117 §1)	
	14. Further investigations can be ordered by the Secretary (Art. 117 §2)	
	15. If parties dissent on further investigation recourse to judging cardinals (Art. 177 §2)	30 days
	16. Request possible for consultation of a legal expert (Art. 117 §3)	
30 Days	17. Copies and summaries of process to be deposited (arts. 118-119)	
	C. <u>Judgement on the recourse</u>	
60 Days	18. Judgement by the college of judges (art. 120)	
	19. If all questions are not defined, further evidence may be sought, new time limits set (art. 123 §2)	No limits

NORMAL TIME LIMIT FROM ACT IMPUGNED TO JUDGEMENT = 240 DAYS

APPENDIX

Figure 3

ADMINISTRATIVE RECOURSE AGAINST ADMINISTRATIVE AUTHORITIES



APPENDIX

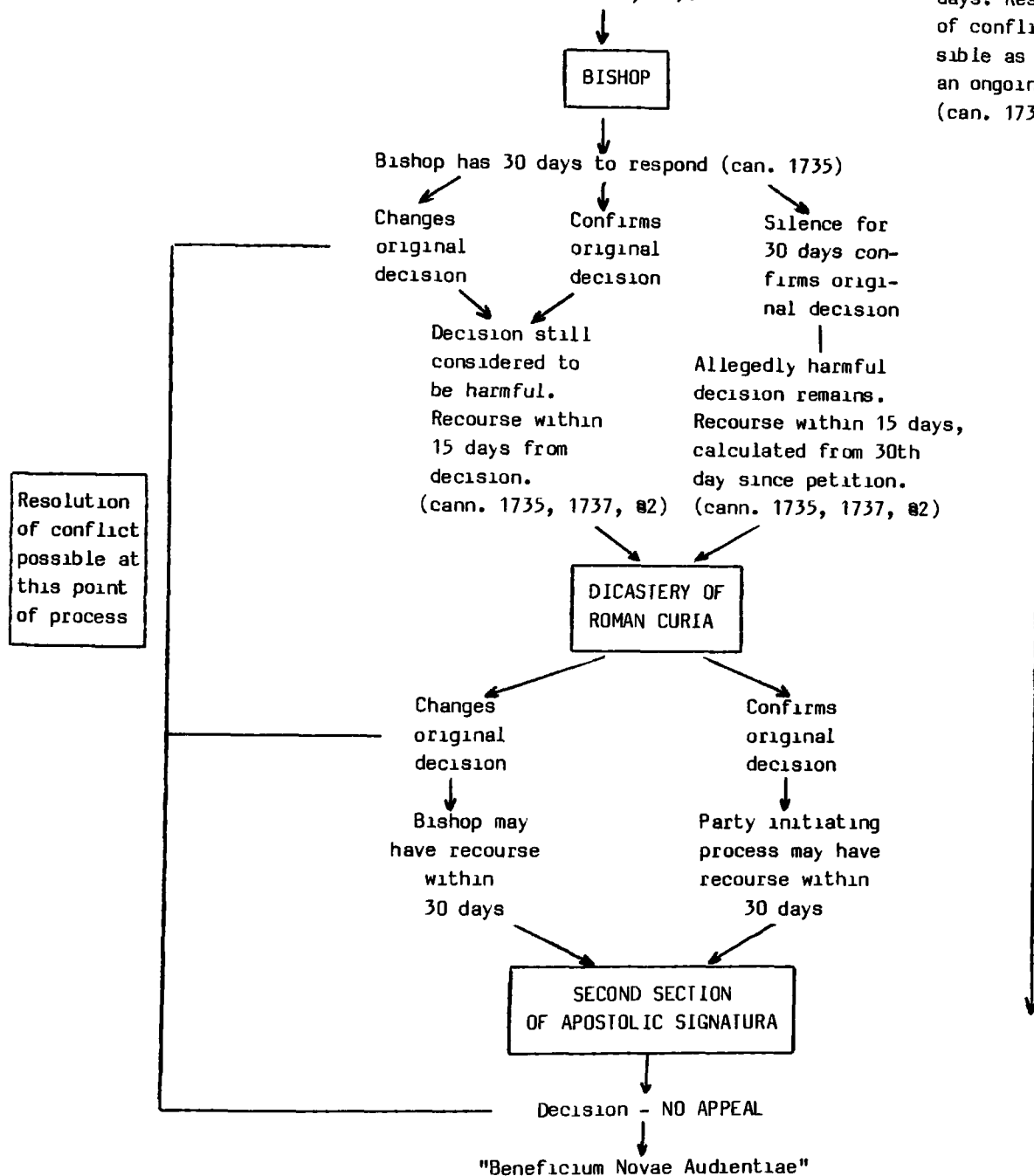
Figure 4

ADMINISTRATIVE RECOURSE AGAINST DIOCESAN BISHOP

Allegedly harmful decision of the Bishop

Preliminary recourse or petition to the Bishop within 10 days. This recourse in writing seeks revocation or amendment of decree and is understood to seek suspension of the execution of the the decree (can. 1734, §1).

Use of the office or council for conciliation principally during first 15 days. Resolution of conflict possible as part of an ongoing process (can. 1733, §3).



APPENDIX

Figure 5

AN OBJECTIVE COMPARISON OF SYSTEMS AVAILABLE FOR RESOLUTION OF ADMINISTRATIVE CONFLICT

ELEMENTS REQUIRED IN THE PROCESS	SYSTEMS COMPARED						
	CONCILIATION	ARBITRATION	EXTRAJUDICIAL APPEAL	HIERARCHICAL APPEAL	SECOND SECTION OF THE APOSTOLIC SIGNATURA	ADMINISTRATIVE RECOURSE OF THE 1983 CODE	ORIENTAL LAW PROPOSALS
A local process	•	•	•				•
Uses preliminary processes for equitable solutions	•	•			•	•	•
Independent and impartial	•	•			•		•
An objective process that favours neither party	•				•		•
A process for use with all administrative superiors	•						•
A process that is swift	•	•		•		•	•
Decisions have executive force			•	•	•	•	•
Right to self-defense included	•	•	•		•	•	•
Right to legal representation		•	•		•	•	•
Process can award damages			•	•	•	•	•
Essentially a public process			•		•		•
Does not suspend administrative activity except for grave reasons				•	•	•	•

CANONICAL SOURCES

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THESIS SUMMARY

"The Development and Future of the Administrative Tribunal" is a thesis that deals with a limited area of justice in the Church. It treats of justice in the area of Church administration and in particular of remedies against administrative acts that allegedly cause harm. The particular emphasis is on the recourse available against administrative acts of bishops.

Since a gap appears to exist in canon law where no challenge to the administrative authority of the bishop is available at the level of the local Church, this thesis looks to the possibility of future development in this specialised field of justice. The overall aim is to investigate the possibility of some future introduction of local administrative tribunals by tracing the systems used in the Church throughout the centuries and determining the consistency of the canonical tradition that is contained in these various approaches.

The first chapter of the thesis commences with a brief study of the practice of the early Church as portrayed in the New Testament and the systems used in the early centuries of the Church which provided first for a peaceful resolution and then for a legal solution when all else failed. The autonomy of the local resolution of conflict situations contained in the writings of St. Paul is reflected in the practice of judgement before the provincial synod of bishops, a system that lasted for several centuries. The refinements of juridical terminology and the theory of administrative practice of today were not present in the early Church, so the thesis commences with processes for the resolution of conflict in general and develops towards the more specific theme of administrative justice.

The second chapter of the thesis treats of the processes of conciliation and arbitration, the only solutions that have remained consistently used within the Church since its inception. The value of such processes is outlined and rests in their universal availability and harmony with the spirit in which christians should be reconciled in their differences.

The third chapter treats of the processes used since the twelfth century, extrajudicial appeal and hierarchical recourse. The first, a judicial process, favoured the appellant, while the second, an administrative decision of a hierarchical superior, favoured the authority challenged. Out of these two systems came the compromise solution of the administrative tribunal in the Second Section of the Apostolic Signatura based on the question of legality of acts.

The fourth chapter presents the solution proposed and used in the Second Section of the Apostolic Signatura. The limitations in having such a tribunal that may only be used as a last resort and is the sole administrative tribunal for the whole Church are highlighted. From these limitations springs the question raised by this thesis, namely, the possibility of implementation of similar tribunals at the level of the local Church.

The fifth chapter presents the law of the 1983 Code on administrative justice. Essentially there is little change in the law from that of the 1917 Code which is generally accepted as deficient in providing adequate justice within the Church. The Oriental Code proposals are examined with a view to a possible future, limited and experimental introduction of administrative tribunals at the level of the local Church.

The introduction of the local administrative tribunal appears

in essence to be feasible, however, for the introduction of a system that will not prove to be counterproductive there are some serious implications that cannot be overlooked. The major area of need appears to be in the area of education in administrative law. When canonists and bishops begin to appreciate the administrative challenges of the 1983 Code then the complimentary nature of good administration and provisions for administrative justice will be better appreciated. Without this understanding, any immediate introduction of experimental administrative tribunals must prove counterproductive.