Administrative Recourse:

What It Is, What It Is Not, and What It Could Be

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Introduction

The Catholic Church is a divinely instituted reality. But it is also at the same time a very human institution, made up of human members with human failings. Called by the Gospel to love one another and to live harmoniously with and for each other as they actively seek the reign of God, the *christifideles* are a community whose members, like those of any other community, will occasionally have disputes, and who therefore need to have fair and equitable methods of proceeding in such disputes.

One of the most common—or at least most commonly thought of—such disputes in the Church are those between ecclesiastical officials and their subjects regarding official decisions of one kind or another.

> The preamble to *Administrativae potestatis* starts with a citation of *Lumen gentium* […] that shepherds of the Church "have the sacred right and duty before the Lord to make laws for their subjects, to pass judgment on them and to moderate everything pertaining to the ordering of worship and the apostolate." However, it is further stated in the preamble that in carrying out this task, it is possible that differences may arise between bishops, the faithful and the priests, and thus that someone may feel injured by a certain act of administration of his shepherd. The best solution is to settle this dispute in a friendly way.[2]

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[2] Kurt MARTENS, citing the unpublished *motu proprio* of Paul VI, *Administrativae potestatis*, in "The Law That Never Was: The *motu proprio Administrativae Potestatis* on Administrative Procedures," in *The Jurist*, 68 (2008), p, 202.

In this brief paper, we will look at how a dispute over such an act of administration might proceed in the current law of the Catholic Church. We will also reflect briefly on a proposal that was entertained for many years, yet was not included in the 1983 *Code of Canon Law*: the administrative tribunal. Finally, we will consider what, if any, better ways there might be to seek resolution to such conflicts over administrative acts.

Recourse Against Administrative Acts

When we speak of administrative recourse in the Church, it is important to be very clear what it truly is—and is not—that we are referring to. In the procedural law of the Catholic Church, a judicial decision—the sentence following a formal trial—can be legitimately appealed (by one of the parties to the case)[3] to another, second instance, court, and from there—if further recourse is still required—to the Tribunal of the Roman Rota. If a diocesan bishop enacts legislation for his subjects which they feel is unjust, the Pontifical Council for the Interpretation of Legislative Texts can be asked to examine the particular law in question.[4] These are examples of what administrative recourse is *not*. So what is it?

Pastors of the Church—specifically diocesan bishops and, to a preeminent degree, the Roman Pontiff—possess by virtue of their episcopal ordination a special fullness of the offices of teaching, governing, and sanctifying the faithful entrusted to their pastoral care.[5] Of these, we are concerned in this paper with the office of governing, or the kingly function (*munus regendi*). Executive power—applying the law authoritatively to specific cases—is one of three aspects of this power of governance (*potestas regiminis*), the other two being legislative power (to enact laws for one's subjects) and judicial power (to render judgement in causes brought by or involving one's subjects).

The exercise of this executive power can take various forms, but it is frequently done through a singular administrative act, such as a decree or a precept, which makes known a specific decision, in light of the law, in regards a specific situation. It is precisely this sort of singular administrative act that is uniquely the proper object of administrative recourse.

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[3] Including the promoter of justice and defender of the bond, where applicable (c. 1628)

[4] JOHN PAUL II, Apostolic Constitution on the Roman Curia *Pastor Bonus*,28 June 1988, art. 158.

[5] Cf. c. 375.

While the notion of a grievance against such an administrative act is not new in the Church's legal history,[6] the specific mode of dealing with such grievances is a newcomer to the currently codified legislation. A clue to just how new these procedures are in their current form can be found at the bottom of the pages that deal with the topic in the Code. In an edition that includes the *fontes* for the canons, as the edition prepared by the CLSA does,[7] at the bottom of each page, there is a glaring blank space below the text of the canons on recourse against administrative decrees (cc. 1732-1739): not a single foundational source is listed for any of them. Certainly not every one of the 1,752 canons in the current Code has a clear divine basis; many are clearly "merely" ecclesiastical law, that is, positive human law in origin. But usually such laws are part of the development of a core that is built upon scripture and tradition. To have an entire block of canons that has no reference to anything beyond itself is, therefore, curious at the very least.[8]

But *fontes* or no, the shape of possible recourse against an administrative act is clear: it is done through hierarchical recourse, that is, by appeal (using the term loosely) to the hierarchical superior of the author of the decision in dispute. When a person (or group of persons) feels aggrieved by a singular administrative act[9] the first step is to contact the author of the decree and to "take care to seek an equitable solution by common counsel, possibly using the mediation and effort of wise persons to avoid or settle the controversy in a suitable way" (c. 1733 §1). Conferences of bishops—or even individual diocesan bishops if the conference has not done so—are encouraged to establish some sort of stable office "whose function is to seek and suggest equitable solutions" (c. 1733 §2).[10]

In the event that such conciliation or mediation does not lead to an end of the dispute, the aggrieved party must then request formally in writing that the decree be revoked or emended by its author; this must be done within ten useful days following the "legitimate notification of the decree" (c. 1734 §§ 1&2). The author of the decree can either

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[6] John BEAL highlights several key moments of canonical history that pertain to administrative recourse prior to the 1983 Code in his article "Administrative Tribunals in the Church: An Idea Whose Time Has Come or an Idea Whose Time Has Gone?" in *CLSAP*, 55 (1993), pp. 39-45.

[7] *Code of Canon Law: Latin-English Edition, New English Translation*, prepared under the auspices of the CANON LAW SOCIETY OF AMERICA, Washington, Canon Law Society of America, 1999. All quotations from the Code are taken from this edition.

[8] Without delving into the textual history of these canons or the recorded relations of the deliberations of the *coetus*, it seems at least a strong indication that these are not only merely ecclesiastical law, but they are whole cloth innovations by the drafters of the current Code.

[9] Excluding any such act by the Pope himself or an ecumenical council (c. 1732).

[10] While not listed as a *fons*, Saint Paul's exhortation in 1 Corinthians 6:1-5 regarding resolution of internal disputes in the Christian community is clearly remembered in this canon.

comply with the request, or not, within thirty days of this formal request (c. 1735), after which time the aggrieved party, if the matter is still unsettled, "can make recourse […] to the hierarchical superior of the one who issued the decree" (c. 1737 §1), again within strict time limits (c. 1737 §2).

Who is "the hierarchical superior of the one who issued the decree" to whom such recourse can be made? Within a diocese, it will be the diocesan bishop as superior to all those under his jurisdiction. If, however, the diocesan bishop himself is the author of the decree in question, then the matter can only be addressed by the competent dicastery of the Roman Curia (the Congregation for Bishops, in most cases), "[s]ince diocesan bishops have no superiors below the level of the Holy See."[11]

And what is the possible outcome of such hierarchical recourse? According to c. 1739, the "superior who deals with the recourse, as the case warrants, is permitted not only to confirm the decree or declare it invalid but also to rescind or revoke it or, if it seems more expedient to the superior, to emend, replace, or modify it." The superior's judgment in the matter takes the place of that of the original author of the decree.

Administrative Tribunals

The inclusion of administrative recourse in the universal law of the Church goes back to the very beginning of the process for the revision of the 1917 Code, when the proposed principles to guide the work of the Code Commission were presented to the 1967 Synod of Bishops. Among these principles it was stated that

> it is the common opinion of canonists that administrative recourses are still lacking considerably in church practice and in the administration of justice. Hence the need is everywhere felt to set up in the Church administrative tribunals of various degrees and kinds, so that the defense of one's rights can be taken up in these tribunals according to proper canonical procedure….[12]

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[11] John Beal, "Hierarchical Recourse: Procedures at the Local Level," in *CLSAP*, 62 (2000), p. 96.

As an example of such measures, the extensive and ambitious experiments with "Due Process" by the NCCB and the CLSA In the United States are of considerable interest, but fall completely outside the scope of this paper.

[12] Pontificia Commissio Codici Iuris Canonici Recognoscendo, "Principia quae Codicis Iuris Cononici recogntionem dirigant," in *Communicationes*, 1 (1969), as quoted in Beal, pp. 43-44.

So throughout most of the work of the Code Commission, the solution to the problem was seen to necessarily include the establishment of a new entity: the administrative tribunal.

Viewed from a certain perspective, the idea of administrative tribunals seems a perfectly reasonable and much-needed structure in a vast international church with over a billion very human members. As mentioned above, the idea was not an utter novelty, although its formulation in the various schemata of the Code owed more perhaps to civil judiciary structures in Italy at the time than it did to any time-honored praxis in the Church.[13] This notion clearly had a great deal of traction in the canonical community throughout much of the twentieth century, and almost thirty years later proponents of such organs seem to be as baffled by their absence as they were the day the new Code was promulgated without including a single provision for them.

In brief, the planned law would have required every diocese to establish a tribunal "with the competency to hear appeals against decrees of authorities subject to the bishop."[14] It also recommended that each conference of bishops establish a number of regional or interdiocesan administrative tribunals to hear and resolve recourse in the first instance against administrative acts of diocesan bishops, and in the second instance such recourses against persons below the level of diocesan bishop.[15]

There was, it must be acknowledged, already a single administrative tribunal in the Church at this time: the so-called second section of the Apostolic Signatura, established in 1967 in the reordering of the entire Roman Curia by means of the apostolic constitution *Regimini Ecclesiae universae*. Its stated purpose was to consider "contentions which have arisen from the exercise of administrative ecclesiastical power."[16] And in the vision of the Code Commission, this second section of the Signatura "would in the future operate as the highest administrative tribunal in the Church."[17] Instead it remains the sole example of such a tribunal in the Church.

So advanced was the work on administrative tribunals that this entire set of provisions was very nearly promulgated *ad experimentum* by Paul VI in 1973. As Martens re-

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[13] See Michael MOODIE, "Defense of Rights: Developing New Procedural Norms," in *The Jurist*, 47 (1987), p. 432.

[14] MARTENS, p. 198.

[15] Ibid.

[16] PAUL VI, Apostolic Constitution *Regimini Ecclesiae universae*, 15 August 1967, in *AAS* 59 (1967), p. 921, English translation in *Canon Law Digest* 6, p. 351.

[17] MARTENS, p. 185.

peats throughout his article, all that was missing from the prepared *motu proprio* was the papal signature and a date of promulgation. But these were never to be added. Despite the overall enthusiasm of the members of the *coetus*, there had been considerable red flags raised along the way as well. Principally

> it was questioned whether administrative tribunals can be reconciled with the nature of the Church, and whether the power of bishops can be subject to a review by administrative tribunals, other than by an ecumenical council or the pope. Likewise, a certain fear was expressed that the possibility of hierarchical recourse and the creation of administrative tribunals will lead to useless recourses and appeals, organized by way of opposition to the public administration in the Church. Finally, practical concerns were raised as well: it would not be possible to find enough people, qualified to deal with such cases, since there was already a problem in staffing the ordinary tribunals.[18]

While no official account has ever been made, it is likely that these same concerns were at play when the provisions for administrative tribunals were removed from the final draft of the Code just before promulgation.

Interestingly, the promulgated 1983 Code contains two explicit mentions of *tribunalis administritavi*. The first, c. 149 §2, provides that the election to an ecclesiastical office of an unqualified candidate "can be rescinded by decree of competent authority or by sentence of an administrative tribunal." The second instance, c. 1400 §2, defines a class of actions which cannot be dealt with before ordinary ecclesiastical tribunals; rather, "controversies arising from an act of administrative power can be brought only before the superior or an administrative tribunal." Yet what, in the context of the *ius vigens*, are the administrative tribunals these canons refer to? The seemingly-obvious answer is that these now-meaningless cross-references were simply missed in the final editing before the Code was promulgated.[19] Martens calls them "the sole remaining witnesses of a proposed sophisti-

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[18] MARTENS, 196.

[19] This is eloquently attested to by the simple fact that, as James PROVOST points out in *CLSAComm2*, p. 206, note 33, the *CCEO* c. 940 §2 makes no such reference in the otherwise parallel text.

However, an alternate view comes from Archbishop Zenon Grochelewski, who is, at least according to John Beal, believed to have been one of the select advisors to John Paul II during the final redaction of the 1983 Code, and who insists that "these two remaining mentions […] were neither editorial oversights nor oblique references to the Second Section of the Apostolic Signatura." Instead, "he suggests they were meant to leave open the question of establishing local administrative tribunals at the initiative of the competent territorial authorities." (BEAL, pp. 60-61).

cated system of protection of rights, combining hierarchical recourse and appeal to an administrative tribunal."[20]

Does the absence of provision for administrative tribunals in the promulgated universal law mean that such things cannot exist? Canonists seem to think not. John Beal makes the point that, even though they were not included in the Code, the same or similar organs could be instated by diocesan bishops or even by episcopal conferences for their jurisdictions, by means of particular law.[21] Whether this is desirable or not remains a different question. The ecclesiological concerns certainly remain valid, although not insurmountable. But perhaps the stated purpose of administrative tribunals—the resolution of conflict and the vindication of rights in the Church—could be met better by a solution that doesn't look like a tribunal at all.

A Better Way?

In the most un-canonical terms possible, a recourse is a way for the affected person or persons to say to the author of the administrative act, "I do not agree with the decision you have made." In most cases the aggrieved party is also saying "Please change your decision," although that is not as essential an element. What is essential, what is at the core of most recourse proceedings, is this plea: "Will you please talk with me (or us) about this decision you have made. We may have facts or considerations you didn't see before, and we want to ensure that you to know how—and how much—your decision will effect me (or us)."

But in a Christian community, the first step to achieve those kind of intentions should not have to be a a formal procedure that is so like a juridical process as to be indistinguishable from one to all but canonical experts. The exhortation of c. 1733 §1 needs to be moved much farther into the spotlight. Paprocki goes so far as to say that having a clear and accessible process for such resolution is the most important step. "Even if an administrator's decision ultimately proves to be correct, the person who *feels harmed* must also be able to *feel heard* by an impartial party who has the power to overrule or affirm the action of decision of another according to the laws of the Church."[22] Do aggrieved individuals feel heard in the current system of hierarchical recourse?

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[20] MARTENS, p. 179.

[21] See BEAL, pp. 53-61, especially 60-61.

[22] Thomas PAPROCKI, "Rights of Christians in the Local Church: Canon Law Procedures in Light of Civil Law Principles of Administrative Justice," in *Studia canonica*, 24 (1990), p. 432 (emphasis in original).

In the First Letter to the Corinthians, the Apostle Paul exhorts the Christian community to settle their differences among themselves if at all possible. While the passage in question refers specifically to situations where Christians were bringing lawsuits against fellow Christians before civil (i.e. Pagan) courts, it can easily be read as a broader commendation that the followers of Jesus should be able to regularly work out their own differences in charity and justice. But as Paprocki points out, "in order for St. Paul's exhortation to be realized, the Church must provide viable alternatives to civil litigation for the resolution of conflicts and disputes."[23]

What would this look like? Not, Paprocki seems to think, much like a tribunal of any sort. This is where the absence of administrative tribunals in the universal law has proven a blessing: by not mandating a universal set of norms for such a tribunal, the Church has given local bishops the freedom and flexibility to provide for some sort of solution that best meets the possibly unique needs of local communities and cultures. Instead, "it may be preferable to design avenues of review that are more informal and dialogical, in keeping with the ecclesial nature of the Church as community, rather than relying on a legal model of tribunals which are adversarial in nature."[24]

> In a community based on ministry and collaboration between members who share a fundamental equality with regard to their dignity and activity in building up the body of Christ, the resolution of conflicts and reparation of harm should be based on reconciliation, rather than on strict notions of retribution or punishment.[25]

Conclusion

It was very tempting to entitle this paper (in Beal-esque fashion) something like "Let's Just Talk About It." But all glibness aside, a great deal of the analysis I have examined on the subject of administrative tribunals seems to lead me to this conclusion: administrative tribunals as they have been conceived of in recent history would not be a truly providential fit in an ecclesiastical context. As important as law is in contributing to order and justice in the Church, the People of God is not, ultimately, a *Rechtstaat* where the rule of law is the final arbiter. Instead, it is a society founded by divine mandate, a worldwide community of disciples, bonded together by faith, hope, and above all love. And such a

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[23] PAPROCKI, p. 440.

[24] PAPROCKI, p. 434.

[25] Ibid.

society, such a *communio*, cannot rely solely on the innovations of positive human law to solve an endemic problem of minor internal conflict, especially when to do so would mean glossing over and marginalizing the recommended response to such circumstances found in Sacred Scripture itself. A great deal of Spirit-led creative energy directed toward improving and fostering avenues of conciliation and mediation of disputes large and small within the Church would go far to not truly only protect the rights of the Christian faithful, but to build up the reign of God as well.

Bibliography

BEAL, John, "Administrative Tribunals in the Church: An Idea Whose Time Has Come or an Idea Whose Time Has Gone?" in *CLSAP*, 55 (1993), pp. 39–71.

———, "Hierarchical Recourse: Procedures at the Local Level," in *CLSAP*, 62 (2000), pp. 93-106.

CORIDEN, James A., "The Vindication of Parish Rights," in *The Jurist*, 54 (1994), pp. 22-39.

JOHN PAUL II, Apostolic Constitution on the Roman Curia *Pastor Bonus*,28 June 1988, in *AAS*, 80 (1988), pp. 841-923.

MARTENS, Kurt, "The Law That Never Was: The *motu proprio Administrativae Potestatis* on Administrative Procedures," in *The Jurist*, 68 (2008), pp. 178-222.

MOODIE, Michael R., "Defense of Rights: Developing New Procedural Norms," in *The Jurist*, 47 (1987), pp. 423-448.

PAPROCKI, Thomas J., "Rights of Christians in the Local Church: Canon Law Procedures in Light of Civil Law Principles of Administrative Justice," in *Studia canonica*, 24 (1990), pp. 427-442.

PAUL VI, apostolic constitution *Regimini Ecclesiae universae*, 15 August 1967, in *AAS*, 59 (1967), pp. 885-928, English translation in *Canon Law Digest* 6, pp. 324-357.

PROVOST, James H., "Promoting and Protecting the Rights of Christians: Some Implications for Church Structure," in *The Jurist*, 46 (1986), pp. 289-342.

PUNDERSON, Joseph R., "Hierarchical Recourse to the Holy See: Theory and Practice," in *CLSAP*, 62 (2000), pp. 19–47.

SCICLUNA, Charles J., "Recourse Against Singular or Particular Administrative Acts of the Diocesan Bishop: Request for Revocation or Amendment, Hierarchical Recourse to the Holy See, Procedure Before the Apostolic Signatura," in *Forum*, 16 (2005), pp. 87–110.

Abbreviations

AAS = *Acta Apostolicae Sedes*,

CLSAComm2 = BEAL, John P., James A. CORIDEN, Thomas J. GREEN (eds.), *New Commentary of the Code of Canon Law*, commissioned by the Canon Law Society of America, New York and Mahwah (NJ), Paulist Press, 2000.

CLSAP = CANON LAW SOCIETY OF AMERICA, Proceedings of the Annual Convention, Washington, DC, Canon Law Society of America, 1970-