Singular Administrative Acts

(Book I, Tit. IV, cc. 35-58)

Recourse against Administrative Decrees

(Book VII, Pt. V, Sect. II, cc. 1732-1739)

Author: J. Miras, in *Exegetical Commentary on the Code of Canon Law. Prepared under the responsibility of the Martin de Azpilcueta Institute, Faculty of Canon Law, University of Navarre*, Wilson & Lafleur —Montreal and Midwest Theological Forum —Chicago, 2004, vol. I, p. 467-557, vol. IV/2, p. 2049-2097.

TITULUS IV
De actibus administrativis singularibus

TITLE IV
Singular Administrative Acts

INTRODUCTION

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1. *The formal category of singular administrative acts*

This title collects for the first time in canon law the technical category of "singular administrative act." It is a decisive innovation directed toward the distinction of functions demanded by the principles guiding the reform of the Code[1] and constitutes an undeniable advance in the technical construction of canonical administrative law. A technical option of this kind allows the weight of the juridical regulation of the acts that make up this category to be markedly displaced toward their common elements—subjects, power, competence, form, procedure, challenge, etc.—instead of gravitating primarily toward the various possible contents of the various acts, which would simply add characteristics or specific requirements here and there to the norms common to all of them. By avoiding the dispersal and heterogeneity that are unnecessary in the juridical regimen of these acts, this categorization contributes to a clearer and more rigorous regulation of the exercise of ecclesiastical power, which redounds to greater juridical certainty and security and, in short, to the good of the life of the Church and of the faithful.[2]

Chapter I, which is devoted to the "common norms," consecrates the notion of the singular administrative act, which includes two types: singular decrees and rescripts (see commentary on c. 35), which are regulated in consecutive chapters. The juridical nature and regulation of the various types of administrative acts have been consciously adapted to this generic

1. Cf. *Principles*, 7: "potestatis ecclesiasticae clare distinguantur diversae functiones, videlicet legislativa, administrativa et iudicialis, atque apte definiatur a quibusdam organis singulae functiones exerceantur."

2. Cf. ibid.: "Proclamare idcirco oportet in iure canonico principium tutelae iuridicae aequo modo applicari superioribus et subditis, ita ut quaelibet arbitrarietatis suspicio in administratione ecclesiastica penitus evanescat."

concept, which constitutes the common nucleus to which are then added the specific characteristics of each act. This brief introduction will focus on this chapter, since its position and meaning are especially important for the interpretation of the content of chapters II–V.

Since those "common norms" form the framework for the harmonious interpretation of the specific norms on each type of act, it would not be logical, once the legislator has achieved this technical option, to dispense with it and realize a discordant interpretation of the norms, which would echo the old uncertainties and doctrinal confusion that stemmed from the previous law.[3] Such a discordant interpretation would also render inoperable the advantages of a unitary system—still inchoate—of administrative law. On the contrary, in our view, one must begin from the common norms in order to interpret harmoniously in the light of these norms those aspects that may have been left somewhat obscure in the comprehensive juridical regulation (see, for this purpose also, the commentary on c. 35). It is precisely the possibility of constituting a basis for a consistent doctrine, as well as a jurisprudence that is in the process of constructing a certain and efficacious system of administrative law in the Church, that is one of the most encouraging potentialities of this new regulation.

Notwithstanding this overall positive appraisal[4] of the technical option on which we are commenting, it does not forbid us, in making a detailed analysis of the general regulation of administrative acts, to point out some deficient and unsatisfactory aspects.

In particular, we must point out that the content of chapter I is rather meager and incomplete. It could be said that, even if all the norms contained in it are common, it still does not contain all the common norms, at least not all those that could have been included. In addition, it reveals a clear imbalance in composition, and a careful reading reveals some important lacunae. For example, it is out of all proportion that six of the thirteen canons of the chapter concern the execution of administrative acts (cc. 40–45), while there is not a single general norm properly dedicated to the procedure for the issuance of administrative acts (a lacuna which, moreover, is also not satisfactorily filled in the specific norms on decrees and on rescripts, which are very spare in this regard [see commentary on c. 50]).

Attention should also be drawn to the fact that most of the common norms come from the old canons *De rescriptis*. The regulation of rescripts has always been heavily influenced by the gracious nature of the principal contents—dispensations and privileges—and by their character as replies to a *preces* in which the petitioner himself adduces the motivation. Chapter I incorporated those norms on rescripts that seemed adaptable to all

3. One can see an explanation of that intention in the work of revision of the *CIC*/1917. Cf. *Comm.* 3 (1971), pp. 88–90; cf. also *Comm.* 9 (1977), p. 233.

4. Cf., in this regard, Z. GROCHOLEWSKI, "Atti e ricorsi amministrativi," in *Il nuovo codice di diritto canonico. Novità, motivazione e significato* (Rome 1983), pp. 502–522.

administrative acts and has dispensed with those that were not applicable to decrees; however, the resulting lacunae have not been filled with the necessary new common norms (the innovations in this regard have been introduced in the chapter on singular decrees rather than among the common norms).

Nevertheless, the rescript is not the paradigm of the singular administrative act, just as the granting of favors does not reflect the most important function of governance in the Church. Accordingly, certain norms that were adapted from the canons *De rescriptis* are not the most suitable for decrees or for a general discipline of administrative acts, which is thereby regulated in an excessively schematic manner. It has been correctly pointed out that certain "common norms" ought to permit the elaboration of a general theory of administrative acts beginning from those norms, but this is not possible in this case.[5] To outline a general theory of administrative acts, or at least to give a definition based on their principal characteristics, it is necessary to turn to the collection of canons contained in title IV and to one that regulates the hierarchical recourse, specifically c. 1732 § 1.

2. *Definition of singular administrative act*

Labandeira has given a brief definition of an administrative act as a formal category and independent of its specific contents: "a unilateral, singular and extrajudicial juridical act of an executive authority."[6] Let us briefly examine these characteristics.

a) It is a *juridical act*, a notion that excludes purely material acts as well as the management of the ecclesiastical administration. Further, it is a dispositive juridical act, that is, an act of will that is directed precisely to the production of determined juridical effects. It can be said that in canon law, acts that are merely declarative and acts of procedure are excluded from this notion. It includes only those juridical acts that can be directly challenged. Moreover, administrative acts are specifically for the external forum (cf. cc. 37 and 130); those for the internal forum have their own distinctive juridical efficacy and a special regimen concerning their publicity. Furthermore, the Code declares that they may be challenged by the procedures laid down for the other administrative acts (see commentary on c. 1732).

b) It is an *act of an executive authority.* (For a full commentary on this characteristic, which is essential and therefore strictly common to every administrative act, see commentary on c. 35.). The most obvious

5. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 293.

6. E. LABANDEIRA, *Tratado...*, cit., pp. 293–294.

consequence of this characteristic of administrative acts is their submission to the principle of legality, which *also occurs in every case.* That does not mean that there cannot be administrative acts *contra legem* (cf., e.g., cc. 36 § 1, 38, 85–93), or *praeter legem* (cf., e.g., cc. 49, 76–84). They can occur in the cases and with the requirements that the law establishes. They, too, fulfill the principle of legality, which does not have to be understood as if it assigned to administrative acts a function that was merely duplicative or determinative of the dispositions already contained in the general norms. The function proper to executive power is much broader, precisely because its legality establishes it so.

c) That the administrative act is *singular* means that it does not constitute in any case a general, abstract norm that supposes an innovation in the juridical order. On the contrary, every administrative act possesses a specific "efficacy": it affects a precise situation, a determined person or persons, and is not to be extended to other cases apart from those that it directly contemplates (cf. the expressions of cc. 48, 49, 52, 36 § 2, 59).

d) A *unilateral* nature is characteristic of acts of authority; they produce their juridical effects without the need for the concurrence of any will other than that of the competent authority in order to complete the act. An efficacious administrative act produces its effects independent of the opposition or approval of the person concerned. Another question altogether is the lawfulness of the act or the causes of inefficacy or invalidity that may occur in specific cases.

e) *Extrajudiciality* (cf. cc. 1342, 1363, 1718, 1720, and 1732) is also a defining characteristic of administrative acts. For our purposes, it will suffice to say that this characteristic signals that they occur outside the judicial process, through the channels proper to the exercise of executive power. Therefore, there are extrajudicial acts that cannot be classed as administrative acts, but there are no administrative acts that are not extrajudicial. Accordingly, the regimen of challenge proper to administrative acts is applicable solely to extrajudicial acts (c. 1732).

These brief observations should sufficiently illustrate the concept of an administrative act underlying all the norms that comprise title IV.

CAPUT I
Normae communes

CHAPTER I
Common Norms

35 **Actus administrativus singularis, sive est decretum aut praeceptum sive est rescriptum, elici potest, intra fines suae competentiae, ab eo qui potestate exsecutiva gaudet, firmo praescripto can. 76, § 1.**

Within the limits of his or her competence, one who has executive power can issue a singular administrative act, either by decree or precept, or by rescript, without prejudice to can. 76 § 1.

SOURCES: —

CROSS REFERENCES: cc. 49, 59 § 1, 76, 85, 135–144

COMMENTARY

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1. *The concept of the "common norm"*

Canon 35 heads the first chapter, "Common Norms," of the title that the *CIC* devotes to singular administrative acts. It is, therefore, the first of the common norms that affect the administrative acts. It seems appropriate, then, to begin this commentary by pointing out the importance of the concept of *common norm* because, although not obvious, it continues to have a special relevance to the work of interpretation.

When the legislator establishes common norms along with the norms proper to each of the species that compose a juridical genus, he is intending to establish—with greater or lesser success—essential elements that can be verified in every hypothesis. This means that, in principle, the aspects regulated by the common norms will be applied in most cases. In

brief, the norms proper to the genus: a) constitute the most basic juridical characteristics common to the various species; b) integrate the species within the genus to establish the elements that unite them even though their different elements are an obstacle; and c) provide the model for the harmonious and coherent interpretation of the specific norms applicable in each case, which are to be understood in such a way that they are not contradictory to the general norms, but rather complement them and agree with them. This last statement is logically valid, especially for what refers to the essential characteristics of the genus.

Regarding the matter at hand, chapter I establishes a series of norms that are valid for each singular administrative act, regardless of the kind. Thus we can obtain a certain uniformity in the juridical regime of a whole series of acts proper to ecclesiastical authority, a uniformity that will allow for a coherent treatment of many of their hypotheses, requisites, effects, and consequences, and in this way will also facilitate a desirable normative economy.

2. *Typology of singular administrative acts*

Canon 35 is meant to be applied in a general way, and the legislator expressly proclaims this intention in distinguishing the common concept of the singular administrative act by the expression "either by decree or precept, or by rescript." This refers to an absolute *bipartition*, since every one of the singular administrative acts regulated by the *CIC* takes the form of one of the following two basic categories around which the entire discipline has been constructed: singular decrees and rescripts. As a matter of fact, the singular precept is nothing more than a type of decree (cf. c. 49). The privileges and dispensations—whose specific norms constitute the content of chapters IV and V of this title—are not truly administrative acts, but favors granted through a rescript. In other words, they constitute the proper and peculiar content of an administrative act (cf. cc. 59 § 1; 76 and 85).

Therefore, the introduction of c. 35 requires the following reading: "every singular administrative act, regardless of its species." At the greatest extent of this boundary lies the proper content of the norm, which fixes the power of a general nature required to be the legitimate author of a valid administrative act. In other words, this wording refers to the minimum requisites that the author should fulfill, to which should be added, as necessary, other specific requisites, depending on the type of administrative act at stake. These requirements are in addition to the conditions required by the case itself (e.g., by the matter at hand, the persons concerned, and the circumstances of the situation).

3. *Essential requisite for the author: executive power*

"One who has executive power can issue a singular administrative act." The enunciation of this general principle prompts at least three different and complementary observations:

a) *The administrative act is an act of authority; in other words, a juridical act of an ecclesiastical authority that acts as such, with public power.* Not every act of ecclesiastical authority is an administrative act. For instance, the non-juridical acts or the private acts (in which the holder of an office acts as private person) are not administrative acts. The juridical acts carried out by virtue of a public power that is not executive are also not administrative acts. As we will later see, this requirement is not the only requisite; it is, however, indispensable. We say this because the executive power is the essential element, and without it administrative acts cannot exist.

b) *The administrative act is properly the act of an executive authority.* The *CIC*, which has adopted the distinction of power of governance in legislative, judicial and executive matters (c. 135), favors in c. 35 a clearer, more uniform and more coherent concept of administrative acts by excluding from this concept all the acts that come from the legislative and judicial powers. These acts possess their own set of rules. So the norms of the Code that directly affect the determination of the author of the singular administrative acts are exclusively the ones that refer to executive power (cf. especially, cc. 134 and 136–144). In other words, they are the norms necessary to determine who is, in each case, the "executive authority."

In the life of the Church there are also acts of governance that do not properly originate in ecclesiastical power; this occurs in the case of the institutes of consecrated life, whose superiors do not possess such power (cf. c. 596 § 1). In our opinion, besides the specific norms established by the constitutions, the norms set forth by the *CIC* regarding singular administrative acts can also be applied, in fact, to those acts—*congrua congruis referendo*—as long as one applies the norms on executive power to the power of these superiors, even though it is not executive (cf. c. 596 § 3).

c) *Every administrative act is issued by virtue of executive power, yet not every juridical act of executive power is a singular administrative act.* There are acts proper to executive power that have a normative character since they contain prescriptions of a general character. In other words, they are general norms distinct from, and of a lower status than the laws (cf., for instance, cc. 31–34). If we want to adopt a clear terminology consistent with the Code's prescriptions, it seems profitable—not to mention necessary—to imagine two types of acts of executive power: singular administrative acts (or, simply, administrative acts) and administrative norms (general norms), rather than applying the denomination of *acts* to the general norms, or the denomination of *singular norms* to the administrative acts.

4. *The condition for the exercise of executive power: competence*

Executive power, as we have said, is a necessary condition, but not a sufficient one, for authentically issuing an administrative act. One who has executive power must, in addition, be able to execute it in the case in question. In other words, the person has to be, in each case, not simply an "executive authority," but rather a "competent executive authority" (cf., for the use of that expression, cc. 48 and 59 § 1).

Competence must be determined on a case-by-case basis by examining the criteria established by the law. It is important to consider *simultaneously*, according to the circumstances, the subject and type of act at issue (material competence); the scope (territorial competence); and the persons concerned (cf., e.g., c. 476) in light of the legal criteria regarding the scope of exercise of executive power (cf. c. 136); as well as the possible intervention of hierarchically superior executive authorities (functional competence: cf. c. 139), including by reservation (cf., e.g., c. 479 § 1).

The norms that determine competence can contain general clauses that grant competence (such as the norms that describe the power established in the various ecclesiastical offices [cf., for instance, cc. 381 and 479]), or at least specific abilities for specific cases (cf., e.g., c. 504). In addition to these norms, we also must consider those norms that regulate the possibility of delegation of executive power (cf. cc. 131–133 and 137–142).

5. *A special competence required for rescripts that contain privileges: c. 76 § 1*

The last clause of c. 35 contains an important reminder about which it behooves us to comment on specifically: "*firmo praescripto* c. 76 § 1." The first paragraph of c. 76 states that a privilege can be granted "by the legislator" or "by an executive authority to whom the legislator has given this power." Does this mean that, in the case of the privileges, the canon violates the general principle according to which every administrative act is given by virtue of the executive power? Such an interpretation would not be appropriate since it would not properly take into account the fact that c. 35 has the nature of a *common norm*, and because it would exclude privileges from the concept of administrative act, thereby destroying the unity of the juridical regime that the legislator meant to establish.

In light of this discussion, can the absolute character of c. 35 be reconciled with the prescription of c. 76 § 1? In our opinion, these two norms are complementary, not contradictory. As a matter of fact, c. 35 affirms that every administrative act, *whether decree or rescript*, can be issued by one who has executive power, within the limits of his competence. On the other hand, c. 59, when regulating the rescripts—acts that are vehicles for privileges, among other favors—states that they are given by "a competent

authority." Canon 75 adds that if the rescript contains a privilege or a dispensation, "the provision of the following canons [not *of the previous canons*] are also to be observed."

Among those "provisions of the following canons," the first one is c. 76, which does not void the previous norm since it does not affirm that the privileges are to be given *by virtue of legislative power*—that would be a contradictory and inconsistent statement in the context of the juridical construct of administrative acts—rather, it affirms that the ones *that can give them are the legislators*. In other words, it states that when the rescript contains a privilege, the "competent executive authority" to which c. 59 refers is precisely *the legislator*. The most important offices in the Church (Roman Pontiff, College of Bishops, and bishops) simultaneously possess the three parts of the power of governance (cf. c. 135), so that these most important offices are superior to the lower authorities, which only have one of the properties of the power of governance, either executive or judicial, and have no legislative power, which is reserved solely to the most important offices. Therefore, when we refer to the legislator in this context, we are referring to the *supreme executive authority* in the scope of his competence, who is the only one that has the competence to grant privileges or to delegate such power (the term *legislator* is used in the same sense, though with respect to dispensations in c. 90, which also must be interpreted so that no contradiction occurs with cc. 35, 59 and 85).[1]

We must recognize, then, that we are confronted with a reservation of competence in favor of the supreme executive authority at each level (universal Church or a particular church). In other words, c. 76 § 1 does not establish a new requirement for power, but rather a specific requirement of competence for the exercise of executive power in certain cases. Therefore, the last incidental clause of c. 35 does not contradict, but rather complements, the universal applicability of its most important clause: every administrative act, regardless of its species, is issued by virtue of executive power.

1. Cf., for a detailed treatment of this entire subject, E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 328ff.

36 **§ 1. Actus administrativus intellegendus est secundum propriam verborum significationem et communem loquendi usum; in dubio, qui ad lites referuntur aut ad poenas comminandas infligendasve attinent aut personae iura coarctant aut iura aliis quaesita laedunt aut adversantur legi incommodum privatorum, strictae subsunt interpretationi; ceteri omnes, latae.**

§ 2. Actus administrativus non debet ad alios casus praeter expressos extendi.

§ 1. An administrative act is to be understood according to the proper meaning of the words and the common manner of speaking. In doubt, a strict interpretation is to be given to those administrative acts which concern litigation or threaten or inflict penalties, or restrict the rights of persons, or harm the acquired rights of others, or run counter to a law in favour of private persons; all other administrative acts are to be widely interpreted.

§ 2. Administrative acts must not be extended to cases other than those expressly stated.

SOURCES: § 1: cc. 49, 50; SCHO Resp., 6 dec. 1966
§ 2: c. 49

CROSS REFERENCES: cc. 16 § 3, 17, 18, 19, 38, 57 § 1, 124 § 2, 1319, 1342, 1400 § 2, 1734, 1739

COMMENTARY

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The first paragraph contains the common rules of interpretation of singular administrative acts. These norms determine the criteria to be used in establishing the precise meaning of an administrative act, which because of its literal content lends itself to various interpretations.

1. *General rule: the administrative act means what it says*

An administrative act expressed in unequivocal terms will not require interpretation. Hence, the legislator, using a criterion analogous to that expressed regarding laws in c. 17, imposes as a general rule what is already stated in c. 49, *De rescriptis*, of the *CIC*/1917: literal understanding of the administrative acts, which is not properly *interpretation*, but merely the

result of reading. Hence also, the legislator limits possible manipulative intentions or obscure distortions of the literal meaning by warning that the words are to be understood in their intended sense and in accordance with the common manner of speaking. Thus, it will not be presumed that the authority is using words hyperbolically or in a metaphorical sense, or that the authority is conferring the most unusual meanings on his expressions. To the contrary, the basic presumption is that the authority really means just what is stated, and therefore the principle that states that his will is to be understood directly from the terms by which he manifests it is elevated to the status of a norm.

This norm, then, implicitly exhorts the public administration to express its will clearly and accurately when it issues administrative acts. Nevertheless, we must emphasize that the reference to the "common manner of speaking" does not mean that common language is to be used in the administrative acts. Indeed, that stipulation does not exclude the use of technical expressions that contain precise meanings in juridical language, or of formulas well-established in the *stylus Curiae*. One has only to think of the stylistic clauses typically used in rescripts that reply to petitions, which have a meaning well-established by usage and custom, although they are all but impenetrable to the uninitiated. Therefore, we must conclude that this canon refers to the common manner of speaking in the context in which those expressions are accustomed to be used; these expressions encompass equally juridical language, if dealing with technical expressions; common parlance, if ordinary language is being used; and even technical language, when terms proper to a scientific field or specialized discipline are being used.

The use of the appropriate expression in each particular case is precisely what allows administrative acts to be understood according to the proper meanings of the words themselves, without the necessity of interpretation.

2. *Interpretation of administrative acts of uncertain meaning*

It is conceivable that doubts will still remain regarding different aspects of an administrative act, because its content is not precisely expressed, because it does not mention some important or characteristic facet of the case it purports to discuss, or because of other reasons. We must remember that the norm of c. 36 does not directly affect cases in which the validity of the act itself is in doubt. In those instances, in the first place, general validity is presumed, as with any juridical act, provided that the act has been put into effect properly with regard to its external elements (c. 124 § 2); in the second place, we are obligated to appeal to the authority that issued it when the validity of the rescript is in doubt (c. 67 § 3).

Canon 36 is concerned with the situation that results when, after reading the literal content of an administrative act that is considered valid, doubts arise regarding its exact sense or its scope. For such cases, the Code includes rules that essentially have been present for centuries in canonical tradition,[1] and establishes two contrasting criteria, depending on the content of the acts that are to be interpreted.

The general rule is that the ambiguous administrative acts, in regard to their literal meaning, are to be broadly interpreted. In other words, their scope should not be thought to be limited by any restriction that has not been expressly included in the act itself, or at least generally provided for by the juridical order. Although c. 36 does not expressly point this out, this broad interpretation will fundamentally affect the administrative acts whose content could be labeled with the classic expression of *favorable*. So, for instance, a *favorable* interpretation is expressly required for privileges, which are to be interpreted literally but always in such a way that the beneficiary does obtain some profit or advantage (c. 77).

On the other hand, strict interpretation is required for a series of administrative acts whose content has traditionally been labeled *odious*. Here is exemplified the true meaning of the old saying *favorabilia amplianda, odiosa restringenda*. This principle, together with the preceding one, had already been accepted by the *CIC*/1917 in regard to rescripts (cf. c. 50 *CIC*/1917). Here, though, the formula is stated in a general way for all administrative acts. Let us consider the following scenarios foreseen by the canon:

a) *Acts that refer to litigation as well as to threat or imposition of penalties.* We can mention as examples of administrative acts related to the threat or imposition of penalties, the penal precepts of c. 1319 (see commentary on c. 49) and the decrees imposing penalties through administrative procedure (c. 1342). And as an example of acts referring to litigation, we can mention the decree that decides about the *supplicatio* or *remonstratio* before hierarchical recourse, or the one that decides about the recourse itself (cf. cc. 1734–1735 and 1739). We could also mention every administrative act related to any of the controversies mentioned in c. 1400 § 2.

b) *Acts that restrict the rights of persons.* Included here are those administrative acts that prevent, suspend, or limit the enjoyment of rights. Examples include acts that make it more difficult to exercise a right, acts that impose new obligations or add to existing ones (cf., for instance, c. 49), and acts that restrict faculties or abilities, etc.

1. Cf. *Reg. Iur.* XV, in VI: "Odia restringi et favores convenit ampliare"; *Reg. Iur.* XXX, in VI: "In obscuris, minimum est sequendum"; *Reg. Iur.* XLIX, in VI: "In poenis benignior interpretatio est facienda."

c) *Acts that harm the acquired rights of others.* These could be, for instance, the administrative acts pertaining to removal from office or appointment of new officeholders (cf. c. 192), dispensation from vows (c. 1196), or assignment of the temporal goods of a juridically extinguished person (cf. c. 326) (regarding the concept of acquired right, see commentary on cc. 4 and 9).

d) *Acts contrary to a law in favor of private persons.* In this category fit neatly the concepts of privilege and dispensation, which by their nature are acts contrary to a law—precisely because the law foresees and permits them, with certain conditions (note that this does not refer to acts contrary to the law, meaning unlawful acts).[2] The specific norms regarding these acts require a strict interpretation (cf. commentary on cc. 77 and 92).

The requirement for a strict interpretation in cases c) and d) is rigorous, since it answers to two principles that are as important as those of respect for the law and for acquired rights.[3] Indeed, in accordance with c. 38, the administrative acts mentioned can only affect acquired rights or prevent the application of a law in a specific case provided that its author, through the use of the so-called "express derogatory clause," expressly states that he intends to secure precisely that result; otherwise, those acts are without effect (regarding the nature of the express derogatory clause, see commentary on c. 38).

3. *Prohibition of the analogical extension of singular administrative acts*

The norm contained in paragraph 2 breaks the analogy that could be imagined at first glance between the first paragraph of this canon and the norms of interpretation of the law (cc. 17–18). It describes precisely the different natures of the two types of acts in expressly prohibiting that the provision of c. 19 regarding *lacunae legis* be applied to administrative acts, even to "favorable" ones. The same norm is specifically reiterated for the singular decrees in c. 52 (see commentary). This refers to a principle that was already present in c. 49, *De rescriptis*, of the *CIC*/1917, which corresponds to the content of the *Regula iuris* LXXIV of the *Liber Sextus*: "Quod alicui gratiose conceditur, trahi non debet ab aliis in exemplum."

The literal tenor of that *regula iuris*, in basing the prohibition of analogous extension exclusively on the gracious character of the favor—undeserved, legally speaking—made it applicable especially to rescripts, which

2. On the juridical nature of privileges and dispensations, in the light of the current law, cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 319ff.

3. On the tradition of respect for acquired rights in the canonical system, cf., e.g., *VI* I, 3, 7 and 10; *VI* III, 7, 8.

are the administrative acts by which graces or favors are granted (cf. c. 59 § 1). However, the desire on the part of the legislator to extend this prohibition to all administrative acts is consistent and logical, not because they refer to acts of grace or favor—a characteristic not shared by most administrative acts—but because they are *singular* acts. As a matter of fact, in issuing an administrative act, the executive authority is not proposing a general norm, but making a decision that takes into account the peculiar conditions of the situation that will be juridically affected (cf., for instance, c. 50), conditions that necessarily cannot be extrapolated to other situations. Since the decision depends on a coincidence of variable factors (so that it might be completely different in other similar circumstances), it is the essential characteristic of singular administrative acts that they do not offer specific and valid solutions beyond the case they purport to consider. While similar previous cases can serve as models or give direction, a new *ad hoc* decision will always be necessary, with no room for interpreting or presuming that the will of an ecclesiastical authority will turn out to be the same as it was in past instances, when different conditions obtained.

In short, we could say that paragraph 2 prohibits an administrative act from being interpreted broadly (cf. § 1) when that which is in doubt —meaning, that which is to be *interpreted*—is precisely the case or the persons to which it refers.

37 **Actus administrativus, qui forum externum respicit, scripto est consignandus; item, si fit in forma commissoria, actus huius exsecutionis.**

An administrative act which concerns the external forum is to be effected in writing; likewise, if it requires an executor, the act of execution is to be in writing.

SOURCES: c. 56; SCCS, Decr. *Ne ob diuturnum*, 3 apr. 1970 (*AAS* 62 [1970] 554–555)

CROSS REFERENCES: cc. 10; 36 § 2; 51; 54; 57; 58 § 2; 59; 62; 74; 124 § 1; 130

COMMENTARY

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1. *Form of issuance of administrative acts: general norm*

This canon—which extends to all administrative acts a norm that the *CIC*/1917 (c. 56) addressed solely to rescripts—marks the beginning of the regulation of some of the requirements concerning the form of issuance or the *extrinsic form* of the administrative acts, which a majority of the doctrine distinguishes from the *intrinsic form* or procedure of formation of the act.

The first formal requisite that the common norms impose is the *written form*, which is required of administrative authority for the issuance of every act that affects the external forum; in other words, for the acts that constitute the general rule among those that proceed from the power of governance (cf. c. 130). Therefore, only the acts intended to produce effects exclusively in the internal forum are excluded from the general requirement that they be written since their effects are not felt in the external forum (cf. c. 130). However, if they are to have any effect in the external forum—due to the circumstances or due to the very nature of the act in question (for example, in the case of absolution of censures that have been declared)—it seems logical that the written form also be required. Accordingly, favors granted orally (c. 59 § 1) can be used freely in the internal forum, but they must be proven anew on each occasion if they are intended for use in the external forum (c. 74). The *CIC* also considers the possibility that authority can oblige someone by means of an oral precept, but that precept only obliges the recipient for as long as the authority

of the person who issued it continues in effect (c. 58 § 2). It is possible and reasonable to doubt its juridical efficacy in the external forum, as we will later see (see commentary on c. 54 § 2).

2. *The importance of the written form*

The written form intends to guarantee the certainty and security of juridical situations (cf., for example, c. 36 § 2), making possible their documentary proof, which is of great importance, as shown by age-old juridical experience. This is why the *CIC* explicitly requires the written form in the specific regulation of many acts issued by authority, in addition to establishing it in this canon as a common norm for all the administrative acts in the external forum. This requirement is expressed, for example, in c. 156 for the provision of any ecclesiastical office; in c. 267 for the excardination and consecutive incardination of a priest that is transferred from one particular church to another; and in c. 382 for the appointment of a diocesan bishop, etc.

3. *Consequences of the absence of the written form*

The text of this general norm only affirms that the administrative act that is to have effect in the external forum "*scripto est consignandus.*" Clearly, this requirement is binding on administrative authority. But what precise juridical consequences will the infraction of that norm have?

At the outset, we should note that the sanction of invalidity is not imposed generally on administrative acts that are not effected in writing. Indeed, according to c. 10, for a norm to have nullifying force, it must expressly state that an act is null and void; c. 37 does not contain such language.

Therefore, to determine the precise consequences of the omission of the written form, we have to examine the specific regulation of each type of administrative act and also the norms applicable to the very contents of the act in question. As for the regulation of the two basic types of administrative acts, c. 59 § 1 points out that the written form is an essential element of the rescript; therefore an unwritten rescript is, by nature, like a nonexistent rescript (cf. c. 124 § 1). This does not mean that the graces or favors that normally constitute the content of a rescript cannot be granted orally (c. 59 § 2). Nevertheless, one must always remember the consequences of the omission of the written form listed in c. 74, as we have mentioned previously. By contrast, c. 51 reiterates the requirement of the written form for singular decrees, although it does not expressly establish a general sanction of invalidity by reason of its omission. Such a hypothesis, then, is not tenable unless the decree contains a precept, as we have

already seen (on the consequences of the omission of written form, see especially the commentaries to cc. 51, 54, 55, and 58).

As far as the norms applicable to the contents that the diverse forms of administrative act can adopt, we have already pointed out that the Code requires the written form in many cases (cf., for example, cc. 179, 186, 190, 193, 268 § 1, 312 § 2, 973, etc.). We would have to analyze each one of them separately to determine the consequences of the absence of the written form according to the literal content of the norm. For example, c. 474 expressly affirms that those acts of the diocesan curia that are meant to produce juridical effects—among which are the administrative acts—must be signed (and, therefore, they must first be written) by the ordinary from which they originate, "as a requirement for their validity." In this instance, the act is equally invalid if the act is written but lacks the signature of the ordinary, as if it is not written, and so cannot be signed. Thus, the written form indirectly constitutes one of the requisites for the validity of these acts.

4. *Administrative acts effected through an executor*

Canon 37 also requires the written form for the acts of execution of the administrative acts "*in forma commissoria*" (i.e., that require an executor). The efficacy of administrative acts "*in forma commissoria*" is said to be suspended until they are "applied" or "executed" by a person other than their author (the executor) to whom this mission is entrusted (*committitur*). For singular decrees, then, the *CIC* establishes that they come into force as of the date of their execution if they have been given *in forma commissoria*, or from the time of their communication to the person concerned if not so given (c. 54 § 1). As for rescripts, an analogous norm is established, with the difference that if they have not been given *in forma commissoria*, they go into effect from the date of issuance (c. 62). Therefore, every act given *in forma commissoria*, must be issued by the competent authority and must be accompanied by a subsequent act, or group of acts, of execution, which are regulated by the common norms of cc. 40–45, in order to be considered valid. So long as the execution is not yet accomplished, the act is said to be *perfect*—meaning that it is suitable in itself to produce effects—but *ineffective*. Therefore, c. 37 also establishes the imperative to state in writing that the execution has been carried out, so that there is juridical certitude about the moment at which the act in question has come into force.

Will an act whose execution has not yet been made in writing produce effects? There is only a general sanction of nullity when the omitted written form is part of the "substantial form of procedure" (cf. c. 42). In practice, with respect to the validity of an execution not reported in writing, we think it necessary to resolve the matter in accordance with the

same criteria mentioned in each case for the principal act. Notwithstanding this method of resolution, since the executor must give an account of his acts to the authority who entrusted him with the execution, the possibility of omission of the written form in the act of execution will occur less often than it will for the principal administrative acts, in whose formulation the author is, to a certain extent, sovereign, and not likely to give an account of his decisions to a superior authority.

38 **Actus administrativus, etiam si agatur de rescripto *Motu proprio* dato, effectu caret quatenus ius alteri quaesitum laedit aut legi consuetudinive probatae contrarius est, nisi auctoritas competens expresse clausulam derogatoriam addiderit.**

An administrative act, even if there is 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.

SOURCES: c. 46

CROSS REFERENCES: cc. 35, 36 §2, 50, 1732–1739

COMMENTARY

Jorge Miras

1. *Determination of the case affected by the norm*

The elements involved in the case to which this canon refers are the following:

a) *A singular administrative act.* What is not in question here is a law (for conflicts of laws, cf. cc. 20–21), or other general norm inferior to the law (cf. cc. 33 § 1 and 34 § 2). The canon rather refers to a singular act which, in addition, is apt to contradict a law or an approved custom, or to violate an acquired right. First we will examine the problem of the acts contrary to a law or custom. Obviously such a state cannot consist of the failure to fulfill the norms that regulate the essential elements of that act, or the norms that regulate competence and procedure. Then we would simply have an unlawful administrative act—illegal, i.e., contrary to *the law*, not to *a law*—and therefore, null or annullable (cf., in general, c. 124 § 1 and c. 86). The possibility that an administrative act (which is always the act of an executive authority [cf. c. 35]) may contradict a law cannot arise anywhere but in another law. So there is the possibility—in a general way, or through specific provisions for certain acts—that certain acts under certain conditions will lawfully establish juridical situations that, if they were not effected through those acts, would be unlawful. Therefore, the conflict is one between the general regimen established by a law or custom and the regimen created by a singular administrative act for the particular circumstance to which it refers. Such an act does not affect the

law, nor does it modify the juridical system, for it does not have that potential. Rather, it creates a subjective juridical situation, leaving the juridical system intact, which continues to govern all other cases not directly included in the singular act (cf. c. 36 § 2). The acts of executive power that typically possess these characteristics or that have the potential recognized by the law, to lawfully contradict a law in a specific case, are fundamentally the privilege *contra legem* (cf. cc. 76ff) and the dispensation (cc. 85ff), both of which are usually granted through a rescript (c. 59).

b) *A law or an approved custom.* The *CIC*/1917 (cf. c. 46) only required the express derogatory clause in the case of a rescript contrary to a *particular custom* or *to particular norms*, because it presumed that authority knew the universal law adequately and, therefore, could take it into account in making decisions. On the other hand, knowledge of the particular or special norm was not presumed.

Canon 38 extends this norm to all administrative acts instead of only to rescripts, although it is certainly difficult to conceive of a decree that is lawfully contrary to a law or an approved custom, seeing that the acts that possess the necessary legal support for those effects are in fact the rescripts that contain privileges or dispensations. Of course, there are decrees that can legitimately be contrary to acquired rights (see below).

The new Code has also removed at this point a restriction found in the former Code in the sense that the norm of this canon is to be applied to administrative acts whose content is contrary to a norm of law, whether universal or particular, common or special, general or specific, provided that it is merely ecclesiastical. This, in our judgment, is a proper change, since juridical certainty makes it reasonable to require identical guarantees of certainty in order to place an act contrary to a valid norm, regardless of its scope.

c) *An acquired right of a third party.* The prejudicial effect of the administrative act in question toward the acquired right of a third party (for the technical concept of the acquired right, see commentary on cc. 4 and 9) can also be contrary to a law or an approved custom (for example, in a privilege that is indirectly prejudicial to another in the exercise of a faculty), or it can be harmful without being contrary to a law or custom, for instance in an act whose intent is not to establish particular situations contrary to a general norm in force.

It seems clear that the expression "*alteri*" should be interpreted broadly, so that it may also include the proper addressee of the administrative act.[1] Indeed, while that norm in the *CIC*/1917 only referred to rescripts, it was proper and sufficient to interpret the expression *alteri* as referring principally to a subject other than the addressee, because by def-

1. Cf., along these lines, E. LABANDEIRA, "Gli atti giuridici dell'Amministrazione ecclesiastica," in *Ius Ecclesiae* 2 (1990), pp. 225–260 (*ad* c. 38).

inition privileges and dispensations are given in favor of their beneficiaries. Thus, they do not violate acquired rights of the beneficiaries, but rather the rights of others. As soon as it is applied to decrees, however, it is entirely possible to conceive of an administrative act that could be considered prejudicial to the acquired rights of the addressee himself (for example, a decree of removal or transfer).

2. *Competent authority*

Executive authority is competent for these types of acts, in accordance with the norms common to all administrative acts (cf. c. 35). When it is a question of a privilege, the competent executive authority is the legislator or the one authorized by the legislator (c. 76; for the technical meaning of the expression *the legislator*, see commentary on c. 35). If it is a dispensation, the lower executive authorities are also competent (cf. c. 85) within their own area of competence (cf., in general, cc. 87–89). For the decrees that can affect acquired rights, the competent authority will have to take into account c. 50, whose observance further guarantees that the authority's decision has been adequately evaluated.

3. *The clause that expressly derogates*

The principle of respect for the laws and juridical situations upheld by the norms in force and for the other acquired rights, justifies the requirement that the authority expressly manifest its intention to affect them when issuing an administrative act. Put more traditionally, this refers to *bad faith* that cannot—and is not meant to be—presumed. This formal requirement ensures that those effects will not be produced unless the competent authority has provided for and intended them, and has manifestly expressed that intention. The clause "*etiam si agatur de rescripto Motu proprio dato*" has the same meaning, which affirms the traditional doctrine in this regard.[2] It is understood that the liberal intention of an authority who grants a favor of his own volition—with or without a previous request—and in doing so adds the clause *Motu proprio* to the rescript, is enough to correct for the possible error of subreption that a petitioner might have committed (cf. c. 45 *CIC*/1917; c. 63 § 1 *CIC*). However, that clause cannot be interpreted to mean that the liberality extends so far as to place itself in opposition to a contrary norm or to affect an acquired right; such an intention must be expressly stated.

2. Cf. A. VAN HOVE, *De rescriptis* (*Commentarium Lovaniense in CIC*, I/4) (Malines-Rome 1936), pp. 165–167, 170.

When referring to a "derogatory clause," c. 38 reproduces the intention of its precursor in the *CIC*/1917 (c. 46, *De rescriptis*), using a term that is vague or can give rise to confusion. As a matter of fact, this phrase does not properly refer to derogation in the case of the law. Perhaps the use of that phrase would have been justified in the previous *CIC* by the influence of the classic notion of dispensation as *casualis derogatio* of a law. As we have already pointed out, however, a singular administrative act never directly affects the law or the custom, which continues intact and in force; it simply prevents its normal effects from obtaining in a specific case. In the case of the clause contrary to an acquired right, it does directly affect the law at issue, insofar as the effectiveness of the administrative act is incompatible with it. Yet even still, this does not refer to the derogation of the objective law, but to the modification, of greater or lesser extent, of a juridical situation unique to the one (or ones) affected.

The nature and effectiveness of that clause can be appreciated in the content of the example that a commentator of the previous *CIC* provides: "Huiuscemodi *clausula* est v. g. clausula 'non obstante quacumque consuetudine vel statuto vel iure alteri quaesito.'"[3] As can be seen, this example does not have any intention of derogating, properly speaking. Accordingly, such a derogating clause can be used by virtue of executive power, which is the *competent authority* for every administrative act, even though the executive authority who uses it may turn out to be the legislator. Juridical public acts are accomplished by the power that their own nature requires, and in the case under discussion, no derogation occurs—this would necessarily require the legislative power—but rather an effect that the Code considers typical of executive power. The possible circumstance in which the author of a singular administrative act may also enjoy legislative power, in any area, does not in any way reduce the requirements established by the law regarding his singular administrative acts (unless the law expressly provides otherwise [cf. for instance, c. 90 § 1]).

Another question altogether is whether a derogating clause as generic as the one we have quoted by way of example will be sufficient in every case. We think that the requirement of this canon is not to be reduced to a mere formality. A mere formulaic clause that foresees the possibility of a violation of acquired rights and thereby justifies a procedure that was negligent on the part of the author of the act, should not be sufficient to conform to the intention of the legislator. To support this claim and to understand the importance of the requirement for the *express* derogatory clause in these new norms, it will suffice to consider the disposition of c. 50 (see commentary).

3. H. JONE, *Commentarium in Codicem Iuris Canonici*, 2nd ed., I (Paderborn 1950), *ad* c. 46.

4. *The consequence of omitting the expressed derogating clause*

The juridical consequence of omitting the expressed clause, in the context of c. 38 is that the administrative act "*effectu caret*" (the former c. 46 read "*non sustinetur*"). Of course, this does not refer to the extreme sanction of invalidity.[4] Rather, it refers to a greater or lesser degree of ineffectiveness, insofar as the content of the act (*quatenus*), or part of it, is contrary to a law or to a custom or to an acquired right (in this last case, the strict interpretation is imposed by the law [cf. c. 36]). Moreover, this ineffectiveness is not automatic (cf. c. 124 § 2). Rather, it will be declared upon the request of one of the parties (cf. cc. 1732–1739; *PB* 123) so that, if there is no opposition, the administrative act would then enter into effect.

4. Cf. A. VAN HOVE, *De rescriptis*, cit., p. 169–170; E. LABANDEIRA, *Gli atti giuridici...*, cit.

39 **Condiciones in actu administrativo tunc tantum ad validitatem censentur adiectae, cum per particulas *si*, *nisi*, *dummodo* exprimuntur.**

Conditions attached to an administrative act are considered to concern validity only when they are expressed by the particles 'if', 'unless', 'provided that'.

SOURCES: c. 39; SCSO Resp., 14 ian. 1960

CROSS REFERENCES: cc. 10, 36, 124 § 1

COMMENTARY

Jorge Miras

1. *The condition in administrative acts*

A condition is one of the possible *eventual contents* of an administrative act. For our present purposes, it can be defined as any uncertain or ignored circumstance upon which the validity of a juridical act is expressly made to depend, to a greater or lesser extent (this canon does not affect the case of implicit conditions).

The Code here refers to conditions *ad validitatem*, but this is an imprecise expression. Strictly speaking, that which is conditioned is not the validity of the administrative act, since that depends on whether it contains its essential elements, was issued by the authority within the limits of his competence, and fulfills the basic requirements established by the law for that type of act (cf. c. 124 § 1). If these requisites are met, the act is valid, but its effects will not be produced if the condition is not met. As Labandeira has written quite cogently, "in reality, the conditions do not affect the validity of the act, but its effectiveness: if the conditioned act were not valid, the condition would not be so either, and then it would not produce effects."[1]

1. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 355. For a detailled treatment of the perfection, validity and efficacy of the administrative acts, cf. ibid., pp. 368–405.

2. *The scope of the taxative character of the disposition*

The *CIC*/1917 established that conditions added to rescripts were only considered essential if they were expressed with the particles *si, dummodo, vel aliam eiusdem significationis* (c. 39). The current Code has eliminated the possibility of using equivalent formulas, which in the end turned out to be a source of uncertainty liable to dilute the effect intended by the norm. Therefore, the list of particles included in c. 39 is exhaustive. Nevertheless, how effective is the taxative character of the listing practically speaking? We think some questions can be formulated to help clarify the meaning of this norm.

a) *Are we supposed to infer from the mere appearance of any of these particles in the text of an administrative act, that the intention is to introduce a condition for the effectiveness of the act?* Just by reading the text, we can see that this is not exactly what it says. On the other hand, past doctrine on the parallel norm of the *CIC*/1917 held that it was possible to express through any of these formulas a condition already required under another title only to determine the legality of the act. In this case, "the force of such a condition ordinarily was not modified."[2] We do not think that the current version of the canon has substantially changed that possibility.

b) *Would it be possible, in light of this canon, to introduce conditions essential for the effectiveness of the act through an unequivocal formula that would not permit doubt about its scope, but which does not use previously indicated particles?* We believe so. Otherwise we would be led to excessive conclusions, if only because the official text of the *CIC* is in Latin, while administrative acts are generally not written in Latin, and those issued by the Roman Curia are not always written in Latin either (cf. *PB* 16; *RGCR*, 144 § 1). We should remember that not all languages have exact equivalents for the translation of these particles.

Thus we can say—at least hypothetically—*that the presence of these particles does not always indicate the existence of an essential condition, and that not every essential condition need be introduced by one of these particles.*

To better understand this claim, which seems to contradict the letter of the canon, we may note that the original wording, built around the verb *censeo* (as it was in the *CIC*/1917 [cf. c. 39]) seems to indicate that this does not refer here to a norm that establishes a form necessary for certain acts (*essence* [c. 124 § 1]), but rather to a *legal criterion for the interpre-*

2. Commentary on c. 39, in L. MIGUÉLEZ-S. ALONSO-M. CABREROS, *Código de Derecho Canónico and legislación complementaria. Texto latino and castellano con jurisprudencia and comentarios*, 8th ed. (Madrid 1974).

tation of the conditioned administrative acts or, if you will, of the juridical potentiality of the conditions added to the administrative act.

3. *Canon 39 understood as a rule of interpretation*

If we understand this canon as a norm for interpretation, one notices that the legislator here does not prejudge the importance that the author of an act could grant, in practice, to the condition that he imposes, nor the objective importance of a circumstance that might act like a condition. The legislator simply establishes a formal rule by which whoever intends to make conditional the effectiveness of an administrative act, must certify that intention by using an utterly unequivocal formula that guarantees certainty in those juridical situations affected by the conditional act. Otherwise, restrictive interpretation would be applied to that condition (along the lines that it sets forth regarding the laws in c. 10, and regarding acts that weaken the laws in c. 36), and it would then be considered—in terms of the classic doctrine—not essential but accidental.

Yet, if we are considering a norm of interpretation, it will be applicable only to the cases that require it. The general norm does not stipulate that the acts be interpreted, but rather that they be taken literally (see commentary on c. 36). Therefore, if the literal tenor of the act, using other formulae, states in an unequivocal way that its effectiveness is being made conditional, no interpretation need be made. On the other hand, if the literal tenor of the act, despite the use of these particles, makes it unmistakably clear that it is not making the effectiveness of the act conditional, then those conditions will have no real meaning.

We think that this norm will principally affect that act which contains conditions stated in terms that do not make clear *per se* the extension that they are intended to have. In those cases, if the author has used the indicated particles, we must infer that the conditions are essential, without it being necessary to emphasize through other means the extension he intended to give to the condition.

40 Exsecutor alicuius actus administrativi invalide suo munere fungitur, antequam litteras receperit earumque authenticitatem et integritatem recognoverit, nisi praevia earundem notitia ad ipsum auctoritate eundem actum edentis transmissa fuerit.

The executor of any administrative act cannot validly carry out this office before receiving the relevant document and establishing its authenticity and integrity, unless prior notice of this document has been conveyed to the executor on the authority of the person who issued the administrative act.

SOURCES: c. 53; SCR Ind., 2 maii 1955

CROSS REFERENCES: cc. 10, 37, 41, 42, 54 § 1, 62, 124 § 2, 129 § 2, 131 § 3, 133–142, 144

COMMENTARY

Jorge Miras

1. *Condition of validity for the executor to carry out his mandate*

The administrative acts that are not supposed to produce their effects immediately and directly (cf. cc. 54 § 1 and 62) must be executed either by the author himself or through another person called the executor. In this last case, the acts are carried out *in forma commissoria* (see commentary on c. 37 § 4). Canons 40–45 adapt the basic norms of the *CIC*/1917 on rescripts given *in forma commissoria* (cc. 52–59 *CIC*/1917), thus constituting a group of common norms for the execution of any administrative act. In addition to these common norms, and since the execution of an administrative act represents a true delegation, the norms on delegated power are applicable to these cases as supplementary norms, especially those contained in cc. 131 § 3, 133–142 and 144.[1]

Canon 40 establishes the first condition of validity (the other conditions are contained in c. 42) for the executor to carry out his mandate: the executor must have received the legitimate mandate or *commissio* in

1. Cf. E. LABANDEIRA, *Los actos jurídicos de la Administración eclesiástica*, in idem, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1993), p. 441.

order to execute the administrative act since the execution constitutes a public juridical activity, which requires that the subject possess power and competence, and to have been informed of it prior to executing the act.

The subject can be unequivocally assured of the reliability of the mandate of execution only when in possession of the order in which he or she is appointed executor and can verify its authenticity and integrity. One can reasonably assume the authenticity of a mandate in written form received through ordinary channels without it being necessary to request confirmation from the one who granted the mandate, unless some circumstance or aspect of the text gives cause for doubt or confusion. Regarding the integrity of the document, the executor must verify that all the pages have arrived, along with any appendices mentioned in the text, and that, outwardly at least, there are no omissions or emendations that have been left out, so that the executor may undertake the execution with knowledge of the scope of execution as it has been entrusted (cf., on the different types of execution, cc. 41–42).

Yet c. 40 also considers the execution to be valid when, even without having received the commissory documents, the executor has been informed by authority of the one granting the mandate (that is, by a true official act of authority, not through merely unofficial information), of such assignment. In this second scenario, the executor is exempt from the obligation to wait for the receipt of the authentic mandate, and consequently, is exempt from verifying its authenticity and integrity. Notwithstanding this freedom, the executor is supposed to be reasonably sure of the legitimacy of the communication and, depending on the type of execution asked for (cf. c. 41), not just of the existence of the assignment, but also of all of the things necessary to carry out the execution (cf. c. 42).

The contrast between the rigor of the first requirement and the flexibility of this second alternative can only be explained by looking to the urgency of the case mentioned in the mandate of execution. We should not suppose that these are two equivalent means of accomplishing a valid execution; the first part of the canon would be useless if that were the case. It is more appropriate to call it a general norm that admits of an exception ("*nisi*..."). In fact, during the revising of the *CIC*/1917, it was proposed in a draft of this norm virtually identical to the final version to require the effective receipt of the mandate in all cases, for reasons of certainty and security: "Exc.mus primus consultor animadvertit melius esse si exsecutor semper agat post litterarum receptionem ut fundamentum et probationem suae legitimae activitatis habeat.

"Rev.mus nonus consultor, tamquam agens precum in Curia plurium dioecesium, tenet omnino necessarium esse ut textus servetur uti est; nam, hodie saepe saepius agitur secundum alteram canonis partem.

"Rev.mus quartus consultor proponit ut adiungatur 'in casu necessitatis.'

"Respondet Rev.mus Secretarius Ad. rem per se patere.

"Placet canon."[2]

2. *The executor*

Execution is a juridical activity carried out with executive power. Moreover, the very nature of the act being executed—above all in the case of acts for the internal forum—can require the framework proper for the exercise of sacred orders. In these cases it is clear that the executor must have already received the relevant order. Otherwise, it is common practice to assign the execution of administrative acts to the ordinary or to clerics who have some power by virtue of their office.

The doctrine has discussed the question of whether a layperson can be an executor in cases which do not require that the subject possess sacred orders. Based on the current prescriptions concerning the possibility of lay participation, in accordance with the law, in the exercise of the power of jurisdiction (cf. cc. 129 § 2 and 228 § 1), there appears to be nothing to prevent laypersons from being entrusted with the execution of specific administrative acts. This opinion is shared by a number of authors.[3]

Here we still need to address a critical question concerning the receipt of the mandate of execution of an administrative act. According to commonly accepted doctrine, the validity of the act of delegation of power does not require the acceptance of the individual delegated. Likewise, we could say that the mandate of execution of an administrative act does not require, for its validity, acceptance on the part of the individual commissioned. Now then, is the designated executor, in every case, obligated to accept the commission and execute it? This is no idle question, because execution of an administrative act may entail some duties (cf. cc. 41–42) that the executor may not be in a position to accept, as is implicitly admitted, for example, by cc. 43–44. In addressing this question, some authors distinguish two cases: if the designated executor is subject to the authority of the one who commissions the execution, his acceptance is not necessary for him to be bound by the assignment; however, if the one who assigns the execution does not have the authority to bind juridically the executor, then the executor is not obligated to discharge the commission,

2. *Comm.* 23 (1991), p. 30.

3. Cf., e.g., E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 376; J.M. PIÑERO CARRIÓN, *La Ley de la Iglesia*, I (Madrid 1985), p. 187.

so long as he has not compromised himself by accepting it.[4] Notwithstanding this technical question of the existence of a strict juridical obligation to accept the duties of execution, it is vital to keep in mind the necessity of fostering a spirit of cooperation in order to work together in all that pertains to the common good of the Church and the rest of the faithful as much as possible.

3. *The consequence of execution without legitimate mandate or official notice*

If we begin with the assumption that the act of execution is merely accessory or complementary to the main administrative act, which is the act being executed (cf. c. 37, which distinguishes the administrative act and its act of execution), then we clearly see that c. 40 conditions precisely the validity of the actions of the executor: "exsecutor invalide munere suo fungitur." Indeed, full understanding of the case requires us to consider three things: on the one hand, the invalidity of the act of execution, established by the norm; on the other, the appearance of validity of an execution carried out correctly to all appearances, though invalid; and finally, the consequences of the invalidity of the act of execution for the efficacy of the principal act, whose validity is not in question.

An act of execution carried out correctly as regards its external elements, but which does not meet the conditions prescribed by this canon, is invalid by express disposition of the law (cf. c. 10). However, it enjoys a presumption of validity (cf. c. 124 § 2) that only ceases when the competent authority declares—at the request of a concerned individual or *ex officio*—that the execution was invalid. Moreover, the main administrative act remains valid; its effectiveness is simply suspended until the moment of its execution (cf. cc. 54 and 62). Thus, a seemingly correct execution, though invalid, can set in motion the effects of the act that has been executed, which begin to appear and do not cease so long as the validity of the act of execution is not in question. The competent authority, in certain cases, might consider it more convenient, in light of the particular situation, to assume as valid the execution that has been performed without having received the mandate, and then rectifying the error *a posteriori*, provided no further reasons counsel or require a declaration of nullity. The competent authority could also simply allow, if this is the case, the situation to be governed by c. 144 § 1, so that the lack of authority in the actions of the executor might be supplied. For his part, the addressee of the improperly executed act—yet valid as far as its content is concerned—

4. Cf. A. BERNÁRDEZ CANTÓN, "La delegación de la potestad eclesiástica," in *Trabajos de la VII Semana de Derecho Canónico* (Salamanca 1960), pp. 232 ff; E. LABANDEIRA, *Tratado...*, cit., pp. 134–135, 377.

could also choose to challenge the act of execution, depending on the circumstances. If we should reach the point of a declaration of nullity, there would be an obligation regarding the effects produced under the guise of the validity of the execution, to repair the damage caused in each case, according to cc. 57 and 128.

In practice, then, the "invalidity" sanctioned by this norm translates into the possibility of challenging the act of execution. As long as the nullity of the act is not declared by decree or judgment, the execution that has been performed with the appearance of validity protects the beginning of the effectiveness of the executed act and opens the possibility of a rich casuistry on the link between acts and juridical effects that eventually follow this defective effectiveness. This is why, excepting cases of urgency and necessity, the norm seeks to guarantee the consistency of the mandate of execution as securely as possible.

41 Exsecutor actus administrativi cui committitur merum exsecutionis ministerium, exsecutionem huius actus denegare non potest, nisi manifesto appareat eundem actum esse nullum aut alia ex gravi causa sustineri non posse aut condiciones in ipso actu administrativo appositas non esse adimpletas; si tamen actus administrativi exsecutio adiunctorum personae aut loci ratione videatur inopportuna, exsecutor exsecutionem intermittat; quibus in casibus statim certiorem faciat auctoritatem quae actum edidit.

The executor of an administrative act to whom the task of execution only is entrusted, cannot refuse to execute it, unless it is quite clear that the act itself is null, or that it cannot for some other grave reason be sustained, or that the conditions attached to the administrative act itself have not been fulfilled. If, however, the execution of the administrative act would appear to be inopportune, by reason of the circumstances of person or place, the executor is to desist from the execution, and immediately inform the person who issued the act.

SOURCES: c. 54 § 1

CROSS REFERENCES: cc. 38, 39, 63, 70, 124 § 1, 1739

COMMENTARY

Jorge Miras

1. *Types of execution*

Taking its lead from what has been established by the Code (as well as by the *CIC*/1917), the doctrine distinguishes—by using terminology that is perhaps not very precise—between obligatory or necessary execution and free or voluntary execution,[1] depending on the extent of the powers granted to the executor. Thus, the mandate that consists of simply executing the administrative act in a regulated manner is distinguished from the mandate by which a person is entrusted with the execution at his own discretion (cf. c. 70), and therefore, with the faculties to verify the necessary content and then either carry out the execution or not, as he deems fit.

1. Cf., for a discussion of these terms, G. MICHIELS, *Normae generales Juris Canonici*, II (Paris-Tournai-Rome 1949), pp. 448–452; E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 379–380.

Canon 41 considers the case of the simple executor; that is, the case of the mandate of regulated execution (the so-called "necessary" or "obligatory" execution) of an act whose content has already been completely determined by its author such that the executor receives no power other than that of mere execution ("*merum exsecutionis ministerium*"), which, in principle, cannot be refused.

Nevertheless, the execution—like any other act of authority—is a human act. Therefore it does not consist of an automatic reply to the received mandate. If it did, it would be pointless to issue an administrative act *in forma commissoria*, since automatic efficacy would be produced more quickly through an act issued in simple form. Accordingly, c. 41 anticipates some reasons that permit the obligatory executor—precisely by virtue of immediacy to the persons and circumstances affected by the administrative act—to refuse the execution or suspend it in order to inform the author of the act, who will, in turn, have to make some provision on his own authority.

Actually, it can be said that this disposition, more than underlining the obligatory nature of the execution, emphasizes that the-obligatory execution is also an intelligent activity of service. The executor must not permit the public good (or the particular good, as the case may be) to be harmed through the execution of an administrative act that is merely passive and mechanical. The norm can then be read with this slant: once the executor has sufficiently verified that the act is valid and that there is no reason that suggests refusal or delay of the execution and informing the author of the act, then it cannot be refused without cause, nor must it be delayed unnecessarily. But if there are well-founded doubts about the propriety of the execution, the executor should not proceed to it rashly.

At the heart of this clause, as of administrative law, appears the characteristic *modus operandi* of public ecclesiastical administration, which must at all costs endeavor to safeguard the public good while harmonizing it as best it can with the particular good. In order for this delicate balance not to suffer unnecessarily, *immediacy*, that is, *proximity*, in the execution of the governmental measures—in this case, of administrative acts—must be a fundamental feature of administration. This immediacy is promoted when sensitivity to a particular case, with the aid of a suitable margin for discretion and the juridical security and certainty conferred by the rules for the exercise of authority, are appropriately articulated at each instance and level of government.

2. *Reasons for refusal of the execution*

The three reasons that *oblige* the executor to refuse the execution of an act have one characteristic in common: they must be "quite clear." In effect, the text—which we have modified for greater clarity by means of sub-

categories—reads thus: "exsecutionem huius actus denegare non potest, nisi manifesto appareat:

a) eundem actum esse nullum

b) aut alia ex gravi causa sustineri non posse

c) aut condiciones in ipso actu administrativo appositas non esse adimpletas."

Let us analyze these three cases in turn:

a) *Manifestly null acts*

The possibility that execution may be refused was conceived above all as a security measure, lest the semblance of validity be granted through the execution of an act that is manifestly null, along with the consequent realization that its effects and actual consequences would have to be repaired afterwards. An act is considered to be manifestly null when, for example, it lacks an essential element, when it has been issued by a subject manifestly incompetent for the matter, when it does not fulfill the essential formalities as established by the law for that specific type of act (cf. c. 124 § 1), when it is based on subreption or obreption (cf. c. 63), etc.

b) *Grave reasons that manifestly prevent the permanence of the act*

The execution of the act can also be refused when the act, though valid—or at least not manifestly invalid—must not be maintained for grave reason. It may be that such a reason was revealed in the interval of time between the issuance of the administrative act and the reception of the mandate of execution. Or again it may be that it already existed when the act was issued, but was unknown to its author. For example, the author of the act may not have taken into account the fact that the act harmed the acquired rights of third parties (see the commentary on c. 38), and so may not have attached the derogatory clause required by c. 38. (As a matter of fact, c. 46 *CIC*/1917, the precursor of the current c. 38, instead of using the expression "*effectu caret*," which is now used by c. 38, said that the acts included among those cases mentioned there "*non sustinentur*," a formula parallel to that of c. 41: "*sustineri non posse.*")

We must now turn to the grave reason—importance comparable to the nullity of the previous case—that the revocation of the act requires to be quite clear ("manifeste constet... alia ex gravi causa sustineri non posse"), so that the executor is obliged to refuse its execution. If the reason should be less grave or less clear, on account of which, in the judgment of the executor, execution of the act seems unsuitable at that time or in those circumstances, then the proper course of action would be, not refusal, but suspension (*vide infra*).

c) *Manifest non-fulfillment of the conditions indicated in the administrative act*

If the administrative act is expressly conditional, the executor must verify that the established conditions are fulfilled before proceeding to the

execution. In this case, since an *odious* norm is concerned, the disposition—which speaks of manifest non-fulfillment and "*conditiones appositae*"—must be interpreted strictly. Therefore, the execution of an administrative act cannot be refused in case of doubt about the fulfillment of a condition, or about the sufficiency of the fulfillment of the conditions; nor can the execution be refused when, in the judgment of the executor, conditions that must be considered implicit in the administrative act are unfulfilled. Such cases would instead constitute grounds for suspending the execution (see below).

The text, however, does not distinguish between the conditions for validity and those for legality. Even when the unfulfilled conditions affect only the legality, the act is not to be executed, since the executor must not knowingly execute an act whose efficacy could have illicit repercussions[2] (on the scope and efficacy of conditions attached to administrative acts, see the commentary on c. 39).

3. *Reasons for suspension of the execution*

In contrast to refusal, suspension is provisional by its very nature. It is not based on a manifest reason that prevents the execution, but rather on a judgment of its expedience by the executor, who transmits an opinion to the author of the act so that the author may reconsider the decision with a better understanding of the reason (on the concept of administrative expedience, see the commentary on c. 1739: 1, b).

Immediacy, which we mentioned previously, now acquires an important role. It could be said that the law trusts the discretion of the executor and remits to the executor's proximate understanding the circumstances and persons affected in the case as a guarantee that the author of the act, who is more removed than the designated executor, will not adopt a decision that could turn out to be unsuitable or inexpedient. Instead of the general reference to the inexpedience currently in force, Canon 54 § 1 *CIC*/1917, the forerunner to the current c. 41, established: "aut qui rescriptum impetravit adeo, iudicio exsecutoris, videatur indignus ut aliorum offensione futura sit gratiae concessio." It is clearly a supposition of expedience, as when, for example, the prudent foresight that discerns when an act will be useless, will result in scandal or division, will turn out to be disproportionately grave for the party concerned or for the faithful, will disappoint legitimate and valid expectations (all judgments made by the executor) of persons or institutions that were unable to be officially represented in the proceedings, or simply ignores precedents that are especially important in that place, etc. It is understood that this discernment

2. Cf. E. LABANDEIRA, *Tratado...*, cit., p. 380.

holds, provided that the author of the act has not already anticipated these secondary effects of his decision and informed the executor accordingly.

4. *Informing the author of the act*

Whether the executor refuses the execution or decides to suspend it ("*quibus in casibus*"), the executor must "*statim*" inform the author of the act, remitting to him the necessary information so that he may provide accordingly.

On this point it must be remembered that the execution we have been discussing is not a favor, even when that which is executed constitutes a favor. The concession has already been granted by the competent authority, and that concession generates an expectation of justice in the person or persons concerned. That is why the norm states: "*exsecutionem denegare non potest.*" This characterization of the act of execution leads us to point out the possibility of reaction from the individual or individuals concerned—to the extent that they understand the intricacies of the execution of the act that concerns them—against the decision to refuse the execution, and even against the mere suspension of it. Depending on the case, that reaction could take the form of a recourse properly so-called, or of a simple denunciation, appeal, instance, or presentation of claims to the competent authority.

42 **Exsecutor actus administrativi procedere debet ad mandati normam; si autem condiciones essentiales in litteris appositas non impleverit ac substantialem procedendi formam non servaverit, irrita est exsecutio.**

The executor of an administrative act must proceed in accordance with the mandate. If, however, the executor has not fulfilled the essential conditions attached to the document, or has not observed the substantial form of procedure, the execution is invalid.

SOURCES: c. 55

CROSS REFERENCES: cc. 10, 40, 45, 124 § 2, 133, 138

COMMENTARY

Jorge Miras

1. *The mandate as the norm for valid execution*

The fundamental norm by which the execution must be governed is the mandate received by the executor. This constitutes a specific application of the general rule established in c. 133 § 1 for acts performed through delegation: "A delegate who exceeds the limits of the mandate, with regard either to things or to persons, performs no act at all."

The content of the mandate of execution will determine the parameters of valid action by the executor. The mandate, however, need not be explicit with regard to each action—preparatory (cf. c. 43), material, and juridical—that the execution of an administrative act may require. In this case, therefore, the rule of c. 138 must be applied, according to which delegation for one case alone must be interpreted strictly, but always with the understanding that "delegation of power to a person is understood to include everything necessary for the exercise of that power." Otherwise, an insufficiently explicit mandate would make execution practically impossible.

Therefore, only those limits that are expressly established as such in the mandate are to be considered essential *limits* for the execution. Canon 42 mentions two possible limitations of this type, which necessarily bind the executor under sanction of nullity of his actions:

a) *The essential conditions established in the mandate*

The text refers to the essential conditions "*in litteris appositis*." This case must be clearly distinguished from that which refers to the execution of a conditional administrative act. When the conditions expressed

in the act to be executed have not been fulfilled, then we find ourselves facing one of the suppositions of c. 41, by virtue of which the execution is to be refused. By contrast, we are concerned here with conditions imposed for *the validity of the execution.* These conditions are found in the text through which the mandate is entrusted to the executor. It is the executor—not the designee of the act that is being executed—who must fulfill those conditions, regardless of whether the act that is being executed also includes conditions of its own.

Since an invalidating law is concerned, the reference to "essential" conditions must be interpreted strictly. They must be stated so clearly that there is no possibility of doubt about their intention to condition the validity of the execution (see the commentary on c. 39).

b) *Omission of the substantial form of procedure*

The substantial form of procedure is in each case that which the law has established as *necessary for the efficacy* of the act at issue. For specific cases, we could also call *substantial form* that which has been imposed by the author of the act as a requirement for the validity of the execution. Thus, c. 133 § 2, which also applies to this case, makes clear that the delegate does not exceed the limits of the mandate (and therefore does not act invalidly [c. 133 § 1]) if he simply performs the entrusted acts in a manner other than that determined in the mandate, "unless the manner was prescribed for validity by the delegating authority," thereby elevating such form to substantial form of procedure.

2. *The sanction of invalidity*

If the executor does not fulfill the conditions established as essential, or does not observe the substantial form of procedure, the execution is null ("*irrita est exsecutio*"). In addition, if the executor otherwise exceeds the limits of his mandate with regard either to things or to persons, his actions are null ("*nihil agit*" [c. 133 § 1]).

What do these sanctions mean in practice? Since they are certainly express sanctions of nullity (cf. c. 10), they truly nullify the act of execution. However, the paralysis of the efficacy of the executed act is generally not produced automatically. The act of execution, despite being invalid, if it has been performed correctly with respect to its external elements, enjoys a presumption of validity that is destroyed only by proof to the contrary (c. 124 § 2). For this reason, depending upon the degree of external importance of the elements that are unfulfilled in the execution, it is certainly possible that such nullity will have to be made effective through a declaration by the competent authority by means of a decree or a judgment (see commentary on c. 40, 3). Otherwise, if the executor learns in good time that the execution is null, he can repeat it, as is established in c. 45.

43 **Actus administrativi exsecutor potest alium pro suo prudenti arbitrio sibi substituere, nisi substitutio prohibita fuerit, aut electa industria personae, aut substituti persona praefinita; hisce autem in casibus exsecutori licet alteri committere actus praeparatorios.**

The executor of an administrative act may in his prudent judgment substitute another for himself, unless substitution has been forbidden, or he has been deliberately chosen as the only person to be executor, or a specific person has been designated as substitute; however, in these cases the executor may commit the preparatory acts to another.

SOURCES: c. 57

44 **Actus administrativus exsecutioni mandari potest etiam ab exsecutoris successore in officio, nisi fuerit electa industria personae.**

An administrative act can also be executed by the executor's successor in office, unless the first had been chosen deliberately as the only person to be executor.

SOURCES: c. 58

CROSS REFERENCES: cc. 40, 41, 124 § 1, 137, 145 § 1

COMMENTARY

Jorge Miras

1. *Substitution*

These canons present two different scenarios for the transmission of the obligatory burden and the power to execute the administrative act: substitution and succession. The general rule established in c. 43 states that the person who has been designated to execute an administrative act may substitute another personally, in accordance with prudential judgment. Included among the matters left to the "prudent judgment" of the executor is, of course, the verification that the substitute he intends to

designate possesses the conditions necessary to carry out the commission validly, legally, and competently.

A simple comparison will suffice to show that this possibility extends beyond the faculty of sub-delegation (cf. c. 137 §§ 2-3) and might be called the category to which the faculty of designating substitutes belongs. Perhaps the reason lies in the very specificity of the supposition: delegated power in general—which could give rise to a wide range of juridical phenomena—is not what is meant here. Rather, it refers only to the mandate of execution of an administrative act whose fulfillment is not to be delayed without cause (cf. c. 41). Generally, the commission of execution is entrusted to persons who hold offices or positions, or who already exercise some other function, and who, therefore, may well encounter difficulties in having to add that commission to their habitual obligations. The possibilities of absence, sickness, or commitments that cannot be postponed, together with lack of time and other eventualities, generally favor fullness in the faculty of substitution, which better ensures the promptness and diligence desirable in the execution, without the need to return to the mandator to inform him of those circumstances.

Nevertheless, c. 43 establishes three cases in which this possibility is excluded:

a) *When substitution is prohibited.* This clause must refer to an express prohibition, either of a general nature as established by the law for the specific act that is to be performed, or as established by the author of the act in the *litterae* in which the executor is designated.

b) *When the executor has been deliberately chosen for his personal characteristics.* Obviously, it must somehow be made known to the executor that he or she has been chosen precisely for certain personal characteristics, since the executor is the one who must refrain from substituting another. Therefore, if an executor is thus designated, the mandate must state this circumstance—which is equivalent to an indirect prohibition of substitution—or at the least, the designated person must be duly informed of it (cf. c. 40). If it is his intention to exclude it (*vide infra*), the author of the act must also clearly state such a circumstance, lest the disposition of c. 44 automatically come into effect (if applicable).

c) *When there already exists a designated substitute.* If the mandate has anticipated the eventuality that the person designated as executor in the first place cannot execute the commission and has established who must be the substitute, then the executor (unless an automatic mechanism of substitution has been provided) can still choose a substitute "according to his prudent judgment"—unlike in the first two cases—but the substitute must be and can be the designated person only.

Canon 43 makes no special provision for a case of substitution for the substitute. Normally, the relationship between the executor and the substitute is much closer and more responsive than that between the executor and the author of the act, such that, if it proves impossible to desig-

nate the originally intended substitute, the executor will be able to designate another in good time. When the faculty to designate a substitute is limited by any of these circumstances, the author of the mandate will have to make provision anew.

In the absence of an express disposition, we are to understand that c. 137 § 4 applies here, such that, unless it was expressly granted in the mandate by the author of the act, the substitute cannot in turn choose a substitute.

2. *Succession*

Canon 44 regulates what could be considered a special case of automatic substitution: succession. This situation generally takes place when the mandate of execution is granted to the holder of an ecclesiastical office (cf. c. 145 § 1), precisely because he holds an office—sometimes the executor is even designated by office and not by name, such as the ordinary, the parish priest, the penitentiary, etc.—without any special regard for their personal characteristics.

In such cases, the person who succeeds the executor in office succeeds him in the execution as well, if the execution has not yet been carried out. In contrast to the cases of substitution properly so-called, in which the executor could himself carry out the execution but entrusts the commission to a substitute, in succession, the obligation and the power of execution automatically pass to the successor, such that the person who left office ceases to be competent to carry out the execution.

When the holder of an office has been designated as executor because of personal characteristics—provided there is evidence of them—this succession does not take place, nor, as we have seen, is it possible to freely designate a substitute.[1] The result is that, if a person leaves office without having carried out the execution, the author of the act will have to make provision anew.

3. *Consequences of the improper designation of a substitute*

What consequences would be incurred by the designation of a substitute in violation of the limitations established in c. 43?

The appointment of a substitute in contravention of an express prohibition would be, in principle, null (cf. c. 42). It would give rise to an equally null execution if it were carried out, since this would amount to an example of an act performed by an incapable person (cf. c. 124 § 1). The

1. Cf., for the doctrine subsequent to the *CIC/17*, G. MICHIELS, *Normae generales Juris Canonici* (Paris-Tournai-Rome 1949), p. 464.

same consequence would be attributed to the designation of a substitute other than the one established as necessary by the mandator.

Regarding the designation of a substitute by an executor who knows that he has been designated precisely for personal characteristics, we would likewise have to conclude that such a designation is null, since the expression of that circumstance is equivalent to an indirect prohibition. On the other hand, if that point has not been stated sufficiently clearly, and was therefore unknown to the executor, the substitution and the performance of the executor would be valid—the same could be said of succession—unless the precise characteristic desired in the executor can be considered essential for the validity of the act of execution and is lacking in the substitute (cf. c. 124 § 1).

Even in those cases in which the faculty of substitution is limited or excluded, the executor can always commit to another the preparatory acts of the execution, properly so-called. Examples include the possible interrogation of witnesses, the verification of the fulfillment of required conditions, the gathering of specific information, certain previous formalities, material acts, etc.

45 **Exsecutori fas est, si quoquo modo in actus administrativi exsecutione erraverit, eundem actum iterum exsecutioni mandare.**

If there has been any error in the execution of an administrative act, the executor may execute it again.

SOURCES: c. 59 § 1

CROSS REFERENCES: cc. 42, 66, 126, 1616

COMMENTARY

Jorge Miras

1. *Types of errors included in the norm*

The group of norms concerning the execution of administrative acts in general comes to an end with this canon. This last norm considers the possibility that the executor has committed errors in the course of executing the act. Since the canon does not make distinctions, this norm should be interpreted broadly because it seeks to simplify administrative activity—it is, in other words, a *favorable* norm. Therefore, the canon embraces all types of errors: material, accidental, and substantial.

A logical interpretation can only be obtained by achieving proportionality between the faculty granted by the norm and the type of error at issue. It is essential to note that the intention here is not to prescribe a procedure for the simple correction of errors, material or otherwise, but rather to grant the executor the faculty *to perform the execution again* ("eundem actum iterum exsecutioni mandari"). This concession is necessary because the executor is not the authority competent over the matter. His competence is limited to the execution and once carried out, it would, in principle, be exhausted; he would then lack any power to act again in the case. Yet if he realized, after the execution, that he had made an error, and this norm did not exist, the executor would have to notify the author—the competent authority—of the act to the effect that an error had been made, so that he may convalidate, as appropriate, the faulty execution, or so that the executor may receive a mandate to execute again. Naturally, the concerned individuals would suffer prolonged uncertainty because of this delay.

2. *Use of the faculty to repeat the execution*

Once this perspective has been adopted, in which cases would it be fitting to use the faculty of repeating the execution? Doubtless, it could be used in case of purely accidental errors, or even solely material errors ("si quoquo modo in exsecutione actus administrativi erraverit"), but such action would be disproportionate—or even inopportune—in many cases.

In practice, there are errors that void the execution or that turn them into uncertain and doubtful executions. Others, however, do not affect the validity of the execution at all because, after its execution, the act undoubtedly begins to produce its effects. Should the execution be repeated in these cases, uncertainty and confusion about the effectiveness of an act whose execution has certainly been valid would be introduced.

When is the act of execution certainly valid? For example, in the case of rescripts, c. 66 establishes a principle according to which accidental errors do not void their validity, "provided that in the judgment of the ordinary there is no doubt about the person or the matter in question."The same criteria should be applied to the act of execution of the rescript. In general, however, c. 126 stipulates for any juridical act—and therefore, for administrative acts as well, in the absence of other specific norms applicable to the case in question—the principle that, in the absence of a disposition to the contrary, only those errors related to the substance of the act or any other condition *sine qua non* affect the validity of the execution (cf., for the execution of administrative acts, c. 42).

It appears that the legislator is inclined to minimize the importance of errors that do not affect validity. Indeed, as we have already seen, it has not even been thought necessary to issue a norm for the simple correction of errors (cf., for judicial judgments, c. 1616). Perhaps we can articulate the following *practical principle of behavior* for the executor: when an act of execution is valid, if the error does not harm anyone and the effectiveness of the executed act will not be subject to possible challenges, it is better to let it take effect without creating unnecessary burdens. It is the responsibility of the competent authority to adopt the act of execution and to repair the possible accidental errors, or to note, as the case may be, that the error goes beyond the accidental and to provide for the consequences. Thus will healthy economy in procedure be promoted, which will redound to the benefit of souls and to efficiency in governance.

In our opinion, the case in which this faculty would have to be used would arise when the executor has made errors that affect the validity, or that at least make the act of execution doubtful or susceptible to challenge. In those cases:

a) If the error is identified before remitting the records of execution to the author of the act, the execution can and *should* be repeated. Otherwise, the mandate received would be *negligently* unfulfilled since the law

grants to the executor the necessary faculty so that the issue does not need to be returned to the author of the act unresolved.

b) If, on the other hand, an error of this nature has gone unnoticed, and the executor remits the records of execution to the superior, we will be before a case of invalidity of the execution (see commentary on c. 42). In this case c. 45 would not be relevant, because the executor believes he has carried out his commission correctly, and the possibility of using this faculty does not arise. If, however, he realizes the error that has been made after the records of execution have been sent, he must communicate this to the superior using the quickest means possible and stating his willingness to repeat the execution, failing any indication to the contrary.

The faculty granted by this canon to the executor is to be understood also to be granted, for the same reasons, to his substitute and successor (cf. cc. 43–44). In other words, it is to be granted to any person who lawfully acts as an *executor* of an administrative act.

46 **Actus administrativus non cessat resoluto iure statuentis, nisi aliud iure expresse caveatur.**

An administrative act does not cease on the expiry of the authority of the person issuing it, unless the law expressly provides otherwise.

SOURCES: c. 61

CROSS REFERENCES: cc. 58 § 2, 81

COMMENTARY

Jorge Miras

1. *The general rule and its "rationale"*

The issuance of singular administrative acts forms part of the exercise of the function or ministry of governance. It represents a use of public authority by the competent executive authority, who exercises the function of discerning in each particular case the requirements of the public good—the purpose of the Church, in short—and makes the decision most appropriate for that purpose. Such an act, then, is not a private act confined to the personal juridical sphere of its author, as if it were an arbitrary or capricious decision that depended exclusively on the will or disposition of the person issuing it. Rather, it must be remembered that administrative acts, like the administrative function as a whole, are governed by their own rationale, which binds the author even in those cases where the widest discretion is allowed in the exercise of authority. In fact, however broad the scope for discretion may be in each case, administrative acts are always subject to at least two aspects of the exercise of public authority: the purpose of the act and the notion of competence.[1] Therefore, an administrative act, once it has been lawfully issued, becomes *independent* of its author—who cannot revoke it without just cause—and acquires a life of its own in the public-juridical world, creating, altering, or extinguishing a wide variety of juridical situations.

The general principle established by the *CIC* is the permanence of the effects of a lawful administrative act, independent of the continuance of its author in the exercise of the authority by virtue of which it was issued. If he possessed power and competence at the time of issuance and acted

1. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 192–197; 357–365.

lawfully, then the requirements for the permanence of the act's effects have been fulfilled. Otherwise, such an important good as the certainty and security of juridical situations would disappear from Church life, to be replaced by a kind of fundamental precariousness of all decisions of governance, which would then be subject to sudden changes of persons.

On the contrary, the general norm is that lawful administrative acts—provided they do not have a fixed date of expiry and their efficacy has not lapsed in one way or another—cease by revocation. In other words, they cease by a new act from the competent authority, motivated by considerations of expedience or good governance. Put another way, they cease as the result of a new evaluation of the requirements of the public good in relation to the circumstances of persons, times, and places, carried out by the competent authority of the moment, who can be that very same author of the previous act or his successor, or his superior (see the commentary on c. 47).

2. *Exceptional cessation of an administrative act upon the cessation of the authority of its author*

Canon 46 recognizes that the law has expressly provided for the possibility that, in certain cases, the administrative act ceases upon the expiry of the authority of the person who issued it. Such is the case with c. 58 § 2, which makes the following disposition regarding singular precepts that have not been imposed by a lawful document: upon the expiry of the authority of their author, the basis for upholding the certainty of the juridical situations dependent on these decrees disappears as well. If we should also apply to these cases the general norm that acts are permanent, we would thereby bestow continuity on juridical situations whose basis is uncertain, which would contradict the very *rationale* of that general norm. Moreover, the author of such decrees can ensure quite easily that they will remain in force after his authority expires; he need only record them in a lawful document (see the commentary on c. 58).

Canon 81—applicable also to dispensations capable of successive applications, along the lines of c. 93—exceptionally allows for the cessation in this case of privileges granted with certain clauses that make them precisely dependent throughout the period of their validity on their author's continued will to grant them.

There can be many motivations for possible exceptions established by the law to the general principle enshrined in c. 46. One must analyze in each case the exact motive for the legislator—or as the case may be, the author of the act, although that is not the case contemplated here—to manifest expressly his will to limit the duration of the efficacy of an administrative act to the time in which its author holds office or possesses the use of authority.

The fact that there are exceptions to this norm does not harm the interest in protecting the stability and certainty of juridical situations since the exception must be stated *expressly.* This requirement ensures that it will be known to all interested parties from the very moment of issuance of an administrative act subject to such a limitation, and it prevents the creation of false expectations or conflicts with acquired rights.

47 **Revocatio actus administrativi per alium actum administrativum auctoritatis competentis effectum tantummodo obtinet a momento, quo legitime notificatur personae pro qua datus est.**

The revocation of an administrative act by another administrative act of the competent authority takes effect only from the moment at which the person to whom it was issued is lawfully notified.

SOURCES: c. 60 § 1

CROSS REFERENCES: cc. 36 § 1, 54–56, 58, 73, 79, 93

COMMENTARY

Jorge Miras

1. *Revocation*

This canon concludes the common norms that the *CIC* devotes to singular administrative acts, and they do so by establishing that the lawful notification of the person directly affected by the new act ("*pro qua datus est*") determines the moment when the effects of the revocation begin.

Here it is implicitly stated that the usual manner of cessation for those administrative acts that are of indeterminate duration or do not contain a (resolutory) condition or a predetermined provision for passing out of effect, is precisely revocation through a new administrative act originating with the competent authority (cf. c. 58 § 1 for singular decrees, c. 73 for rescripts, c. 79 for privileges, and c. 93 for dispensations).

The revocation is always effected by means of a new administrative act proceeding from the competent authority, which supposes that said authority has completed a reevaluation of the matter, taking into account the personal, local, and temporary circumstances that it includes, and has made a new decision that is considered more opportune, suitable, wise, or beneficial than the previous one.

The competent authority can be the author of the act being revoked (cf. cc. 1734–1735), the hierarchical superior of the author (cf. c. 1739), or the author's successor in office. The revocation can be made *Motu proprio* or at the request of an interested party. The revocation can be explicit (cf. cc. 1734, 1739) or implicit if express mention of the act being revoked is not made, but in either case, it is rendered totally without effect (cf., for example, c. 53 *in fine*). To define adequately the scope of the cases of im-

plicit revocation, we must take into consideration, if that is the case, the rules established in c. 36 (cf. also c. 38).

2. *Lawful notification*

Technically speaking, it is necessary to distinguish revocation, which is an ordinary measure of governance used for reasons of opportuneness, from other cases that are based in the nullity or the voidability of the act, or from the possible amendments or corrections that essentially keep the same act in effect (see commentary on c. 1739). In any case, the moment at which these decisions take effect will always be the date of the notification (the retroactivity of the effectiveness is an entirely different matter).

Locating the effectiveness of the acts precisely in the lawful notification does not mar the notion of administrative acts as unilateral acts of authority, nor does it reveal an alleged similarity to the nature of transactions, which require the acceptance of the recipient. It is simply a norm conducive to juridical certainty, in virtue of which the position of the interested party and the acts that he carries out in the interval between the date of revocation and that of notification are still governed by the act being revoked, so that there is no period of juridical uncertainty.

Surprisingly enough, the common norms for administrative acts do not establish any rule regarding lawful notification. However, c. 47 seems to favor the interpretation that an administrative act by which a previous one is being revoked is indeed a singular decree since the norm under consideration here is absolutely equivalent to the one established in c. 54 § 2 for decrees (although for rescripts, cf. c. 62). Therefore, we can apply the norms of cc. 54–56 to the notification of the decree effecting a revocation (regarding the different cases of notification, see commentary on cc. 54–56).

CAPUT II
De decretis et praeceptis singularibus

CHAPTER II
Singular Decrees and Precepts

48 **Decretum singulare intellegitur actus administrativus a competenti auctoritate exsecutiva editus, quo secundum iuris normas pro casu particulari datur decisio aut fit provisio, quae natura sua petitionem ab aliquo factam non supponunt.**

A singular decree is an administrative act issued by a competent executive authority, whereby in accordance with the norms of law a decision is given or a provision made for a particular case; of its nature this decision or provision does not presuppose that a petition has been made by anyone.

SOURCES: —

CROSS REFERENCES: cc. 35–47, 49–58, 59, 1732–1739

COMMENTARY

Jorge Miras

1. *Singular decrees: a category of administrative acts*

After stating the general norms, the Code turns in succession to the specific norms for the two categories of administrative acts: singular decrees and rescripts.

It could be said that c. 48, to a certain extent, defines the notion of singular decree—although a more precise technical definition must take into account other elements that follow from cc. 48–58; but what it actually achieves, which is perhaps greater than a definition, is the incorporation of a whole series of heterogeneous juridical acts of ecclesiastical

authority in the category of singular decrees. Indeed, the most important function of c. 48 is not *to define* with scientific precision, but rather *to declare* that those singular acts of authority which are not to be given through a rescript (cf. c. 59) must be understood to be decrees and to possess a definite juridical regimen, established by the general norms and canons that follow. The Code has intended to include all administrative acts of ecclesiastical authority in one of these two formal categories for practical reasons: it is simpler and more economical in terms of normative policy and more secure to give norms for one category of acts, in which a great number of cases is included, than to establish special norms for each type of act now included in that category. Establishing such special norms would undoubtedly give rise to annoying redundancies, and worse, lacunae and uncertainties.

2. *Characteristics enumerated by c. 48*

What characteristics are to bring together the various juridical acts understood to be included under the term "singular decrees"? Canon 48 lists some that merit extended treatment.

a) *Administrative act*

In actuality, since it has adopted this technical expression, which has already been used in the general norms, c. 48 could have omitted the rest of the characteristics common to every administrative act, limiting itself to stating those characteristics that are different for rescripts. The affirmation that the administrative act as conceived here is given by competent executive authority in accordance with the norms of the law and for a particular case, does nothing to distinguish singular decrees from the rest of administrative acts; the same could be said of rescripts: "rescriptum intelligitur actus administrativus a competenti auctoritate exsecutiva editus quo secundum iuris normas pro casu particulari .... " It still remains to add the distinct characteristics of singular decrees to this express inclusion of them in the class of singular administrative acts.

Nevertheless, it cannot be said that this provision is entirely superfluous, since it does differentiate singular decrees from other decrees that are, properly speaking, general norms, and are also given by competent executive authority (cf. cc. 31–33). Thus the similarity in terms does not lead to error regarding the nature and juridical regimen of the acts discussed in these canons.

b) *The content of singular decrees*

Content is the first specific difference cited by c. 48 for characterizing singular decrees; through a decree "a decision is given or a provision made for a particular case." Obviously, the terms *provision* and *decision* are inexact and generic, suitable for designating a wide range of specific measures of governance (appointments, decisions, provisions, dismissals,

establishments, extinctions, resolutions, confirmations, revocations, substitutions, etc.). Decisions may concern conflicts (cf., e.g., cc. 51, 1734 § 3, 2°, 1735), but not necessarily. Provisions may concern ecclesiastical offices (cf., e.g., cc. 146–156), but they need not refer only to these cases. In actuality, any specific disposition of governance that concerns a particular case can be included under these headings, except for grants of favors at the request of concerned parties, which constitute the specific content of rescripts. Therefore, it can be said that the administrative act par excellence, in canon law, is the singular decree, since every administrative act that does not have to take the form of a rescript will take the form of a singular decree.[1] The Code itself confirms as much in regulating the recourse against administrative acts under the rubric: "De recursu adversus decreta administrativa" (also, see the commentary on c. 1734).

c) *The initiative in singular decrees*

The text of c. 48 adds a further nuance that in a way defines the breadth of the notions of *decision* and *provision*: it speaks of decisions or provisions that "of their nature do not presuppose that a petition has been made by anyone" ("petitionem ab aliquo factam non supponunt").

That expression is not meant to establish that the issuance of a decree cannot be preceded—or even forced—by the petition of a concerned party; to the contrary, that is precisely what happens in many cases, and accordingly it has been foreseen in c. 57 (see commentary on c. 57). What it does intend to establish is that the decision or provision at issue be adopted in a preeminent manner by the competent authority through the use of his power of governance. He makes use of his own assessment of the facts, circumstances, and needs of those conceivably presented by the potential petitioner, but also of others, and his own appreciation of what is most just, expedient, or appropriate in the case for the public good (cf. c. 50). For the sake of the public good, all administrative decisions and provisions must be created "by their very nature," even if the involvement of authority has been requested through a petition.

This is not what happens in the case of rescripts. In the granting of favors, authority basically acts at the request of the person concerned and considers the motivating reasons expounded by the petitioner in the *preces* (hence the special relevance of defects such as subreption and obreption, and the need for at least one of the alleged motivating reasons to be true [cf. c. 63]), evaluating their sufficiency as well as the absence of obstacles to granting whatever has been requested.

Perhaps the key to interpreting this expression can be found in one of the differences between decrees and rescripts expounded by Labandeira: "The immediate and principal purpose of a decree is normally the

1. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 306ff.

public good, which does not prevent it from having a specific designee who can be favored or injured by it (cc. 50 and 52). On the other hand, even when the ultimate purpose of a rescript is the public good, the immediate purpose is to favor one or several specific persons, granting them a grace, a favor, or a privilege (cc. 59, 61, 71, 77, and 80), or even establishing something contrary to a norm, in favor of particular individuals (c. 36)."[2]

3. *Other characteristics*

In addition to those enumerated in c. 48, there are other fundamental characteristics of singular decrees. The collection of canons in this second chapter makes it possible to say that the legislator intended to give unity of juridical regimen to the whole heterogeneous group of singular decisions of governance that cannot be embraced in the granting of favors. He does this by means of the category of the singular decree, which appears to be characterized as a formal act of disposition with a long reach. Here we find ourselves before the form of administrative act par excellence: under this form, authority makes decisions capable of creating, altering, or unilaterally extinguishing the broadest range of juridical situations on its own initiative while being protected by a presumption of legality and capable of immediately impinging on the juridical state of the faithful and the public good.

For this reason, the general norms on singular decrees constitute a juridical regimen characterized by the special presence of guarantees. Along these lines—in addition to the necessary guarantees presupposed by the requirements established by the substantive norms applicable to the situations affected by the possible decrees—the following can be identified as especially important in administrative acts:

a) the method of proceeding, and in particular, the hearing of the interested parties (cf. c. 50);

b) the obligation of the administration to reply to lawful petitions of the faithful and to adopt the expedient decisions or provisions within the ambit of its competence. Here the introduction of the discipline on administrative silence in the Church is extraordinarily important (cf. c. 57 § 1–2);

c) the written form and the explanation of decisions (cf. cc. 51 and 58 § 2);

d) the lawful notification of the individual concerned (cf. cc. 54–56);

e) and the responsibility of the ecclesiastical public administration for damages caused (cf. c. 57 § 2).

2. Cf. ibid., p. 305.

Furthermore, it has been generally established in the Code that one who believes he has been injured by a decree can have recourse to the hierarchical superior of the one who issued the decree. This constitutes a fresh guarantee of the just exercise of the function of governance apparent in administrative acts (see the commentary on cc. 1732–1739; also, cf. cc. 1400 § 2, 1445 § 2 and *PB* 123).

49 **Praeceptum singulare est decretum quo personae aut personis determinatis aliquid faciendum aut omittendum directe et legitime imponitur, praesertim ad legis observantiam urgendam.**

A singular precept is a decree by which an obligation is directly and lawfully imposed on a specific person or persons to do or to omit something, especially in order to urge the observance of a law.

SOURCES: —

CROSS REFERENCES: cc. 35–58, 136, 1319

COMMENTARY

Jorge Miras

1. *A singular decree whose content consists of a direct order*

In this canon the name of *singular precept* is given to a decree characterized by its content, which consists of a direct order given to one or a number of specific persons.

The reason for this specificity—it is the only type of decree to make use of it—is to be found in the very nature of the singular precept, which directly and immediately binds the behavior of the faithful affected by it, imposing an obligation on them. As is evident, the details found in the Code on this type of decree are not meant to establish a set of special norms for precepts, but rather to regulate the precepts by subjecting them to the same guarantees established for the other singular decrees. In fact, the only special norm given for precepts constitutes precisely a reinforcement of these common guarantees: a precept that has not been imposed through a lawful document ceases upon the expiry of the authority of the person who issued it (see commentary on c. 58 § 2).

2. *Characteristics of the singular precept*

The precept is expressly configured as an administrative act in order to overcome former uncertainties caused by the figure of "praecepta singulis data" (the object of c. 24 *CIC*/1917), which led one part of the doctrine prior to the Code to consider it a legislative act. In fact, the Code is only concerned here with precepts given by competent ecclesiastical authority

by virtue of executive power, to the exclusion of other related figures. It says, in effect, that the precept is a decree; that is to say, "actus administrativus a competenti auctoritate exsecutiva editus." Therefore, its characteristics are those common to all administrative acts plus those proper to singular decrees, and including one specific characteristic: it is an administrative act (cf. cc. 35ff) that contains a decision made for a particular case (cf. c. 48). The elements of this additional characteristic can be explicated as follows:

a) That decision consists of imposing on one or several determined persons a mandate (an order to do something) or a prohibition (an order to abstain from something);

b) It refers to an order from the "competent executive authority," and therefore its addressee is someone who is subject by reason of some concept to the authority of the one who issues the precept (cf. cc. 35, 48, and 136);

c) It is to be imposed "lawfully," that is, "secundum iuris normas" (c. 48), such that, in addition to the norms applicable to the situation to which the precept in question refers, the norms on competence, procedure (cf. c. 50), form (cc. 51 and 58 § 2), and notification (cc. 54–56) must also be strictly observed;

d) Once lawfully imposed, it obliges the addressee or addressees everywhere, unless it is expressly established otherwise (c. 52).

3. *Principal types of singular precept*

Leaving aside for now the other distinctions that could be made by considering the content of precepts, the manner by which they instruct, or the ways in which their obliging effectiveness is expressed, we will cite two that seem to us to be of special interest:

a) *The simple precept and the penal precept*

The obligation to do or to omit something, which essentially constitutes the content of a precept, can simply be imposed or it can also contain the threat of a penalty in case of non-fulfillment. In these cases one speaks precisely of a *penal precept* (cf. cc. 1314ff), a figure whose regimen has been simplified in the Code, which assigns to it the characteristics and regimen of the administrative acts. Canon 1319 establishes that, to the extent to which someone can by virtue of his power of governance, impose precepts in the external forum (that is, to the extent to which it is the "competent executive authority" [cf. cc. 48–49]), that authority can also by precept threaten determined penalties, with the exception of perpetual expiatory penalties. Therefore, the executive authority can reinforce the lawful precept with a threat of punishment, which aggravates the consequences of possible non-fulfillment, or which, to put it positively, makes the mandate

more urgent and effective. The legislator is not to adopt this measure,whose extension is expressly limited, unless the matter has been very carefully considered (cf. c. 1319 § 2).

In these cases, in addition to the guarantees proper to every precept, the specific guarantees regarding penalties are also applicable, including the one that assumes the strict interpretation imposed by c. 36 § 1 of those acts that refer to "the threat or imposition of penalties."[1]

b) *Precepts that urge a preexisting legal obligation and precepts that impose obligations* praeter legem

In the course of the revision of the *CIC*/1917, the singular precept appeared for a time to have been conceived as a simple means to urge the observance of preexistent obligations, as stated in c. 48: "Praeceptum singulare intelligitur decretum quo directe alicuius normae canonicae aut decreti observantia urgetur contra invitos."[2] The final wording of the canon, however, admits of other possibilities—in accordance with the concept of administrative act—by establishing that the singular precept is imposed "praesertim ad legis observantiam urgendam."

Urging the observance of the law is not the sole possible function of the precept, but that is its principal function.[3] Executive authority, within the scope of its competence, can also impose certain obligations that have not been established previously by the law, which does not mean that in such cases the precept is legislative in nature, or that it violates the principle of legality. The legality characteristic of acts of executive power—or, in general, of the administrative function—is not to be understood as a limitation of its function to the mere automatic execution of the law (if the law could anticipate every eventuality that might arise at various times and places, and supply a solution *a priori*, the administrative function would not be necessary). Rather, legality consists in the fact that the actions of the executive authority must always be produced "*legitime*," "*secundum iuris norms*." This means that sometimes the authority necessarily must act in a manner predetermined by the law, as in cases of regulated authority, and at other times must decide upon the action most suitable for the purpose that is entrusted to it in the Church. This authority must also be based on the capacity and range of decision granted to it by the law and using the resources—including juridical ones—proper to the authority that has been assigned, while always remaining within the limits determined by the law for its acting (discretionary authority).

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1. Cf., on the penal precept, E. LABANDEIRA-J. MIRAS, "El precepto penal en el CIC," in *Ius Ecclesiae* 3 (1991), pp. 671–690.
2. *Comm.* 23 (1991), p. 32.
3. Cf., to the contrary, with certain distinctions, B. GANGOITI, commentary on c. 49, in A. BENLLOCH POVEDA (Dir.), *Código de Derecho Canónico. Edición bilingüe, fuentes y comentarios de todos los cánones*, 3rd ed. (Valencia 1993); P. LOMBARDÍA, commentary on c. 49, in *Pamplona Com.*

Therefore, when an executive authority, through a singular precept, lawfully establishes an obligation *praeter legem*, it is in fact acting *secundum legem*, since the law confers the following possibility of acting upon it: what legality requires is not that the content of the precept be predetermined by the law, but that the precept be given *secundum iuris normas*. Accordingly, it can be said that what distinguishes every singular precept—and therefore any administrative act—is precisely that "in a specific case, it creates, modifies, or extinguishes subjective juridical situations *in a manner subordinated to the law and by virtue of a power attributed by it.*"[4]

4. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 310–314.

50 **Antequam decretum singulare ferat, auctoritas necessarias notitias et probationes exquirat, atque, quantum fieri potest, eos audiat quorum iura laedi possint.**

Before issuing a singular decree, the person in authority is to seek the necessary information and proof and, as far as possible, is to consult those whose rights could be harmed.

SOURCES: —

CROSS REFERENCES: cc. 10, 51, 57, 128, 212, 1526–1586

COMMENTARY

Jorge Miras

1. *The regulation of the procedure of preparation of decrees*

For the commentary on this canon, we will distinguish the procedure of *preparation* of the administrative acts (the process from the moment of initiation until it comes to the decision), from the norms related to the forms of issuance (c. 51), notification (cc. 54–56), and execution (cc. 40–45).

The content of the plans for a law *of administrative procedure* ended up being only partially included in the Code, and that content was scattered in diverse places. The current regulation of the procedure of preparation of the administrative acts in general has proved to be excessively spare; it is composed of a few indications that can be gleaned from the norms common to the administrative acts (cf., especially, c. 38) and some prescriptions for specific cases found dispersed in the *CIC* (cf., for example, cc. 1748–1752, on the removal and transfer of parish priests; c. 1720 on the imposition of penalties by decree) In addition, some other norms exist that establish requisites to be fulfilled by the authority issuing the decree, such as a request for opinions or advice, or for hearing determined persons (cf. c. 127 § 1). Finally, a few norms discuss procedure among the canons on singular decrees and rescripts. It may well be that no complete, unitary, and clear regulation of this procedure exists.

As for the "procedure of preparation" proper to singular decrees, there is only one norm of general extension to be found in the *CIC*, which is the canon under discussion. Apart from the Code, there are some other norms of procedure for the Roman dicasteries in the *RGCR* (cf. arts. 98–138), whose meaning can be completed by the prescriptions contained in

the particular norms for each dicastery. For the rest, nothing prevents the bishop from issuing certain norms of procedure for the diocesan curia that he may deem useful or necessary. If we look only to the Code, however, the regulation of administrative procedure is very limited.

The parsimony and lack of unity of these norms is lamentable because this is a matter of great importance. Surely an appropriate regulation of the procedure for the preparation of administrative acts would be conducive to correct decision-making by the authority. Moreover, as a tangible manifestation of the principle of legality, it guarantees a just and thorough execution of the function of pastoral governance in the Church.[1] For this reason, these norms should not be seen as limitations or obstacles to the dynamism and efficiency of governance in the Church, but rather as a true service, both for the authority who carries out this function (who is primarily interested in exercising it effectively, but always in a lawful, just, and timely manner, without causing any unnecessary damage), and for those governed by it. An effective procedure for preparation would help the authority avoid improvisation and even the "suspicion of an arbitrary exercise of power" in decisions that can affect others.[2]

2. *Content of the procedure outlined in c. 50*

The text of this canon succinctly expounds two objectives/tendencies of the procedure for the preparation of decrees without specifying the means by which it has arrived at them, nor the consequences of the possible non-fulfillment of this prescription on the part of the executive authority. It can be said, then, that this is not, properly speaking, a norm of procedure, in the sense that it directly and expressly links the validity of the acts of the authority to the fulfillment of certain requisites. It is instead a strong appeal to the authority,[3] which largely subordinates the effectiveness of the juridical protection (cf. *Principles*, 7) to the sensitivity and juridical sense of the author of the administrative act. Let us look separately at the two requisites mentioned in the canon:

a) *Seeking the necessary information and proof*

Naturally, this is an activity that precedes the issuance of a decree. The authority must always endeavor to act with complete knowledge of the case, which is acquired in the course of preparing the decree. The knowledge referred to here, however, is merely the "necessary" informa-

1. Cf., e.g., J. HERRANZ, "La giustizia amministrativa nella Chiesa dal Concilio Vaticano II al Codice del 1983," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), pp. 30–31.

2. Cf. *Principles*, 7.

3. Cf., on the juridically binding character of the Code's different expressions, P. ERDŐ, "Expressiones obligationis et exhortationis in Codice Iuris Canonici," in *Periodica* 76 (1987), pp. 3–27.

tion and proof, not knowledge of the material in general. Instead, this activity involves the careful study of all specific aspects of the matter that could bear on the final decision, since we are concerned with a singular decree given for a particular case. Thus, the information to be obtained can be quite varied, depending on the case, and must permit the author of the decree to have an exact idea of the particular circumstances of the situation that the decision will affect, in order that the decree be, first and foremost, valid and effective (cf., for example, c. 38), but also licit, useful, and timely.

Sometimes, the norms of the Code indicate the points to be investigated (cf., for example, c. 114 § 3), and sometimes they also determine the consequences of the action performed when the acquisition of the necessary information has been overlooked. Thus, if it refers, for example, to the provision for an office, the office must first be shown to be vacant (c. 153 § 1), and information concerning the points mentioned in c. 149 § 1 must be obtained. In addition, the competent authority can deem it necessary to verify other elements as well, even if they do not constitute a legal requisite for the validity of the act.

As for the *proofs* properly so-called, they are necessary when a decree depends on the certain verification that an essential circumstance is true. This situation occurs in the decrees that impose penalties (cf. c. 1720), but also in other instances in which the decree responds to the allegation of determined circumstances by a person concerned (cf., for example, cc. 166 § 2, 179 § 1, 182 § 2, etc.), and especially in the decree that resolves a hierarchical recourse. In the absence of specific norms, cc. 1526ff may be applied to these proofs, at least as guidelines.

In so far as they determine the decision that is made, the information and the evaluated proofs will, of course, constitute the substance of the motivation for the decree (see commentary on c. 51).

b) *Hearing those whose rights could be harmed*

As we have said, this issue was considered in the *Schemata de procedura administrativa* during the work of revising the Code. For example, in 1970 this clause was mentioned in the following terms: "Summarie indicatur in Schemate [in the *Schema* of November 16, 1970, which was composed of 21 canons] qua via procedere debeat Superior in actu administrativo ferendo: necessarias notitias et probationes exquirat; eos audiat, quorum interest, nisi omnino id superfluum sit; petitori vel recurrenti notitias et probationes patefaciat, quae sine publico vel privato detrimento cognosci possint, et rationes forte contrarias ostendat, data ei facultate respondendi, et etiam, dum ne celeritate vel iustitiae noceat, patronum et peritum constituendi."[4]

4. *Comm.* 2 (1970), pp. 192–194.

In this document, language was developed concerning the procedure for hearing persons concerned that permits them to appear *in person* in cases that affect them and to know the reasons for the measure that will be adopted, as well as to have the possibility of making statements and even to receive the advice of an expert or an advocate. By contrast, c. 50 contains only the following laconic statement: "quantum fieri potest, eos audiat quorum iura laedi possint."

According to the discussions in the coetus that worked on the reform of the *CIC*/1917, we may observe that the introduction of the expression "*quorum iura laedi possint*," in place of "quorum interest" or other similar ones, responds above all to the concern to determine more precisely the subjects who ought to be heard, because of the fear that the possible lack of precision in a concept as broad as "persons concerned" could in practice have a paralyzing effect on the authority.[5] This concern is a sensible one; however, we think that this restriction would have been more justified if the hearing had been formally established as a binding requirement on the authority—indeed, a requirement for the validity of the act. On the other hand, with the introduction of the expression "*quantum fieri potest*," it would not have supposed an unnecessary hindrance to the activity of governance to require that all "persons concerned" be heard (not just those whose rights could be harmed), since it would be up to the competent authority to judge which persons to hear, depending on the importance of their possible interest in the matter.

Indeed, "*quantum fieri potest*" is also a clause introduced to point out a criterion that permits the authority to consider a proceeding concluded at the opportune time. In other words, this clause permits the authority to proceed to issue the decree after he deems that he has heard—or attempted to hear—those whose input he considers necessary. Thus, if it should prove impossible or remarkably difficult to hear those who might be affected in some cases, it would not be necessary to delay, because of a rigidly binding requirement, a decision whose postponement could harm the public good.

Thus the formulation "quantum fieri potest, eos audiat quorum iura laedi possint" shows that there was no intent to bind ecclesiastical authority strictly, in order to avoid the danger that the necessary activity of governance might be obstructed (or even paralyzed) in some cases. Nevertheless, one must also avoid the opposite danger, of stripping the norm of its meaning by interpreting it as if the general rule were to restrict the hearing to those affected, or to lightly omit the procedure altogether. This norm was unquestionably introduced to establish greater regulation of the exercise of authority as well as to provide more protection for the rights of the faithful.

5. For an example of the discussions on this question, cf. *Comm.* 23 (1991), pp. 32–33.

The particular importance of *dialogue* in the Church—understood in its correct terms—is well-known and essential, and it is no less so in the relationship between the administration and the faithful. Accordingly, we will not dwell on this matter here (instead, see commentary on c. 1733). However, we must not forget that the pleasant obligation of obedience to the lawful pastors is enhanced by a style of exercising authority which, as far as possible, shows itself to be sensitive to the requests and viewpoints that the persons concerned may express (cf. c. 212). This is especially true when they could be adversely affected—even if lawfully so—in their rights or situations.

From this point of view, the sensitivity required by the submission of the activity of the administration to this norm should be realized, in our opinion, through a strict interpretation of "*quantum fieri potest*" and a broad interpretation of "*quorum iura laedi possint.*"

The clause "*quantum fieri potest*" clearly requires a restrictive interpretation (cf. c. 18) because a broad interpretation would imply a reduction of juridical guarantees. A strict interpretation implies that if the authority decides to proceed with the case without having heard all or some of those affected, it must be because it was not in fact physically or morally possible to act otherwise; for example, because there was nonculpable ignorance of the existence or interest of the person in question; because the person refuses to speak with the authority, cannot be located, or engages in deliberately dilatory behavior; because it was prudently and reasonably anticipated that the audience would be prejudicial; because there would entail a delay that was excessively harmful to the good of souls; or because hearing all those affected would be otherwise gravely inopportune, etc.

By contrast, the clause "*quorum iura laedi possint*" must be broadly interpreted, that is, in such a way that the hearing is not limited exclusively to those who possess a strict right that is actually going to be harmed. The authority can—and must—also hear other parties who could possibly be affected. As a practical criterion, it might be said that the hearing should be granted at least to those who are likely to have lawful reasons to appeal the decree in the future; that is, those who could "consider themselves harmed by a decree" (for more on this, see commentary on c. 1737).

3. *Consequences of the omission of the procedure of c. 50*

As we have already pointed out, c. 50 does not expressly establish the nullity of decrees issued in contravention of it, and consequently, omission of this procedure does not directly carry with it the nullity of the act (c. 10). Nevertheless, this does not mean that the undue overlooking of this procedure does not have juridical consequences.

In the first place, omission of the obligation to gather the necessary information could render the decree null and void if it culminates in the case of ignorance or error contemplated in c. 126, or if the consequence is the non-observance, for lack of information, of any requisite that the law establishes for the validity or effectiveness of the act in question (for example, if the decree harmed a subjective right of a third party without the express clause mentioned in c. 38).

Furthermore, even when the act is not null, omission of this procedure makes it subject to recourse, and therefore, makes possible its eventual revocation, annulment, correction, or substitution (cf. cc. 1737 and 1739). In addition, the evaluation of the hierarchical superior and, if applicable, of the administrative tribunal concerning the justification of this omission, may be unlawful.

Finally, to the extent that the issuance of a decree with omission of these requisites may cause damages unlawfully, their repair can be requested of the administration (cf. cc. 128 and 57; *PB* art. 123 § 2).

51 **Decretum scripto feratur expressis, saltem summarie, si agatur de decisione, motivis.**

A decree is to be issued in writing. When it is a decision, it should express, at least in summary form, the reasons for the decision.

SOURCES: —

CROSS REFERENCES: cc. 37, 48, 54 § 2, 55, 58 § 2

COMMENTARY

Jorge Miras

Canon 51 refers to the *form of issuance* (or simply the *form*) of singular decrees, and it contains two requirements: that it be in writing, and that it give the reasons for the decision.

1. *The written form*

The general norm established by c. 37 for all acts of the external forum is explicitly reiterated here (see commentary on c. 37). The legislator thus establishes with total clarity that the decree is a formal dispositive act of the authority, for which the written form is the only one contemplated. The wording of the canon poses no alternative, and the other norms related to the extrinsic form of the decrees assume that they have been issued in written form. Even when the gravest of reasons prevents the possibility of a written notification, the notification is still to be made by reading the text of the decree to the person concerned (see commentary on c. 55). There are no exceptions to the rule of the written form other than the case of a singular precept, whose effectiveness—if it is imposed orally—is remarkably limited, both in time (cf. c. 58 § 2), and regarding the possibility that it can be enforced in the external forum (cf. c. 54 § 2).

If we bear in mind that most prescriptions of governance, the most important prescriptions for the public good of the Church (which often affect the way of life, as well as the rights and juridical situations of the faithful [cf. c. 50]) are adopted through decrees (cf. c. 48), then there is nothing strange about the legislator requiring the juridical security and certainty that only the written form provides. The written form allows for precise knowledge of the sense, content, motivation, and extension of a

decision. It also provides a certain documentary foundation for the juridical situations that are created, modified, or extinguished, as well for their review, which may take place hierarchically or administratively. The systematic use of oral decisions in governance would carry with it a generalized precariousness in juridical situations, with incalculable negative consequences for the life of the Church. Uncertainty and insecurity are not desirable, either in general or even in a single case; hence, the written form is expressly required for decrees.

What force does this requirement have? We have already pointed out that the legislator has not provided for decrees that are not in written form. Thus, it may be said that this is an essential element of the concept of decree,[1] on which its juridical effectiveness directly depends. Indeed, c. 54 § 2 establishes that the fulfillment of a singular decree that has not been issued through a lawful document cannot be required. This norm directly refers to the act of notification, but we have already seen that it presupposes that the decree has been issued in written form (c. 55 establishes that "without prejudice to cc. 37 and 51"), but that in certain circumstances the decree can be lawfully communicated by reading its text to the person concerned in the presence of a notary or of two witnesses. Therefore, the absence of the written form makes lawful notification impossible and carries with it the ineffectiveness of the decree.

In addition to the general norms of cc. 37 and 51, the Code often reiterates explicitly the requirement of the written form for many specific decrees (cf., for example, cc. 156, 179 § 3, 190 § 3, 193 § 4, 268 § 1, etc.), sometimes also indicating the precise consequences of the omission of that form for the case in question.

2. *The motivation of the decree*

The second formal requirement of c. 50 is that the reasons for the decree must be set forth, at least in summary form, "when it is a decision."

How are we to interpret "decision" in the context of this canon? The requirement to motivate administrative acts is connected to the abandonment of the view that the relationship of subjects to the administration would always take the form of a *supplicatio*, to which the authority would reply freely and as it chose. When it became possible to have recourse against administrative acts, with all that that implies for the notion of exercise of authority in the Church, the doctrine immediately notes that the motivation of those acts is necessary so that they may be challenged effectively.[2] In light of this shift, it can be said that, for purposes of motivation,

1. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 307.
2. Cf. E. LABANDEIRA, *Tratado...*, cit., p. 368, note 58.

the notion of decision must be determined by considering the type of incidence of the decree in question and the possibility, insofar as it can be foreseen, that a person concerned may challenge it. This consideration will occur provided that the decree assumes "a resolution between contrary possibilities, in which some acquired right, or at least alleged right, is implied."[3] Thus, a decree that resolves a hierarchical recourse, settles another type of conflict, or imposes a penalty will have to be motivated,[4] just as will a decree that denies a requested provision (for example, when the competent authority decides not to appoint one who is presented for an office, or not to confirm an election [cf. cc. 163 and 179]) or rejects a lawful request (cf. c. 57). For all of these cases there is a decision by the authority that could contradict rights, expectations, or some other type of lawful claims, and it is logical to think that the persons concerned need to know the motivation in order to know what to expect.

The only case in which it is not necessary to motivate the decree—if this canon is read in light of c. 48—is when it contains a *provision*. In this case, the provisions—of offices or of something else—must be understood as actions in which the authority, protecting on its own initiative that bit of the common good that has been entrusted to it, applies the methods (personal, material, economic, etc.) that the authority believes to be most suitable to meeting the observed needs. The authority then abides by the criteria that the law, if applicable, points out to it, as well as by other norms of prudence, efficacy, opportuneness, suitability, good governance, etc. that it deems appropriate to take into consideration. Nevertheless, these cases do not involve, at least in principle, conflicts between the measure adopted and specific rights or interests. If there were such conflicts, the decrees would then be decisions rather than provisions.

The motivation[5] consists of an exposition of the reasons for the act, which embraces the basis in law, the facts of the case, and the reasons that led to the adoption of that particular decision rather than a different one. This canon requires the motivation to be expressed "at least in summary form." Perhaps it is fitting here to emphasize that this expression cannot be interpreted as if to mean *vaguely, abstractly,* or *generally*; a genuine motivation is required, one that sufficiently explains which reasons the authority has accepted and which he has not considered relevant for the decision. This motivation does not require an exhaustive explanation of the reasoning; it is sufficient to express it in summary form.

3. Idem, p. 368.

4. Cf. *Principles*, 7: "Requiritur... ut in processu sive iudiciali sive administrativo, recurrenti vel reo manifestentur omnes rationes quae contra ipsum invocantur."

5. For an assessment of this question in the doctrine and jurisprudence prior to the Code, cf. G. LOBINA, "La motivazione dei decreti amministrativi, dottrina e giurisprudenza," in *Monitor Ecclesiasticus* 72 (1983), pp. 279–294.

Since this norm is an absolute requisite of the canon for all decrees that contain decisions, the motivation (more or less elaborate depending on the case) cannot be omitted. The non-motivation of these decrees does not directly cause their nullity, pursuant to c. 10 (no express sanction of nullity is established as in the case of unmotivated judgments [cf. cc. 1611, 3° and 1620, 2°]), but it certainly does make them subject to hierarchical recourse (cc. 1732ff) and subsequently to contentious-administrative recourse (cf. *PB* art. 123 § 1).

52 **Decretum singulare vim habet tantum quoad res de quibus decernit et pro personis quibus datum est; eas vero ubique obligat, nisi aliud constet.**

A singular decree has effect in respect only of those matters it determines and of those persons to whom it was issued; it obliges such persons everywhere, unless it is established otherwise.

SOURCES: c. 17 § 3

CROSS REFERENCES: cc. 13 § 1, 35, 36 § 2, 48, 49, 51, 136

COMMENTARY

Jorge Miras

1. *The juridical "singularity" of decrees*

Canon 36 § 2 establishes, for all administrative acts, the principle that their effectiveness is not to be extended outside the cases that it expressly contemplates (see commentary on c. 36 § 3 for the basis of this principle).

While in general the analogous extension of singular administrative acts is prohibited by this prescription, c. 52 positively affirms that the singular decree is juridically effective ("*vim habet*") only in respect of those matters that it determines and those persons to whom it is issued. Therefore, it can be said that c. 52 in its first clause determines the positive scope of the characteristic of "singularity," which is proper to these decrees, in terms of juridical effectiveness.

The content of c. 36 § 2, a norm of interpretation, is designed to serve as a complement to this taxative limitation of the scope of the objective effectiveness of the singular decrees. Indeed, the strengthening of juridical certainty and security guaranteed by c. 52 necessarily demands respect for the requirement of the written form (see commentary on c. 51). It also assumes that the authority is careful to ensure the precision and clarity of the text of its decrees. Otherwise c. 36 and, as a complementary guarantee, the aforementioned prescription of its paragraph 2, would enter into play, and a singular decree would not be capable of juridically affecting persons or situations that only as a result of interpretation or some other doubtful means could be considered embraced by it.

2. *Personal effectiveness of singular decrees, as a general rule*

The second rule established by this canon, though one that in this case permits of exceptions, is the effectiveness *in principio personae* of singular decrees. Since by these decrees a decision is taken or a provision is made for a particular case (c. 48), the logical rule governing the scope of their effectiveness is personhood if there are persons directly affected by the decree (this is always the case with singular precepts [c. 49] and unlike the case of particular laws [cf. c. 13 § 1]).

This norm is, then, perfectly consistent with the nature of the acts whose effectiveness it regulates; if the decree creates, modifies, or extinguishes a subjective juridical situation, logically its effects should pertain to the person, unless it is established otherwise by reason of the nature of the matter (for example, in the case of a prohibition imposed on a person in relation to a determined place) or by an express prescription. It is also completely consistent with the scope of exercise of the executive power prescribed in c. 136; this power has the administrative acts as one of its proper means of manifestation. The reference to c. 136 serves, incidentally, to make explicit something that is implicit in c. 52, that personal effectiveness of the decrees presupposes that the persons affected are "subjects" of the authority that issues them. This presupposition constitutes one of the criteria that permits the determination of whether the authority is acting within the limits of its competence (cf. cc. 35 and 48).

53 **Si decreta inter se sint contraria, peculiare, in iis quae peculariter exprimuntur, praevalet generali; si aeque sint peculiaria aut generalia, posterius tempore obrogat priori, quatenus ei contrarium est.**

If decrees are contrary one to another, where specific matters are expressed, the specific prevails over the general; if both are equally specific or equally general, the one later in time abrogates the earlier in so far as it is contrary to it.

SOURCES: c. 48 §§ 1 et 2

CROSS REFERENCES: cc. 36 § 2, 38, 48, 52, 67 § 2

COMMENTARY

Jorge Miras

1. *Conflict between singular decrees*

Canon 53 contains the norms that are to be applied in resolving conflicts between decrees. It is proper to speak of *conflicts* because, according to cc. 36 §§ 2 and 52, a singular decree affects only those matters that it treats and those persons to whom it is directed. Thus, the objective presupposition for the application of c. 53 is the simultaneous existence of two or more singular decrees, equally lawful, that affect in whole or in part the same "particular case" (c. 48), the same persons, or the same cases and persons, and that are contrary one to another such that it is impossible to abide by them all simultaneously. In this situation, it is then necessary to determine which one is applicable and which of those in conflict are left without effect, and to what extent they are without effect.

Accordingly, c. 53 establishes two criteria that are to be applied in succession: the degree of "generality" of the dispositions contained in the decree and the temporal succession. Let us examine these two issues in more detail.

2. *The degree of "generality" of the decrees*

The first criterion establishes the prevalence of the more specific decree over the more general one, where specific matters are expressed. The immediate question then becomes: how can a singular decree, given for a "particular case," be said to be "general"?

Obviously, the generality mentioned here does not imply confusion between a singular administrative act and a general norm. Besides, conflicts between singular acts and general norms constitute a different supposition than the one we are now considering (cf. c. 38).

When we speak of greater or lesser generality, we always mean greater or lesser generality within the singular nature characteristic of these decrees. We are always talking about a provision or decision given for a particular case. A singular decree can affect persons and matters alike, as well as juridical situations in general, more or less directly or specifically ("peculiarly"). It must be borne in mind that the specificity or generality does not derive directly from the *decree*, but rather from the disposition(s) of the decree that affect(s) a specific case or a specific person or persons. For example, a decree can be more general (broader in content) in the sense that it treats of three parochial offices, while another decree affects only one of them (it is less general or more limited). What is supposed to be compared is not such "generality" as just described, but rather the more or less specific manner of disposition concerning the office affected by the two decrees: the specificity of the disposition contained in the decree regarding the particular case or the affected persons. Hence, c. 53 affirms the prevalence of the more specific decree precisely "where specific matters are expressed."

The greater specificity of a decree indicates that the competent authority is that much more concerned about affecting a certain situation in a specific way. Accordingly, a changed intention is not presumed unless it is revealed by the authority in a manner that is at least equally direct and specific. Thus, a decree that imposes an obligation on certain priests with respect to the Sundays in a given liturgical season will yield, with respect to one of those Sundays, to a contrary decree that directly affects that one Sunday, or that refers to only one of those Sundays. Furthermore, if the more general decree is later in time and does not mention the earlier one, then the earlier one continues in force and governs the affected priest or specified Sunday.

It can also be said, in our opinion, that c. 38 requires the specificity to be stated expressly as a condition for the efficacy of decrees that harm the acquired rights of third parties (see commentary on c. 38).

3. *The temporal succession of decrees that are equally specific or general*

It can happen that the degree of generality or specificity of two decrees—as we have defined these characteristics—is the same; that is, that they affect, in whole or in part, a situation, a matter, or a person(s), in an equally direct or indirect manner. Therefore, c. 53 stipulates that the later

decree prevails over the earlier one "in so far as it is contrary to it," leaving intact those dispositions of the earlier decree that are not contrary to it.

It would perhaps be illustrative to note that the norm established for the succession of rescripts makes use of a presupposition that is exactly opposite to the one established for decrees (whether the result of its application is very different in practice is another question). The general rule established in c. 67 § 2 is the prevalence of the earlier rescript over the later one, unless the latter expressly states the opposite, or unless the earlier rescript has fallen into disuse by reason of the deceit or negligence of the beneficiary. The reason is obvious: rescripts, by their very nature, grant favors, and therefore mark the beginning of the enjoyment of a favorable situation whose cessation is not presumed unless the authority expressly indicates that such is his intention.

The same is true of favorable situations, specifically of acquired rights, with respect to decrees. In fact, it is the same juridical reasoning that supports the requirement of an express clause of derogation (c. 38) for decrees that harm the acquired rights of third parties; in case of conflict, the automatic temporal succession established in c. 53 does not come into play since the decree "is without effect insofar as it" harms an acquired right of a third party without expressly manifesting an intention to derogate from it. In such cases, the expression "insofar as it is contrary to it," drawn from c. 53, must be interpreted as "insofar as it expressly derogates from it," because a disposition that was implicitly derogative would not suffice.

Nevertheless, in the remaining cases, the rule is exactly opposite to that established for rescripts: a later decree derogates from an earlier one where it contradicts the earlier one. Since decrees are not always concessive—as is the case with rescripts—but instead give decisions or make provisions undertaken on the authority's own initiative, a later decree presupposes a new evaluation of circumstances on the part of the competent authority, as well as the adoption of a new measure of governance devised precisely for the current circumstances of time, place, matter, and person(s). Therefore, the logical rule is that such a disposition, insofar as it is contrary to the earlier one, derogates from it.

54 **§ 1. Decretum singulare, cuius applicatio committitur executori, effectum habet a momento exsecutionis; secus a momento quo personae auctoritate ipsius decernentis intimatur.**

§ 2. Decretum singulare, ut urgeri possit, legitimo documento ad normam iuris intimandum est.

§ 1. A singular decree whose application is entrusted to an executor, has effect from the moment of execution; otherwise, from the moment when it is made known to the person on the authority of the one who issued it.

§ 2. For a singular decree to be enforceable, it must be made known by a lawful document in accordance with the law.

SOURCES: § 2: c. 24

CROSS REFERENCES: cc. 37, 40–45, 51, 55–56, 58 § 2, 62

COMMENTARY

Jorge Miras

1. *Initial moment of efficacy of decrees*

Canon 54 § 1 stipulates the first moment of efficacy of decrees, distinguishing two possibilities, depending on whether the decree requires execution or not:

a) *Lawful notification*

The rule for decrees whose application is not entrusted to an executor is that they enter into effect from the moment they are implied or made known to the person concerned, on the authority of the one who issued them (for the form of notification of decrees, see the commentary on cc. 55–56).

Notification is the key element for the efficacy of decrees, as is made clear in other places in the Code: for example, in c. 47 for the revocation of administrative acts, in c. 190 § 3 for decrees of removal from offices, and in c. 193 § 4 for those of transfer, etc.

Comparison of this norm with that which defines the beginning of efficacy of rescripts reveals a clear difference. According to c. 62, "a rescript in which there is no executor, has effect from the moment the document was issued ('a momento quo datae sunt litterae')," not from the moment it is received by the person concerned.

The reason for this difference must be sought in the nature of the content characteristic of these administrative acts. The rescript is the vehicle that implements the concession of favors; thus, its content is favorable to the person concerned. Since the concession does not depend on its acceptance by the designee but rather on the authority who issued the rescript, nothing prevents the efficacy from commencing at the moment the act of authority is completed. Nonetheless, for certain purposes, the date that must be taken into account is that of notification (cf., e.g., for purposes of possible recourses, cc. 1734 § 2, 1735).

By contrast, a decree may imply—in addition to the creation of favorable juridical situations—the emergence of burdens, duties, or obligations for the designee or for third parties; thus, it makes sense for it not to take effect until the individuals concerned receive official notification. Moreover, the date of notification acts as a precise *terminus post quem* for the changes that arise in a wide variety of subjective juridical situations, a very important matter in determining the juridical regimen of pending situations.

It is worthwhile to emphasize that this norm specifically affects the *efficacy* of decrees. As with rescripts, the decision of the authority is complete at the time the decree is issued, but for the reasons discussed above, its efficacy is made dependent on the lawful notification of the person concerned, as is established in paragraph 2.

b) *The execution*

In the case of a decree given *in forma commissoria* (see the commentary on c. 37, 4), its effects are not produced until the execution is correctly carried out in accordance with cc. 40–45 (see the corresponding commentaries). In this case, the norm is in fact the same as that established for rescripts given *in forma commissoria* (cf. c. 62). The date that the decree begins to be efficacious will be, therefore, the date on which the process of execution concludes, which must be recorded in writing for purposes of juridical certainty (cf. c. 37).

2. *Form of notification*

a) *The general rule: written form*

Canon 54 § 2 contains the first of the norms that the Code devotes to the notification (cf. cc. 55–56 as well). It incorporates the provisions of c. 24 *CIC*/1917 for precepts, extending their application to all singular decrees.

As a general rule, notification must take the written form: "legitimo documento ad normam iuris intimandum est." This clause reinforces the requirement of the written form for decrees (see the commentary on c. 51) inasmuch as notification through a lawful document will normally

consist in the delivery of the written text of the decree (cf. c. 55). Nevertheless, whereas c. 51 does not include any exception whatsoever to the written form for a decree (cf., however, c. 58 § 2), the legislator here has provided for the possibility that the notification may take place through other equally lawful forms; accordingly, the text includes the phrase "*ad normam iuris.*" This means that the specific norms on notification that influence the case affected by each decree, if there are any, must be observed; moreover, it establishes that the penalty fixed by c. 54 § 2 for decrees that are not communicated through a lawful document is not applicable to decrees that are communicated "*ad normam iuris*" by other lawful means, that is, in accordance with the exceptional forms described in cc. 55 and 56.

b) *Consequence of the omission of the lawful form*

The penalty established by the legislator for the case of omission of the lawful form of notification is that the decree cannot possibly be fulfilled. Canon 24 *CIC*/1917 established that precepts "*singulis data,*" if they were not imposed through a lawful document or before two witnesses, "*iudicialiter urgeri nequeunt.*" There is a certain difference between the expressions "imposition" (which is more general, in that it can refer to the validity and efficacy of the act alike) and "notification." The present extension of this norm to singular decrees in general, together with the existence of cc. 51 and 58 § 2, makes it possible to distinguish, in a technical and more precise way, the completeness of the act of authority *per se*, and the moments of commencement and cessation of its effects.

Canon 54 refers specifically to notification, which presupposes that the decree has been issued in the proper form (c. 51). This could, for various reasons, for a particular precept, be oral (c. 49), in which case its efficacy would cease on expiry of the authority of the author (c. 58 § 2). This form is valid however (i.e., suitable to produce effects). These effects begin to arise once notification has been made, which for precepts given orally would naturally not be in written form (cf. c. 55). Without lawful notification, whatever form it may take, the fulfillment of the decree cannot be required. In practice, this is equivalent to saying that the law is without effect if the designee demands due notification before he will observe it.

55 **Firmo praescripto cann. 37 et 51 cum gravissima rationale obstet ne scriptus decreti textus tradatur, decretum intimatum habetur si ei, cui destinatur, coram notario vel duobus testibus legatur, actis redactis, ab omnibus praesentibus subscribendis.**

Without prejudice to cann. 37 and 51, whenever the gravest of reasons prevents the handing over of the written text of a decree, the decree is deemed to have been made known if it is read to the person to whom it is directed, in the presence of a notary or two witnesses; a record of the occasion is to be drawn up and signed by all present.

SOURCES: —

56 **Decretum pro intimato habetur, si is cui destinatur, rite vocatus ad decretum accipiendum vel audiendum, sine iusta causa non comparuerit vel subscribere recusaverit.**

A decree is deemed to have been made known if the person to whom it is directed has been duly summoned to receive or to hear the decree, and without a just reason has not appeared or has refused to sign.

SOURCES: —

CROSS REFERENCES: cc. 37, 51, 54 § 2, 58 § 2, 482–484, 489, 1598 § 1

COMMENTARY

Jorge Miras

1. *Special norms on the form of notification of decrees*

The norms collected here stem from the schemata *De procedura administrativa*.[1] Canon 55 begins with a proviso: "*firmo praescripto* cc. 37 et 51." These canons establish the requirement of the written form for the issuance of all administrative acts in general, and of decrees in particular

1. Cf., e.g., *Comm.* 23 (1991), p. 34.

(see the commentaries to cc. 37 and 51). Thus the canon emphasizes from the start the difference between the form of issuance and the form of notification. This clarifies that the *form of issuance* must be written *in all cases*, and that the purpose of this norm is not to establish an exception to this general disposition. This disposition remains in force[2] (with the possible exception, little used by the legislator, of the oral precept [see the commentary on c. 58 § 2]), whereas, without prejudice to this requirement, *other forms of notification* besides the normal (written) one, could be lawful in certain circumstances. These are exceptional forms inasmuch as the general norm, contained in c. 54 § 2, makes the efficacy of decrees dependent on their communication through a lawful document; however, when the conditions established for these special forms are satisfied, their use constitutes another *lawful* mode of notification, and therefore a decree thus communicated begins to produce its effects (see the commentary on c. 54).

A combined reading of cc. 54 § 2, 55, and 56 allows us to distinguish two forms—ordinary and extraordinary—of *actual* notification of the decree, and one *fictitious* or equivalent form of notification. Let us consider each of these cases in more detail.

2. *The ordinary form of notification*

The ordinary form of notification consists in communicating the decree to the designee through a lawful document (c. 54 § 2); that is, delivery of the written text of the decree ("*scriptus decreti textus tradatur*"). For these purposes, it does not matter whether or not a cover letter or accompanying document is attached to the text. What is essential is that an authentic copy of the decree be given to the designee, either by mail (certified with acknowledgment of receipt, so that the date of notification can be certified) or by hand.

3. *The extraordinary form of notification*

a) *The gravest of reasons*

The extraordinary form of notification consists in the reading of the text of the decree so that the designee becomes cognizant of it. This mode of notification is lawful only when the *gravest* of reasons prevents the text of the decree from being delivered to the designee. In general, it can be said that what is desired—as is clearly revealed by the legislator—is that

2. Cf., for a dissenting opinion, T.I. JIMÉNEZ URRESTI, commentary on c. 55, in *Salamanca Com.*

the interested person be in possession of the text. In this way, he may know and study in depth the decision that affects him or her, and, where applicable, the reasons (which must be recorded, in the case of a decision, even when the text is not delivered) that underpin the decision. This is done, for example, so that the possibility of defense with a view to recourse is not impaired. On the other hand, the opposite situation is not to be considered normal, but rather *highly exceptional*,[3] compelled by the gravest of reasons. The superlative used in c. 55 is highly significant. In the entire Code, the adjective *gravissimum* is used in only seven other instances, while *gravis* or its comparatives is used over sixty times. This one fact alone shows that the superlative was employed deliberately.

What are we to understand by "the gravest of reasons"? First of all, it should be noted that even the gravest of reasons does not, of course, prevent the person concerned from *knowing* the text of the decree; it only prevents the text from being *physically delivered.* Secondly, the reason must be based on the gravest difficulties that could derive from the possible circulation of the official text, because of, for example, hostility to the Church in a given country, or the confluence of certain circumstances that could be foreseen to produce the gravest harm if the text were to fall into the hands of others (the press, civil courts, anyone incidentally mentioned in the decree, etc.).

In this respect, a helpful guide may be found in the textual process of another canon in which the legislator also uses the superlative *gravest*, and which regulates a case that is, to a certain extent, similar to that of c. 55, namely c. 1598 § 1: "... In cases which concern the public good, however, the judge can decide that, in order to avoid very serious dangers, some part or parts of the acts are not to be shown to anyone. He must take care, however, that the right of defense always remains intact." That possibility, which was not contemplated in the corresponding canon of the 1976 *Schema*—which simply required the publication of acts under penalty of nullification—was introduced in response to observations such as the following: "Such publication seems dangerous, because ... damage to the reputation of witnesses could arise from it, and because in regions in which the jurisdiction of the Church is not recognized, statements made by the parties or by witnesses could be brought before a civil court on a charge of calumny. Moreover, the minutes of ecclesiastical proceedings are sometimes used to bring a penal action before a civil court against one of the parties or witnesses."[4] While it is apparent that the cases are not exactly the same (in the case under discussion, the designee *does know* the decree), the evaluation of this gravest reason will very likely have to take

3. *Comm.* 5 (1973), p. 239: "De decreto notificando vel aliter intimando sunt qui opinentur periculosum esse admittere ut propter gravissima motiva omittatur traditio decreti, ideoque suadent ut saltem patrono decretum tradatur sub secreto, quod tamen aliis videtur periculosius."

4. Cf. *Comm.* 11 (1979), p. 134.

place within those parameters, or at least within similar limits. Furthermore, just as in the case under discussion, the right of defense must in every case remain intact, so that if the person concerned decides to have recourse but will not be able to present an authentic copy of the decree together with the petition, then certification of the act of notification must be facilitated for him or her. The superior who decides on the recourse must, in turn, request the necessary information from the author of the decree.

b) *Formal requirements*

The first formal requirement is that the reading be made in the presence either of a notary (i.e. the chancellor of the curia or one of the other notaries [cf. cc. 482–484]) or two witnesses who are not notaries. No special disposition has been established about the characteristics required of the witnesses; thus, any person who is capable is, in principle, competent for this function. Notwithstanding this lack of special disposition, the nature of the task must be prudently taken into account for purposes of selecting appropriate witnesses. It must not be forgotten that there is a very grave reason for not delivering the text, and therefore, for not allowing it to be made known imprudently to persons who might proceed without the necessary caution.

There is no directive regarding who should read the decree, but in the event that the person who does so is a notary, his mere presence does not appear to be sufficient; rather, the presence of a notary or of two witnesses is still necessary to fulfill this function properly.

Once the reading has been completed, a record of the occasion must be drawn up and signed by all present; that is, at least by the person who read the decree and by the notary, if one was present, or by the two witnesses. The designee must also sign, thereby acknowledging the decree. But should he or she refuse, the notification shall be held to have been effected without the signature, in accordance with one of the reasons contained in c. 56 (see 4, below).

Naturally, in these cases the "*gravissima ratio*" that forbade delivery of the text of the decree to the person concerned must advise that such a text, together with the record of its communication, be held in the secret archive (cf. c. 489).

4. *Notification in equivalent form*

Canon 56 governs two cases that are fundamentally different. The first concerns the non-appearance of the person concerned who has been duly summoned to receive or to hear the decree (for its communication, whether ordinary or extraordinary). When the person concerned cannot adduce a just reason for not appearing, the norm establishes that the decree *pro intimato habetur*. Properly speaking, this case constitutes a noti-

fication in equivalent form, or "*fictitious* notification."[5] The person concerned does not know the content of the decree through his or her own fault, and the law, in order to avoid the paralysis of governance through the bad faith of the designee, establishes a fiction by virtue of which the decree enters into effect without waiting for the person concerned to know the text. A person who later claims that he or she did not appear for a just reason (e.g., with a view to reckoning the time periods allowed for recourse) must prove the claim.

It is well understood that this fiction operates only in the event that the person concerned has been "*rite vocatus*." This requirement cannot be considered fulfilled if it cannot be ascertained that the person concerned has received the summons in the first place, whether oral or written.[6]

The second case considered in c. 56 is very different; it is not a fiction, because the person concerned has in fact appeared and knows the decree but refuses to sign. It is understood that he or she is refusing to sign the corresponding receipt or record mentioned in c. 55; therefore, it is not necessary for it to be "deemed to have been made known," because it has, in fact, been communicated. In this case, what the law establishes is only a formal requirement (the absence of a signature), but this case, for purposes of documentary certification, is equivalent to the *fictitious* notification because the signature of the person concerned does not appear in the record.

Although not expressly stated, a record must be drawn up, signed by the notary and the other witnesses, not only when the person concerned appears and refuses to sign, but also when he or she does not appear. When the decree first achieves its efficacy must be certified with certainty.

5. Cf., for this terminology, E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 374.

6. Cf., along these lines, T.I. JIMÉNEZ URRESTI, commentary on c. 55, cit.

57 **§ 1. Quoties lex iubeat decretum ferri vel ab eo, cuius interest, petitio vel recursus ad decretum obtinendum legitime proponatur, auctoritas competens intra tres menses a recepta petitione vel recursu provideat, nisi alius terminus lege praescribatur.**

§ 2. Hoc termino transacto, si decretum nondum datum fuerit, responsum praesumitur negativum, ad propositionem ulterioris recursus quod attinet.

§ 3. Responsum negativum praesumptum non eximit competentem auctoritatem ab obligatione decretum ferendi, immo et damnum forte illatum, ad normam can. 128, reparandi.

§ 1. Whenever the law orders a decree to be issued, or when a person who is concerned lawfully requests a decree or has recourse to obtain one, the competent authority is to provide for the situation within three months of having received the petition or recourse, unless a different period of time is prescribed by law.

§ 2. If this period of time has expired and the decree has not yet been given, then as far as proposing a further recourse is concerned, the reply is presumed to be negative.

§ 3. A presumed negative reply does not relieve the competent authority of the obligation of issuing the decree, and, in accordance with can. 128, of repairing any harm done.

SOURCES: —

CROSS REFERENCES: cc. 48, 200–203, 212 § 2, 221 § 1, 1400 § 2, 1445 § 2, 1732–1739

COMMENTARY

Jorge Miras

Canon 57 contains two norms that are new to canon law: the regulation of *administrative silence* (§§ 1–2) and the express declaration that the ecclesiastical administration is responsible for damages it has caused unlawfully in the course of exercising its duties (§ 3).

1. *Administrative silence*

In c. 212 § 2, the Code embodies a general declaration of the right of all the faithful to "make known their needs, especially their spiritual needs, and their wishes to the pastors of the Church." This general declaration certainly encompasses the so-called "right of petition" (see the commen-

tary on c. 212), by virtue of which the faithful may request from sacred pastors that which they consider proper, necessary, useful, opportune, or reasonable, provided that the matters at issue fall under pastoral authority. Some of these petitions, because they are directed toward obtaining a reply that requires a decision by authority, or because they require a specific provision (for the broad meanings of *decision* and *provision*, see the commentary on c. 48), can be said (in the words of c. 57) to have been made "*ad decretum obtinendum*" (at other times, the faithful turn to authority to request rescripts, or they limit themselves to stating facts or opinions without requesting any reply). Furthermore, this decree can be requested through a simple petition (cf. cc. 1734–1735) or through recourse (cf. c. 1737). It is essential for one of the faithful to be able to defend a right or juridical situation that he or she considers to have been harmed, both in an administrative recourse and before an administrative tribunal (cf. cc. 221 § 1, 1400 § 2, 1445 § 2; *PB* 123). Finally, sometimes the law itself requires authority to issue a decree, there being no need for a request from a person concerned (cf. c. 48). In this case, persons concerned have a strict right for that decree to be issued (cf., e.g., cc. 116–117, 163).

In all of these cases, should the competent authority give no reply, the person concerned would be left defenseless, with no other option but to insist on the petition until the administration deigns to reply, either positively or negatively. Regardless of the reasons that can be given for the rejection of a similar situation in civil law, it is obvious that both the purpose and characteristics of authority in the Church, and the dignity of all of the faithful (and of the other possible persons concerned), as well as the extremely delicate nature of the goods and rights affected by ecclesiastical authority, make especially imperative the diligent attention of sacred pastors to the needs and lawful claims of the faithful that fall within their competence. This attention often constitutes an obligation that is not merely moral, but also properly juridical. Thus, the introduction of *administrative silence* into the Code of Canon Law is quite appropriate.

Administrative silence is a mechanism—introduced relatively recently into civil law codes and now also into canon law[1]—to prevent the possible disregard of a reply by the administration, arising from negligence or from leading to a situation lasting longer than is reasonable of uncertainty and defenselessness for the person concerned. Accordingly, there are various technical formulae which, once a set time has elapsed without a reply, obviate the need for the person concerned to turn once again to the same authority who has not replied, in order to overcome his dilatoriness, because the law attributes a fixed value—of affirmation or negation—to that silence. From that point on, the person concerned may proceed on the basis of administrative silence.

1. For an assessment of the situation prior to the *CIC*, cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 408–409.

The Code has chosen, in the wording of its final version, to utilize the technical formula of presumption of a negative reply for purposes of a further recourse by the person concerned. Let us look more closely at the terms of the canonical regulation of administrative silence.

a) *The obligation to provide for the situation in the face of petitions or lawful recourses*

The validity of administrative silence presupposes a declaration that the administration is obliged to provide for the situation. In fact, the Code applies the norm regulating administrative silence only to decrees, without prejudging whether the reply to the *preces* to obtain a rescript is just or not, which is a different question altogether.

According to c. 57, the competent authority is under a true "obligation of issuing the decree" (§ 3) when the law requires that it be issued, or when a person who is concerned lawfully requests a decree or petitions recourse to obtain one (§ 1).

Lawfully, in the context of the presentation of recourses, means that a genuine hierarchical recourse is contemplated, and therefore, that the requirements established for recourses must be fulfilled (cf. cc. 1732–1739). The lawfulness of petitions will also include—where appropriate—the fulfillment of the requirements established by the law in the case of regulated petitions (cf., e.g., the petition regulated under c. 1734, which must be in written form and made within the peremptory time-limit of ten days). For all other cases, it is not necessary to define *lawfulness* in a way that restricts the right of petition[2] (and, correspondingly, the obligation to reply). Every formal petition will be lawful if it is duly presented by a capable person who can be considered "concerned" (in the case of rescripts, the request can be made by a person who is not concerned [cf. c. 61]), and is reasonable.[3]

b) *Presumption of negative reply for purposes of further recourse*

Once three months (cf. cc. 200–203) have elapsed from the date of the petition or recourse (unless the law has fixed a different time limit [cf., e.g., c. 1735]), the law *presumes* that the reply from the administration is negative.[4]

The technical mechanism of presumption finally adopted by the Code is of limited extension. In canon law, the law does not specifically attribute

2. T.I. JIMÉNEZ URRESTI seems to identify the "lawfulness" of the petition with the existence of a right or strict obligation to petition on the part of the person concerned: cf. commentary on c. 57, in *Salamanca Com.*

3. Cf. E. LABANDEIRA, *Tratado...*, cit., p. 410.

4. Cf., on the possibility that the Administration might interrupt the silence with an interlocutory reply, RGCR, 136 § 2; denying that possibility, G.P. MONTINI, "Problemata quaedam de silentio administrativo et recursu iuxta can. 57 CIC," in *Periodica* 80 (1991), pp. 482–483.

a value to the silence of the administration as happens in other law codes; it simply makes a presumption based on that silence with a view toward further recourses, *as though* the petition or recourse had been denied.

Therefore, the only effect produced by silence (speaking generally, for in certain cases the law can endow silence with substantive efficacy [cf., e.g., c. 268 § 1]) is to open the possibility of recourse to the person concerned with the result that if the recourse is not proposed, the situation would remain awaiting the decision of authority, and no substantive effect would be produced.

Since only a presumption is involved, it will yield to the certainty of an actual reply from the administration. The lapse of the time limit established for administrative silence does not relieve authority from the obligation of issuing the decree (§ 3); thus, it can still be issued when the recourse is still pending, but not if it has already been decided because, in that case, competence would have been assumed by the hierarchical superior. Accordingly, it can happen that the content of the decree, once actually issued, may render the recourse groundless, at least in part. In such cases, "equity requires that the recourse not be automatically frozen, thereby inflicting a second set of damages on the person concerned, but rather that it continue and retain its efficacy, unless the claims of the person concerned have been satisfied, in which case the recourse would be without its raison d'être and would no longer be current."[5] In addition, whatever the content of the decree issued outside the time limit, the damages conceivably caused by the delay (see 2 below) will have to be considered, which, at the very least, will be the costs incurred in proposing the recourse (§ 3).

2. *The responsibility of the public ecclesiastical administration for damages*

The second important innovation introduced by c. 57 is the formal recognition of the responsibility of the public ecclesiastical administration. According to paragraph 3, authority has "the obligation of issuing the decree, and, in accordance with can. 128, of repairing any harm done."

This clause applies to cases in which the administration's silence causes damages that would have been avoided by a timely response to the petition or recourse. But this disposition extends beyond the case of ad-

5. E. LABANDEIRA, *Tratado...*, cit., p. 411. On decrees issued outside of the time-limit, cf. G.P. MONTINI, "Problemata quaedam...," cit., pp. 486–487.

ministrative silence because c. 128 establishes the universal principle of canonical liability for all damages unlawfully caused, whether by a juridical act or by any other act performed through fraudulent or culpable actions. Therefore, by virtue of c. 57, ecclesiastical authority is also subject to this principle; it is liable both for damages caused unlawfully by its own juridical acts—among which are included administrative acts[6]—and for those caused by other acts performed through fraudulent or culpable actions.

What is to be understood by *damage* in the context of canon law? Certainly, it would not be appropriate to apply a restrictive definition that takes into account only the damages unlawfully caused to the patrimony of the persons administered. If one considers the wide range of goods and specific rights that fall within the competence of ecclesiastical authority by virtue of the very mission of the Church, it can be said that the patrimony of the faithful is only one of many possible areas that could be harmed. It is well to think, for example, of the possible damages, attributable to the negligence of authority, stemming from the culpable spiritual disregard of the faithful, or the possible damages of a moral nature caused by the imprudent conduct of authority, etc. Naturally, the uniqueness of the goods susceptible to damage would require that the possible reparation be capable of taking a number of proper forms. This view is in keeping with the specific means available to the Church for fulfilling its mission, which are not reducible to monetary reparation (though this is not excluded in cases in which that is the nature of the damage). Thus, for example, scandal caused by the negligence of authority in adopting measures of governance could be repaired by the exceptional spiritual care of the faithful, by extraordinary means of catechesis, by the appointment of a suitable pastor, etc.

Without question, what is needed is an effort on the part of doctrine and jurisprudence—using the many elements contained in the canonical tradition itself—to form a notion of damage and of reparation that, without ignoring material damages and their indemnification, also efficaciously includes the most authentic elements of canon law and of the life of the Church.[7]

As for the manner of presenting a claim founded on that liability, in addition to the avenue of administrative contestation expressly established by art. 123 § 2 *PB*, it is undoubtedly admissible to present that claim

6. J. KRUKOWSKI, "Responsibility for Damage resulting from illegal Administrative Act in the Code of Canon Law of 1983," in *Le Nouveau Code de droit canonique* (Ottawa 1986), pp. 231–242.

7. Cf., in this respect, G.P. MONTINI, "Il risarcimento del danno provocato dall'atto amministrativo illegittimo e la competenza del Supremo Tribunale della Segnatura Apostolica," *La giustizia amministrativa nella Chiesa* (Vatican City 1991), pp. 179–200; G. REGOJO BACARDÍ, "Pautas para una concepción canónica del resarcimiento de daños," in *Fidelium Iura* 4 (1994).

in a proper hierarchical recourse (see commentary on c. 1739, 3), or as an autonomous petition to authority, when the cause of the damage was not a juridical act (or, in this case, an administrative act) and, consequently, there was no possibility of proposing recourse. It is just such a petition that is foreseen in c. 57 § 1.

58 **§ 1. Decretum singulare vim habere desinit legitima revocatione ab auctoritate competendi facta necnon cessante lege ad cuius exsecutionem datum est.**

§ 2. Praeceptum singulare, legitimo documento non impositum, cessat resoluto iure praecipientis.

§ 1. A singular decree ceases to have force when it is lawfully revoked by the competent authority, or when the law ceases for whose execution it was issued.

§ 2. A singular precept, which was not imposed by a lawful document, ceases on the expiry of the authority of the person who issued it.

SOURCES: § 2: c. 24

CROSS REFERENCES: cc. 47, 54 § 2, 55–56

COMMENTARY

Jorge Miras

1. *Normal cessation of singular decrees*

The normal cessation of singular decrees can occur in two ways, according to paragraph 1: through their revocation and through the loss of force of the laws they execute, as the case may be.

a) *Revocation*

According to c. 47, the general norm applied explicitly here, revocation is produced by another administrative act, in which the competent authority (or the superior of that authority), because of a new evaluation of the situation affected by the singular decree, gives a decision or makes a provision for that situation that differs from the earlier one (on the different cases of revocation, vide commentary on c. 47). The revoked decree ceases upon the notification of the designee of the new decree (c. 47).

b) *Loss of force of the law executed by the decree*

A singular decree also ceases, indirectly, with the disappearance of the law "ad cuius excecutionem datum est." This expression, in our opinion, should not be construed narrowly, as though it affected only those decrees that explicitly constitute a specific application of a law (see commentary on c. 49: 3b), but rather as equivalent to the following: "on cessation of the law which constitutes the basis for the lawfulness of that which the decree specifically establishes."

2. *Precepts not imposed by a lawful document*

Canon 58 § 2 contains an express exception to the principle established in c. 46. When there is no authentic certification by a lawful document of the imposition of a singular precept, then, on the expiry of the authority of the person who issued it, the basis for the juridical certainty of the affected situation disappears. The legislator prefers not to prolong the validity of juridical situations whose basis is uncertain; hence, the provision for this special case of cessation of singular precepts (see commentary on c. 46).

Canon 24 of *CIC*/1917 regulated the "praecepta singulis data," and established that "iudicialiter urgeri nequeunt et cessant resoluto iure praecipientis, nisi per legitimum documentum aut coram duobus testibus imposita fuerint." Accordingly, two sanctions were simultaneously established for the case of *imposition* of precepts issued without the required formalities: the impossibility of requiring their fulfillment and their cessation on the expiry of the authority of their author.

A clear distinction has been made in the Code between the *form of issuance* and the *form of notification* of decrees. In actuality, the impossibility of requiring the fulfillment of a singular decree (and therefore of a precept as well), derives from the lack of communication or lawful notification (cf. cc. 54 § 2–56). Notification may be given orally in special cases (cf. c. 55), but it presupposes the written form of issuance when acts for the external forum are involved. If the authority wants the capability to require the fulfillment of a precept, it must always be issued in written form. This is true even when circumstances advise that the precept be communicated only orally, in the presence of a notary or of two witnesses who draw up a record to be kept in the secret archive (see commentary on cc. 55–56). In that case, however, we would no longer be within the purview of the case contemplated in c. 58 § 2. Such a precept would have been imposed by a lawful document; only the *form of its notification* would be oral (yet still lawful). Therefore, it would not cease on the expiry of the authority of its author.

The specific case addressed in c. 58 is the precept that has also been issued in oral form. In our opinion, however, the Code does not admit as a lawful hypothesis the notification of a precept for the external forum that was issued orally. In fact, whereas c. 24 of *CIC*/1917 authorized—in that it did not distinguish—both the issuance and the notification in the presence of two witnesses, the current c. 55, which authorizes oral notification in certain exceptional cases, begins by reaffirming the validity in all cases of cc. 37 and 51, which require the written form of issuance for acts issued for the external forum. If lawful notification is impossible, one must conclude that juridically requiring the fulfillment of a precept issued orally for the external forum is also in any and all cases impossible (c. 54 § 2). The limited efficacy which these precepts may have—they always depend on

their observance by the designee or on the direct involvement of their author who personally requires their fulfillment—disappears entirely on the expiry of the authority of the person who issued them.

It may well be that this question of interpretation has been complicated by this canon's retention of the technically imprecise expression "imposed by a lawful document." The expression is taken from c. 24 of *CIC*/1917 and does not in itself state whether, in light of the new regulation of administrative acts, this "imposition" refers to the issuance or to the notification of the precept. In our opinion, considering the norms on issuance and notification together, it seems clear that a precept issued orally does not enjoy the favor of law and is only possible for certain cases in the internal forum (cf. c. 130). In fact, once there exists the possibility of extraordinary notification for the gravest cases (c. 55), it is not well understood what reason could justify an external precept that is not issued in written form. Furthermore, this unusual provision does not accord with the legislator's intention to include singular precepts in the category of singular decrees and, therefore, to regulate them juridically as formal acts (see commentary on c. 49: 1).

PARS V
De ratione procedendi in recursibus administrativis atque in parochis amovendis vel transferendis

SECTIO I
De recursu adversus decreta administrativa

PART V
The Manner of Procedure in Administrative Recourse and in the Removal or Transfer of Parish Priests

SECTION I
Recourse Against Administrative Decrees

INTRODUCTION

Jorge Miras

One of the motivations behind the reform of the *CIC*/1917 referred to the exercise of power on the part of the ecclesiastical administration and the relationship between the acts of authority and the rights of the faithful. Even though they are well known and constitute a lengthy citation, a quote is nonetheless appropriate: "It does not suffice to say that in our current law there is a suitable way to protect rights. As a matter of fact, true and proper subjective rights have to be recognized, without which the juridical ordinance of a society can be conceived only with difficulty. Therefore, it is advisable to send out the message that the principle of juridical protection is applied in canon law to superiors and to subjects in such a way that any suspicion of arbitrariness in the ecclesiastical administration is removed. This object can solely be attained through the appeals that are wisely scattered throughout the law, so that if anybody considers his right damaged by the lower instance court, that right can be efficaciously restored in the superior instance court. While it is considered that the recourses and judicial appeals are sufficiently regulated in the Code (*CIC*/1917) according to the needs of justice, the common

opinion of canonists believes that, in ecclesiastical practice and in the administration of justice, the administrative recourses are quite conspicuous by their absence ..."[1]

The "recourse against administrative decrees" to which the title of this section alludes, is the only one that sees fit to include it rightfully in the generic category of "administrative recourse." It utilizes the opening lines of Part V, and its proper name is "hierarchical recourse" (cf. cc. 1734 § 3, 2°, 1736 § 1). Actually, the Code does not regulate administrative recourses *per se* against the individual acts of the administration any more than this, because the foregoing *supplicatio* (see commentary on c. 1734) is not properly a recourse, and the administrative dispute (cf. cc. 1400 § 2, 1445 § 2 and *PB* 123) is not an administrative but a jurisdictional recourse. This means that it is a true trial before a judicial tribunal concerning an administrative act.

Although the title of part V announces that it will treat the procedure in administrative recourses, what is mainly regulated are the steps necessary for lodging recourse. In contrast, part V treats the true *procedure* (the itinerary for the substantiation and the resolution of the hierarchical recourse) quite sparingly. Of the eight canons which constitute the first section, the first (c. 1732) is dedicated to defining the extent of the application of those norms; the two following canons regulate the intent of conciliation (c. 1733) and the preliminary petition of revocation or emendation, which is imposed as a requirement for access to the recourse (c. 1734). For its part, c. 1736 regulates a question parallel to the recourse, the possibility of suspending the execution of the administrative act (cf. c. 1737 § 3).

In three of the four remaining canons, norms are contained that refer properly to the procedure of the recourse. However, they regulate only some aspects: the calculation of the time periods for the lodging of the recourse (cc. 1735 and 1737 § 2); the legitimacy needed to make recourse (cc. 1737 § 1); the right of the one making recourse to be represented by an advocate or procurator, and the naming of a patron or advocate on the part of the superior, if he considers it necessary and the one making recourse has not done so (c. 1738). The advisability of avoiding useless delays (c. 1738) is mentioned, as well as the possibility that the superior may order the one making recourse to appear in person (c. 1738). After this, the Code passes directly to enumerate, in the last canon of the section (c. 1739), the different possibilities that pertain to the superior in the final decision about the recourse.

The Code's regulation of the procedure stops at the same moment in which the recourse has been presented. This is done without knowledge of whether it has been admitted or not. From that point, it takes us directly to the moment of the final decision. Therefore, the gap covers all of

1. *Principles*, n. 7. in *Comm.* 1 (1969), p. 83.

the substantive elements of the recourse, from the formality of its being accepted to the drafting of the definitive decree, leaving out the activity of the parties, the means of proof, etc.

The norms that can be applied to partially offset that gap are primarily cc. 35–47, which contain general norms about administrative acts. In addition, there are some canons that are applicable to administrative decrees in general, every time tthe resolution of a hierarchical recourse is produced by means of an individual decree. In particular, the following would be applicable in the procedure for hierarchical recourse:

— Canon 50. From this canon, it is deduced that the superior who resolves the recourse must ask for the necessary information and proofs, and must always listen, as much as is possible, to the interested parties (see commentary on c. 50). There are no more norms about the proof and the hearings with the interested parties in such manner that they can at least provide direction, *servatis servandis*, (cf. c. 19), for the use of the norms about these matters in the judicial procedure (cc. 1476–1490, 1526–1586, etc.).

— Canon 51. This stipulates that the decree for the resolution of the recourse be issued in writing and explain the reasons for the decision (see commentary on c. 51);

— Canon 57. This canon establishes the time limit of three months for the resolution of the recourse and the possibility of its passing into the administrative-contentious procedure if the time period is exceeded without a resolution. Moreover, in virtue of § 3 of this canon, it follows that, for administrative appeals, the norm of c. 128 is applicable, for the purpose of eventually obtaining indemnification for damages on the part of the ecclesiastical administration (see commentary on c. 57).

In articles 134–138, the *Regolamento generale della Curia Romana* regulates the "procedure for the examination of recourses" when the competent hierarchical superior is a dicastery of the Roman Curia. These articles expressly or implicitly declare the points contained in the above canons as being applicable to that procedure.

These few notes are sufficient as a presentation about the regulation of administrative recourse in the Code.[2] The commentary of the canons of this section will provide a basis for a more detailed study of the substantive aspects of the recourse.

2. One can profit from consulting, *La giustizia amministrativa nella Chiesa* (Vatican City 1991). The study of J. Salerno, *Il giudizio presso la "Sectio Altera" del S.T. della Segnatura Apostolica*, ibid., pp. 125–178 offers in note 4 an ample bibliographic sketch on administrative justice.

1732 **Quae in canonibus huius sectionis de decretis statuuntur, eadem applicanda sunt ad omnes administrativos actus singulares, qui in foro externo extra iudicium dantur, iis exceptis, qui ab ipso Romano Pontifice vel ab ipso Concilio Oecumenico ferantur.**

Whatever is laid down in the canons of this section concerning decrees is also to be applied to all singular administrative acts given in the external forum outside a judicial trial, except for those given by the Roman Pontiff himself or by an Ecumenical Council.

SOURCES: —

CROSS REFERENCES: cc. 35–93, 130, 333 § 3, 336–338, 1372, 1405 § 2, 1417, 1445 § 2

COMMENTARY

Jorge Miras

1. *Delimitation of acts as objects of hierarchical recourse*

This norm, which serves as the gateway into the treatment of hierarchical recourse (cc. 1734 and 1736 call it that, appropriately), indicates the acts that can be the object of that juridical remedy, exactly stating the literal expression of the subheading of this section and of the canons themselves, which speak only about particular decrees. In virtue of this canon, the applicability of all the arrangements of the section is extended to the rest of the particular administrative acts (see commentary on c. 35: n. 2). The general norms of administration are excluded only *a priori*. Therefore, hierarchic recourse can be taken against decrees and particular precepts —which are nothing more than a type of decree: cf. c. 49— and also against rescripts, whatever their content may be, and against those acts equivalent to rescripts insofar as they relate to the juridical system (for permissions and favors granted orally: c. 59 § 2).

Certainly, the acts that are the object of the recourse will normally be decrees,[1] because of their proper nature and because of the classification of their contents (cf. cc. 48–49). In contrast, it could seem more difficult to justify the situation where the person who receives a rescript

1. Cf. Z. GROCHOLEWSKI, "Atti e ricorsi amministrativi," in *Il nuovo codice di diritto canonico. Novità, motivazione e significato* (Rome 1983), p. 500.

rejecting a favor could personally suffer because of this. This injury would justify the intervention of a hierarchical recourse, given the character of a favor —not as though owed out of justice— in the *natural* subject matter of rescripts (cf. c. 59). In addition, the interested party may always insist upon making a petition or bringing it before another authority. This has already been provided for by the law with a series of conditions: cf. cc. 64–65 (in that context, the old doctrine and the one following the *CIC*/1917 used to speak of *recourse*,[2] but not exactly in the technical sense that the concept of hierarchical recourse has today). On the other hand, if the contents of a rescript were harmful to the interested party himself —think, for example, although not exclusively, of the premise of c. 61— one must consider that, in principle, nobody is obligated to use the rescript conceded solely in his favor —except due to another title distinct from the rescript itself (cf. c. 71). Moreover, in the case of the privilege, its renunciation is included in accordance with c. 80. Therefore, it could give the impression that the position of the recipient of a rescript is sufficiently protected by the law without a need for hierarchical recourse.

However, the legislator expressly wanted to assure the possibility of placing hierarchical recourse against rescripts because the concession of privileges, dispensations or other favors might cause other injuries or liabilities, not only for the interested party but also for third parties (the Code admits possibilities of that kind: cf. cc. 36 § 1, 38, 82; also cc. 83 § 2, 84). These parties would be left helpless because of their not being equipped with a clear way of defense of their rights and with their juridical circumstances affected by the concession made to the beneficiary.

2. *Limits to the extension of these norms*

a) *Administrative acts given for the internal forum*

The application of these norms does not extend identically to *all* administrative acts because of two restrictions, each of which is derived for a separate reason. The first restriction is pointed out in the canon through the incidental clause *qui in foro externo extra iudicium dantur*. It would not be superfluous to note that this incidental clause contains two points of distinct importance:

— *Qui... extra iudicium dantur*. This instruction does not try to limit a specific category of administrative acts, distinct from the others, but it does express *a common note* for all particular administrative acts (see the introduction for title IV of book I), since every administrative act, by definition, is *extrajudicial*: it takes place outside of a sentence;

2. Cf., for example, F.X. WERNZ-P. VIDAL, *Ius Canonicum*, I (Rome 1938), nos. 261ff; A. VAN HOVE, *De rescriptis* (*Commentarium Lovaniense in C.I.C.*, I/4) (Mechelen-Rome 1936), pp. 152ff.

— *qui in foro externo... dantur.* In contrast, this expression does have a distinct intention and purpose. It states that the scope of the recourse extends only to the administrative acts made through the external forum. To understand the sense of this limitation of the hierarchical recourse, one should keep in mind the proper and individual nature of the circumstances, relationships, and juridical benefits that are the object of regulation through the canonical ordinance. These considerations occasionally warrant that, without always losing their juridical character, the effects need not possess a special external and public importance.

Canon 37, agreeing with the general precaution contained in c. 130 for the exercise of the power of governance, implicitly admits the possibility that, among the particular administrative acts, there would be some that have efficacy only in the internal forum (see commentary on c. 37). There are found among them those that form a part of the competencies of the Sacred Penitentiary, in the internal forum: "absolutions, commutations, sanations, remissions and other favors for the internal forum" (cf. *PB* 117–118; c. 64). As has been correctly pointed out, all of them "are cases of considerable subjective importance, but with scant social consequence."[3] When one is specifically dealing with the juridical acts that combine in themselves the other essential characteristics, in actuality they are particular administrative acts. However, they take place within a special juridical system that requires, besides other features, that they cannot be the object of the recourse as regulated in cc. 1732–1739. Nevertheless, one should not forget that one is treating exceptional situations for the exercise of the power of governing (cf. c. 130), the normal scope of which is the external forum. At the same time, hierarchical recourse constitutes the *ordinary and general way* of challenging particular administrative acts.

Apart from that, the subject matter of this canon is not to establish that the acts that have been exempted —acts for the internal forum and for general norms— are not susceptible of any juridical remedy, but simply to state that hierarchical recourse is not that remedy.

b) *Exclusion of the acts of the Roman Pontiff and of the Ecumenical Council*

The second limitation for the applicability of the norms about hierarchical recourse refers to the particular administrative acts coming from the supreme authority of the Church. In this case, one finds the express formulation of the general principle contained in cc. 333 § 3 and 336–338, and safeguarded through penalties by c. 1372. Strictly speaking, there is no place to intervene with recourse against the acts of the supreme authority of the Church. The same thing can be said about the acts of the Roman

3. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 296.

dicasteries approved by the Roman Pontiff in specific form.[4] In those cases, at the most, there will be a provision for directing oneself to the Roman Pontiff by means of a request by way of a favor, according to the ancient institution of the *aperitio oris*,[5] by means of which the Pope can draw up an order to a lower authority so that it might revise one of its own acts, or one that was confirmed in a specific form by him (cf. c. 1405 § 2).

c) *Administrative acts of Roman dicasteries*

Although the canon does not expressly advert to this, the other administrative acts issued or approved by the dicasteries of the Holy See cannot be the object of hierarchical recourse, even though they are not equipped with the approbation of the Pope in specific form. The reason is that *they have exhausted the ordinary administrative way.* The result of this means that, in contesting them, there can only be provided, in an administrative way, a chance of *recovery* before one's own dicastery, as regulated in the *Regolamento generale della Curia Romana*, article 134. This regulation accepts the classic institution of the *beneficium novae audientiae.*[6] Otherwise, there is an extraordinary recourse —that is to say, outside of the ordinary system of hierarchical recourses— to the Roman Pontiff.[7] Generally, however, when one has exhausted the administrative route, the challenge of these acts —not specifically approved— is already produced in the jurisdictional method by means of the "contentious administrative recourse" before the *sectio altera* of the Apostolic Signatura (cf. cc. 1445 § 2; *PB* 123).

4. Cf. RGCR, 126–134; as to the doctrine, cf. V. GÓMEZ-IGLESIAS, "La 'aprobación específica' en la 'Pastor Bonus' y la seguridad jurídica," in *Fidelium Iura* 3 (1993), pp. 361–423.

5. Cf. *X* II, 30, 1–2; D.G. OESTERLE, "Aperitio oris," in *Revista Española de Derecho Canónico* 8 (1953), pp. 25ff; E. LABANDEIRA, *Tratado...*, cit., pp. 263–265.

6. Cf. E. LABANDEIRA, *Tratado...*, cit., pp. 457–459.

7. Cf. c. 1417; regarding how it applies in this context, cf. E. LABANDEIRA, ibid., pp. 450–454.

1733 **§ 1. Valde optandum est ut, quoties quis gravatum se decreto putet, vitetur inter ipsum et decreti auctorem contentio atque inter eos de aequa solutione quaerenda communi consilio curetur, gravibus quoque personis ad mediationem et studium forte adhibitis, ita ut per idoneam viam controversia praecaveatur vel dirimatur.**

§ 2. Episcoporum conferentia statuere potest ut in unaquaque dioecesi officium quoddam vel consilium stabiliter constituatur, cui, secundum normas ab ipsa conferentia statuendas, munus sit aequas solutiones quaerere et suggerere; quod si conferentia id non iusserit, potest Episcopus eiusmodi consilium vel officium constituere.

§ 3. Officium vel consilium, de quo in § 2, tunc praecipue operam navet, cum revocatio decreti petita est ad normam can. 1734, neque termini ad recurrendum sunt elapsi; quod si adversus decretum recursus propositus sit, ipse Superior, qui de recursu videt, recurrentem et decreti auctorem hortetur, quotiescumque spem boni exitus perspicit, ad eiusmodi solutiones quaerendas.

§ 1. Whenever a person believes that he or she has been injured by a decree, it is greatly to be desired that contention between that person and the author of the decree be avoided, and that care be taken to reach an equitable solution by mutual consultation, possibly using the assistance of serious-minded persons to mediate and study the matter. In this way, the controversy may by some suitable method be avoided or brought to an end.

§ 2. The Bishops' Conference can prescribe that in each diocese there be established a permanent office or council which would have the duty, in accordance with the norms laid down by the Conference, of seeking and suggesting equitable solutions. Even if the Conference has not demanded this, the Bishop may establish such an office or council.

§ 3. The office or council mentioned in § 2 is to be diligent in its work principally when the revocation of a decree is sought in accordance with Can. 1734 and the time-limit for recourse has not elapsed. If recourse is proposed against a decree, the Superior who would have to decide the recourse is to encourage both the person having the recourse and the author of the decree to seek this type of solution, whenever the prospect of a satisfactory outcome is discerned.

SOURCES: —

CROSS REFERENCES: cc. 50, 57, 209, 221 § 1, 223, 1446, 1713–1716, 1734, 1735, 1737 § 2

COMMENTARY

Jorge Miras

The Code establishes two steps before intervening with hierarchical recourse: the intent, regulated in this canon,[1] of reaching a solution of mutual accord to avoid the recourse, and the *supplicatio* to the author of the administrative act being challenged (see commentary on cc. 1734–1736).

1. *Suitability of avoiding unnecessary litigations*

In the context of the canonical regulation of processes in general, and as an elementary feature of the Christian physiognomy that must portray the coexistence of all the faithful in the church, the duty to reject the litigious spirit is promulgated (cf., for example, Titus 3:1–2; 1 Tim 3:3; 2 Tim 2:23–24; etc.). It must find its substitute in a benign and gentle spirit (cf. 1 Cor 13:4–7), which diligently seeks the manner "with due regard for justice, of ensuring that lawsuits among the people of God are avoided as far as possible, and are settled promptly and without rancour" (c. 1446 § 1).

Paragraph 1 of this canon conveys that same spirit toward the area of administrative recourses, expressing in a compelling way (*valde optandum est*) the desire to try to avoid them, or, though various methods of recourse, to resolve the conflict which might arise between the ecclesiastical authority and the faithful subject to that authority as a consequence of an act of power issued in the exercise of the administrative function.

Obviously, the purpose of the norm is to exhort that, by means of a suitable way, a controversy should be either prevented or terminated. This does not implicitly declare that hierarchical recourse is an unsuitable means to resolve disputed questions juridically. As a juridical remedy, there can be no doubt that it does settle them, but it does so by means of an act of power, which *imposes the solution upon the parties in an authoritarian manner*. The worry revealed through this canon is due to the fact that, rather than using that course of action, though it might be perfectly adequate and legitimate to resolve possible controversies, its purpose is not to *avoid* conflicts or to resolve them *through mutual*

1. Regarding the antecedents of these norms, cf. J. CORSO, "I modi di evitare il giudizio amministrativo," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), pp. 33ff.

agreement. In that sense, there is no room to doubt that, whenever possible, a peaceful and agreeable solution is preferred over any other, which, in addition to prolonging the situation of conflict while the recourse is resolved (with its further possible appeals), will turn out more traumatic in relation to the final decision (it will not satisfy at least one party, and, on occasion, will fully appease neither). In addition, it might expose the parties in conflict —through deficiencies not attributable to the law, but to the condition of human nature— to inflicting injury upon the communion of the faithful, at least affectively, making it more expensive to mend the possible impairment of the desirable relationships of mutual trust and collaboration, once the lawsuit has been concluded.

However, all this must be accomplished insofar as it is possible without detriment to justice (cf. c. 1446 § 1) or injury to the welfare of the Church. The call of this norm to the spirit of harmony, of dialogue and cooperation, is not an exhortation toward the systematic renunciation of rights or the neglect of obligations, in such a way that conflicts are avoided *at every cost*. The canonical legislator knows[2] that a hypothetical *harmony* based upon unjust situations, or in some way injurious to the life of the Church, would not be true peace but, at most, a shallow appearance of the absence of conflicts, which has very little to do with fellowship: "peace will be the work of justice" (Is 32:17), in the way that, when it is necessary to carry out these lawsuits, make these appeals, and in general to employ the means arranged for the protection of rights, these all function as suitable and efficacious means for the service of the fellowship.[3] One must not forget that this norm is found exactly in the context of the canonical regulation of hierarchical recourse, which is not viewed as contradictory, but as complementary to the fundamental right of the faithful recognized in c. 221 § 1. This canon, in its turn, must be interpreted in harmony with cc. 209 and 223 (see commentaries on the three cited canons).

Overall, the relationships between the ecclesiastical authority and the faithful subject to it, in the context of the administrative function, can be expressed in the classic structure of the relationships between the public welfare and the individual good. In its search for the public good, entrusted to the *diakonía* of the public authority of the Church, it sometimes inevitably happens that personal or particular interests must be sacrificed to the cause of the higher good. These take place when there is no other way to assure the public welfare, and one cannot legitimately sacrifice authority upon the altars of badly understood reconciliation. However, on other occasions, the injury of the particular good caused by the act of authority can be contrary to the law, and then the member of the faithful

2. Cf., in this regard, *Principles*, 1, 6 and 7.

3. Cf., for a more ample development of this question, among others, J. LLOBELL, "Il 'petitum' e la 'causa petendi' nel contenzioso-amministrativo canonico. Profili sostanziali ricostruttivi alla luce della Cost. Ap. 'Pastor bonus,'" in *La giustizia amministrativa*... cit., especially pp. 101–107.

who is affected does not have any obligation to endure it. Or, it can happen that, even when the act is legitimate, the sacrifice imposed is unnecessary or disproportionate, or the means adopted is inopportune, or it responds to a reckless decision that could be reconsidered with more caution to make it less burdensome (see commentary on c. 1739). In all of those cases, the faithful person who is affected has the right to appeal, a right whose correct exercise never implies an undermining of the communal fellowship.

It is in these situations of conflict that this norm is applied. Thus, it is not directed solely to whoever is considered prejudiced through the administrative act, but also to the authority from which the administrative act was issued. Canon 1446 (discussed above), in a different manner, treats the general principle from which the present canon emerged. It draws attention "to all the faithful and first of all to the bishops" as being subject to the duty of avoiding unnecessary conflicts. In fact, in the matter of administrative relationships, a most important role in the avoidance of conflict belongs to the authority, by means of their special preoccupation for the correct and adequate performance of service in exercising ecclesiastical power. In this context, as has been skillfully pointed out,[4] there should be an interest in rendering the hearing effective and operative before issuing an administrative act; this helps avoid future conflicts. Then, there is also the procedural norm that ensures that the Code, without imposing it as a requirement for the validity of the acts (see commentary on c. 50), relies upon the sensibility of the ecclesiastical authority and its prudent evaluation of the circumstances.

2. *Means of seeking conciliation*

a) *Through the mediation of persons not integrated into a stable organism of conciliation*

Undoubtedly, the most direct measure of searching for conciliation is the immediate dialogue between the authority and the person affected by the administrative act. However, it will not always be possible, prudent, or productive. Therefore, the canon (§ 1) has additionally provided the possibility of approaching some persons to study the subject and intervene between the parties, managing to make that dialogue possible, and perhaps efficacious. Insofar as the personal conditions of the mediators, the norm indicates only that they have to be *serious persons*. The circumstances of each case will determine the qualities that the suitable mediators have to fulfill. They are advised to be capable persons who enjoy the confidence of the person affected, or have an easy access to the parties in

4. Cf. P. MONETA, "La tutela dei diritti dei fedeli di fronte all'autorità amministrativa," in *Fidelium Iura* 3 (1993), especially pp. 291ff.

conflict, or perhaps are equipped with other kinds of qualities —a certain prestige, certain technical or professional aptitudes, etc.— in addition to prudence. In any case, the intention of the norm does not seem to be that one always must deal with the same person, since this would lead to the detriment of the desired effectiveness.

b) *Stable organisms of conciliation*

On the other hand, the provisional institutionalization of competencies of this type is considered in § 2, which anticipates the possibility that the bishops' conference might stipulate that in each diocese there be set up a stable organization, according to the norms generated through their own conference. In the absence of a decision from the bishops' conference, the bishop can institute that department or council in his diocese.

According to some opinions, the establishment of these organizations would perhaps have had results that are more favorable outside of the diocese, in a way that would exercise its functions with a greater independence with respect to the diocesan authority. This independence could bring about an improvement in the prospects of interventional success.[5] In any case, it does not appear that in the view of the foreseen conduct (which does not in any way possess a decisive character) the question is of great practical importance.

The features of this department or council of conciliation, such as appear to be sketched in the text, are the following:

— It has to have a stable character; it is not established provisionally for every case;

— It possesses a function that is exclusively advisory, which is made evident in the search for fair solutions —therefore, they are not necessarily solutions from strict justice, which is the proper duty of the administrative tribunal. The administrative tribunal later on *will suggest* these fair solutions to the parties, since they have to accept them and submit to them by mutual accord.

No norm is established about the composition of that "department," nor about the character, merits and conditions of the members, since it leaves all of that to the norms established by the bishops' conference or, in its absence, by the bishop who might institute this council in his diocese.[6]

5. Cf. L. DE ECHEVERRÍA, commentary on c. 1733, in *CIC Salamanca*.

6. Cf., for some suggestions regarding the assignation of this institutionalized function to other already existing organs, L. DE ECHEVERRÍA, commentary on c. 1733, cit. One can find references to some already constituted organs of conciliation for other categories of conflicts, in P. MONETA, "La tutela...," cit., p. 296, note 15; S. BERLINGÒ, "Il diritto al 'processo' (c. 22 §2 CIC) in alcune procedure particolari," in *Fidelium Iura* 3 (1993), pp. 342–343; for some projects and their results cf. Z. GROCHOLEWSKI, "I tribunali regionali amministrativi nella Chiesa," in *La giustizia amministrativa nella Chiesa* (Rome 1984), pp. 135–165.

3. *Applicability of the solutions contemplated in cc. 1713–1716*

The Code, in cc. 1731–1716, controls the settlement and the commitment to arbitration as the means for an extrajudicial solution of controversies. Are these applications also ways toward the solution of the conflicts caused through an administrative act?

To answer to this question, one must start from the fact that every activity carried out in the exercise of the administrative function is aimed at the good of the public welfare, and the same can be said of the individual administrative acts. Consequently, the prohibition of c. 1715 § 1, according to which "settlements and mutual promises to abide by an arbitrator'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," would seem to absolutely exclude settlement as a means of solution for administrative conflicts.[7]

However, if one carefully considers the subject matter, there could be a more harmonious answer. Certainly, a settlement about the public welfare is not admissible in the case where it is being dealt with, since the public welfare is not *negotiable* and is not at the disposition of the authority. However, it is one thing to seek the public welfare with an administrative act, and it is something very different to affirm that the decision contained in that act might be the only way possible *hic et nunc* to make a ruling for that determined facet of the public welfare. Alternatively, it might be that all and each one of the concrete aspects of the administrative act are identifiable directly and essentially with the public welfare. It should be observed that c. 1715 § 1 does not exactly prohibit the settlement in the *cases* in which the public welfare enters, but *circa ea quae ad bonum publicum pertinent*: it does not treat of a generic exclusion of how far its jurisdiction extends, but to the specific exclusion of the objects of the settlement. It is evident that the authority might consider its act again and modify it after taking into consideration the requests of the person affected, either to mend it insofar as there exist other ways of accomplishing the same finality which is aimed at, or more carefully to evaluate the possible lack of proportion between the good that is pursued and the sacrifices demanded, etc.

Therefore, it seems possible to state that the settlement in these hypotheses might also be possible, since it does not automatically assume a surrender of the obligation of the authority toward the public welfare. This would not occur every time that this settlement examined the possible solutions that arise in the dialogue and made sure they were not insidious to the public welfare before accepting them, or even reaching a decision about them.[8] A highly subtle example of a possible accord about

7. Those who exclude it by referring to the transaction in its strictest sense are e.g., L. DE ECHEVERRÍA, commentary on c. 1733, cit.; J. CORSO, "I modi di evitare...," cit., p. 51.

materials related to the public welfare is found in c. 1743. For this proposal, one can also recall what the *CCEO* cites —with a drafting parallel to the first one that was proposed for § 1 of the present c. 1733 of the *CIC*[8]— namely that, among other possible solutions of the controversy, and in addition to being joined to the voluntary amendment of the decree, a just compensation for the person affected (cf. *CCEO*, c. 999), which evidently might be the object of compromise between the authority and the proper person affected. In another way, if the authority might not be able to yield and compromise in anything that is related with regard to its administrative act, it is hard to understand how the authority might arrive at solutions "of common accord," according to this canon.

However, because of some people's difficulty in accepting the settlement in this environment, it should be clarified that the expression "solutions of common accord" certainly does not mean that the result of the intention prior to the conciliation is an administrative act by nature in a certain way "contractual," or of a bilateral character. Such an administrative act would be contradictory to the proper nature of the act of authority, which is always unilateral. In addition, it would go against the inalienable right and duty of the authority to protect the public welfare. However, it can certainly happen that, as a fruit of a previous dialogue, the authority would reach an accord or a compromise —a settlement— even formalizing it into a contract. Afterwards, it can happen that the authority issues a new administrative act modified completely or in part (or simply keeps the former act). In the case of the amendment of the act, the authority will do it in this way, since the authority thinks that the new act does not infringe upon the public welfare now in play, but that it advances more fittingly as a whole than the previous one. In addition, the authority knows that the new act will not be challenged. However, that act is not the direct and immediate result of the settlement. The consequence of the settlement is an accord —about the basic question or about one or other of its aspects more specifically harmful for the faithful person affected— that secures their positions and guarantees that there will be no controversy. The administrative act that could have been issued immediately after simply takes as a *presupposition* the possible previous settlement, without being bound *formally* by it.

This is possible here because the administrative authority is the one competent in evaluating the implication of the public welfare in the matter. It is not this way in the judicial area, precisely due to the position of the *detachment* of the judge in respect to the interests in play (cf. c. 1431 § 1).

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8. Cf., in this sense, E. LABANDEIRA, commentary on c. 1733, in *CIC Pamplona*; idem, *Tratado de Derecho Administrativo Canónico*, 2nd ed. updated (Pamplona 1993), pp. 434-435.

9. Cf. the text of P. CIPROTTI, in J. CORSO, "I modi di evitare...," cit., p. 51.

In contrast, it is not acceptable to submit these conflicts to the judgment of arbitrators, since this means of solution is characterized by the situation in which both parties pledge to respect the resolution —the "arbitral decision"— of a third party (see commentary on c. 1713), in such a way that the decision about matters in which only the authority is competent would have to be left in the hands of third parties —or their hierarchical superior— without guaranteeing that the decision— since it is now *imposed*, not *proposed*— is adjusted to the needs of the public welfare.

4. *Moment to attempt conciliation*

The Code does not formally impose this attempt at conciliation as a requirement before a recourse—as it has, on the other hand, with the previous *supplicatio*: cf. c. 1734— but it is simply limited to point out the interest that is obtained for a solution agreed upon before the resolution of the possible recourse. Precisely for this reason, there is no norm which subordinates the beginning of the passage of some time limits in order to arrive at the failure of the attempt at reconciliation, so that the time is counted without interruption from the date established with its general character (cf. cc. 1734 § 2, 1735 and 1737 § 2), and which counts against the one who considers himself wronged through the administrative act. Therefore, for practical purposes, whomever thinks that he must have recourse about an administrative act has to consider that the time periods established are peremptory and are not interrupted. He must continue through them, taking the necessary steps in each time limit, without overlooking the fact that, in a parallel way, there would be ongoing conversations whose purpose was a search for another possible solution.

In fact, the passage of the time periods without an appeal would block the later presentation of the recourse from any hope of attaining an accord, while the presentation of the recourse in time does not close the possibility of reaching that accord. It is on account of this that § 3 of this canon indicates that the moment of trying the alternative solution is "principal" once the "entreaty" has been presented before the recourse of c. 1734, and before the time periods are exhausted to make recourse. However, there is nothing to prevent one, even though recourse has already been presented, from still seeking a solution different from the decision of the hierarchical superior. For that reason a call is made to the superior —parallel to what the judge does in c. 1446 § 2— so that he might encourage the parties to seek that solution, and there may always be fostered a hope of success. This is done while keeping in mind that the passage of the time to resolve the case (cf. with the general character, c. 57) is not interrupted in virtue of these attempts.

1734 **§ 1. Antequam quis recursum proponat, debet decreti revocationem vel emendationem scripto ab ipsius auctore petere; qua petitione proposita, etiam suspensio exsecutionis eo ipso petita intellegitur.**

§ 2. Petitio fieri debet intra peremptorium terminum decem dierum utilium a decreto legitime intimato.

§ 3. Normae §§ 1 et 2 non valent:
1° de recursu proponendo ad Episcopum adversus decreta lata ab auctoritatibus, quae ei subsunt;
2° de recursu proponendo adversus decretum, quo recursus hierarchicus deciditur, nisi decisio data sit ab Episcopo;
3° de recursibus proponendis ad normam cann. 57 et 1735.

§ 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.

§ 2. The petition must be made within the peremptory time limit of ten canonical days from the time the decree was lawfully notified.

§ 3. The norms in §§ 1 and 2 do not apply:
1° in having recourse to the Bishop against decrees given by authorities who are subject to him;
2° in having recourse against the decree by which a hierarchical recourse is decided, unless the decision was given by the Bishop himself;
3° in having recourse in accordance with Cann. 57 and 1735.

SOURCES: —

CROSS REFERENCES: cc. 53–57, 200–203, 1465, 1733 § 2, 1735, 1736 §§ 1–2, 1737

COMMENTARY

Jorge Miras

1. *Nature of the petition sought beforehand*

The request is here formulated that the author of the administrative act revoke or amend the petition as an unavoidable prior requirement (*antequam quis recursum proponat, debet...*)[1] for the lodging of the

hierarchical recourse in the cases and under the conditions established in this canon.

The text of the canon distinguishes that petition from hierarchical recourse (cf. also cc. 1733 § 2, 1735 and 1736 § 1). Canon 57 describes the petition and the recourse as different from administrative actions, directed to obtain a decree from the authority. The petition and the recourse appear separated by means of the particle "or" (see commentary on c. 57). In fact, the petition is not a recourse properly speaking, because it does not possess the character of a *challenge* that is proper to every recourse: the presentation of that petition does not set up the juridical conflict between the authority and the affected member of the faithful. Because of that, c. 1733 § 3 advises the avoidance (*praecavere*) of the controversy once that petition has been presented for an amendment or revocation. The *Relatio* about the *Schema* of the *CIC* of 1982 explains: "the petition has the purpose of having the decree reconsidered and, if possible, for an avoidance of recourse."[2]

Therefore, one is simply dealing with a petition, request or entreaty, which can be correctly inserted, according to Labandeira, among the realities historically designated with the name of "supplication."[3] that is prior to the true recourse. Above all, its purpose is to forewarn the ecclesiastical authority about anything that is considered prejudicial through its administrative act and which may provide an interest in a recourse for the purpose of making a reconsideration of the decision possible and hoping, either for it to be reaffirmed in order to face the recourse, or to have the decision revoked or modified.

The *animadversiones praeviae* to the *Schema* "Concerning the Administrative Process," sent for consultation on April 20, 1972, explained the reason for this requirement prior to the recourse in this way: "From those matters which have been mentioned about the preferable changes which are proposed in the schema, it is already clear what system has been accepted into the schema about challenges to administrative acts. However, it can be briefly explained in this way: a) no recourse can be proposed against the decree of an administrative body unless the petition precedes it, made out to the author of the precept, for the purpose of having the decree revoked or changed. The importance of this norm, the purpose of which is to protect good order and the authority of the superior, is not concealed from anyone."[4] Certainly, it seems reasonable for the

1. Cf., regarding the wording of this norm and the introduction of its obligatory nature, J. CORSO, "I modi di evitare il giudicio amministrativo," in *La giustizia amministrativa nella Chiesa* (Vatican City 199), pp. 33ff; especially pp. 52–55.

2. *Comm.* 15 (1984), p. 85.

3. Cf. regarding this question E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. updated (Pamplona 1993), pp. 435ff; idem, commentary on c. 1734, in *CIC Pamplona*.

4. *Comm.* 4 (1972), p. 38.

ecclesiastical authority that issues an administrative act in the exercise of its function of governing not to be surprised through the intervention of a recourse, where its first learning about it might be the communication made through his hierarchical superior. This could happen in such a way that he would be bereft of the opportunity of trying to better explain the reason for the decision, or the reason for having modified or retracted the decision, once influenced by the reasons that arose in the dialogue with the member of the faithful who considers himself aggrieved.

2. *Period of presentation*

Paragraph two sets forth a binding period of ten useful days (cf. cc. 201-203), between the legitimate notice or notification of the administrative act to the revocation or amendment of that which is being sought (cf. cc. 54-56). In this case, one will always be dealing with an administrative act *effectively issued* by the authority. The reason is that the recourse against the "presumed decisions" in virtue of the administrative silence does not require a previous solicitation (*see below*, n. 5).

Once the ten days has expired without the *supplicatio* having been presented (unless it has expired *uselessly*, because the interested party did not know about the existence of the act, or the possibility of making this petition, or because he could not present it: c. 201 § 2), the member of the faithful who considers himself wronged by the administrative act loses his right to recourse (c. 1465). The reason is that the later recourse will not be admitted if there has not been a previous *supplicatio*. Nevertheless, if, despite everything, the author of the act admits the petition outside of the deadline and responds to it, he reopens the possibility for the interested party for recourse.[5] However, the possibility of having the recourse admitted seems more doubtful when it is based upon a negative response that has been presumed in virtue of the administrative silence toward a petition that has been presented outside of the deadline (c. 1735). Still, it can always be attempted, since the requirement of the previous *supplicatio* has apparently been satisfied and the person making recourse could prove that he presented the petition in *useful* time.

3. *Formal requirements and content*

a) *Personal activity of the interested party*

The Code expressly anticipates (cf. c. 1738) the possibility —and even the necessity in some cases— in which *the one making recourse*

5. Cf. E. LABANDEIRA, *Tratado...*, cit., p. 437.

acts, in the properly named hierarchical recourse, by means of an advocate or procurator, but not as such for the *supplicatio*. The motive is clear. Here, one is not dealing with recourse but with a simple petition (*see above*, n. 1). Therefore, the personal intervention of the interested party is sufficient, and he does not thereby bring about a lack of defense, since the juridical defense of his situation occasioned through the administrative act will begin properly with the later recourse. Nevertheless, nothing prevents the interested party from seeking advice that he thinks is opportune; and asking, on the part of an advocate, before presenting the *supplicatio*, although afterwards he acted personally.

b) *Written format*

With respect to the formal requirements of the *supplicatio*, the Code sets up only one: the written form ("they must seek in writing the revocation or amendment of the decree from the author"). Here one can be dealing with writing in the form of an application or of a simple letter.

c) *Content*

At least the following points must be included in the writing:

— the necessary data to identify the administrative act to which reference is being made;

— the identification of the person presenting the petition for the revocation or amendment, and his domicile for the purpose of notifications;

— at least one explicit petition: that of the revocation or the reforming of the act; it can also contain the petition for its suspension, but if it does not contain it, the law automatically adds it to the "supplicatio," and at that point an *iter* parallel to that of the recourse begins, reference being made only to its suspension (see commentary on c. 1736 § 2). For the admission of hierarchic recourse— which can be lodged for any just reason (c. 1737) — the motivation is necessary. On the other hand, for the *supplicatio* to be able to precede the juridical basis for the conflict, there is no formal requirement for a detailed explanation of the reasons, the proofs and allegations. It suffices that the interested party manifests in a summary fashion that he considers himself wronged through that administrative act.

— the signature and date upon which the petition is presented.

The writing can be hand-delivered to the chancery, to the secretariat or to the office corresponding to each case. This office will issue the certification of reception and a registration (in that case, the seal placed upon a copy of the writing with the date of entry, its registration and the seal of the corresponding curia would be sufficient). It can also be sent by certified mail with a receipt of acknowledgement, in such a way that the date of its presentation and its being received is evident.

4. *Effects*

The effects of the presentation of the *supplicatio* are the following:

— at times, it implies the automatic suspension of the act *ipso iure*: cf. c. 1736 § 1;

— in the rest of the cases, it constitutes an implicit suspension of the execution of the administrative act, which puts into motion a special deadline for the administrative silence of ten days, relative only to the possibility of an autonomous application of suspension of the act to the hierarchical superior of its author (cf. § 1 and c. 1736 § 2);

— it initiates attempts at reconciliation in the matters to which c. 1733 refers;

— it marks the day from which counting begins (c. 203 § 1) in the computation of the deadline of thirty days so that the author of the act may respond to the petition. When that deadline passes, the way to hierarchical recourse is expedited for the interested party (c. 1735).

5. *Acts that can be recurred to without previous "supplicatio"*

Paragraph three lists the cases in which the *supplicatio* is not demanded as a requirement for the placing of the recourse:

a) when one makes recourse to the bishop against authoritative acts subordinate to himself. In this supposition, the possibility of direct recourse is due to the position of the bishop as the head of the particular Church, which constitutes his proper sphere of ordinary and immediate governance (cf. cc. 381 and 391). Because of this, his direct intervention, without any more steps in the matter, does not have the character that in a certain extraordinary manner can be observed in other suppositions.

b) when the decree which it attempts to challenge was issued in the resolution of a recourse (therefore an antecedent *supplicatio* already existed), unless the one who resolved it was the bishop. In that case, the previous *supplicatio* to the lower authority was not there (see the previous supposition), and the law has an interest in granting to the bishop that advantage "in order to protect good rule and the authority of the superior" (*see above*, n. 1).

c) if the recourse takes place in virtue of administrative silence, in the general hypothesis of c. 57 (three months), or in the specific hypothesis of silence before the *supplicatio* (thirty days: c. 1735).

d) when a response is made to the *supplicatio* with a new act that amends the previous one, but does not suffice in satisfying the one affected (cf. c. 1735). Both in this case as in the previous one, one is dealing with a logical exception. It is considered that the author of the decree has

already had the occasion to consider the matter again, and even has amended the points that he has considered could or must be reformulated. The necessity of the previous petition for the revocation would keep its original meaning, and would simply produce a delaying effect, which is undesirable (see commentary on c. 1735 § 2).

In these four cases, the peremptory deadline of fifteen useful days to make recourse (c. 1737 § 2) begins to transpire from the judicial notice of the act that is the basis for the recourse, without the expiration of the ten days established for the *supplicatio*.

1735 Si intra triginta dies, ex quo petitio, de qua in can. 1734, ad auctorem decreti pervenit, is novum decretum intimet, quo vel prius emendet vel petitionem reiciendam esse decernat, termini ad recurrendum decurrunt ex novi decreti intimatione; si autem intra triginta dies nihil decernat, termini decurrunt ex tricesimo die.

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.

SOURCES: —

CROSS REFERENCES: cc. 54–57, 200–203, 1734, 1737 § 2

COMMENTARY

Jorge Miras

This norm anticipates two possible reactions from the author of the administrative act before the *supplicatio*, which is regulated in canon 1734.

1. *Issuance and notification of a new decree*

When the answer to the petition for an amendment or revocation of the previous act is effected by a new decree, this decree can have different contents:

— *the rejection of the petition*, which assumes the confirmation of the previous act;

— *the revocation of the administrative act* and the restoration of the situation that preceded it;

— *the issuance of a new administrative act that in some aspects amends the one preceding it.* In this case, the amendment can satisfy the person affected by the first administrative act. It could be the consequence of attempts toward conciliation that should have begun in the presentation of the *supplicatio*, but it also could happen that the person still

considers himself wronged by the new act and, consequently, maintains his interest in appealing it.

In all these cases, the peremptory deadline of fifteen useful days to make recourse (c. 1737 § 2; cf. also cc. 201–203) is computed from the date of the legitimate notification of the new decree (cf. concerning the notification, cc. 54–56).

If one is treating a decree of rejection of the *supplicatio*, the original administrative act, which has been confirmed by this last decree, is challenged. In contrast, when one is handling a decree that amends the previous act, recourse is made against the new decree, without a need to present the previous *supplicatio*, since the deadline begins to count from the notification of the new decree (see commentary on c. 1734; n. 5, d).

2. *Absence of reply*

It can also happen that the authority does not respond to the *supplicatio*, as described in c. 57 § 1, which refers to the absence of an administrative response "when the interested party legitimately presents a petition ... to obtain a decree." As a general rule, once three months have passed without an answer from the authority, a negative answer is presumed, as far as the effects of the appeal are concerned (c. 57 § 2). Yet the possibility remains open that specific norms might prescribe other different deadlines. Precisely because of that, the final incidental clause of c. 1735 establishes one of those special deadlines for administrative silence for an amendment or revocation in c. 1734. If the authority has not formally made any decision, the expression *nihil decernat* has its precise meaning here: "if he has not issued a new decree"— within the deadline of thirty days. The deadline to make recourse (cf. c. 1737 § 2) begins to count from the thirtieth day from the presentation of the *supplicatio* (cf. cc. 202 § 1, 203).

One of the objectives of the relative shortness of the deadlines in the matter of recourse against administrative acts (see commentary on c. 1737: n. II, 1) is to avoid delaying situations of unnecessarily continuing the conflict. These situations might progress to the stage of being a detriment to the community.[1] That same reason can explain this point: for these cases, there should be established a special deadline of administrative silence noticeably less than the one already provided by a general rule. When the *supplicatio* is presented, it is actually announcing the intention to make recourse, unless the administrative act is revoked or modified to the satisfaction of the interested party. Therefore, the potential

1. Cf. J. HERRANZ, "La giustizia amministrativa nella Chiesa: dal Concilio Vaticano II al Codice del 1983," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), p. 21.

administrative conflict is already found in the beginning stage, and it would not be convenient for the member of the faithful who considers himself wronged to remain in a situation of uncertainty for a long period.

To conclude, in canon law, the silence of the administration *is not* an answer, but simply gives rise to a *presumption* of a negative response that permits the interested party to continue taking the necessary steps (see commentary on c. 57). However, the authority remains obligated to respond to the legitimate petitions, and can do so in the same fashion as c. 57 § 3, although the deadline has passed and recourse has already been lodged. Thus, if the author of the administrative act were to decide to amend or revoke it belatedly, he might do it, theoretically, after the presentation of recourse, which would then be bereft of an object (if the amendment eliminates the wrong on the part of the person making recourse). In those cases, c. 57 § 3 determines that the competent authority remains obligated to repair the possible damages caused for their delay. For example, such damages might include the costs that the lodging of the recourse would have presumably placed upon the member of the faithful, or other expenses that would eventually occur, stemming from the possible period of time during which the challenged act would have had efficacy, if its execution were not to have been suspended in the same manner as cc. 1734 § 1 and 1736.

1736 **§ 1. In iis materiis, in quibus recursus hierarchicus suspendit decreti exsecutionem, idem efficit etiam petitio, de qua in can. 1734.**

§ 2. In ceteris casibus, nisi intra decem dies, ex quo petitio de qua in can. 1734 ad ipsum auctorem decreti pervenit, is exsecutionem suspendendam decreverit, potest suspensio interim peti ab eius Superiore hierarchico, qui eam decernere potest gravibus tantum de causis et cauto semper ne quid salus animarum detrimenti capiat.

§ 3. Suspensa decreti exsecutione ad normam § 2, si postea recursus proponatur, is qui de recursu videre debet, ad normam can. 1737 § 3 decernat utrum suspensio sit confirmanda an revocanda.

§ 4. Si nullus recursus intra statutum terminum adversus decretum proponatur, suspensio exsecutionis, ad normam § 1 vel § 2 interim effecta, eo ipso cessat.

§ 1. In those matters in which hierarchical recourse suspends the execution of a decree, the petition mentioned in Can. 1734 also has the same effect.

§ 2. In other cases, unless within ten days of receiving the petition mentioned in Can. 1734 the author of the decree has decreed its suspension, an interim suspension can be sought from the author's hierarchical Superior. This Superior can decree the suspension only for serious reasons and must always take care that the salvation of souls suffers no harm.

§ 3. If the execution of the decree is suspended in accordance with § 2 and recourse is subsequently proposed, the person who must decide the recourse is to determine, in accordance with Can. 1737 § 3, whether the suspension is to be confirmed or revoked.

§ 4. If no recourse is proposed against the decree within the time limit established, an interim suspension of execution in accordance with §§ 1 and 2 automatically lapses.

SOURCES: —

CROSS REFERENCES: cc. 700, 1319, 1342 § 1, 1353, 1638, 1720, 1734, 1735, 1737 § 3, 1747, 1752

COMMENTARY

Jorge Miras

In addressing the challenges in general, it is customary to differentiate between two primary effects that are classically called "devolutive" (forwarding the question to the body that has to resolve the challenge by creating or exercising his competence) and "suspensive" (deflecting the effects of the challenged act until the challenge is resolved). As a rule, in the judicial arena, an appeal always suspends the execution of the sentence (cf. c. 1638). However, in contrast, in administrative recourse, the norm is the opposite. Thus, hierarchical recourse produces only a devolutive effect, except in cases as determined by law.

This clear difference between judicial and administrative competencies can be explained by the special characteristics of administrative activity, relative to the immediate exercise of the function of governance that officially follows from the public ecclesiastical welfare. The extreme importance and delicacy of the public welfare, the safeguard of which is entrusted to the ecclesiastical authority, makes it necessary to guarantee that the function of governance can be carried out with agility and without unnecessary obstacles. If by general rule the recourse (and the *supplicatio* itself, in accordance with the § 1 of this canon) were to suspend the execution of the challenged act automatically, one would have to fear the risk of a virtual paralysis for the ecclesiastical authority in situations when there is an obligation to make decisions which can be executed without delay. From that situation, it came about that it was preferred to set up a norm that suspension would not be the automatic effect for every recourse.

Nevertheless, this important prerogative of the administration (which strengthens those prerogatives constituted through the presumption of legitimacy and the executivity of its acts[1]) also implies a risk that an administrative act may cause injuries that might be very difficult to repair. For this reason, the possibility is also provided for the proper author of the act or his superior to suspend its execution with caution. Thus, one is dealing with an area where the harmonization of the very sensitive matters at stake is at the disposition of the prudence of the competent authority.

Let us look, in a schematic fashion, at the rules established for the suspension of the carrying out of administrative acts.

1. Cf., e.g., E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. updated (Pamplona 1993), pp. 415–417.

1. *Exceptional cases of the effect of automatic suspension*

In some serious cases, the law sets up the automatic suspension of a recourse, and § 1 of this canon extends in those cases the same suspensive efficacy to the presentation, not the recourse properly speaking, but including the preceding *supplicatio* as regulated in c. 1734. For example, this is what happens in recourse against the decree of expulsion of a member of a religious institute (c. 700), or against a decree that imposes or declares a penalty (c. 1353, in relationship with cc. 1319, 1342 § 1 and 1720). It may partially happen in the case of recourse against a decree of removal or transfer in which the faculty of the bishop is suspended from naming a new pastor while the recourse is pending (cc. 1747 and 1752).

2. *Procedure in the remaining cases*

When the specific norms applicable to the case do not expressly acknowledge the suspensive effect of the recourse (which happens *in ceteris casibus*), the general norm has to be followed in a fashion parallel to the development of the recourse:

a) *Implicit petition of suspension*

Once the *supplicatio* for amendment or revocation of the administrative act has been presented, the suspension is also automatically understood as having been requested *eo ipso* in the matters being insisted upon by the act (cf. c. 1734 § 1).

b) *Autonomous period of administrative silence for the request of suspension*

From the presentation of the *supplicatio*, there is a deadline of ten days for what the author of the act decides to do, but *only with regard to the suspension.*

c) *Anterior provisional suspension to the presentation of recourse*

Once the ten days have elapsed without any response, the interested party can direct his request for a suspension to the hierarchic superior — who is the same one who will have to resolve, in this case, the former recourse. He can provisionally grant it while the deadline is still running for the answer to the *supplicatio*, but only for serious causes —the evaluation of which corresponds to it— and taking precautions that the care of souls does not suffer any detriment (§ 2). While examining all the circumstances, such consideration might lead him not to grant the suspension. Here the hierarchical superior does not yet know of the recourse at the heart of the matter, but only of its suspension. Whatever the decision that he adopts in this moment, he will have to go back to it once the recourse has been undertaken (§ 3 and c. 1737 § 3).

d) *Provisional suspension ceases if recourse is not sought in the period*

If the recourse is not finally lodged (§ 4) once the deadline of fifteen days for the "supplicatio" (cf. c. 1735) has passed, the provisional suspension remains without effect. In this case, the administrative act can be executed without further requirements.

e) *Conformation or revocation of provisionally granted suspension*

Once the recourse is made, and if the provisional suspension was conceded, the hierarchical superior maneuvers himself into the position of deciding whether he is going to confirm or revoke it while the resolution of the recourse is pending (§ 3).

f) *Concession of the suspension that has been provisionally denied*

If the hierarchical superior denies the provisional suspension, he can still grant it when he has heard the recourse, once the circumstances of the case have been studied in depth. That concession is subject to the same conditions indicated by § 2 for provisional suspension (c. 1737 § 3).

The peculiarities of the process that has to follow the suspension in those cases in which the previous *supplicatio* is not demanded (see commentary on c. 1734: n. 5) are not expressly regulated in the Code. If the interested parties think it necessary, it is possible to begin the formality of the suspension before the lodging of the recourse, with the presentation of the request for provisional suspension to the hierarchical superior. This request could be granted and confirmed or revoked once the recourse has been presented. This interpretation seems in accord with the objective toward which the possibility of suspension of the execution of the administrative act has been anticipated. In those circumstances of direct recourse to the superior, this remains in force.

Finally, as is logical, a suspension that has been granted ceases when the ordinary recourses against the act are exhausted without success.[2]

2. For the suspension of the act for the duration of the contentious—administrative recourse before the Apostolic Signatura, cf. art. 108 of the *Normae speciales* of that tribunal: "Recursui adnecti potest instantia, allatis motivis gravibus vel documentis quibus innititur, ad obtinendam suspensionem exsecutionis actus impugnati." Cf., in this regard, G. LOBINA, *Elementi di procedura amministrativa canonica* (Rome 1973), pp. 15ff.

1737 **§ 1. Qui se decreto gravatum esse contendit, potest ad Superiorem hierarchicum eius, qui decretum tulit, propter quodlibet iustum motivum recurrere; recursus proponi potest coram ipso decreti auctore, qui eum statim ad competentem Superiorem hierarchicum transmittere debet.**

§ 2. Recursus proponendus est intra peremptorium terminum quindecim dierum utilium, qui in casibus de quibus in can. 1734 § 3 decurrunt ex die quo decretum intimatum est, in ceteris autem casibus decurrunt ad normam can. 1735.

§ 3. Etiam in casibus, in quibus recursus non suspendit ipso iure decreti exsecutionem neque suspensio ad normam can. 1736 § 2 decreta est, potest tamen gravi de causa Superior iubere ut exsecutio suspendatur, cauto tamen ne quid salus animarum detrimenti capiat.

§ 1. 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. The recourse can be proposed before the author of the decree, who must immediately forward it to the competent hierarchical Superior.

§ 2. The recourse is to be proposed within the peremptory time limit of fifteen canonical days. In the cases mentioned in Can. 1734 § 3, the time limit begins to run from the day the decree was notified; in other cases, it runs in accordance with Can. 1735.

§ 3. Even in those cases in which recourse does not by law suspend the execution of the decree, or in which the suspension is decreed in accordance with Can. 1736 § 2, the Superior can for a serious reason order that the execution be suspended, but is to take care that the salvation of souls suffers no harm.

SOURCES: —

CROSS REFERENCES: cc. 19, 96–123, 299 § 3, 310, 1476–1480, 1733–1736, 1738, 1739

COMMENTARY

Jorge Miras

Beginning with c. 1737, some aspects of hierarchic recourse are regulated. In commenting upon the first paragraphs of this canon, we shall occupy ourselves with individuals and their lodging of recourse (the form, reasons, time limits and effects). For suspension of the act being appealed, to which § 3 refers, see the commentary on c. 1736.

I. SUBJECTS OF RECOURSE

Hierarchical recourse *juridically* establishes a controversy (which existed previously in a way not institutionalized in a juridical channel for a solution) between two parties with interests that are in conflict, and it has been submitted to the competent administrative authority to be resolved by use of its executive power, imposing the solution upon the parties by a decree. Therefore, there will always be an active party, whom the Code calls "the one making recourse" (c. 1738), as well as a passive or resistant party, whom the Code designates as *qui decretum tulit* (c. 1737 § 1) or the *auctor decreti* (c. 1733 §§ 1 and 3, 1734 § 1, 1735, 1736, 1737 § 1), and a competent hierarchical superior for resolving the recourse.

1. *The referral*

In studying the one making the recourse, one must take note of the requirements of being recognized juridically as a subject (juridical capacity) capable of acting in a hierarchical recourse (capacity to act). In addition, it is essential to explain what type of relationship has to exist with the act that is the subject of the recourse for the person to be admitted as an active party in a determined appeal (active legitimation). Although these two aspects —capacity and legitimation— are related, it is fitting to distinguish them carefully, both for their theoretical study and for their practical effects, since the confusion over them can have consequences regarding the viability and efficacy of hierarchical recourse as regulated by the Code.

a) *Capacity*

The capacity —the juridical suitability to be a subject in a legal system, or within the determined scope of an ordinance— is a requirement that the law establishes in the abstract. Therefore, it does not have a relationship with a determined administrative act.

The Code does not establish any special norm regarding who enjoys juridical capacity and what is required in the lodging of hierarchical recourse. Therefore, the general norms must be applied: *a)* if the one appealing is a physical person, the capacity to act will be in force (c. 19) through cc. 1476–1479, which presuppose the general requirements for capacity given in cc. 97 and following; *b)* if one is dealing with a juridic person, the norm of c. 1480 applies, which must be understood in the light of the general norms contained in cc. 113–123. Therefore, every human person can take recourse, baptized or not, if over 18 years of age. Minors and those lacking the use of reason must be represented through their parents, guardians, or tutors, although in some cases, minors with the use of reason who have completed fourteen years might be admitted to act personally (cf. cc. 96–99, 1476, 1478–1479).

They also have the capacity to make recourse through their legitimate representatives, juridical persons, public or private. One authentic response of June 20, 1987 declared that groups of the faithful —including private associations of the faithful which do not merit the status of "persons" (c. 310)— without statutes which have been at least reviewed by the competent authority (c. 299 § 3), are not capable of lodging recourse as a unified body.[1] On the other hand, members of the same private institutions, the statutes of which have been the object of that review, can defend their rights and interests *jointly*, although not as an association (c. 310). This last point is expressly recognized by the authentic response cited, according to which they can make recourse *qua singuli christifideles, sive singillatim sive coniunctim agentes.*

b) *Legitimation*

However, not every subject juridically capable of making recourse can challenge *any* administrative act. In addition to the capacity, the law establishes other conditions that must be met so that a subject can challenge a determined administrative act. That special situation of the subject capable with respect to a determined act is called *active legitimization.* Therefore, the capable subject who is legitimated can make recourse through his relationship (in the terms provided by the law) to the act, the object of the recourse, or through his position with regard to the effects of that act.

1. "D. Utrum christifidelium coetus, personalitatis iuridicae, immo et recognitionis de qua in can. 299, §3, expers, legitimationem activam habeat ad recursum hierarchicum proponendum adversus decretum proprii Episcopi dioecesani. R. Negative qua coetus: affirmative qua singuli christifideles, sive singillatim sive coniunctim agentes, dummodo revera gravamen passi sint. In aestimatione huius gravaminis, iudex congrua discretionalitate gaudeat oportet." *AAS* 80 (1988), p. 1818. Cf., for an analysis of the cited reply, which speaks in a confused manner of "active legitimization" in the formulation of the *dubium*, J. MIRAS, "Respuestas de la Comisión Pontificia para la interpretación de los textos legislativos. (Comentarios)," in *Ius Canonicum* 61 (1991), pp. 211–217; cf. also the commentary of P. BONNET, in *Periodica* (1989), pp. 261ff.

This canon expresses the requirement for legitimization, establishing whoever considers himself wronged by the administrative act and is interested in its revocation or amendment (c. 1734) may lodge hierarchical recourse. The verbs used by the norms which allude to this requirement (whoever *contends* that he has been injured, whoever *thinks* that he has been injured by a decree) indicate that absolutely certain and objective evidence for the existence of an effective injury is not demanded. Neither do they have to be understood as being in a purely subjective sense, as if the legitimization would reside simply in a psychological state that would empower that person to make recourse for anything he might conceive is hurtful to him. This would be the equivalent to a concept of a potentially universal and arbitrary legitimization, foreign to any juridical system, even the canonical.

On the contrary, to have recourse against a particular administrative act is legitimate only for persons who can experience injury if the act is confirmed and executed or can benefit if the recourse is successful.[2] This happens when the interested party has seen that a strictly subjective right has been injured through an administrative act, but a similar occurrence would happen where the one making recourse, in virtue of his juridical situation can been seen as injured through the administrative act.[3]

Therefore, it is necessary that it can at least be observed that the recourse does not constitute an absolutely foolhardy or groundless attempt. In reality, the interest that makes the recourse legitimate is not an interest with a certain qualification, so that it does not lapse into an unspecific general process. Nor is it a substantial juridical situation for which someone is the titleholder, but which consists in a question *de facto* protected indirectly by the norm.[1]

That is what the doctrine seeks to express when it enumerates the characteristics that must be fulfilled for the subject to become legitimate. In a decree of the Apostolic Signatura, it was established that the legitimating interest has to be "personal, direct, actual, and based at least

2. Cf. E. LABANDEIRA, "El recurso jerárquico ante la Curia Romana," in *Ius Canonicum* 60 (1990), pp. 449–465 (printed in idem, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1992); cf., especially, pp. 416–417).

3. Regarding the irrelevance, mostly admitted by learned teaching, of the distinction, in Canon Law, between the subjective law and the legitimate interest cf., e.g., A. RANAUDO, "Il ricorso gerarchico e la rimozione e trasferimento dei parroci nel nuovo Codice," in *Dilexit iustitiam. Studia in honorem Aurelii Card. Sabattani*, (Vatican City 1984), pp. 503ff (even though this author maintains the validity, in a technical sense, of the strict concept of interest which he describes); P. MONETA, *Il controllo giurisdizionale sugli atti dell'autorità amministrativa nell'ordinamento canonico* (Milan 1973), pp. 251ff; J. LLOBELL, "Associazioni non riconosciute e funzione giudiziaria," in *Monitor Ecclesiasticus* 113 (1988), pp. 379ff; E. LABANDEIRA, "El objeto del recurso contencioso administrativo en la Iglesia y los derechos subjetivos," in *Ius Canonicum* 40 (1980), pp. 151–166 (printed in idem, *Cuestiones de Derecho Administrativo...*, cit., cf. especially pp. 48–51; etc.).

4. E. LABANDEIRA, "El recurso jerárquico ante la Curia...," cit., p. 418.

indirectly upon the law and [adequately] proportioned."[5] However, more than the concrete qualifications that accompany the interest, what is important for the actual possibility of access to the recourse is the content that jurisprudence assigns to each of those requirements. Perhaps the manner in which the cited decree interprets them and the later application of that doctrine in another case,[6] show an incipient restrictive inclination of jurisprudence on this point, which has been received with a certain apprehension on the part of learned teaching.[7]

Certainly, the genuine canonical sensitiveness to justice and a profoundly personalitic orientation of the juridical institutions seem to demand a refined attention toward all the situations eventually worthy of consideration and protection.[8] This attention should not be seen as derived solely from a restrictive interpretation that was not imposed in accordance with the juridical norms. There is a provision that these norms admit of a reading that is broader and more flexible, more in accord with the finality toward which they tend (cf. *a sensu contrario*, c. 18).

c) *Capacity and legitimation are requirements for the granting of the recourse*

To understand the extent of this problem, one should notice that the active legitimization is not the foundation of the controversy, but it is a *formal and prior topic*. This topic constitutes a requisite for the admission of the recourse, but it does not prejudge in any way the decisions that the superior who has admitted it can adopt, once he carefully finds out its basis. The person becomes absolutely legitimated to make recourse, yet he might not succeed in his attempt.

Precisely in order for him to treat a previous topic, the superior who receives a recourse is not in a situation to resolve it at that moment — without a rebuttal, without proofs, without guarantees— with a decision about the substance of the recourse. The law does not ask him to do so. To admit the recourse, he must briefly verify that because of the reasons for the recourse there is the presence of a certain foundation that justifies the intervention of the one making recourse as an interested party in the recourse.

5. STSA, Decr. November 21, 1987, "Castillo Lara ponente," n. 5 *in fine*, in *Comm.* 20 (1988), pp. 88–94.

6. STSA, Decr. "de causa Cincinnaten," January 26, 1990, in *Notitiae* 26 (1990), p. 144.

7. Cf., e.g., E. LABANDEIRA, "La defensa de los administrados en el Derecho Canónico," in *Ius Canonicum* 61 (1991), pp. 271–288 (printed in idem, *Cuestiones de Derecho Administrativo...*, cit., pp. 467–490); P. MONETA, "I soggetti nel giudizio amministrativo canonico," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), pp. 55–70, especially, pp. 65–66.

8. Cf., in this sense, P. MONETA, "La tutela dei diritti dei fedeli di fronte all'autorità amministrativa," in *Fidelium Iura* 3 (1993), pp. 281–306.

For that reason the terms of the authentic response cited before do not seem very fortunate, which, while speaking of another question, incidentally recognizes active legitimization for subjects who are capable *dummodo revera gravamen passi sint.*[9] From its literal interpretation, that expression was superimposed upon the previous requirement of the legitimization for the substantial question of the recourse. However, it was to be a substantial question that had to be resolved *in limine litis*, with the juridical guarantees for the faithful that the hierarchic recourse intends to establish.[10] Of all the ways, for different reasons,[11] it seems clear that the intention of that authentic response is not to restrict, in such a drastic way and by an indirect means, the actual possibility of the exercise of a right of the faithful. (The direct object of the *dubium*, according to its content, rests heavily upon the confused terminology with which it is formulated, and is clearly within the *capacity* of the groups of the faithful without personality to lodge recourse, not the legitimization).

Therefore, the norm about legitimization continues to be current in all of its effects the way it is expressed in the present canon. The *admission* of the recourse is not conditional upon the subject having *actually* been injured, but upon what appears to be his condition through an administrative act with a certain foundation. Even better (since in this assumption the principle to be applied is *favorabilia amplianda*), the recourse is granted as long as it does not appear as absurd and without basis. In reality, recourse is reasonably accessible to the faithful— as reasonably accessible as the Code outlines it, which may be resolved later on with a clear and accurate rationale. This would appear to be more favorable for the peace and the community of the faithful, and therefore of the general interest and of the good administration in the Church,[12] than the easy non-admission of recourses based upon an excessive demand for formal and unnecessary requirements for the legitimization. Nevertheless, it remains the jurisprudential task to determine the practice in this subject matter.

On the other hand, regarding legitimization, the question of the collective interests, as well as that of the "diffused interests," has been firmly established in the teaching. Thus, the ones who have a determined title juridically cannot be stated specifically. However, their protection interests an entire succession of subjects. In these cases, despite the fact that a direct and exclusive title does not exist, it can happen that one is treating interests truly worthy of protection, which would remain without effective protection for want of a subject formally legitimated to make recourse against it. This could happen in the situation in which jurisprudence does

9. Cf. *supra*, note 1.
10. Cf. *Principles*, 6–7.
11. Cf. J. MIRAS, *Respuestas de la Comisión...*, cit.
12. Cf. E. LABANDEIRA, commentary on c. 1737, in *CIC Pamplona*.

not adopt a flexible point of view toward the question. Otherwise, one is dealing with a flexibility that would not be totally new in canon law.[13]

d) *Other possible interested parties*

In addition to the subject or subjects directly affected by the administrative act, other interested persons could exist who are interested in its modification or its revocation —or even in its confirmation— who must be heard by the superior, if possible, before the case is resolved (cf. c. 50). They could even formally join the claim of one of the legitimated parties in the recourse as "collaborators." This figure is not foreseen for by the Code in this area, but it is perfectly possible. In fact, procedural canon law has provided various assumptions for the intervention of third parties in judicial cases: cf. cc. 1596–1597.

2. *The resisting party*

Passive legitimization offers fewer problems, because it primarily and directly belongs to the authority who issued the administrative act being appealed. The authority is expressed clearly with the words "author of the decree," which the Code repeatedly uses in its references to the resistant party. The only ones excluded from this assumption of passive legitimation, by reasons of constitutional order, are the Roman Pontiff and the Ecumenical Council (see commentary on c. 1732). The intervention of other subjects or persons who have an interest in supporting the recourse against the act as collaborators was also made possible.

3. *The superior "ad quem"*

The determination of the competent authority to receive the recourse is narrowed down to the identification of the hierarchical superior of the author of the administrative act in question. Thus, for administrative acts issued by authorities subordinate to the bishop, the superior *ad quem* will be the bishop. The administrative acts of the diocesan bishop will have to be brought to the competent pontifical dicastery depending on its material (PB, 19 § 1). If various dicasteries could be competent, the recourse can be directed to one of them or alternatively to various

13. Cf., e.g., P. GANGOITI, "De iure standi in judicio administrativo hierarchico et in Altera Sectione Signaturae Apostolicae laicorum paroecialium contra decretum episcopi, qui demolitionem paroecialis ecclesiae decernit," in *Angelicum* (1988), pp. 392 ff; J. LLOBELL, "Associazioni non riconosciute e funzione giudiziaria," in *Monitor Ecclesiasticus* 113 (1988), pp. 379 ff; P. MONETA, "I soggetti nel giudizio amministrativo...," cit.; E. LABANDEIRA, "La defensa de los administrados...," cit. One can detect a more adequate grasp of the legal aspects of this question in the sentence c. Fagiolo cited by C. GULLO: see introduction a Lib. VII, part. I, tit. IV, 2, and note 24.

dicasteries, since the question of the determination of competence will be resolved through the procedure provided for in *Pastor Bonus*, 20 and *Regolamento generale della Curia Romana*, 129.

Administrative acts of the Roman dicasteries cannot be the object of hierarchical recourse, since there is no competent hierarchic superior. The dicasteries can only be the ordinary object of a contentious-administrative recourse to the Apostolic Signatura, as provided for in *Pastor Bonus* 123 (cf. RGCR, 135 and 136 § 4).

Insofar as the determination of the competent superior in the case of administrative acts issued within the seat of a body that is an association or an institute of consecrated life is concerned, that determination will have to be provided for by their statutes and their constitutions, plus common law.

II. INTERPOSITION OF RECOURSE

1. *Period for recurring*

§ 2 of c. 1737 points out that, for the lodging of the recourse, there is a peremptory time limit of fifteen useful days (cf. cc. 201–203), which have to be counted:

— from the legitimate notice of the administrative act (see cc. 54–56) in the cases in which a previous *supplicatio* is not necessary (see commentary on c. 1734: n. 5);

— from the notification of the decree which answers the *supplicatio*, when the author of the administrative act upon which a challenge is being attempted issues that decree within the time limit of thirty days (see commentary on c. 1735: n. 1);

— from the thirtieth day from the presentation of the *supplicatio*, when there had not been an answer to the petition (see commentary on c. 1735: n. 2).

Once that time limit has passed, the interested party —if he knew and could make recourse, since one is treating of "useful" days— loses the possibility of lodging hierarchical recourse. In addition, if the provisional suspension of the execution of the administrative act in question had been decreed, it ceases automatically and the act can be executed beginning with that date (c. 1736 § 4).

2. *Form of interposition*

Recourse can be directly presented to the competent hierarchical superior, or to the author of the act. However, this recourse must be transferred immediately to the superior without further delay. The reason is that, beginning with that moment, the matter slips out of his competence. The author of the act that is the subject of the recourse could also continue attempting ways for its resolution apart from recourse (cf. c. 1733 § 3), but simultaneously and in a parallel manner to its being substantiated. This is done without concealing the negotiation regarding the recourse, which must be *immediate* on his part.

He has to intervene in writing, and the following points must be clearly indicated:

— the necessary data to identify unequivocally the administrative act to which it refers, even attaching, if possible, a copy of the act;

— the identification of the person who is presenting it, as well as his domicile for the purposes of receiving notifications;

— when an advocate or procurator is taking part in the recourse, his mandate to act in the name of the interested party;

— the superior to whom it is directed;

— the object of the one making recourse with respect to the administrative act being challenged and with respect to the juridical situation affected. Moreover, if the execution of the challenged act was not suspended automatically (cf. c. 1736 § 1), and if it did merit the provisional suspension either, he can once again give notice of recourse, since the superior who resolves it has the faculty to agree with it officially or at the insistence of the interested party (cf. § 3). In this case, nothing prevents him from also introducing a claim for indemnification for the injuries caused by chance through the act being challenged (cc. 128, 57; and *CCEO*, cc. 1000 § 3 and 1005; see commentary on c. 1739: n. 3);

— the reasons which give rise to the recourse, with documentation to support them —or at least a brief description of them, since in the brief time limit which is provided for him it is not easy to obtain this disclosure, and it is always possible to present it once it is admitted by means of the recourse and within the time limits which the competent superior sets up— plus argumentation that can lay the foundations for the reasons;

— the documentation (for example, written copies for property, contracts, statutes, decrees of confirmation of appointments, acts and certifications, etc.) which support the juridical situation in virtue of which the interested party considers himself legitimated to make recourse; or at least, the disclosure of the documentation of a required nature which could be provided;

— the date and signature of the person appealing or of his procurator.

3. *Reasons for recourse*

Hierarchical recourse must be provided with reasons, which immediately prompts one to ask what these reasons could be.

Likewise § 1 of this canon states that the interested party can make recourse *propter quodlibet iustum motivum*. Here one is dealing with a very broad expression, which absolutely excludes recourse that is presented without any reason or for a reason that cannot be qualified as just.

Certainly, that wide scope for the acceptance of the rationale indicates an idea of recourse as *properly administrative*. This designation removes it from the actions of the jurisdictional court. In fact, an assembling of the hierarchical recourse with a jurisdictional tone will end up restricting its reasons, centering on the questions of legitimacy and of strict justice. On the other hand, an idea of an administrative court does not transform the hierarchical superior into a judge. But, he does keep his position as a competent authority to administer for all of its effects in the same sphere and matter as the author of the act that is the subject of recourse—also insofar as the resolution of the recourse is concerned— but at a superior level. The authority that resolves the recourse is not a judge who applies the strict law, but *a Superior who governs*, and this is reflected in the broadness of his powers of decision (see commentary on c. 1739).

The practical extent of the broad wording of c. 1737 with respect to the rationale could be revealed by saying that it is possible to base recourse upon any reason that the superior can justly and legitimately take into consideration in order to adopt a decision within the limits of c. 1739. In other words, the petition can be made because of all the reasons because of which the superior *can* make his concession of the recourse.[14]

4. *Effects of the interposition of recourse*[15]

The lodging of the hierarchical recourse establishes, or at least, brings into existence, the competence of the superior *ad quem* about the question that is the object of the controversy. This is what is known by the expression "devolutive effect," in speaking of the effects of recourse (see commentary on c. 1736). Insofar as the suspensive effect is understood as a general rule, it is not automatically produced here in this action, but

14. Cf., e.g., E. LABANDEIRA, "Il ricorso gerarchico canonico: 'petitum' e 'causa petendi'," in *La giustizia amministrativa nella Chiesa*, cit., above all pp. 77–82 (Spanish vers. in idem *Cuestiones de Derecho Administrativo*..., cit., pp. 493 ff); P. MONETA, "La tutela dei diritti dei fedeli...," cit., p. 299.

15. Cf., for a more detailed treatment, E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 439ff.

through the express decision of the superior, based on a serious reason, and according to what § 3 of c. 1737 (see also the commentary on c. 1736) sets up.

In addition, once the recourse has been presented, the obligation to answer (cf. c. 57) is born for the superior. He must either refuse it, giving reasons for his acceptance (cf. c. 51), or he must resolve it, likewise giving the reasons for its basis once it has been admitted (cf. RGCR, 136 § 3). Canon 57 established as a rule the time limit of three months for the resolution, although the special norms that regulate the material of what is being treated could establish other different time limits. For the rest, once the recourse has been accepted, the superior might, if necessary, communicate to the parties that the time limit for the resolution of the recourse —because of its complexity or for other reasons, which must be specified— will be prolonged for a determined time (cf. RGCR, 136 § 2)

Up to this point, these norms are the only general norms or procedures for the resolution of recourses accepted within the *CIC*. Clearly, they are incomplete. For example, there are other norms for recourse to the dicasteries of the Roman Curia.[16]

16. Cf. RGCR, 134–138; C. GULLO, "Il ricorso gerarchico: procedura e decisione," in *La giustizia amministrativa nella Chiesa*, cit., pp. 85–96.

1738 **Recurrens semper ius habet advocatum vel procuratorem adhibendi, vitatis inutilibus moris; immo vero patronus ex officio constituatur, si recurrens patrono careat et Superior id necessarium censeat; semper tamen potest Superior iubere ut recurrens ipse compareat ut interrogetur.**

The person having recourse always has the right to the services of an advocate or procurator, but is to avoid futile delays. Indeed, an advocate is to be appointed *ex officio* if the person does not have one and the Superior considers it necessary. The Superior, however, can always order that the one having recourse appear in person to answer questions.

SOURCES: —

CROSS REFERENCES: cc. 1481–1490

COMMENTARY

Jorge Miras

1. *Right of the one making recourse to the services of an advocate or procurator*

Canon 1738 accepts for administrative recourses the general rule in the canonical procedural system, according to which, save for an express prescription to the contrary, the party can personally carry out all the activity that belongs to the process (cf. c. 1481 § 1). Therefore, legal assistance is a right that belongs to the person making recourse, but it is possible for him not to use it. This guarantee of the right to legal representation indicates that the substantiation of hierarchical recourse has a properly challenging character. That means that the parties may present allegations and proofs in favor of their interests,[1] and they have to proceed in a formal context that requires a specific preparation. This is allowed since on many occasions the technical intervention of legal assistance is indispensable.

1. Cf., e.g., E. LABANDEIRA, commentary on c. 1738, in *CIC Pamplona*; J. HERRANZ, "La giustizia amministrativa nella Chiesa: dal Concilio Vaticano II al Codice del 1983," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), p. 24; M.J. ARROBA CONDE, commentary on c. 1738, in A. BENLLOCH POVEDA (Dir.), *Código de Derecho Canónico. Edición bilingüe, fuentes y comentarios de todos los cánones*, 3rd ed. (Valencia 1993); etc.

Otherwise, the norms applicable to the intervention of the patron will be the general norms (cf. cc. 1481–1490), and they will have to consider the specific norms established for the performance before the dicasteries of the Roman Curia (PB, 183).[2]

In addition to this right of the person making recourse, the duty and the capacity of the hierarchical superior who has to resolve the recourse are regulated here.

The superior has the duty to name a patron or advocate for the person making recourse if he considers it necessary and the one making recourse has not done so. This is a decision left to the judgment of the superior who will have to decide if the absence of a patron can produce a notable disadvantage to the person making recourse because he appears incapable of personally defending his interests in an adequate way. If this is so, the superior must designate a patron *ex officio*. On the other hand, he does not have to do this if he does not judge that it is necessary.

Moreover, even in those cases in which the person making recourse is represented by a patron designated by him or *ex officio*, the superior "can always" cite him to personally appear and be interrogated. In addition, in this case the opportunity or the necessity of ordering the personal appearance of the interested party still depends upon the judgment of the superior.

2. *The phrase "vitatis inutilibus moris"*

In administrative recourse, the abbreviation of the situation of the pending conflict is a value that is specially sought after. This is manifested, for example, in the brevity of the time-limits (see commentary on c. 1737: n. II, 1), or in the setting up of a shorter time limit than the general one for the administrative silence that precedes the *supplicatio* (see commentary on c. 1735).

Here, one notices once again that the interest that the person making recourse "always" has is now declared together with the expression "vitatis inutilibus moris." This phrase is added to the declaration of the right to use the services of an advocate or procurator. The person making recourse "always" has the right to have one. The expression appears from the very first of the *schemata De procedura administrativa*. In those directives, another similar form referring to the intervention of an expert or a patron (or advocate) in the process of forming an administrative act makes its appearance. However, this was not accepted into the *CIC*. Such

2. Cf. also, regarding the advocates, JOHN PAUL II, m.p. *Iusti Iudicis*, June 28, 1988, in *AAS* 80 (1988), pp. 1285ff, developed by Secr. St., *Ordinatio*, December 15, 1990, in *AAS* 82 (1990), pp. 1630–1634.

a clause was inserted to explain the content of those *schemata* and to answer the observations made for them.[3] This incidental clause cannot be interpreted as a restrictive formula for the right to learned assistance, which is *always* given in the recourse, but simply as an exhortation to avoid unnecessary delays, in line with the principle of promptness that seems to dominate the procedure of administrative recourse. Therefore, if the one making recourse thinks that he must avail himself of an advocate or procurator, the superior who is resolving the recourse *cannot be opposed to this*. At most, he will be able to direct and control the activity, ensuring that unnecessary delays are avoided, but always without harming the appellant's defense.

3. *Intervention of the advocate on the part of the author of the act*

Among the exceptions which c. 1481 imposes on the general rule that personal parties can act in a contentious trial are the cases in which there enters into play the public welfare. In these exceptions, the official designation of a defender for the party who does not have one is always obligatory.

In the recourse against an administrative act, the public welfare is always in play, either actually or potentially. The reason is that this objective must prevail over every legitimate intervention by the ecclesiastical authority. However, the intervention by an advocate or procurator acting in support of the author of the act being challenged is not imposed here. This is probably done for two reasons: (1) because it is supposed that the author of the administrative act has the capacity to protect the small area of the public welfare that is affected by himself (which is "his interest" in these cases) and (2) because the superior who resolves the recourse also has the duty, *ex officio* to look after those same interests, but in a position hierarchically superior (see commentary on c. 1739). Therefore, the non-intervention of an advocate or procurator on the part of the authority whose act is being challenged does not for that reason mean putting the public welfare in danger. Nevertheless, nothing keeps the author of the challenged act from being represented by an advocate or procurator,[4] if he thinks it appropriate.

3. Cf. *Comm.* 2 (1970), pp. 192–194; 5 (1973), p. 238.
4. Cf. E. LABANDEIRA, commentary on c. 1738, in *CIC Pamplona*.

1739 **Superiori, qui de recursu videt, licet, prout casus ferat, non solum decretum confirmare vel irritum declarare, sed etiam rescindere, revocare, vel si id Superiori magis expedire videatur, emendare, subrogare, ei obrogare.**

Insofar as the case demands, it is lawful for the Superior who must decide the recourse, not only to confirm the decree or declare that it is invalid, but also to rescind or revoke it or, if it seems to the Superior to be more expedient, to amend it, to substitute for it, or to obrogate it.

SOURCES: —

CROSS REFERENCES: cc. 10, 35, 51, 124, 1734, 1737

COMMENTARY

Jorge Miras

1. *Position of the superior in hierarchical recourse*

a) *The superior as competent administrative authority*

The enumeration of the superior's faculties regarding the resolution, considered in their intimate connection with the breadth allowed for the motivation of the recourse (see commentary on c. 1737: n. II, 3), confirms the option of the Code that hierarchical recourse is true administrative recourse. As a matter of fact, in the *animadversiones previae* to the *Schema De procedura administrative* which was sent to the bishops' conferences and the dicasteries of the Roman Curia on April 20, 1972, it was explained that "the hierarchical superior, discerning the recourse, ordinarily can not only confirm the act or declare it invalid, but also can reform it, using the same powers which the author had. The administrative tribunal however can only confirm it or declare it invalid, while the authors themselves of the decree are given the faculty and duty, if the case calls for it, of producing a new decree."[1]

In securing a resolution, the superior is not limited by the restrictions that affect the judge in the contentious-administrative recourse, which can be admitted only because of reasons of legitimacy (cf. c. 1445

1. Cf. *Comm.* 4 (1972), p. 38; cf. also *Comm.* 2 (1970), p. 193.

§ 2; *PB* 123).[2] This is because the proper task of the judge is not to make decisions of governance, but simply to judge if a determined means adopted by the administrative authority is in accord with the canonical system, and to impose his sentence upon the parties in conflict. In contrast, the hierarchical superior is an administrative authority, and resolves the recourse *through administrating*, governing *in actu* about the same matter that is the object of the decision of the author of the challenged act, which has passed from his competence. His functions regarding the question are the same as those the author of the act had, but in a hierarchically superior grade.[3]

Consequently, the superior does not have to limit himself to verifying the legitimacy of the administrative act being challenged. However, he can —if he considers it suitable— retract the matter and make a new decision. This action is found among equally legitimate possibilities for a solution based on his own authority and in the knowledge acquired during the substantiation of the recourse. In that respect, the literal tone of the canon is significant: "it is lawful for the superior ... depending on the case, not only to confirm the decree but also to declare it invalid" —up to here, it could be understood that we are moving in the terrain of legitimacy— "but also ... if this seems to suit the superior more ..." In this drafting, one must keep in mind legal considerations and requirements for validity, as well as the possibility of resolving the recourse abiding by the reasons of suitability, convenience, good administration, etc.

The interpretation that the *Regolamento generale della Curia Romana* gives to this norm confirms this idea, since it establishes that the dicasteries, in resolving recourses, examine them both for legitimacy and for "merit" (art. 136 § 1).

b) *Concept of "expediency"*

However, one must note that a decision adopted for reasons of expediency is not the same as a decision that is not reasoned. Therefore, a recourse grounded in reasons of expediency is not recourse that is without reason. In this respect, it has been written, "if we wish to take expediency as a reason to challenge the act, we must give it an objective sense. In principle, it can be said that that act is expedient which is adequate to reach the social purpose that one expects of it. In contrast, inexpedient describes the act that is lacking in that potentiality. However, for that expediency or inexpediency to be taken into consideration by the law, it is not sufficient that the act has failed, that is to say, that it has been useless

2. Cf., regarding the sense of legitimacy in the contentious-administrative process, J. MIRAS, "El contencioso-administrativo canónico en la Constitución Apostólica 'Pastor Bonus,'" in *Ius Canonicum* 60 (1990), pp. 409–422.

3. Cf., for other consequences of that conception, above all regarding the possibility of "reformatio in peius," E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 449.

or harmful. It is also necessary that at the moment in which the so-called non-juridic law was broken, it would emanate from a good, scientific, technical, etc.administration of the act. Expediency operates within the sphere of discretion and ends up limiting the freedom of the administration. When the ordinance grants discretional power, there is a concern that its exercise would be controlled relative to certain objectives."[4]

Therefore, the concept of "expediency" is not synonymous with arbitrariness, caprice or lack of reason. Above all, it presupposes legitimacy. Between strict legality and illegality there is a narrow area —yet more or less broad, according to the case— in which discretion comes into play. This is not a mere opening for the capricious exercise of authority, but for the *possibility of choosing among equally legitimate means* for a concrete case. The decision that is adopted in each case will be based upon some determined reason, criteria, appraisal, etc.

Placed before the discretion of the law, the criteria of expediency, convenience, good government, good administration, efficacy, etc., are not purely imaginative or subjective. For that purpose, the canon supplies ample powers that are conceded to the superior for an exercise *prout casus ferat*, or for a decision that *magis expedire videatur*. In this area, criteria enter that do not take the form of juridical mandates, but contribute to determining the extent to which the discretional means of the authority must go, what values or preferences must be present, etc.[5] Many times one will treat matters of pastoral guidance or encouragement. At other times, one will have to refer to criteria taken from science, art or the economy. The lack of deliberation for that type of criteria does not make a discretional act strictly illegitimate, but it can make it unsuitable, and, for that reason, capable of being challenged.

2. *Resolution of the recourse*

Hierarchical recourse is resolved by means of a special decree of the competent superior, given in writing, which must make known the reasons upon which it is based (c. 51). Insofar as its content is concerned, the decision can range from a total confirmation of the challenged act to a total substitution with a contrary act.

a) *Confirmation of the challenged act*

Suppose that the superior at least considers that the decision contained in the act being challenged is legitimate, since the legitimacy is in every case a necessary requirement —although it is not always sufficient

4. E. LABANDEIRA, "Il ricorso gerarchico canonico: 'petitum' e 'causa petendi,'" in *La giustizia amministrativa nella Chiesa*, cit., pp. 80–81 (Spanish vers. in idem, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1993), pp. 506–507).

5. For some examples, cf. ibid.

or decisive— for the confirmation of the act. This decision implies the rejection of all the petitions of the one making recourse. The substance of the administrative act that has been challenged is put into the same terms in which it was issued.

b) *Declaration of nullity*

The second possibility of a decision that the norm contemplates is to declare the challenged act null (*irritum declarare*). In some cases, the administrative act is null *ipso iure* for an absolute lack of power of competence on the part of the author (cf. c. 35), for the lack of some essential element, for the absence of one of the requirements established by the law for the validity of that type of act (cf. c. 124 § 1), or because of the presence of some vice of procedure expressly sanctioned with nullity (cf. c. 10). But, that nullity does not automatically work, since administrative acts enjoy a presumption of legitimacy that only yields proof to the contrary, in addition to the presumption of validity that holds for every apparent juridic act (cf. c. 124 § 2). Therefore, supposedly null acts that affect the external forum —the norms refer only to those acts about hierarchical recourse: cf. c. 1732— bind their recipients until a declaration of nullity takes place.

If this comes to pass, since the effects —juridical and *material*— produced up to that moment depended upon an absolutely invalid act, the declaration of nullity will also have efficacy from the date of the issuance of the act the nullity of which is declared as far as possible (*ex tunc*). In these cases, the superior will also have to consider the question of possible injuries, which will have to be compensated in accordance with c. 128. The prudent foresight of this eventuality can be one of the causes that would recommend suspending the execution of the administrative act (cf. cc. 1734 § 1, 1736 and 1737 § 3).

c) *Rescission*

The challenged act may also appear to be contaminated by some vice which, although it does not imply its absolute nullity, or its nullity *ipso iure*, could give cause for its being annulled at the insistence of the interested party. In canon law, this is traditionally called rescission[6] (cf., for example, cc. 125 § 2, 126, 1451 § 2). Here, one is dealing with situations *capable of being annulled*. In these cases, as long as the annulment is not called for nor obtained, the act continues to be efficacious (cf., for example, cc. 149 § 2, 166 § 2).

In these cases, the decision of the superior is not merely declarative (the vice would not be sufficient in itself to annul the act, or of not mediating in that decision), but *constitutive* (causing the nullity), since the

6. On the capacity of canon law to be rescinded, cf. E. LABANDEIRA, *Tratado...*, cit., pp. 399–401.

annulment will produce effects *ex nunc*, not automatically from the moment of the issuance of the annulled act.

Justice will demand, in a hypothesis of this type, the combining of the possible retroactivity adequately —total or partial— of the effects of the annulment with the legitimacy of the situations which would have been born under the protection of the act which was efficacious up until that moment, but which can be annulled.

d) *Revocation*

Revocation is the normal way for the cessation of administrative acts (c. 47; cf. c. 58 § 1 for the decrees; c. 79 for the rescripts which grant privileges; and c. 93 for those which grant dispensations). It consists in the issuance of a decree that leaves the former act without effect, with the need to establish in its place another act referring to the matter that has been affected.

The revoked act does not thereby have any errors of nullity, or other defects that make it able to be annulled. In those cases, the adequate means would be either the declaration of nullity or the declaration of the rescission. In these cases, one is dealing with an act which could still exist, but which the superior revokes because he thinks that it is unnecessary or counterproductive in some way. Administrative *expediency* does not have the perfectly defined parameters of legitimacy, but it also does not constitute an area of arbitrary or casual willfulness in the exercise of authority. Every administrative act must answer to some criteria, either to an evaluation of the circumstances, or to a judgment about the common good and the particular good in the case. These are the matters that influence the authority to make that decision and not another. The same can be said of the act through which it is decided to revoke a previous administrative act.

e) *Amendment or correction*

Correction is given when the superior considers that he has to keep the challenged act partially, but with some amended points. The aspects leading to the purpose for the amendment could be material errors, collateral circumstances that the superior does not consider suitable, some determined time limits established in the challenged act or the calculation of age, etc. However, the corrected act retains substantially the same content of the challenged act.

Correction can be carried out to satisfy the one making recourse. In fact, when he presents the *supplicatio*, one request that the person making recourse can make is for the amendment of the act (cf. c. 1734). Correction also can be carried out as a way of perfecting an act that the superior considers substantially correct but not proper or possible to confirm *sic et simpliciter* in its original draft.

Finally, it must be noted that correction is distinguished in the *CIC* as different both from *sanation* from the errors of nullity or those elements which make the act rescindable (cf., for the judicial sentences, cc. 1616, 1619 and 1622), and from convalidation, which would not be a mere amendment.

f) *Substitution*

The last of the decisions foreseen in this canon is the substitution of the administrative act by another. This is not the same as revocation, because revocation does not have for its objective the establishment of a new situation, although it leaves the previous act without effect. On the other hand, substitution occurs when, in place of the challenged act, another is enacted, with different content. Here, one is not dealing with a simple correction or amendment, because one cannot speak of substitution if the new act substantially maintains the previous one.

Substitution is properly given when one cannot perceive a substantial identity with the challenged act. This possibility appears in the text of the canon under two titles, which, if they are not redundant, could be referred to as two kinds of substitution:

— *subrogation* is the substitution of the challenged act with another distinct one (the Code uses this word to refer to the substitution of persons: cf. cc. 1425 § 5, 1624);

— *obrogation is* the substitution of the challenged act by another that is not simply distinct, but contrary, such as one deduces from the use of that same verb which c. 53 uses. Such could be the adequate resolution, for example, in cases in which the superior considers that the challenged act harms a true and proper right and thinks that the revocation of the harmful act is not sufficient. However, he considers it advisable to point out the recognition of that violated right by means of an administrative act that expressly protects it.

3. *The question of reparation of damages*

To conclude, it is advisable to consider that, except in the case of confirmation, the superior will have to keep in mind the possible responsibility for damages (c. 128), which c. 57 declares are expressly applicable in the matter of administrative acts. *Pastor Bonus* has established in article 123 a method for a jurisdictional complaint made at the request of the interested party concerning that possible responsibility of the administration. However, in the hierarchical procedure, it must be one of the matters that the superior officially examines, even when the interested party does not include it in the recourse among his *petita*. For practical effects, the one making recourse will see himself benefited if, when he is preparing the recourse, he has already included among his petitions the one relative

to the eventual indemnification of damages without waiting for the intervention of the contentious-administrative controversy. The reason is that he can at least have at his disposal two pronouncements about the question. The *CCEO*, later than the *CIC* in its definitive drafting, explicitly contemplates that among the requests of the hierarchical recourse, there is the indemnification of damages (c. 1000 § 3). It also establishes the criterion to indicate what authorities incur in responsibility and in which measure, in the case of a challenged act (c. 1005). These points are absent in the *CIC* and will have to be integrated at least jurisprudentially.