Canonical Administrative Act: Essential Elements and Validity

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Abstract

This essay examined the nature, essential elements, criteria for the validity of administrative act, and recourse against administrative act, within the framework of canon law A canonical administrative act is a juridical act issued by an executive ecclesiastical authority through which a provision is made for individual cases. It refers to a wide range of activities in the application of law to particular situation, resolution of controversy or provision made for common good. Through a doctrinal and jurisprudential lens, the study draws on canonical sources to elucidate how the Church ensures both juridical certainty and pastoral equity. The paper ultimately argued that the structural integrity and legitimacy of administrative acts are not only legal necessities but also expressions of the Church's commitment to justice, order, and pastoral care within its hierarchical governance. The conclusion offers insights into current challenges and potential developments in the interpretation and application of administrative acts in canonical practice. The methodology adopted in the study is doctrinal while the approach is expository – analytical.

Key Words: Administration, Act, governance, validity, common good, recourse.

1. Introduction

The activity of ecclesiastical governance enjoys wide space of discretionality, which refers to the freedom of choice in adopting acts and making provision for the good of ecclesial community; but at the same time it is subject to the principle of legality. The administrative canonical norms serve as limit in the exercise of executive authority to curb any form of arbitrariness in governance. The act of one in authority contrary to the prescriptions of law on formation of acts attract the punishment of nullity. Church administrators are obliged to observed rules and procedures on juridical acts of governance.

Administrative act which refers to a decision or directive issued by competent Church authority that applied to particular persons or situations, as distinct from legislative or judicial acts; is of great importance as a fundamental means through which ecclesiastical authority governs the faithful and ensures the orderly functioning of the Church. The fulfilment of specific essential elements and adherence to the standards of validity established in the Church's legal framework is indispensable for the act to be legally effective and morally binding. This write up explored the nature of canonical administrative acts, identified their essential elements, and examines the criteria that determine their validity within the ecclesiastical legal system. The question of hierarchical recourse against administrative act was also examined.

2. Clarification of Key Concepts

2.1 The Concept of Administrative Act and Administrative Power

There is no explicit definition of administrative act or power in the 1983 Code; rather, the legislator gives rule on its interpretation, limits and modality of carrying it out. The expression administrative act is not found in the former 1917 Code because then, it was not clear from doctrinal point of view how to distinguish in the Church's juridical order the three powers: legislative, judicial and administrative. This distinction is done clearly by the 1983 Code in canon 135 which indicates administrative power with the term executive power. With that, it is

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able to elaborate in a perfect way norms on administrative acts.[1]Canon 135, § 1 incorporates into the Code the contemporary tripartite division of governmental authority as legislative, executive, and judicial. Within the tripartite division of governance, administrative activity is a function of the executive authority. The administrative function encompasses a wide range of activity in the application of law to particular situations.[2]

Administrative power according to F. J. Urrutia is "that aspect of the power of government which, within the limits of the law, promotes the public good by executing the laws and to some extent interpreting them, if necessary, by supplying for the law and completing it through various decrees and dispositions."[3] In a general sense, administrative power can be understood simply as the exercise of the power of governance in which a controversy is settled or justice is assured without the use of judicial apparatus.[4] Administrative act can also be described as a single unilateral act of executive authority in the exercise of public power.[5]

The issue of administrative act is treated under Book 1, title IV, canons 35-93, in the section on general norms which regulate the disciplinary action of the Church legislation. In contrast to doctrinal principles, disciplinary laws explain and urge the spiritual good of the faithful. Such laws include prescriptions on the reception of sacraments, the observance of feast days and days of penance, and the celebration of the sacrament of matrimony. Administrative, as distinguished from legislative and judicial, power is concerned with the actual execution of the law, or its fulfilment. All three forms, however, are jurisdictional in nature. The chief function of the executor is to promote, facilitate, or even urge the observance of the law.[6]

In addition to the general norms on singular administrative acts treated in Book I of the 1983 Code, there are also spread out in other parts of the Code norms on different specific singular administrative acts, for instance on the loss of clerical state (cc. 290-293), appointment of a parish priest (cc. 520-525), nomination of a chaplain of a religious institute (can. 567, § 1), admission to the novitiate (cc.684-685), abandoning of religious institute (cc. 686-693), dismissal of religious (cc. 694-704), application of ecclesiastical penalties (cc. 1341-1353), the removal of parish priests (cc. 1740-1747), transfer of parish priests (cc.1748-1752).

Not every act given by the executive authority is an administrative act, since there are acts of the executive authority that has normative character containing prescription of general character, that is, general norms which is in a low level to law. The general norms given by executive authority have their specific characteristics, hence, the laws on administrative acts are not applicable to them.[7] The private act of a person who exercises public authority does not fall under administrative acts. For instance, will or donation of his personal goods. In administrative act, the

[1] Cf. Z. Crocholewski, "Atti e Ricorsi Amministrativi," in AA.VV., *Il Nuovo Codice di Diritto Canonico*: *Novita, motivazione e significato, (*Atti della Settimana di Studio, 26 – 30 April 1983), Libreria Editrice, Pontifical Lateran Uniersity, Rome 1983,507.

[2]M. R., Moodie, "The Administrator and Law: Authority and its Exercise in the Code," in the *Jurist* 46(1986), 46.

[3] F.F., Urrutia, "La potestà amministrativa secondo il diritto canonico," in *De Iustitia Administrativa in Ecclesia: Studia et Documenta Iuris Canonici,* Moderante Pio Fidele (Rome: Catholic Book Agency, 1984), 97-98." The translation is by T.J. Green, *The Code of Canon Law: A Text and Commentary,* 1029.

[4] D. I. Fulton, *Administrative Removal of Diocesan Priests from the Office of Parochus: Causes and Procedure,* Dissertation, Pontifical Gregorian University, Rome 1996, 14.

[5] Cf. J. Miras et al., eds., *Compedio di Diritto amministrativo canonico,* Pontificia Università di Santa Croce, Facoltà di Diritto Canonico, EDISC, Roma 2007, 150.

[6] J. E. Risk, Commentary in *The Code of Canon Law: A Text and Commentary,* J.A. CORIDEN, et. al., ends,Paulist Press, New York/Mahwah 1985, 48.

[7] Cf. J. Miras, et al (eds),*Compendio di diritto amministrativo canonico,* op.cit., 152-153.

authority acts in the exercise of his functions with public power. Not every public juridical act coming from any authority is an administrative act. Administrative act is the one given by an executive authority. This excludes any act given by virtue of legislative or judicial authority.[8]

3. The Nature and Subject of Power in the Church

The power of governance or power of jurisdiction "belongs to the Church by divine institution" and those in sacred orders are capable of its exercise according to the provisions of law (c. 129, 1). Analysing the question of power from theological point of view, Mörsdorf affirms that there is one power in the Church transmitted by Christ through the sacred power.[9] A rigorous distinction of powers as in juridical order of modern states is not acceptable in canon law. There is an insurmountable subjective unity of power in the Church which is re-affirmed clearly in the Magisterium of the Second Vatican Council.[10] The division of the power of jurisdiction in legislative, judicial and executive in the 1983 code does not eliminate the principle of unity of the power of governance or jurisdiction which in the light of the provision of canon 29, § 1 as noted before is of divine origin, to be exercised by those who have received sacred orders.

Based on the nature of the Church and nature of power in it, the legislative, judicial and executive powers belong to the Bishops who are thus "principal administrators, legislators and judges. However, they do not exercise executive or administrative power in isolation but employs other subordinate bodies as aids in Church administration.[11] These bodies possess vicarious or delegated power.[12]Ordinary authority, according to canon 131, is that which is invested in a particular office, while vicarious power is power exercised in the name of another person, titular of office. Delegated authority, on the other hand, is that which is granted personally to an individual; in other words, the individual does not receive the authority from the fact of holding a particular office but from specific act of delegation.[13]

The Code in respect of canonical tradition emphasizes the principle of distinction of functions, providing ordinarily that Bishop governs the particular Church entrusted to him through the Vicars, administrative, and judicial office of the Curia, however, the principle that he is the primary and personal titular of the power he delegates remains.

The diocesan Curia collaborates with the Bishop in directing pastoral action, caring for the diocesan administration, and also for the exercise of judicial power (can. 469). At the level of the universal Church, the Roman Curia assist the Roman Pontiff in the governance of the entire Church.

The non-clerical religious superiors, even though they do not possess power of governance, as persons heading public juridical persons approved by the competent ecclesiastical authority in view of carrying out their mission in the name of the Church and for the good of the Church, they exercise public executive authority. Hence their acts as authorities of their institutes are

[8]Ibid.,151.

[9]Cf. K. Morsdorf, *Munus regendi et potestas iurisdictionis,* in *Act a Conventus Internationalis canonistarum,* 20-25 maggio 1968, Città del Vaticano, 1970, 119 ff.

[10] Cf. A.Intergugliemi, *I decreti singolari nell'esercizio della potestà amministrativa della Chiesa Particolare*, Doctoral Dissertation, Rome 2008, 120. See P.A.Bonnet, *Una questione ancora aperta: l'origine del potere gerarchica nella Chiesa,* in *Ephemerides IurisCanonici*38 91982), 62-121.

[11]Cf. Can. 391.

[12] Cf. 1983 Code of Canon Law, Cann. 134 § 3 and 479 §§ 1-2.

[13]M. R.Moodie, "The Administrator and the Law: Exercise of Authority in the Code," in the Jurist 46 (1986), 60.

administrative acts whose exercise is subject to the regulations of the universal law on administrative acts.[14]

The ecclesiastical authority in the Church include all those who exercise administrative power either directly or by delegation; all those who, together with the Pope (for the universal Church) and the Bishops (for the diocesan Church), have the mission of organizing and directing the life of the Church, and the corresponding power to take specific decisions in order to achieve that end. Administrative activity in canonical order can be understood as that activity by which the public organisms of the Church adopt concrete measures to attain the good of the faithful, with a view to their eternal salvation.[15]

4. Divisions of Administrative Act

In canonical legislation, administrative act is of two natures: 1) general administrative acts, which comprises general executory decrees (cann. 31 -33), instruction (can. 34), statutes (can. 94) and ordinances, and 2) singular administrative acts which include: decree, precept and rescript.

4.1 General Administrative Act

There are acts of administrative agencies that share in the quality of universality, and abstraction which characterizes laws. For instance, general executory decrees and instruction. The former gives supplementary norms for the application of law or urge more faithful observance of law (can. 31); whereas the later which is directed to subordinate officials explains more the prescription of law, giving norms for its application (can. 34). These two acts resemble legislative activity.[16]

The general decrees as prescriptions which is given for community capable of receiving law, by competent legislator are in the true sense law and are guided by the prescription on law. General executory decrees are issued by one who possess executive power within the limit of their competency. General decree resembles laws given that they express general concerns that is applicable to a whole community or categories of individuals. The diocesan documents known as "guidelines" and "policies," fall under general executory decrees.

4.2 Singular Administrative Act

4.2.1. Decree

In the Code, the singular decree is defined as "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 does not presuppose that a petition has been made by anyone."[17] In other words, it is a unilateral decision, affecting a specific person or persons, taken by the competent administrative authority, in fulfilment of the responsibility given to it by law to take practical measures to achieve the public good, respecting the limits and requirements which the law imposes.[18]

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[14]Cf. 1983 Code of Canon Law, can. 617.

[15] P. Hayward, *Administrative Justice According to the Apostolic Constitution "Pastor Bonus",* Dissertation, Pontifical University, Santa Croce, Roma 1993, 39.

[16]Cf. M. R. Moodie, "The Administrator and Law: Authority and its Exercise in the Code," in the *Jurist* 46(1986), 47.

[17] 1983 Code of Canon Law, can. 48.

[18] P. Hayward, *Administrative Justice according to the Apostolic Constitution "Pastor Bonus",* 157.

4.2.2 Precept

One particular form which the decree can take is that of the singular precept,[19] which according to the provision of canon 49 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 to urge the observance of a law."

Since precept is a provision which limits the exercise of rights or imposes an obligation to do something, the Code demands the observance of some procedure for the protection of the persons to whom the act is directed. One of the ways to do this is to gather proofs, consultation, and to emanate the act in written form expressing the motivation for the act. Based on the motivation attached to a decision, a person aggrieved by the decision can make recourse against it.[20]

Precept can be simple or penal. It can be a command to do or not to do something or that impose penalty in the case of non-observance. In this hypothesis you talk of penal precept.[21] As an act that impose penalty, it has to be interpreted strictly as established in canon 36, § 1.

The executive authority apart from urging for the observance of law through a decree, can within the person's competence impose obligation not established by law. The provision does not for this reason possesses legislative nature or violates the principle of legality.

A singular precept, which was not imposed by a lawful document, ceases on the expiry of the authority of the person who issued it(can. 58, § 2). This points to the fact that there can be oral precept not subject to written form, which is the general rule for all decrees. It cannot be said that law encourages this type of precept for the fact that it has these two limitations as regards its efficacy: the impossibility to ask for its fulfilment, and its cessation when the right of the person who emanated it becomes less. When the power of the person who emanated the precept orally ceases, the basis of juridic certainty of the situation to which the act refers will be less, and the legislator prefers not to prolong the existence of juridical situation whose foundation is uncertain establishing the cessation of the precept.

4.2.3. Rescript

A rescript according to the provision of can. 59, § 1 is an administrative act issued in writing by a competent authority, through which a privilege, dispensation or other favour is granted at someone's request.

One fundamental difference between decree and rescript lies in the fact that while in the former the initiative comes from the administrative authority; the latter comes as a response to a request by someone. Both differ as regards their content. The content of a rescript, namely the granting of a "privilege, dispensation or other favour, also differs from that of decree (which contains a "decision" or "provision"): and whereas a decree is based upon factors assessed by the administrative authority with a view to the common good, in the case of a rescript the reasons are principally those provided by the person making the request, and are of immediate benefit to individual persons rather than to the generality of the faithful (although the two ends are not contradictory).

In canon law, there are two defects that render a rescript invalid: subreption (withholding of the truth), and obreption (making of false statement). Subreption nullifies a rescript if the request fails to "express that which according to canonical law, style and practise, must for validity be

[19] Ibid.
[20] G. Lobina, "La motivazione dei decreti amministrativi," in *Monitor Ecclesiasticus,* 108 (1983), 281.
[21] Can. 1314 ff.

expressed." Obreption renders a rescript invalid, in the case where none of the reasons presented is true.[22]

The legislator demands that "in rescript of which there is no executor, the motivating reason must be true at the time the rescript is issued; and in others, at the time of execution (can. 63, § 3).

The above canonical prescription points to the importance of motivating reason for the grant of request, and verification on the part of authority for the veracity of the reason presented before granting the request. Defects of obreption (withholding of the truth) and subreption (making of false statement) are defects in the sincerity of the petition in describing the reasons that determine or facilitate the granting of the request.[23]

The moment of the effect of rescript defers according to whether it is one that has executor or not. A rescript in which there is no executor, has effect from the moment the document was issued; the others have effect from the moment of execution (can. 62).

5. Essential Elements of Administrative Act

Based on the prescriptions of law, any recognized juridic activity in the Church "must include four characteristics: (1) an individual who is capable of a human act, (2) the legal recognition of the individual as qualified to act, (3) the defining characteristics of the intended activity, and (4) the formalities and procedural steps required by law for the activity to be legally recognized.[24]Put differently, there are four major elements in administrative act: its author or competent authority, content, form, and objective. We shall examine these elements in the subsequent pages.

5.1 Author

The author or subject of administrative act is the administrator who emanates the act. From the provisions of law (cc. 48, 59), the subject or the author should be one to whom authority was conferred legally, who has executive authority, and is competent concerning the case in question.

In the light of canon 131, ordinary power is that connected to an office, so that the person to whom the office was conferred,[25] receives also the power attached to the office. Delegated power instead as pointed out before is attributed to the subject and is not received through office. The subject of administrative act, is the executive authority who possesses ordinary or delegated power.

The possession of executive power is not enough to be subject of administrative act, what is required is not just executive authority but competent executive authority. The competence is determined in the concrete case according to the criteria established by law. The material, type of act involved (material competence), place (territorial competence), persons concerned (personal competence) are to be considered. To be noted too is the intervention of hierarchical executive authority (functional competence),[26]through reservation (can. 479, §1).[27]

5.2 Content

The content or object of administrative act implies what is decided through the administrative act and all that accompanies it. The content of administrative act should contain all the essential

[22]Cf. Can. 63, §§ 1, 2.
[23] Commentary to canon 63 in Code of Canon Law annotated, Wilson and Lafleur Limitée Montréal 1993, 112.
[24]M. R. Moodie, "THE Administrator and Law: Authority and its Exercise in the Code," in the *Jurist* 46(1986), 54
[25] Can. 145.
[26] Cf. Can. 139.
[27] J. Miras, et al., (eds) *Compendio di dirittoamministrativocanonico*, op. cit., 154-155.

elements without which, the provision does not exist. The essential content will be determined in each case by the nature of the provision made.

The act that concerns license for the publication of book (can. 803, § 3) should not only express that the examination of the censure is favourable (*nihilobstat*), but also should express the granting of licence for the publication (*imprimatur*) and the name of the competent ordinary.

Apart from the essential element which should appear in the administrative act, there are also other elements that are not necessarily to be indicated given that they are implicit in the content of the act. It is not necessary that the act of delegation indicate all that the person will do, because it is taken for granted that the faculty to do it is included in the power delegated to the person (can. 138).

The content of administrative act should be possible, licit and specific. When the act is absolutely undetermined, it makes the act ineffective. The provision of the administrative act should be possible from material and juridic point of view, otherwise it will be invalid and then will not oblige the persons concerned, because no one is obliged to do what is impossible (*ad impossibilia nemo tenetur*). However, such impossibility has to be proved.

It has to be licit from moral and juridic perspectives. Illicit, immoral, and illegal content always vitiates the act making it illegitimate. In addition, it can produce consequences for its author that is proportionate to the type of norms which he has violated.

Administrative act, be it single decree or rescript serves as a formal instrument for the authority to make provision, decision, or different concessions which are many a time accompanied by complementary indication on the specific way for their juridic efficacy in the concrete case. For instance, an appointment is done through singular decree which can indicate the date from which the appointment will take off and when it will end, or even the condition for it to take effect.

5. 3 Objective

Objective refers to the reason for the administrative act. The activity of ecclesiastical administration is justified exclusively in reference to public good to which it is oriented. The executive power from which comes administrative act, is a functional power that is not part of private juridical patrimony of its titular, but is determined in its exercise by public interest.

Sometimes, the norms that are applicable to determine a case indicate explicitly public good to which the administrative act must aim at using a precise formula. That is the case in canon 301, § 1 which indicates the goal that justifies the erection of public association through singular decree: to transmit Christian doctrine in the name of the Church, to promote public cult, or other goals reserved to their nature by ecclesiastical authority. In some other cases, imprecise expression, imprecise juridic concepts such as common good, necessity or utility, or good of the Church etc. are used. In these cases, these references are to be intended relative to the aspect of public good which concrete administrative act is capable to pursue. Even for the cases where norms make no explicit reference to the goal to which a specific activity is oriented. Here, it is to be intended as implicit the objective gearing of the act towards the attainment of public good.

From the foregoing, it could be said that the cause is the objective goal established explicitly or implicitly by juridical order for a determined juridical act. Juridical act cannot be placed arbitrarily but should always be ordered towards their objective goal. For this motive, authors retain that the cause of administrative act is constituted by objective presupposition of fact and

law established by law for each of them in a way that their presence is the condition for the act to be placed legitimately.

5.4 Form

The legislator requires the use of written form for an administrative act that deals with external forum: "An administrative act which deals with the external forum is to be set forth in writing: likewise, if the administrative act is to be issued in commissorial form, its act of execution is to be in writing."[28] This norm is reproduced in canons 51 and 59, § 1 for singular decree and rescript. Written form figures as formal requirement for the emission of all the acts that regards external forum, that is, for the acts typical of power of governance (can. 130). This requirement is to guarantee the certainty and security of juridic situations, fixing in precise and certain way the content of the decisions of the authority.

The demand of written form is also applicable to the cases of provision of ecclesiastical office (can. 156), appointment of diocesan Bishop (can. 382), excardination and incardination of a priest to or from the diocese (267).Excluded from the general demand of written form, are the acts destined to produce effect only in the internal forum.[29]

The Code provides for the possibility for an authority to bind a person by oral precept, given vocally. According to law, such precept obliges the person as long as the authority of the person who emanated the act last (can 58, § 2).

The demand for written form in canon 37 is an obligatory requirement for administrative authority. However, the nullity of administrative acts not given in written form is not prescribed in a general way. In the light of canon 10, for a norm to be considered as invalidating, it must establish explicitly that the act is null if not given in written form, which is not the case in the prescription of canon 37. To determine the precise consequence of the omission of written form, laws guiding each administrative act are to be considered. In many cases, the Code demands written form.[30]The requirement for written form is actualized by the signature of the authority at the end of the document. With this, the decision is formalized.[31]

6. Procedure for the Formation of Administrative Act

Canons 1517- 1526 are dedicated to the procedure of emanation and execution of administrative acts, while canons 996-1006 regards the procedure for recourse against the act.

Procedure for the formation of decision by administrative authority guarantees the exercise of discretional power in respect of justice, truth, human dignity of person and equity.

The Code established procedure for the emanation of administrative act for the protection of subjective rights.[32]It prescribes that "before issuing a singular decree, an authority is to seek out the necessary information and proofs and, insofar as possible, to hear those whose rights can be injured" (can. 50).By this prescription, the legislator tries to safeguard the right of the governed to express their opinion which is an aid for better decision for the individual and common good. The Code does not provide a rigorous procedure for the formation of administrative act in respect of the principle of discretionality, which is necessary in the exercise of executive authority.

[28] Can. 37.
[29]Cf. Cann. 37, 130.
[30]See cann. 179, 186, 190, 193, 268 § 1, 312 § 2, 973.
[31] Cf. A. Intergugliemi, I decretisingolarinell'eserciziodellapotestàamministrativa, op.cit., 136.
[32]Cf. *Principia nn. 6 and 7* Document of the Synod of Bishops 1967, in *Communicationes 1, 82- 83*

There are two aspects in the process of emanating singular decree that need reconciliation: freedom in proceeding and the obligation of acting according to norms of law (***secundumiurisnormas*).**[33]It is often affirmed in doctrine that administrative function is never exercised within an order of established norms, but is based on the principle of freedom in proceeding. Hence, the intention of caring for the good of the community should be the guiding principle in the emanation of singular decree.

The common good is not a goal by itself, nor is it above the good of the single persons, even though there may be the need to limit the good of single to secure first the good of the community. Discretionality is therefore a fundamental principle of administrative activity even in canon law; it indicates freedom of choice in adopting the acts and provisions in the actualization of the goal of the ecclesial community. At the same time, the demand to avoid the possibility of arbitrary exercise of power which is favoured by the wide space of discretionality connected with the executive function is gradually being presented.[34]Substantially, the choice of means, way, and time (though not always) are free, but the executive authority is bound by the goal of the act.[35]

The person in authority is to carry out careful evaluation of all the useful elements for the decision; circumstances, possible damage to a third person; consultation of other persons and listening to the interested parties.

Listening to persons concerned before emanating an administrative act gives them the opportunity of expressing their opinions. The competent authority takes the final decision after he might have carried out an attentive evaluation of all the elements.

The Code also requires the expression of the motivation for the administrative act. "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."[36] In line with this, the general norm of law stipulates that a decree of removal from ecclesiastical office, if it is to have effect, must be made known in writing.[37]

Failure to express the reasons that form the basis of the decision taken by the administrative authority will result in the violation of law in proceeding, and will be subject to recourse. This requirement for the motivation for the decree is one of the novelties of the 1983 Code.[38]

Like a judicial sentence, an administrative decree if it is to be valid must express the motives (at least in summary form) which led to the decision; as in the case of sentence, a decree should be in writing, although this is not a requirement for validity. The expression of motives in a decree is important for two reasons: (1) it places controls on the arbitrary action of the superior, and (2) it gives the persons involved in hierarchical recourse important knowledge of the administrative act in question. For a singular decree to be enforced, it must be made known by a legitimate document according to the norm of law (can. 54, 2). A Legitimate document is an official written document as indicated in canons 37 and 51.

[33]Can. 48.

[34] A. Interguglielmi, I decreti singolari nell'esercizio della potestà amministrativa, 219 – 220.

[35]See J. Canosa, *I principi e le fasi del procedimiento amministrativo nel diritto canonico, in Ius Ecclesiae*18(2006), 522.

[36] Can. 51.

[37] Can. 193, §4: "; D.I. Fulton, *Administrative Removal of Diocesan Priests from the Office of Parochus: Causes and Procedure,* Dissertation, Pontifical Gregorian University Rome 1996, 16.

[38] Cf. G. Lobina, "La motivazione dei Decreti amministrativi," in *Monitor Ecclesiasticus,* Vol. 108(1983/III), 275.

The written decree may be given to the party who has been summoned to receive it, in which case it ought to be given in the presence of witnesses who are then to attest to the fact. It may also be communicated by sending it to the party or parties by certified mail, with a return receipt requested. It is only from the moment that the decree is made known through the authority of the one who has issued it that it has effect.[39]

Sometimes the material contained in the text of the decree is such that the party or others who have an interest in the case should not have a copy of it. In such a case, the party is to be invited to the Diocesan Bishop or his delegate, and the decree is to be read to him in the presence of a notary or two witnesses – who should sign a statement about what has transpired, which should then be attached to the decree and kept in the curial archive.[40] If the person who is to receive the decree has been summoned according to the requirements of law either to receive a copy of the decree or to hear it read, and if he fails to appear for no good reason, or if he refuses to attest to the fact that the decree was communicated to him, he is considered to have been officially notified.[41]

Execution, which is the activity of the author of the administrative act or another authority, is a public activity which is part of administrative function. The executor is one entrusted with the duty of carrying out the execution. If it is one different from the author of the act, he can receive this obligation through a formal mandate which implies delegation of power or through other types of act of commission. In these cases, there is a relationship of dependence and of trust between the author of the act and the executor.

There are different conditions attached to the role of executor depending on the type of execution. *The executor is obliged to keep to the mandate received which is the fundamental law of execution.* To act validly, he should respect the essential conditions indicated in the mandate and the substantial form of the procedure (can. 42). He can stop the execution if he observes that the act is invalid and the conditions attached to the administrative act itself have not been fulfilled (can. 41). The power of the executor is not limited to execution. He may be given the power by the author of the act to either give the act or not.

6.1 Efficacy and Validity of Administrative Act

The competent authorities are to issue decrees that make provision according to the norms of law (*secundum iuris normas*).[42] The violation of the prescription of law in the emanation of administrative act has many negative juridical consequences. On this Daniel aptly affirms: "There are in fact many consequences for illegality in the canonical order: those which are imposed by law itself – such as inexistence, invalidity and in effectivity – and those which arise through the will of persons who are aggrieved by illegal acts – either in the judicial or administrative *fora*.[43]

The perfection of an administrative act is realized when all the procedures prescribed by law for its existence are observed. That is, when there have been adequate collection and evaluation of facts, information, consultation, listening to certain persons, different views. Before this moment,

[39] Can. 54, § 1: "

[40] Can. Cf. Can. 55: "

[41] Can. 56: "; cf. D. Fulton, *Administrative Removal of Diocesan Priests from the Office of Parochus: Causes and Procedure,* Dissertation, Pontifical Gregorian University, Rome 1996, 15-16.

[42] Can. 48.

[43]W. L. Daniel, "The Principle of Legality in Canon Law," in *The Jurist*70 (2010), 85.

the act is still in the stage of formation, it is imperfect, and one cannot talk of its efficacy or validity.

The efficacy of the act is its suitability, that is, its concrete attitude to produce its effect. A perfect act may not yet be efficacious for different motives; until the moment of notification to the person interested, or the approval of a higher authority.

The validity of the act instead depends on its conformity to the norms that regulate it. When an act, in its essential constitutive elements possesses the form required by law, it is valid, hence it can produce legitimately the effects proper to it, as a formal act.

Validity and efficacy are not the same even though they are two juridical qualities that are related. A perfect and valid act may not be yet efficacious. Secondly, administrative act is presumed to be legitimate until the contrary is proven. An act that is valid as regards its external elements may be invalid for other reasons.

The validity of administrative act is a juridical quality which depends on the presence of its constitutive essential elements and on its conformity to the norms that regulate it. The non conformity of an act to a norm constitute a vice or irregularity which is called illegality, illegitimacy or illicit which when assumed certain importance provokes the effect known as invalidity.

The invalidity is punished by law in different ways: nullity, annulability, rescindibility, which depending on the type of anomaly that produces it and from its relevance, eliminate, limits or renders precarious the juridical efficacy of the act.

Nullity is the graver juridical sanction established for invalidity. This is given when an act does not have the capacity to produce its effect due to the defect of essential element or due to a vice for which law prescribed the penalty of nullity. This is produced *ipsoiure* the act is invalid in itself.

The law and sentence that declares the nullity of act are declarative, they do not create a situation but declare what has been the condition of the act, the efficacy is produced *extunc*, that is from the date of the act, eliminating the effect of the fact which it has produced.

Another sanction provided by the Code for invalidity is the rescindibility, which is the situation of the act that possess determined vice of invalidity which according to the provision of law does not prevent its efficacy unless the person concerned ask for its annulment. The decree or sentence of annulment of an act are constitutive – they produce the nullity of act in a way that its efficacy is produced *exnunc* (from the date it is emanated), it may have also retroactive character, in that case, it will affect the effect produced by the act before its annulment.

The demand of law for the motivation for administrative act is for validity. Hence lack of motivation for the act of the administrative authority renders such an act invalid. This shows the importance of expressing the reasons in fact and law which is the basis for the decision of the authority.[44]

The Code laid down conditions for the emanation of administrative acts. Some of these conditions are for the efficacy or validity of the act while some are not. As a general principle, the Code demands that administrative act or decree be given in written form, this demand for

[44] Cf. G. Lobina, "La motivazione dei decreti amministrativi", op. cit., 292.

written form even though it is not for the validity of the act in some cases, conditions directly the juridical efficacy of the act.

In canon 37, the legislator categorically affirms that, "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 made in writing." It is observed from the expression of this canon that this requirement is not for the validity. This affirmation is based on the prescription of canon 10 that, "only those laws are to be considered invalidating or incapacitating which expressly prescribe that an act is null or that a person is incapable." Again canon 51, establishes that decree is to be issued in writing.[45]

Apart from the general norms of canons 37, 51, the legislator in different places repeats expressly the necessity of written form for specific decrees, [46] indicating in some concrete cases the consequence of lack of written form.Canon 54, 2 states that for a singular decree to be enforceable, it must be made known by a lawful document in accordance with the law. Such lawful document refers to written document.

The invalidity of administrative act does not come automatically; the acts are protected by the presumption of legitimacy. Based on this fact, it is necessary that the person affected by the act makes recourse through administrative or jurisdictional way for their inefficacy to be declared.

Administrative act as a juridical act is governed not only by laws on administrative functionsbut also by the norms of law on juridic acts (can. 124-128).[47] Hence, the validity of an administrative act, requires that it is placed by one legally capable of placing the act, and that it includes those elements which essentially constitute it as well as the formalities and requisites imposed by law for the validity of the act (can. 124, § 1).

Irrespective of the presence of these elements, there are other factors which can seriously impair juridic activity.[48] For instance, A juridic act is inexistent if done by a person under force without any option. Again, an act done without knowing what one is doing through ignorance or mistaken understanding of the activity does not exist.

The limit for the exercise of executive authority is the principle of legality, whereas the limit for legislative power is the principle of rationality.[49]The principle of legality implies the submission of public powers and their activities to juridical order.[50]

"In common parlance, the word "legality" is used to refer to the extent to which a certain action conforms to the law. The central characteristic of the canonical notion of legality, is its application to those in the Church who are entrusted with the power of governance, whether legislative, executive, or judicial. It presupposes the basic relationship in the Church of titulars and subjects, those who govern and those who are governed (*Gubernantes-gubernati).* The complex of rights and obligations proper to both is at the heart of the principle of legality. In

[45] Can. 51.

[46]Cf. Cann. 156, 179 § 3, 190 § 3, 193,§4, 268 § 1.

[47]Canons 124-128 govern any type of activity accorded juridic effect, whether that activity be private or public. These norms regulate the activities of any individual whatever the individual's ecclesial status – an administrator, judge, religious, layperson, etc. M.R. Moodie "The Administrator and Law: Authority and its Exercise in the Code," in the Jurist 46(1986), 51.

[48]See cann. 125-126.

[49]Cf. A. Intergughlielmi, *I decreti singolari nell'esercizio della Potestà amministrativa della Chiesa Particolare*, Doctoral Dissertation, Pontifical Gregorian University, Rome 2008, 130.

[50] Cf. P. Moneta, "La tutela dei diritti dei fideli di fronte all'autorità amministrativa," *Fideliumiura*3 (1996).

ecclesiological terms, Christ's faithful are bound to obedience to their rightful superiors; but in the exercise of power, titulars are bound to observe the law, to respect the rights of their subjects, and to yield to the legitimate acts of the other (especially higher) authorities." [51]

The obligation of the faithful to observe the norms of divine law and merely ecclesiastical law is applicable to ecclesiastical authority as well. The legislator expects that those who have power in the Church will both observe the law for the good of their communities as prudent, and astute shepherds.[52]

Fundamentally, the principle of legality amounts to a regulation of the exercise of the power of governance by the norms of law, as well as the willing self-submission of those with the power of governance to the same norm.[53]The primary goal of the principle of legality is the protection of rights. This is emphasized strongly by the Fathers of the First Synod of Bishops as a goal of canon law and its revision. On this, the Sixth guiding principle for the revision of the Code, pertaining to the protection of the rights of Christ's faithful affirms:

> *Nevertheless, the use of this power in the Church cannot be arbitrary since this is prohibited by natural law as well as by divine positive law and by ecclesiastical law itself. The rights of each member of Christ's faithful must be acknowledged and protected: those which are contained in natural law and divine positive law, and those which organically derive from them on account of the innate social condition which they acquire and possess in the Church.*[54]

The principle of legality aims at protecting the rights of individual members of Christ's faithful from an arbitrary use of power. Stated otherwise, canon law is intended by the legislator to foster, promote and protect the rights of Christ faithful; without the submission of authorities to the norm of law, these rights could be vulnerable to harm. This does not deprive those in the position of authority, certain freedom in the exercise of power. Certain degree of discretion is required by the nature of the Church and her juridical order.[55]Discretion in the exercise of ecclesiastical power can be defined as the portion of freedom which the legislator concedes to ecclesiastical authorities for discerning the most just or appropriate way to apply the law in a particular case.[56]

Canonical juridical order like every other juridical system seeks to harmonise and equilibrates the values of justice and the juridical security. The former sees to it that the juridical situation of the subject is not changed by invalid act, while the later demand that juridical acts placed correctly in reference to their external elements remains and not be precarious.

The principle of legality applies to every jurisdictional juridic act of the canonical order: legislative norm, administrative norms, singular administrative decrees that make a decision or provision, singular precepts, rescripts in general, rescripts that grant a dispensation, rescript that grants a privileged, the oral grants of favours, other acts subject to the rules governing rescripts, definitive sentence, interlocutory decrees, and executory decrees. In placing each of these acts, titulars are summoned to reflect upon the extent to which they are limited by the norms of law,

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[51] W. L. Daniel, "The Principle of Legality in Canon Law," in *The Jurist* 70(2010) 31.
[52]Ibid., 41.
[53] E. Labandeira, *Trattato di diritto amministrativo canonico,* Italiana translation by Lucia Graziano and Luigi del Giudice, Ateneo Romano della Santa Croce, Trattati di diritto, Giuffrè editore, Milano 1994.
[54] "Principia directive," no. 6.
[55]Cf. W. L. Daniel, "The Principle of Legality in Canon Law," op.cit., 40.
[56]E. Labandeira, *Trattato di diritto amministrativo canonico,* op.cit., 181-182.

the degree of discretion given to them by the law, and specifically all the pertinent elements regarding the substance and *modus* of each of these acts.

The person in administration is personally responsible for the juridic effect of administrative activity. The legislator in canon 128 affirms that "anyone who unlawfully inflicts damage upon someone by a juridic act, or indeed by any other act placed with malice or culpability, is obliged to compensate for the damage inflicted." Following the above provision, the act of administration or any act that inflicted damage can be impugned by the person affected for the reparation of damages caused, in the case of administrative act, through hierarchical recourse.[57]

7. Recourse Against Administrative Act

The institution of administrative justice is relatively new in the legal system of the Church. Its emergence coincides with the new vision of the Church as communion and family; the dignity and the inalienable rights of the human person echoed in the Second Vatican Council. The juridic reality of communion and co-responsibility generates an ambience of participation in the ecclesial life of the Church, in the exercise of power of governance. It is in the exercise of such jurisdiction, in the issuing of administrative acts that there arise conflicts and controversies borne out of actual or perceived violation of subjective rights of the people of God.[58]

When one's right is violated by an administrative act of public authority, this right can be vindicated through hierarchical or contentious administrative recourse. For the control of the exercise of public power in the Church and protection of the faithful, canonical order provides for the existence of hierarchical, and contentious-administrative recourse to the hierarchical superior of the author of the act, and after that to the Second Section (*Sectio Altera*) of the Apostolic *Signatura*, an administrative tribunal which is the "highest and only court of appeal in the Church for the matter of administrative recourse in a case which has been decided by the competent Congregation of the Holy See." The function of the Apostolic Signatura among others is to guard against the unlawful exercise of administrative power.[59]

The term "contentious-administrative process" or recourse may refer in general to the process of seeking a remedy against a single administrative act. In canon law, this includes: (a) "remonstration," or the required preliminary petition made in writing to the author of the administrative decree (can. 1734,1); (b) the process of hierarchical recourse to the competent superior of the author of the challenged decree; and (c) final judicial review at the supreme administrative tribunal, the Apostolic *Signatura*.[60]

7.1 Subject of Administrative Hierarchical Recourse

The subject of recourse according to the prescription of law is anyone who has been injured by a decree. This is put thus by canon 1737, § 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

[57] "Every time that a right is violated, some damage is done. Whenever a right is violated, then, the injured party may seek redress for the harm done (can. 221, § 1)." M.R. Moodie, "The Administrator and Law: Authority and its Exercise in the Code," in the *Jurist* 46(1986), 54-55.

[58] Mbata, Evaristus, Administrtive Justice: Juridical Mechanism for the Resolution of Administrative Conflicts in the Church, APT Publications, Owerri, Nigeria 2012, 213.

[59] Cf. J.J. Coughlin, *Administrative Justice at the Supreme Tribunal of the Apostolic Signatura and the United States Supreme Court: A Comparative Study*, Dissertation, Pontifical Gregorian University, Rome 1994, 2.

[60] Ibid., 4.

immediately forward it to the competent hierarchical Superior." Any form of irregularity in the administrative decree is a just motive for hierarchical recourse.

Canon 1737 acknowledges the right to lodge a recourse, which is an application of the general principles on the right of the Christ's faithful to vindicate and defend the rights they enjoy in the Church before competent ecclesiastical forum stated in canon 221. Even though the canon mentions a person as the subject of recourse, the capacity to lodge recourse is not to be expressly restricted, since hierarchical recourse protects not only individual interest but also general interest and good administration. Physical and juridical persons may have standing in court. However, a group of the faithful who are not recognized as a juridical person or whose statutes have not been reviewed (c. 299, §3) does not have standing in court as such. The members of that group can lodge a recourse only as individuals, either alone or jointly.[61]

To be able to initiate an action before the *Sectio Altera* of the Apostolic *Signatura*, the plaintiff must be a physical person (cleric, religious or lay) or a juridical person (such as a parish, diocese, religious house, religious province, Curia of an institute, etc). Physical or juridical personality gives rise to a general "legal capacity" (*capacitas iuridica*), or the capacity to hold rights and duties, which in the procedural sphere takes the form of a general right to bring or defend an action; but to be able to take part in an action the plaintiff must also have *capacitas agenda* (procedural capacity). Minors and persons lacking use of reason do not as a general rule hold this capacity, and are required to be represented in the action by parents, guardians or curators; restrictions also apply to those who are barred from the administration of their goods, or who are of infirm mind. Juridical persons act by means of their lawful representatives; if, however, they do not have any such representative, or the representative is negligent, the Ordinary may act (personally or through another person) in the name of juridical persons under his jurisdiction.

Even though a plaintiff has "procedural capacity", he is still required to show that he has capacity to appear in the particular action (*legitimatio ad causam*, or *legitimation activa*). As regards *legitimatio* for actions before the *Sectio Altera*, the plaintiff is required to demonstrate some special connection between himself and the effects of the administrative act. In a Decree of 21st November 1987, the Apostolic *Signatura* declared that the plaintiff must claim to have been adversely affected by the administrative act, and must hold a "personal, direct and current interest" in having the act annulled, or in the award of damages.[62]

7. 2 Administrative Acts that One Can Recourse Against

According to the prescriptions of canon 1732, the only administrative act that one can recourse against is the singular administrative act. The act of the administration that can be impugned is the act placed by the administrator as an expression of the exercise of administrative authority which by its authoritative action affects directly another person's right.[63]

General executive decrees and instructions are not subject to challenge through the procedure for hierarchical recourse, the procedure can be used to contest not only the singular administrative decrees issued by administrative authorities in the Church but also their refusal to issue them.[64]

[61]Cf. Commentary on can. 1737, Code of Canon Law Annotated, 1073.
[62] P. Hayward, *Administrative Justice According to the Apostolic Constitution "Pastor Bonus",* Doctoral Dissertation, Athenaeum Romanum Sanctae Crucis, Roma, 1993, 129.
[63]Cf. M. R. Moodie, "The Administrator and the Law: Authority and its Exercise in the Code," Jurist, 46(1986), 58.
[64]Cf. J. P. Beal, "Hierarchical Recourse: Procedures at the Local Level", in *CLSA Proceedings* 62(2000), 94-95.

Acts of the diocesan bishop and those equivalent to them (cf. cann. 368, 381, 295), those of the major superior of institutes of consecrated life and societies of apostolic life of pontifical right are brought to the competent Roman dicastery depending on the material subject.[65]The executive, legislative and judicial acts of the Roman Pontiff or of an ecumenical council according to the prescription of canon 1732 is excluded from recourse.

8. Conclusion

In this study, we have tried to explore the meaning, structure, and validity of administrative act. We equally examined the issue of hierarchical recourse.

Administrative acts are ways through which administrative function is expressed, they are the concretization of administrative activity. Administrative act is the act of the competent executive authority, which is emanated in view of fostering and protecting public good. There are many ways in which the person in administration provides for common good (public good): by making provision for ecclesiastical office, emanating explanatory directives, by settling controversy, and by seeing to it that laws are observed. It is the obligation of public authority to direct the life of the community within the limits of the law. All the acts of the person in administration cannot be qualified as administrative act but only the ones intended as official acts. Other acts of the administrator fall under private acts.

The validity of administrative act requires that it is placed by a person who has competence over the material in question in accordance with the form and procedure laid down by law, otherwise, the act will be invalid and thus subject to hierarchical recourse.

The Code punishes the transgression of administrative law by declaring null or invalid the act of public administration contrary to its prescriptions. The objective of administrative rules is to provide guideline for the proper use of authority. Hierarchical recourse to a superior or tribunal provides forum for the vindication of right violated by the administrative authority. The activity of administrative authority is not to be carried out arbitrarily but subject to the principle of legality, which is the limit in the exercise of discretionary authority of the administrator. Canonical regulation of the administrative activity is for the protection of both the administrator and those governed. The administrator in the fulfilment of the responsibilities of the office is to keep to the norms on the formation and emanation of the acts.

Among the requirements for the emanation of administration acts, is the demand for written form (can. 37), expression in summary form of the motives in law and facts which is the basis for the decision (can 51), collection of necessary information, proofs, adequate evaluation of facts, and listening to the interested parties (can. 50). The reason for this provision is based on the fact that ecclesiastical authority is not meant to be exercised capriciously. The executive authority is granted to the official for him to provide for the need of the community. Arbitrary acts and imprudent decisions, constitute abuse of authority. The dignity of the human person, and the good of the entire community requires that decisions be based on objective considerations and not the "whim of the moment."

[65] Mbata, Evaristus, Administrtive Justice: Juridical Mechanism for the Resolution of Administrative Conflicts in the Church, APT Publications, Owerri, Nigeria 2012, 213.