RECOURSE AND THE PRINCIPLE OF *NON LEX SED CORRUPTIO LEGIS*

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1. POSING THE PROBLEM

In his discussion of the nature of law St Thomas Aquinas cites St Augustine's principle that an unjust law ceases by that very fact to be a truly binding one, and this remark provides us with a useful springboard for a discussion of how different institutions have dealt with the occurrence of such a problem within their own systems.[1] There are two principal *factispecies* envisaged when we deal with such a scenario within the Christian community; when a law has been interpreted erroneously by its officers and when the law is applied by the administration with a rigidity that exceeds the intention of the legislator. In these circumstances, it is arguable that we are dealing not with true law as such but with the corruption of law, *non lex sed corruptio legis*.[2] The expression *corruptio legis* is here understood not in a subjective but in an objective sense, i.e. it is not to be understood to refer to the administration or the officials that apply the law but to the legal norm itself. The issues raised by the principle, *non lex sed corruptio legis*, are not simply ethical but also legal, and the important resolution in Augustine and Aquinas offers a useful window into one of the central problems of comparative administrative law.[3]

The appropriateness of Aquinas for a discussion of legal mechanisms, particularly at the interface between ecclesiastical and civil law, is suggested by his enlightened definition of law; namely, as an ordinance of reason established by those who have the care of the community, for the sake of the common good. Such a definition amounts to a curiously contemporary resonance with the democratic aspirations of our own legal and political system. For Aquinas political power and authority were vested, first of all, in the people—those who govern, therefore, should function in the interests of those who have entrusted them with political

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[1] For Aquinas, law (considered in general) was an ordinance of reason that was promulgated by authority (those who have the care of a community) for the sake of the common good (*Nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata* (cf St Thomas Aquinas, *Summa Theologiae*, I II, q 90, art 1; also R J Henle, *The Treatise on Law* (Notre Dame 1993), p 145). Some thinkers in the Catholic Church have suggested that this definition cannot be applied to canon law since the latter is an ordinance of faith (cf Eugenio Correco, *The Theology of Canon Law* (Pittsburgh 1992), pp 70–76), but this would suggest an unhealthy dichotomy between faith and reason apart from the fact that many institutes of canon law are not expressions of divine faith but the rational response of the Church to the exigencies of different epochs. For essays on the relationship between theology and canon law, see L.ORSY, *Theology and Canon Law* (Collegeville: The Liturgical Press, 1992).

[2] Aquinas actually discusses the dictum of Augustine, *lex esse non videtur quae justa non fuerit* when describing laws that are unjust and even goes so far as to say that such laws may be considered as acts of violence rather than truly binding laws (*et huiusmodi magis sunt violentiae quam leges*). An example might be a tax for the support of public education (hence for the common good) but levied disproportionately on the poor (hence unjust). In balance it should be noted that Aquinas does add that such laws do not bind the conscience except perhaps in order to avoid scandal or disturbance (cf Thomas Aquinas, *Summa Theologiae*, I II, q 96, art 5, 4).

[3] One should add here that within the sphere of comparative administrative law the terms 'objective–subjective' are used slightly differently. Those in administrative law who belong to a subjective optic on the problem tend to emphasise the *rights* of those affected by the administration, while those who adopt an objective optic tend to view the problem as a difficulty with the norm. These two approaches tend to propose different solutions, the first a judgment on the subjective rights of the plaintiff, the second a simple decree of annulment of the legal norm that has been challenged. We have presented it here as an objective problem as a gesture of respect to the objectivist school of thought (For more on this see the collection *La giustizia amministrativa nella Chiesa*, (ed Z. Grochelevski: Città del Vaticano: 1991).

power. This model is applied also to the function of law-making.[4] Needless to say, Aquinas' notion of the common good is based on a certain view of virtue ethics rather than upon the rule of the interests of a powerful oligarchy or even of a vociferous majority over the people. It is interesting to note that Aquinas rejected the doctrine of the divine right of kings which holds that the king's power comes directly from God, and indeed his chief interpreter during the Counter-Reformation, Robert Bellarmine, based a whole theory of democracy on Aquinas' teaching. It is not difficult to understand, therefore, why James I had Bellarmine's works banned and burned by the public executioner.[5] Only in our time does such a theory appear particularly attractive. Mortimer Adler, in *The Development of Political Theory and Government*, sets the tone for our discussion when he explains:

> 'Here in Aquinas is one of the first clear statements of the doctrine of popular sovereignty. The voice of the people is the voice of God, but only when the people make just laws for the common good. Otherwise, popular sovereignty degenerates into the might of the majority, which is just another form of tyranny. But when, in addition to being made by duly constituted authority, the positive laws of the state are also based on the natural moral law and represent just regulations of human conduct, they speak with the authority of right, not just the force of might.'[6]

According to this theory then representatives who make laws do so under licence, as it were, of and for the good of the people they represent. Clearly the political commentator would wish to add here that legislation is essentially an act which makes a judgment about what is good for the population as a whole and that this is where the House, as it were, divides.[7] The point is that in Aquinas' system the hierarchy of laws is a little more pronounced and more systematically organised. Consequently he is a useful source from which to quarry the theoretical grounds for a system of administrative recourse that respects such a hierarchy and deflects the charge that the legal system of the Christian community amounts to a melody of predominately positivist instruments that do not reflect higher theological considerations.[8]

2. SOME ALTERNATIVE SOLUTIONS

Now over the centuries different legal systems have wrestled with the problem of *corruptio legis* and arrived at different solutions. We may, for the purposes of this discussion, look at three possible ways of dealing with the problem. The first we can call the mechanism of dispensation, the second an independent judicial instance, the third, subdivided into two, an informal and a formal way of responding to a doubt about the meaning of a law (i.e. informally, a teaching function to

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[4] Aquinas (*Summa Theologiae* I–II, q 90, art 3) cites the maxim of Isidore of Seville: *Lex est constitutio populi secundum quam maiores natu simul cum plebibus aliquid sanxerunt* (Isidore, *Etymologies* V, 10); see Gratian, *Decretum* D 2, c 1.

[5] Cf Henle, *The Treatise on Law*, p 37.

[6] Cf. Mortimer Adler, *The Development of Political Theory and Government*, p 72.

[7] One is not suggesting, however, that the juridical and the moral should be regarded as coextensive spheres. Neil McCormack points out the benefits and indeed the necessity of keeping the two spheres distinct (cf. N McCormack, 'Natural Law and the Separation of Law and Morals', in *Natural Law Theory: Contemporary Essays* (R P George ed., Oxford, 1992), 115f). Even legal moralists like Lon Fuller acknowledge the distinction. This duly noted there is a case for arguing that law involves an anthropological option, i.e. a judgment about the nature of man: 'To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults' (cf L Fuller, *The Morality of Law* (Yale 1961), p 162).

[8] In order to adapt Aquinas' discussion to the legal framework of the Christian community one would have to expand his notion of the common good to include an internal aspect (the salvation of the individual) and an external aspect (the peaceful coexistence of the People of God).

clarify the mind of the legislator, and formally, an organ for the authentic interpretation of laws exercised by the same legislator even if vicariously).

In the common law tradition the solution to the problem of *corruptio legis* is traditionally based on a straightforward bi-partite division of powers into legislative and judicial, though in the last few decades the judiciary has been at pains to evolve a doctrine of administrative law under the guidance of Lord Diplock.[9] On the continent, solutions are based on the classical division of powers formulated by Montesquieu, namely the legislative, judicial and executive, which Montequieu himself claimed to have developed from the theory of government taught by the Greek philosopher Aristotle.[10] A comparative analysis is complicated by the fact that the continental and common law systems operate on slightly different approaches to the function of the judiciary; the common law proceeds by what I would like to call quasi-legislative precedent, the continental by interpretative particularism. Once we have it clear in our minds that the continental tradition favours a neat tripartite division of power and resolves legal problems like this accordingly, then we can understand where the British system parts company from its continental cousins. Thus on the continent, with the possible exception of Germany,[11] administrative tribunals resolve disputes about administrative provisions brought by the private citizen against the administrative authority. They do so, again with the possible exception of Germany, by recourse to a judgment on the status of the administrative provision that has been impugned by the private citizen. This judgment tends to restrict itself to whether the provision amounted to a violation of the general laws or constitution of the State.

Within the common law tradition, one would undoubtedly wish to point out, this problem is solved by a very active judiciary. One also needs to point out that the American system of redress, though based on the English one, is necessarily different because it appeals to a written Constitution. *Pace* the function of the common law in England, a formally inscribed Constitution as yet does not exist in England. Consequently, in the American system the Supreme Court, which will examine a provision to determine its status as law by measuring it against the written Constitution of the United States, passes judgments on the admissability of plaints about the provisions of lower executive authorities. Whether Judiciary should be making such judgments is of course open to debate—there are those who have served at the Supreme Court who would suggest that the Legislature is simply passing the decisional buck to the Judiciary in determining the true content or correct understanding of a given precept of the Constitution.[12]

'Progress towards a comprehensive system of administrative law . . . I regard as having been the greatest achievement of the English courts in my judicial lifetime' (cf. H W R Wade, *Administrative Law: The Problem of Justice* (Milan 1990), p 703).

[10] Cf V E Orlando, *Teorica della legislazione e del governo* (Firenze 1888), p 179. In fact the text in Aristotle's politics (*The Politics*, 1286a7–1286b40) does not show so neat a division. Aristotle is simply using the faculties of the human person to distinguish the faculties of judging and governing. Most comparativists are aware that it is difficult to distinguish the three powers in concrete instances.

[11] The history of German administrative justice is characterised by a reaction to the impositions of the Napoleonic Code of 1805 and its double-jurisdiction of the *Conseil d'Etat*. In 1863 in the district of Baden a special administrative tribunal was established which was independent of the active administration. This system was suspended under the Nazis. After the Second World War a national system of administrative tribunals was established, with two grades, the lower grade for administrative tribunals as such (*Verwaltungsgericht*), the upper grade for the superior tribunals (*Oberverwaltungsgericht*). At a federal level a federal administrative tribunal (*Bundeswaltungsgericht*) acts as the tribunal for the revision of the decisions of federal authorities and of cassation for decisions delated from the tribunals of the *Länder* (cf R Bachof, 'La jurisdicción administrativa en la R. F. alemana' [1985] *RAP* 289–316).

[12] For a comparison of the American and Roman Catholic systems of administrative recourse, see John Coughlin, *Administrative Justice at the Supreme Tribunal of the Apostolic Signatura and the United States Supreme Court—A Comparative Study* (Rome 1994), pp 27–121.

In England it is otherwise because of course we do not have a written constitution properly speaking and so our system has been described as an 'open' one.[13] Historically the English administrative system evolved from state intervention in four main areas; factory legislation, health, the poor law and railways.[14] The function of a constitution is arguably served by the legacy of the common law and of the statutes which are the product of Parliament. From the point of view of what we might call juridic theory this situation cannot be regarded as ideal, for, at a theoretical level, whatever about the practical, it could leave room for the instrumentalisation of law for ideological advantage say on the part of a runaway government majority.[15] The demerits of relying exclusively upon parliamentary sovereignty may be summed up in the objection that it leaves the legislative culture of Britain prone to a kind of see-saw effect, namely one statute passed by the government in one legislative lifetime may be reversed by the opposition in the next. Thus, outside of the important liberties protected in the common law, there would appear to be no institutional restraint on such a scenario. This has prompted some politicians to appeal for a written constitution wherein the fundamental rights of the private citizen could find some express and positive protection.[16] In fairness, the point could be argued that we are pragmatists rather than ideologues and that our system, to quote Diplock, fastens less on principle and more on remedies, and so the instabilities of such a legislative culture may be offset by a fairly new remedy available to the citizen, what is called *application for judicial review*. The general principle is stated in a landmark case by Lord Diplock:

> 'I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department of public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate'.[17]

The system of redress pioneered by such as Diplock amounts to a faculty of revision of an administrative provision that is granted to the plaintiff by the court, normally, though not exclusively, to be heard in the Queen's Bench Division and thereafter at the High Court and thence to the House of Lords. This institute is historically a combination of the two earlier remedies available to plaintiffs, that of injunction and prohibition. So judicial review is granted to the plaintiff to halt the execution of a challenged provision if the plaintiff can demonstrate a 'sufficient interest' in the matter to which the petition

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[13] The kinds of institution affected by administrative law in Britain would include the Executive, quangoes, local authorities, tribunals and inferior courts (cf P P Craig, *Administrative Law* (London 1989), p 34).

[14] Cf Craig, *Administrative Law*, p 37.

[15] Cf Craig, *Administrative Law*, p 59.

[16] The problem is that, unlike in Germany with its *Grundgesetz*, in Britain the absence of a written constitution effectively leaves the judiciary and the body of law at the mercy of a parliamentary majority. It also means that we can make no law more fundamental than any other with the consequent loss of direction this means to jurisprudence. Finally the absence of such a law means that our citizens do not enjoy vindicable protection with regard to what in other European states are regarded as the fundamental rights of the citizen. Wade has opined that European laws could be written into the statute book as a way of offsetting the problem, but the recent refusal of the British government to accept the Social Chapter on the grounds that it would make our workforce less attractive to foreign investment, suggests that it will not be easy to overcome the convergence of economic exigency and political xenophobia that characterised the climate in Britain until recently.

[17] Cf Lord Diplock in *R v Inland Revenue Comrs, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, [1981] 2 All ER 93, HL.

relates.[18] From a comparative point of view, however, it seems to be a discretionary faculty, awarded as it were by concession of the court to the plaintiff, and is not a remedy available to the plaintiff by right, as would be the case in the canonical or continental regimes.[19] Most forms of recourse in the administrative field require the demonstration of a subjective procedural component, what one may call the procedural pre-requisites. In addition to procedural capacity administrative recourse would require the demonstration of some kind of interest on the part of the plaintiff, which in England we refer to as a 'sufficient interest'.[20] In Italy legal theoreticians speak of *interesse ad agire*,[21] in France *interet d'agir*,[22] and in hierarchical recourse from the Roman Catholic canonical regime we speak of a personal, current and direct interest that is at least implicitly founded in the law.[23] The requirement of an interest before one may lodge administrative recourse is a stipulation that goes beyond a simple action on the ground that the issue involves a general or public interest. There simply must be some injury to the individual or individuals concerned in order to justify the intervention of the judge.

The point is that even here English jurisprudence has had to undergo an evolution. Where an initial tendency seemed to favour the idea of an *actio popularis*—an action brought by anyone on the grounds of the public interest, subsequent decisions have tried to put the lid on unlimited access to the courts and instead proposed that the plaintiff demonstrate a sufficient interest in the matter to which the application relates. Those familiar with the jurisprudence in this area may recall the decision involved in the case of *R v. Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd*.[24] So in terms of pure juridic theory one could say that the plaintiff must now demonstrate that there is a relationship between the object of con-

[18] RSC Ord 53, r 3(5); Supreme Court Act 1981 (c 54), s 31(3). For jurisprudence, see *R v Greater London Council, ex parte Blackburn* [1976] 3 All ER 184, [1976] 1 WLR 550, CA. For a commentary, see Terence Ingram, *The English Legal Process* (London, 1990), p 325. The exception to the rule is the use of 'relator actions' according to which the plaintiff may use the name of the Attorney General as a nominal plaintiff to contest the legality of actions of local government (i.e. *Attorney-General ex rel McWhirter v Independent Broadcasting Authority* [1973] QB 629, [1973] 1 All ER 689, CA).

[19] Wade thinks that the requirement of a sufficient interest appearing at this stage, i.e. at the stage of granting leave to apply, is actually the result of a mistake by the legal clerk when transcribing a recommendation of the Law Commission into RSC Order 53! The draftsman misunderstood the nature of the issue and wrote it into Rule 3, which deals not with the granting of remedies but with the earlier stage of leave to apply. This has made the question of standing a threshold question to be determined before the application itself may commence, as shown in the landmark case of *R v Inland Revenue Comrs, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1980] 2 All ER 378 at 382, DC, per Lord Widgery LCJ (not reported on this point in other reports).

[20] Cf Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237 at 275, [1982] 3 All ER 1124 at 1126, HL. In this case, that of a group of prisoners who had been deprived of their remission by allegedly unfair procedures on the part of the Board of Visitors, but who had failed to respond within the statutory time limits, legitimate expectations which were not necessarily protected as rights in private law may be the subject of judicial review in public law, on the ground that the court has the power to order the proceedings to continue as if they had begun by writ (cf C T Emery and B Smythe, *Judicial Review* (London 1986), p 255).

[21] For a historical survey of the concept of interest in the Italian system, see F G Scoca, 'Sguardo storico sopra i contenuti ed i limiti della tutela nei confronti dell'amministrazione' in *La tutela delle situazioni giuridiche nel diritto canonico, civile, amministrativo*, Milano 1991, pp 29–42. For a discussion of the relevant doctrinal indications of the jurisprudence of the Fourth Section of the *Consiglio di Stato*, see P Salvatore, *'Il problema della legittimazione: interesse legittimo, interesse collettivo, interesse diffuso, interesse di fatto'*, in *Consiglio di Stato. Studi per il centenario della Quarta Sezione* (Roma 1989), vol II, pp 489–512.

[22] Cf *Fédération régionale des associations de protection de la nature et de l'environnement dans le Nord de la France-Nord c. M Franck* [1992] in *RDP* 546, n° 3.

[23] For the sake of clarification, one should distinguish interest considered as a substantive situation (*interesse legittimo*) and interest considered as a procedural instrument (*interesse ad agire*). Here we are dealing with the latter (for canonical doctrine and jurisprudence, see R J Barrett, *The Capacity to Act in Court against an Administrative Act which Injures a Group of the Christian Faithful in its Juridical Sphere* (Rome 1996), pp 93–154).

[24] *R v. Inland Revenue Comrs, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, [1981] 2 All ER 93, HL.

troversy and the subjective situation of the plaintiff or recurrent. Traditionally this has been done through the concept of grievance in civil law or *gravamen* in canon law.[25] What this means, very generally, is that the plaintiff must demonstrate that he or she has been injured or aggrieved by the administrative provision in a way that is juridically relevant.[26]

3. CANONICAL SOLUTIONS

The Roman Catholic Church has, after centuries of juridical reflection on the problem of *corruptio legis*, found its way to developing three possible avenues toward a resolution. The first operates at the level of the application of law, what we may call *dispensation*, the second operates at a later stage in the process when the believer alleges himself or herself to have been the subject of a violation of rights, and is called *hierarchical and administrative recourse*, and the third subdivides into an informal and formal means of addressing the erroneous interpretation of law.

(1) *The Mechanism of Dispensation*: The mechanism of dispensation is designed to respond to the more general problem of how far a legal ordinance designed to further the common good can also provide for the individual good of the citizen. How far should the law bend to accommodate the good of the individual? Obviously the interests of the collective do not always war against the interests of the individual, but where the two are opposed is it possible for the legislator to consider some system that will maintain the priority of the common good without neglecting the good of the individual? This is where a legal system would have much in its favour if it granted to its executive officers the power of dispensation. Such a mechanism—built into the process of legal application—would be a way of maintaining the importance of the common precept or law and at the same time allowing—for just cause—an exception in the concrete. A dispensation in our system is thus defined as the relaxation of an ecclesiastical law in a particular case for a just cause.[27] Now we are all aware of the principle of mitigation, but this often operates rather late in the day, at the level of the judiciary, when a citizen has already been arraigned before a judge for a civil offence. What is suggested here is that a mechanism of dispensation would intervene at an earlier stage in the process—where the law is applied, i.e. by means of its administrators or executive officers. Obviously such a mechanism presumes

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[25] For the canonical understanding of the concept of *gravamen* Hostiensis sets forth the classical lines in his *Summa Aurea*, vol II, De appell., 6, 1, 2, pp 801–3. Applications of the concept to subjective right are provided by Ignacio Gordon in '*Origine e sviluppo della giustizia amministrativa nella Chiesa*', in *De iustitia administrativa in Ecclesia*, Roma, Catholic Book Agency, 1–18, while the same concept as related to administrative recourse is discussed by Kevin Matthews, 'The Development and Future of Administrative Tribunals' in *Studia Canonica* 18 (1984) 3, 223, and a comparative analysis is provided by Faustino Cordon Moreno in *La legitimación en el proceso contencioso-administrativo* (Pamplona 1979), pp 88–105.

[26] This understanding has also been assumed by canonical jurisprudence. It appears in a landmark case, published on 27 November 1987, which was judged by the Supreme Tribunal of the Catholic Church, the Apostolic Signatura, when it delineated the contours of an injury that would legitimate administrative recourse. The decree in that case sums up the doctrine: 'Locutione *gravatum esse contendit* (*Codex Iuris Canonici* 1983, canon 1737, para 1) haud obscure indicatur fundamentum iuridicum legitimationis activae. *Gravamen* in casu praesupponit recurrentem ius aliquod subiectivum aut saltem interesse habere: quodcumque, sed debet esse, ut doctrina docet, *personale, directum, actuale et a lege, saltem indirecte, tutelatum*' (cf Sig. Apost., Prot. N., 17447 85 CA, I, decr. def., n° 4, p 5).

[27] Two canons from the Latin Code, canon 85 and canon 90, para 1, regulate this matter. Canon 85 states: 'Dispensatio, seu legis mere ecclesiasticae in casu particulari relaxatio, concedi potest ab iis qui potestate gaudent exsecutiva intra limites suae competentiae, necnon ab illis quibus potestas dispensandi explicite vel implicite comptetit sive ipso iure sive vi legitimae delegationis'. Canon 90, para 1, states: 'A lege dispensetur sine iusta et rationabili causa, habita ratione adiunctorum casus et gravitatis legis a qua dispensatur; alias dispensatio illicita est et, nisi ab ipso legislatore eiusve superiore data sit, etiam invalida' (*Codex iuris canonici* 1983, canons 85 and 90, para 1).

that there is a distinction if not a separation between that which is legal, *lex*, and that which is just, *ius*.[28] This is one mechanism by which the mature legal system could provide for disputes about what is good in an individual case. Dispensation is a humane practice and a necessary one if the positive law is to be of benefit to society. The Romans were aware of this problem and to solve it introduced two concepts, the *ius gentium* and *aequitas*. Whereas for the Romans *aequitas* was invoked as an appeal to the *mores* of the people to solve cases not covered by the strict terms of *ius civile*, in Roman Catholic canon law, canonical equity amounts to an appeal to the objective norm of the Gospels in order to resolve a situation where the spiritual good of the individual is not provided for in the positive law. From a comparative point of view we may have something to learn from the practice of equity. In the absence of such a mechanism some legal systems pass the buck, as it were, to the judiciary for a resolution. A dispensation-mechanism might however, release the courts from a lot of hearings in which the judge feels compelled to throw out the case against the accused on some mitigating grounds. It would also mean that the courts would be freed for more serious cases where the public good is involved. This is simply offered as one way of dealing with the problem of the necessary rigidity of the positive law.

Aside from the mechanism of dispensation, there are two further mechanisms which we in the canonical system have found useful as ways of dealing with the problem of *corruptio legis*. The second addresses excessive rigidity or illegal conduct on the part of the active administration and which we may call an independent judicial instance arising out of hierarchical recourse while the third addresses erroneous interpretations of law and it refers to an instrument of authentic interpretation:

(2) *Hierarchical and Administrative Recourse*: When the administration is challenged by a private citizen then what we have is a dispute about the application of the law in a particular case, keeping in mind that an administrative act is of its very nature characterised by a certain particularism. How then should such a dispute be resolved? Historically many legal systems simply offered further redress higher up the hierarchical ladder so to speak, but in recent years it has become an almost universally accepted principle of administrative law that the private citizen deserves an additional guarantee of fairness when challenging—is there any way that one can assure that a judgment to be made between the two parties is an independent one—i.e. independent of any control by the administration? The only way to do this is not to pass the decision on to a higher level of administrative authority as used to be the case in England and in France but to set up a judicial instance which could judge the matter as if the two disputing parties were equal in dignity and power, i.e. a body which would have the authority and independence to be able to make judgments free of interference from the executive authorities of State. In this country the principle of judiciary independence which is so essential a feature of administrative doctrine is fairly well established. In the canonical regime, Pope Paul VI created such an instance in 1968 through the establishment of the Second Section of the Apostolic Signatura, which although still referred to in the Constitution *Pastor bonus* (1989) as a Dicastery (a department of the Roman Curia) nevertheless is an equivalent to, *mutatis mutandis*, the Supreme Court of other nation-states with the important qualification that it does not decide questions of constitutional

[28] Classically, the distinction has been acknowledged in the very ambiguity of the concept of *ius* as it appears in standard treatments of canon law. It may refer to the objective norm or the law, to the subjective right which is claimed from the law, or to the virtue of doing justice. This tripartite division of the concept allows for considerable flexibility when discussing the relationship between *lex* and *ius* in the canonical regime (cf. B Kurtscheid and F A Wilches, *Historia iuris canonici* (Rome 1943), vol I, p 12).

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interpretation as such.[29] The Signatura is made up of three sections, the first which deals with appeals from the Roman Rota, the second with contentious cases arising from an act of administrative power, and the third with vigilance over the correct administration of justice, i.e. whether church tribunals follow the procedural laws of the Church (canon 1445; *Pastor bonus*, arts 121–124).[30]

It is the Second Section which interests us. It is a judicial instance for administrative recourse. Now here one needs to point out that there is a distinction made in the Roman Catholic system between hierarchical and administrative recourse. The first is an appeal from a lower authority to the hierarchical superior, thus from a parish priest to his bishop, from a bishop to the relevant Dicastery in Rome (in Roman Catholic ecclesiology no national body or figure like an archbishop or cardinal may judge the decisions on appeal of diocesan bishops, only the Apostolic See may do so). When the recourse arrives in Rome it is then subject to the decision of the Congregation. This is still the administrative authority judging another administrative authority, but the Dicastery does have the power to amend or rescind the challenged decision of the lower authority. The decision of the Dicastery may not be completely satisfactory for the plaintiff, who may wish to have a decision from a higher authority. At this point administrative recourse cuts into the process and the Second Section of the Signatura gets involved. This is one mechanism of which the faithful, here the equivalent of the private citizen, may avail if they feel injured by some provision of the administration, i.e. if they allege that the challenged provision violated canon law either with regard to procedure or with regard to decision (*Pastor bonus*, art 123, para 1). One should note, however, that the Dicastery has the power to judge the merits of the decision of the diocese, i.e. whether they had acted justly given all the circumstances. The Signatura, however, is not empowered to judge the merits of the decision per se but only its formal legality, i.e. whether the hierarchical superior had followed the law in procedure or decision.[31] It does not have the power to order a revision, modification or the re-issuance of the decision. Its task is to judge legality not the merits. The point is that the Roman Catholic Church, in common with the majority of administrative systems on the continent, feels obliged to offer a further level of protection of the rights of its believers when they allege injury on the part of Church administrations, and this further level should amount to an independent *judicial* instance. I say independent because it should not just be the hierarchical superior but a truly judicial forum, i.e. one which treats the disputing parties as equals and not as public authority versus private citizen. There are exceptions in the system of

[29] Zenon Grocholewski, presently the Secretary of the Signatura, prefers to compare it to three grades existing in the Italian order: the First Section to the supreme judicial tribunal, the *Corte di Cassazione*, the Second to the supreme administrative tribunal, the *Consiglio di Stato*, and the Third to the *Ministerio di Giustizia*, albeit with several important differences.

[30] Art. 123 of the Constitution *Pastor bonus* states:

§ 1. Praetera cognoscit de recursibus, intra terminum peremptorium triginta dierum utilium interpositis, adversus actus administrativos singulares sive a Dicasteriis Curiae Romanae latos sive ab ipsis probatos, quoties contendatur num actus impugnatus legem aliquam in decernendo vel in procedendo violaverit.

§ 2. In his casibus, praeter iudicium de illegitimitate, cognoscere etiam potest, si recurrens id postulet, de reparatione damnorum actu illegitimo illatorum.

§ 3. Cognoscit etiam de aliis controversiis administrativis, quae a Romano Pontifice vel a Romanae Curiae Dicasteriis ipsi deferantur necnon de conflictibus competentiae inter eadem Dicasteria.

[31] Aurelio Sabattani, a former Prefect of the Signatura, has specified which laws such impugned decisions must be compared against: (*a*) canonical laws from any authority endowed with legislative powers; (*b*) civil laws canonised by canon law; (*c*) concordats entered into by the Holy See with individual nations; (*d*) customs within the stated limits; (*e*) principles of divine positive and natural law which may not be contained expressly in church law; (*f*) suppletory norms of canon law; (*g*) properly approved statutes and constitutions or precepts given to individuals; (*h*) orders or regulations, norms given by administrative authorities in the concrete application of the law; cf. A Sabattani, 'Iudicium de legitimitate actuum administrativorum a Signatura Apostolica peractum' in *Ius Canonicum* 16.2 (1976) 237.

recourse. Decisions of the Roman Pontiff and of Oecumenical Councils may not be appealed against, nor decisions of Dicasteries ratified *in forma specifica* by the Roman Pontiff, nor general executive decrees.[32]

(3) *An Instrument of Authentic Interpretation*: The third mechanism involves two avenues of redress, one informal and the other formal, though the latter may be further subdivided, as a way of resolving disputes about the meaning of a law. The universal legislator (the diocesan bishop is the local legislator) may wish to exercise the first option before having to exercise the second. This he would do by giving out a teaching on a matter, usually in a speech to bishops or an allocution, and this would find its way into the official publication for allocutions of legislative import, namely, *Communicationes*. Just to illustrate what we mean we can take an example that is topical also in the Church of England.

A pastor who is worried about the use of baptism by parents who simply wish to have their children sent to Church schools would understandably look for much more serious evidence of faith-commitment from the parents especially if the parents were not church-goers. If he is a wise administrator he would open up his Code and see what the law entitles him to do. In the Code of Canon Law canon 868, para 1, states:

> For the licit baptism of an infant it is necessary that:
> 1° the parents or at least one of them or the person who lawfully takes their place gives consent:
> 2° there be a well-founded hope that the infant will be brought up in the Catholic religion; if such a hope is altogether lacking the baptism is to be put off according to the prescriptions of particular law.

Now with regard to this canon, a number of dioceses in the United States decided that this canon meant that parents could be turned away if they did not intend to send the child to a Catholic school, or if they did not practise their faith every Sunday, or if they would not participate fully in the baptismal programmes in their parishes. With regard to interpretation the problem lies with the expression '*well-founded hope*', and with regard to the second, the circumstances which would justify postponement. For some pastors it may amount to a question of faith—non-practice means no faith; since faith is a requirement for the sacraments, such parents could not possibly give the assurances required in the baptismal rite itself—i.e. to raise their children in the practice of the faith. Thus on such grounds the pastor would legitimately postpone the baptism of the infants concerned. This dispute about the meaning of the canon was resolved informally by the legislator when, during an *ad limina* visit of some American Bishops in 1993, the Pope gave some indications of his mind:

> 'In keeping with the salutary counsel that Baptism is to be celebrated only when a well-founded hope exists that the child will be raised as a Catholic and so allow the sacrament to bear fruit (*Instruction*, n. 30, CIC, can. 868 § 1 2°), many Dioceses issued particular guidelines to implement these directives. Although intended neither to discourage infant Baptism nor to render its celebration unduly difficult, *such diocesan or parish guidelines have sometimes been applied in more restrictive ways than prescribed by the Holy See.* On occasion Baptism has been unwisely denied to parents requesting it for their child. Pastoral charity would bid us welcome those who have strayed from the practice of their faith (cfr. *Lk* 15: 4–7), and to refrain from making demands not required by Church doctrine or law. Nowhere is the gratuitous

[32] Cf *Codex iuris canonici* 1983, canon 1732.

> and unmerited nature of grace more evident than in infant Baptism "not that we loved God but that he loved us and sent his Son to be the expiation for our sins" (I Jn 4: 10). It is certainly right that Pastors prepare parents for the worthy celebration of their child's Baptism, but it is also true that this Sacrament of initiation is first of all a gift from the Father to the child itself'.[33]

This then is an example of the way an erroneous interpretation might be resolved *informally* by the universal legislator. It is perhaps a useful way of uniting the teaching and legislative functions of the pastoral charge.

Even so some *formal* means of resolving doubts of law and questions of interpretation, especially of a constitutional nature, is required, and this function is supplied by an official body of interpretation. The task of the Pontifical Council for the Interpretation of Legislative Texts is to examine (*a*) the legislative decisions of lower authorities surrendered for a decision, (*b*) the resolution of doubts on specific points of law surrendered by any of the faithful. With regard to the former, it will set the text alongside the 'constitutional' laws of the Church, particularly with regard to those enshrined in the relevant Code of Canon Law, and examine whether the dispositions of authority are reconcileable with such laws (*Pastor bonus*, art 158). With regard to the second, its task lies in the solution to what are objectively speaking doubts of law by determining in a legislative formula what the intrinsic meaning of a disputed canon is, i.e. what the mind of the legislator is in the matter. These latter resolutions tend to be succinct and formulaic and may be approved either generally or specifically by the Roman Pontiff.[34] While provision is made for an appeal against decisions that are ratified in a general way by the Pontiff, no appeal is envisaged against decisions that are ratified in a specific way.[35]

CONCLUSION

We may be tempted to assume with the Victorian jurist Albert Dicey that ours in England is a system as near perfection as it is possible to arrive at and that extraneous systems can teach us very little about the theory and practice of law-making. I think it is fair to say, however, that in recent times, beginning with the decisions surrounding the Birmingham Six and Guildford Four, and more recently with the procedural reforms of Lord Woolf, the judiciary has taken a more open approach to dialogue with other systems, and given the hard lessons of well-publicised failures especially concerning the rights of the accused, we have learnt a little more humility than that shown by Dicey. Given the current climate of openness it seems the time is ripe for comparison and dialogue rather than for a xenophobic retreat into a closed system. Indeed precisely at such a time it seems appropriate to offer some thoughts, however limited, from our own experience of law-making in the Roman Catholic Church, especially at the interface between the public authority and the private citizen. In the light of the insights gained from other ecumenical projects, it must be beneficial to share each other's thoughts on the juridical dimensions of the life of the Christian community, particularly in the developing area of administrative law and more specifically where the individual believer finds himself or herself face to face with the problems posed by *corruptio legis*.

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[33] *Ex allocutione ad quosdam episcopos*, in *Communicationes* 25 (1993) 25.

[34] For an analysis of the status of the responses of the Pontifical Council, see Lawrence Wrenn, *Authentic Interpretations on the 1983 Code* (Washington, CLSA, 1993), 1–6. For an analysis of the competence of the Pontifical Council, see F J Urrutia, '*De Pontificio Consilio de legum textibus interpretandis*' in *Periodica* 78 (1989) 503–521.

[35] Cf Urrutia, 'Quandonam habeatur approbatio *in forma specifica*' in *Periodica* 80 (1991) 3–17.