Ius Ecclesiae, 5 (1993), p. 643-673

CHANGES IN ECCLESIASTICAL ADMINISTRATIVE JUSTICE BROUGHT ABOUT BY THE NEW COMPETENCE OF THE « SECTIO ALTERA » OF THE APOSTOLIC SIGNATURA TO AWARD DAMAGES

A. *Introduction.*

Perhaps the most startling aspect of the Church's legislation in respect of « administrative justice », or the judicial control of administrative activity, is its brevity. The Latin text of Art. 106 of the 1967 Apostolic Constitution *Regimini Ecclesiae Universae* (1), which first introduced a formal system of administrative justice into canon law, contained fewer than fifty words. Paragraphs 1 and 2 of Art. 123 of the 1988 Apostolic Constitution *Pastor Bonus* (2), which replace Art. 106 of *Regimini*, run to a combined total of fifty-seven. For a system that aims to protect the rights of almost a billion people spread throughout the entire world, one could hardly be criticized for considering the extent of the legislative provision in

(1) PAUL VI, Apostolic Constitution *Regimini Ecclesiae Universae*, 15th August 1967, in *Acta Apostolicae Sedis (hereafter referred to as AAS)* 59 (1967), p. 885-928.

(2) JOHN PAUL II, Apostolic Constitution *Pastor Bonus*, 28th June 1988, in *AAS* 80 (1988), p. 841-923.

this important area of ecclesial life (even taking into account supplementary legislation such as the 1968 *Normae Speciales* (3), which deal principally with the composition and functioning of the Apostolic Signatura — but which in any event are now largely out of date) to be woefully inadequate.

Nevertheless paragraphs 1 and 2 of Art. 123 of *Pastor Bonus* are of much deeper significance than might at first be apparent to one who was unfamiliar with all their antecedents. In this article we shall not attempt a full analysis of all the elements which they contain (4), but propose to dwell principally upon the remedies available to an individual in the face of unlawful administrative activity, after the matter has been unsuccessfully referred by him, via the « hierarchical recourse » procedure, to the relevant Congregation of the Roman Curia; and in particular to examine the impact of Art. 123 § 2, which gives the Signatura competence for awarding damages.

The precise provisions of the first two paragraphs of Art. 123 are as follows:

> « § 1. It [the Apostolic Signatura] also judges recourses, presented within the peremptory term of thirty useful days, against singular administrative acts either issued by Dicasteries of the Roman Curia or approved by them, whenever it is argued that the act challenged has violated some law as regards the decision or procedure.
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> § 2. In such cases, apart from the judgment on unlawfulness, it can also, whenever the claimant so requests, award damages for the harm caused by the unlawful act » (5).

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(3) In full, the *Normae Speciales in Supremo Tribunali Signaturae Apostolicae ad experimentum servandae post Constitutionem Apostolicam Pauli PP. VI « Regimini Ecclesiae Universae »*, 23rd March 1968: these were published on 25th March 1968, not in *AAS*, but in booklet form (Typis Polyglottis Vaticanis); they also appear in a number of other publications: see for example the list given by GROCHOLEWSKI, Z., in *La giustizia amministrativa presso la Segnatura Apostolica* (*Ius Ecclesiae*, 4 (1992), p. 6, note 8).

(4) A more extensive analysis is to be found in the writer's publication *Administrative Justice according to the Apostolic Constitution « Pastor Bonus »*, Rome, 1993.

(5) « § 1. Praeterea cognoscit de recursibus, intra terminum peremptorium triginta dierum utilium interpositis, adversus actus administrativos singulares sive a

Given that the actions contemplated in these provisions (often referred to as « contentious-administrative » actions) are centred upon the « singular administrative act » (detailed provision for which is given in cann. 35-93 of the 1983 Code), and that the grounds for bringing the action (referred to in canon law as the *causa petendi*) are that the act has violated some law as regards the decision itself, or the procedure adopted in arriving at that decision (*in decernendo vel in procedendo*), it remains to be seen what a person who has *legitimatio activa* (6) for the action is entitled to request from the tribunal (this aspect is referred to as the *petitum*) (7). Fundamentally

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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 potest, si recurrens id postulet, de reparatione damnorum actu illegitimo illatorum ».

The third paragraph of Art. 123, with which this article is not directly concerned, states:

« § 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 »: cf. *AAS* 80 (1988), p. 892-893.

(6) *Legitimatio activa* (or *legitimatio ad causam*) refers to the requirement that the Plaintiff demonstrate some special connection between himself and the effects of the administrative act (cf. *locus standi* in English law). In a Decree of 21st November 1987 (cf. SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, Decree c. Castillo Lara, 21st November 1987, in Communicationes 20 (1988), p. 88-94), in reliance upon an Authentic Reply of 20th June 1987 (PONTIFICIA COMMISSIO CODICI IURIS CANONICI AUTHENTICE INTERPRETANDO, Reply 20th June 1987, in *AAS* 80 (1988), p. 1818), the Apostolic Signatura declared that the interest of the Plaintiff must be *personale, directum, actuale, in lege fundatum et proportionatum*. For a discussion of some of the considerations and difficulties which this requirement involves, see LABANDEIRA, E., *La defensa de los administrados en el Derecho Canónico*, in *Ius Canonicum*, 31/61 (1991), p. 271-288; MONETA, P., *I soggetti nel giudizio amministrativo*, in *La giustizia amministrativa nella Chiesa*, Città del Vaticano, 1991, p. 55-70; MIRAS, J., *Commentary on Authentic Reply of 20th June 1987*, in *Ius Canonicum*, 31/61 (1990), p. 211-217, at p. 212-214; PUNZI NICOLÒ, Angela Maria, *Dinamiche interne e proiezioni esterne dei fenomeni associativi nella Chiesa*, in *Ius Ecclesiae*, 4 (1992), p. 495-510, at p. 507-510.

(7) The *causa petendi* and the *petitum*, standing in relation to one another as cause and effect (cf. LABANDEIRA, E., *Il ricorso gerarchico canonico: « petitum » e « causa petendi »*, in *La giustizia amministrativa nella Chiesa*, Città del Vaticano, 1991, p. 71-84, at p. 82), and forming the twin co-ordinates that determine the object-matter of the judicial protection provided by the *Sectio Altera* (cf. LLOBELL, J., *Il « petitum » e la « causa petendi » nel ricorso contenzioso-amministrativo canonico. Profili sostanziali riconstruttivi alla luce della Cost. Ap. « Pastor Bonus »*, in *Ius Ecclesiae*, 3 (1991), p. 119-150, at p. 120), are closely interlinked, and it is not

Art. 123 of *Pastor Bonus* allows two possibilities: a declaration of the unlawfulness of the administrative act, and damages. We shall look in turn at each of these *petita*.

B. *Declaration of unlawfulness.*

1. *« Regimini Ecclesiae Universae » and the 1971 Reply.*

Although the formal introduction of ecclesiastical administrative justice in *Regimini Ecclesiae Universae*, and the creation of the new *Sectio Altera* of the Apostolic Signatura with specific competence for contentious-administrative actions, had been motivated in large part by the generally-perceived and officially-recognized need for an adequate protection of the rights of the faithful, canon lawyers soon found themselves arguing among one another as to whether the *Sectio Altera* really had power to enter into the question of rights, or whether Art. 106 of *Regimini Ecclesiae Universae* (8) and Art. 96 of the *Normae Speciales* (9) restricted the competence of the tribunal to the question of the mere « lawfulness » of the administrative act, without allowing any study of the substantive « merits » of the case. The latter interpretation stemmed from and reflected the Italian administrative law distinction of « subjective rights », or *diritti soggettivi*, which were the competence of the so-called « ordinary » courts, and « legitimate interests », or *interessi legittimi*, which were dealt with by special « administrative » courts whose competence was limited to declaring the lawfulness or otherwise of the administrative act. The « lawfulness only » opinion appeared to receive official confirmation from the Pontifical Commission for the Interpretation of the Decrees of the Second Vatican Council, which,

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always easy to determine the dividing-line between them. However in this article we propose to look principally at the question of the *petitum*, and the various problems involved in interpreting precisely what remedies may be requested from and granted by the *Sectio Altera*. Indirectly, in the light of those considerations, the *causa petendi* or grounds upon which an action seeking such remedies may be founded will become more obvious.

(8) « Per ALTERAM SECTIONEM Signatura Apostolica contentiones dirimit ortas ex actu potestatis administrativae ecclesiasticae...quoties contendatur actum ipsum legem aliquam violasse »: *AAS* 59 (1967), p. 921.

(9) « Per sectionem alteram Signatura Apostolica cognoscit...contentiones ortas ex actu potestatis administrativae ecclesiasticae...quoties allegetur legis violatio ».

when asked to confirm the scope of the competence of the *Sectio Altera*, stated that it could judge « *tantum de illegitimitate actus impugnati* » (10).

On such a basis the *petitum* appeared clear: the Plaintiff was entitled only to request a declaration of the unlawfulness of the administrative act (11), and in appropriate cases the suspension of the act, if not produced *ipso iure* (12), pending the final decision of the tribunal (13).

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(10) Reply to 4th *dubium*, 11th January 1971, AAS 63 (1971), p. 330.

(11) SABATTANI, A. (*Iudicium de legitimitate actuum administrativorum a Signatura Apostolica peractum*, in *Ius Canonicum*, 16/32 (1976), p. 229-243, at p. 233-234) states that if the act is found to have been unlawful, the tribunal's function is to « rescind » (*rescindere*) the act rather than to declare it to be null (*irritum declarare*). See, however, the arguments in LABANDEIRA, E., *Tratado de derecho administrativo canónico*, Pamplona, 1988, p. 584-586, to the effect that there is no real difference between the two terms. SABATTANI also makes the point that if the act is lawful, it is incorrect to describe the tribunal as « confirming » it: « rectius erit si Supremum Tribunal tantum respondeat, sicuti reapse nunc facit: "Non constare de violatione legis ex capite adducto" »: *Iudicium...*, p. 232.

(12) Cf. cann. 700 (recourse against a decree of dismissal of a member of a religious institute); 1353 (recourse against a decree imposing or declaring a penalty); 1747 and 1752 (recourse against a decree removing or transferring a parish priest). Where, as in these cases, the hierarchical recourse procedure brings about the suspension of the execution of the administrative act, the effect of the contentious-administrative action is similarly *in suspensivo*: cf. LABANDEIRA, *Tratado...*, p. 761-762; cf. also the Reply of 1st July 1971 given by the Pontifical Commission for the Interpretation of the Decrees of the Second Vatican Council (*AAS* 63 (1971), p. 860), confirming the effect *in suspensivo* of an action challenging a decree removing a parish priest. Otherwise the effect of the recourse or action is considered to be *in devolutivo*, meaning simply that the matter is referred to a higher authority (the hierarchical Superior, or the *Sectio Altera*, as appropriate) for decision, without automatically barring execution of the act in the interim: cf. LABANDEIRA, *Tratado...*, p. 762.

(13) Cf. *Normae Speciales*, Artt. 108, 113; cf. also the proposals in the pre-Code *Schemata* (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema canonum de procedura administrativa (reservatum)*, Typis Polyglottis Vaticanis, 1972, cann. 15 § 2 and 23; *Schema Codicis Iuris Canonici iuxta animadversiones S. R. E. Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Curiae Romanae, Universitatum Facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecratae recognitum (Patribus Commissionis reservatum)*, Libreria Editrice Vaticana, 1980, cann. 1699 § 3, 1707 § 2 and 1709, n. 2; *Codex Iuris Canonici. Schema Novissimum post consultationem S. R. E. Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Curiae Romanae, Universitatum Facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecratae recognitum, iuxta placita Patrum Commis-*

2. *Lawfulness and merits.*

In the minds of many authors, however, the situation was not so clear. The *dubium* which had been presented to the Pontifical Commission had involved the question of whether: « *...Supremum Signaturae Apostolicae Tribunal — Sectio Altera — videat tantummodo de illegitimitate actus impugnati an etiam de merito causae* » (14); and the Commission's reply in full was as follows: « *Affirmative ad I.um; negative ad II.um; seu Supremum Signaturae Apostolicae Tribunal — Sectionem Alteram — videre tantum de illegitimitate actus impugnati* » (15).

The question thus arising was: what did the Commission intend to exclude from the competence of the *Sectio Altera* in denying that it could judge the merits of the case? This in turn leads to a further question: why was the *dubium* phrased in terms of « merits » and « lawfulness » in the first place? The answer is to be found in the Italian administrative law distinction to which reference has previously been made, according to which the administrative courts' competence is described in terms of *legittimità*, as opposed to *merito*, which is the competence of the ordinary courts (16). *Merito* in this sense corresponds to the situations of injustice

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sionis deinde emendatum atque Summo Pontifice praesentatum, E Civitate Vaticana, 25 martii 1982, cann. 1744 and 1755 § 2).

The suspension of the act challenged constitutes the object of a separate accessory judgment: cf. LOBINA, G., *Effetti ed esecuzione dei provvedimenti giurisdizionali della Sectio Altera*, in *Apollinaris*, 46 (1973), p. 148-162, at p. 154-156; also ID., *Rassegna di giurisprudenza della Sectio Altera del Supremo Tribunale della Segnatura Apostolica (1968-1973)*, in *Monitor Ecclesiasticus*, 98 (1973), p. 293-323, at p. 296-298; MENDONÇA, A., *The Effect of the Recourse Against the Decree of Removal of a Parish Priest*, in *Studia canonica*, 25 (1991), p. 139-153; DELGADO, G., *La actividad de la Signatura Apostólica en su Sección Segunda*, in *Ius Canonicum*, 12/23 (1972), p. 67-82, at pp. 76-77. In a Decree of 9th August 1972 the Signatura declared that the effect *in suspensivo* of a recourse operates « *etiam antequam decernatur "utrum recursus admittendus sit ad disceptationem, an reiciendus quia manifeste ipsa caret fundamento"* (art. 116 *Normarum*) »: cf. GORDON, I; GROCHOLEWSKI, Z., *Documenta recentiora circa rem matrimonialem et processualem*, vol. I, Romae, 1977 p. 401 (nn. 3172-3174). See also the comments made in the decision of the Signatura given on 20th April 1991 (« L'Armée de Marie »), reported in PAGÉ, R., *La Signature apostolique et la suppression du statut canonique de l'Armée de Marie*, in *Studia canonica*, 25 (1991), p. 403-415.

(14) *AAS* 63 (1971), p. 330.

(15) *Ibid.*

(16) Cf. PONTICELLI, P.G., *Merito amministrativo (e giurisdizione di merito)*, in *Enciclopedia giuridica*, vol. XX, Roma, 1990, p. 1-12; CORAGGIO, G., *Merito amministrativo*, in *Enciclopedia del Diritto*, vol. XXVI, 1976, p. 131-146.

arising from violations of substantive rights, for which only the ordinary courts have competence. However, the term *merito* is also used in a second way, to refer to the various « non-juridical » assessments and evaluations upon which an administrative act is based, and therefore includes such factors as the « opportuneness », the « fittingness », or the « usefulness », of the act in the particular circumstances: in other words it refers to what might be termed « good administration », and pertains to the exclusively discretionary area which is the proper province of the Administration.

Accordingly a judgment in respect of *merito* can be taken to refer either to a judgment on the facts and an assessment of the situation of injustice alleged to have been brought about by the administrative act, or to a judgment as to whether or not the Administration has made good use of its discretionary powers. In the latter sense there is no difficulty in accepting the restriction upon the powers of the *Sectio Altera*, which, as an independent judicial organism, cannot take upon itself responsibilities and functions which are the exclusive concern of the Administration. Problems arise however in respect of the first meaning, and the ensuing debate among authors revolved around the issue of whether or not the Pontifical Commission intended to exclude *merito* in this sense from the competence of the *Sectio Altera* (17).

3. *Interpretations of the 1971 Reply by authors.*

Those who favoured the view that the involvement of the *Sectio Altera* was limited to the lawfulness of the administrative act likened the function of the tribunal to that of a *restitutio in integrum*, restoring the party who had suffered harm to the legal position in which he had been before the act was issued: in such cases the matter would be referred back to the authority whose act was declared null (18).

Those who claimed that the competence of the tribunal excluded *merito* only in the limited sense of « good administration »,

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(17) For a summary of the arguments on each side of the debate, see GORDON, I., *El contencioso-administrativo eclesiástico*, in *Curso de derecho matrimonial y procesal canónico para profesionales del Foro*, vol. 4, Salamanca, 1980, p. 145-171, at p. 157-170.

(18) Cf. SABATTANI, *Iudicium...*, p. 232-235.

and extended to subjective rights as well as to the lawfulness of the administrative act (19), argued that the wording of Art. 106 of *Regimini Ecclesiae Universae*, which stated that the *Sectio Altera* « resolves » (« *dirimit* ») the disputes brought before it, and that of Art. 96 of the *Normae Speciales*, which used the verb « *cognoscit* », supported their point of view: in either case the tribunal needed to be able to examine the merits aspect in order to resolve the question suitably (20). Further support was found in Art. 118 of the *Normae Speciales*, which referred to the inclusion of various *petita* in the action (implying competence for something more than a mere declaration of unlawfulness); in Art. 120, which required that the judges be provided with details of the « *quaestiones praeiudiciales et de merito...quas quidem quaestiones Signatura dirimendas suscepit* »; and especially in Art. 122, which provided that the tribunal « *in deliberando de merito, decisionem ferre debet circa omnia proposita petita* » (21).

Additional arguments were based upon the Directive Principles for the reform of the Code, which in proposing the establishment of lower administrative tribunals had made explicit reference to the need for rights to be protected (22); and upon statements made by

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(19) See especially GORDON, I., *De obiecto primario competentiae « Sectionis Alterius » Supremi Tribunalis Signaturae Apostolicae*, in *Periodica*, 68 (1979), p. 505-542; ID., *De iustitia administrativa ecclesiastica tum transacto tempore tum hodierno*, in *Periodica*, 61 (1972), p. 251-378, at p. 331-339, ID., *La renovación de la Signatura Apostólica*, in *Revista Española de Derecho Canónico*, 28 (1972), p. 571-610, at p. 600-604. MESZAROS states: « The object of the Signatura's decision is the merit and procedures employed in a particular administrative act », although he gives no explanation as to what he means by « merit »: MESZAROS, J.C., *Procedures of Administrative Recourse*, in *The Jurist*, 46 (1986), p. 107-141, at p. 130.

(20) Cf. GORDON, *De obiecto...*, p. 532; STRAUB, H., *De obiecto primario competentiae Supremi Organismi contentioso-administrativi*, in *Periodica*, 67 (1978), p. 547-557, at p. 551-552; as STRAUB points out, however, the exponents of the opposite view could argue simply that the duty of the *Sectio Altera* could be taken as being that of « resolving » only the question of lawfulness (*ibid.*).

(21) Cf. GORDON, *De obiecto...*, p. 533-535; LABANDEIRA, E., *El objeto del recurso contencioso-administrativo en la Iglesia y los derechos subjetivos*, in *Ius Canonicum*, 20/40 (1980), p. 151-166, at p. 160.

(22) Cf. Directive Principle n. 7, Communicationes 1 (1969), p. 83; GORDON, *La renovación...*, p. 601; also RINCON-PEREZ, T., *Derecho administrativo y relaciones de justicia en la administración de los sacramentos*, in *Ius Canonicum*, 28/55 (1988), p. 59-84, at p. 65. At the Official Presentation of the 1983 Code of the Canon Law, Cardinal CASAROLI stated: « It is precisely the task of the Code of Canon Law

the Secretary of the Pontifical Commission which had prepared the text of *Regimini Ecclesiae Universae*, to the effect that the *Sectio Altera* could be likened to the Administrative Tribunal established during the Second Vatican Council to resolve disputes between Council Fathers and Moderators, the competence of this tribunal extending beyond the question of mere lawfulness (23).

The cases decided by the *Sectio Altera* between 1968 and 1971 also gave grounds for concluding that the Signatura itself accepted that it had competence to deal with subjective rights (24); although as we shall see shortly, no such conclusion could be drawn from its practice after the 1971 Reply.

In general the proponents of the theory that the *Sectio Altera* could deal with the question of subjective rights maintained that such a view was in accordance with canonical tradition, the primary concern of canon law always having been « substantive justice » rather than « objective lawfulness » (25). The concept of a *cour de cassation* for violations of law, they argued, formed no part of the tradition of the Church, whose reasons for declaring certain acts to be null were always based on the desire to avoid grave injustice (26);

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to define and to safeguard...the legitimate freedom and rights which are due the members of the ecclesial community »: CASAROLI, A., *Discourse of Cardinal Agostino Casaroli, Secretary of State*, in PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO. *Promulgation and Official Presentation of the Code of Canon Law*, Vatican, 1983, p. 24-29, at p. 27.

(23) Cf. GORDON, *De obiecto...*, p. 533.

(24) Cf. *ibid.*, p. 535-536; a view not shared by SABATTANI (cf. *Iudicium...*, p. 233).

(25) « Le maître-mot de la conception et de l'organisation des recours contre les décisions judiciaires est l'injustice....Dans chaque cas, le juge est amené à réparer les dommages créés, par une sentence nouvelle, ou par une sentence déclarant la nullité, mais préalable à une nouvelle considération à fond....[L]e droit canonique ne confie jamais à un juge spécialisé l'examen des erreurs de droit mais donne une priorité à la réparation de l'injustice, par le biais de laquelle il réalise la défense du droit objectif »: VALDRINI, P., *Injustices et droits dans l'Église*, 3rd ed., Strasbourg, 1983, p. 355.

(26) Cf. VALDRINI, *Injustices...*, p. 101-356; ID., *Étude sur le caractère subjectif du contentieux administratif ecclésiastique*, in *Estudios canónicos en homenaje al Profesor D. Lamberto de Echeverría*, Salamanca, 1988, p. 405-418, where several arguments are adduced in order to demonstrate the fundamentally « subjectivist » conception of ecclesiastical administrative justice: the requirement that the Plaintiff have a personal interest (p. 412); the importance given to methods of resolving the dispute by means of mediation and conciliation (p. 412-413); the speed with which the various stages of the contentious-administrative action need to be completed,

indeed, the reason why an individual is willing to go to the lengths of pursuing a contentious-administrative action is not a general desire on his part that the law should be observed, but rather that he is personally disadvantaged by the administrative act which he wishes to challenge (27).

4. *Interpretation of the 1971 Reply by the « Sectio Altera ».*

Despite the arguments in favour of a « subjective » interpretation of the 1971 Reply, it may well have been the case that the Pontifical Commission, under the influence of Italian administrative law concepts, deliberately wished to limit the competence of the *Sectio Altera* to « lawfulness only », excluding competence for *merito* in both Italian senses (28). The *Sectio Altera* itself, under the same influence, made no attempt to conceal how it interpreted the Reply. From 1971 onwards it adopted a rigid « lawfulness only » policy, without entering into the merits of the case, and refusing to deal with any *petitum* going beyond the lawfulness of the administrative act (29).

« pour éviter que le dommage, s'il existe, ne s'étende » (p. 413); the presence of an advocate (p. 414); and the content and effects of the sentence, which relate to singular administrative acts and specific parties (p. 414); cf. also TRASERRA, J., *Dialogus*, in *Periodica*, 67 (1978), p. 573-574. GORDON states that « la competencia de legitimidad es un "cuerpo extraño" dentro de la Segunda Sección (que es un verdadero Tribunal Administrativo) y más aún dentro del sistema canónico, donde la ley es defendida indirectamente, a través de la defensa directa de los derechos subjetivos, que siempre ha sido y es para la Iglesia una de sus principales preocupaciones »: *El contencioso-administrativo...*, p. 169. Cf. also MIRAS, J., *El contencioso-administrativo canónico en la Constitución Apostólica « Pastor Bonus »*, in *Ius Canonicum*, 30/60 (1990), p. 409-422, at p. 420-421.

(27) As ROBLEDA says, « si nemo laesum se sentiat, haud bene intelligitur quod quis recursum faciat »: ROBLEDA, O., *Dialogus*, in *Periodica*, 67 (1978), p. 575-576, at p. 576. Further support for the « subjectivist » view is to be found in the *Motu proprio Iusti iudicis* of 28th June 1988 (*AAS* 80 (1988), p. 1258-1261), dealing with Advocates before the Roman Curia, where the predominant concern is expressed as being that of the protection of the rights of the faithful rather than the defence of lawfulness: cf. LLOBELL, *Il « petitum »...*, p. 148.

(28) This is the conclusion which LABANDEIRA reaches (cf. *Tratado...*, p. 744-746), although he considers the Commission unjustified in adopting such an approach.

(29) The Signatura clearly set out its own understanding of the restrictions on its competence in a case involving disputed property rights: « Hae tamen quaestiones, utpote quae meritum causae attingunt, ad iudicium nostrum minime

In practice the reasons leading to such decisions of the *Sectio Altera* as have been published since 1971, as given in the *pars expositiva* of the sentence, reveal that the tribunal has often been obliged to examine the question of subjective rights, either because the administrative act itself has caused harm, or because a prior judgment on the issue of the subjective right is necessary in order to assess the lawfulness or otherwise of the administrative act ([30]). Of the many examples of the practical difficulties involved in separating « lawfulness » from « merits » ([31]), perhaps two or three cases will

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spectant »: SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, Claraven, Subtractionis aedificiorum paroecialium, 23rd February 1974, Card. Tabera *Ponens*, in PINTO, *La giustizia amministrativa della Chiesa*, pp. 300-304, at p. 302. GORDON describes the tribunal's approach as being faithful neither to the content nor to the purpose of Art. 106 of *Regimini Ecclesiae Universae*: cf. *El contencioso-administrativo...*, pp. 167-168; see also MONETA, P., *La tutela delle situazioni giuridiche soggettive nel diritto canonico: rimedi amministrativi e giurisdizionali*, in *La tutela delle situazioni giuridiche soggettive nel diritto canonico, civile, amministrativo*, Milano, 1991, pp. 15-27, at p. 24; ID., *Il controllo giurisdizionale sugli atti dell'autorità amministrativa nell'ordinamento canonico (I)*, Milano, 1973, pp. 133-134; LLOBELL, *Il « petitum »...*, pp. 136-137. LABANDEIRA remarks: « Sin duda esto es un paso atrás en la justicia administrativa de la Iglesia »: *Tratado...*, p. 743.

([30]) SALERNO, F., *Il giudizio presso la « Sectio Altera » del S. T. della Segnatura Apostolica*, in *La giustizia amministrativa nella Chiesa*, Città del Vaticano, 1991, pp. 125-178, at p. 169.

([31]) Cf. the analyses in LABANDEIRA, *El objeto...*, pp. 162-166, and D'OSTILIO, F., *Gli istituti della vita consacrata nelle decisioni del Supremo Tribunale della Segnatura Apostolica*, in *Claretianum*, 27 (1987), pp. 279-344. The latter author, after consulting almost 90 decided cases, « che rappresentano la quasi totalità delle controversie deferite sinora [1987] alla Sectio Altera » (*ibid.*, p. 292), concludes that « in tali decisioni sono costantemente riconosciuti e tutelati i diritti delle persone giuridiche, come pure i diritti delle persone fisiche, nei confronti degli Organi della Pubblica Amministrazione » (*ibid.*, pp. 321-322). COPPOLA, R. (*In tema di risarcimento del danno derivante da atto amministrativo*, in *Apollinaris*, 46 (1973), p. 163-179, at p. 164-165), refers to a case where the Signatura rejected a recourse against a decree of the Roman Rota in which the Rota declared itself incompetent *ratione materiae*, « ma, pur non pronunciandosi direttamente sulla legittimità e sulla liceità del provvedimento...stabilisce la competenza dell'autorità e del giudice amministrativo solo dopo un'indagine sulla fondatezza della domanda di ristoro patrimoniale »: *ibid.*, p. 165. See also SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, Lugdunensis, Iurium, 26th June 1976, Card. Palazzini *Ponens*, in PINTO, *La giustizia amministrativa della Chiesa*, p. 327-339, in which the tribunal described an administrative decree as « iniquum » (p. 330), not for violating any specific law, but on account of « prudentiae defectus et audax imperii exercitium » (p. 333); and SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, Romana (cited in LOBINA, G., *La difesa dei diritti fondamentali nelle procedure amministrative riguardanti le rimozioni dei*

serve to highlight the near impossibility at times of drawing any clear dividing-line between the two concepts.

The sentence of the Signatura dated 27th June 1978 (32) related to a case where the Plaintiff was a priest who, with the consent of the Ordinaries concerned, moved from one diocese to another for health reasons, and later, again with the consent of both Ordinaries, remained for a number of years in the new diocese, performing pastoral tasks there. On several occasions he unsuccessfully requested incardination in the new diocese; at length he claimed to have acquired incardination in the new diocese *ipso iure*, by virtue of the *Motu proprio Ecclesiae Sanctae*, I, Art. 3 § 5, which declared: « *Clericus autem qui a propria diocesi in aliam legitime transmigraverit, huic diocesi, transacto quinquennio, ipso iure incardinatur, si talem voluntatem in scriptis manifestaverit tum Ordinario diocesis hospitis tum Ordinario proprio, neque horum alteruter ipsi contrariam scripto mentem intra quattuor menses significaverit* » (33).

The Ordinary of the new diocese refused to accept the Plaintiff's claim, and ultimately expelled him from the diocese. The Plaintiff contested the lawfulness of the decree of expulsion, but

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parocci e le dimissioni dei religiosi, in CORECCO, E.-HERZOG, N.-SCOLA, A. (editors). *Les Droits Fondamentaux du Chrétien dans l'Eglise et dans la Société. Actes du IVe Congrès International de Droit Canonique, Fribourg (Suisse), 6-11.X.1980*, Fribourg-Freiburg i. Br.-Milano, 1981, p. 323-343, at p. 342), where apart from declaring unlawful a decree of dismissal, the tribunal also examined the possible psychic illness affecting the Plaintiff. Cf. other examples in BACCARI, R., *Il controllo giurisdizionale sugli atti dell'amministrazione ecclesiastica nel nuovo CIC*, in *Scritti in memoria di Pietro Gismondi*, vol. I, Milano, 1987, p. 17-31, at p. 22; and VALDRINI, *Injustices...*, p. 71-79. MONTINI states that the *Sectio Altera* has sometimes issued « (anche a livello di *Congressus*) dei veri e propri giudizi che superano ogni supposta giurisdizione di legittimità per porsi più propriamente come giudizi sul merito amministrativo (e non senza il plauso seguente della dottrina) »: MONTINI, G., *L'esecuzione delle sentenze della 'Sectio Altera' della Segnatura Apostolica. Il significato di una lacuna*, in *Iustus Iudex (Festgabe für P. Wesemann zum 75. Geburtstag)*, Essen, 1990, p. 553-571, at p. 570.

(32) SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, Miamien., Incardinationis, 27th June 1978, Card. Felici *Ponens*, in Communicationes 10 (1978), p. 152-158; see the analysis of the case in LABANDEIRA, E., *La incardinación « ipso iure » en otra diócesis y su amparo ante la Sección 2 de la Signatura Apostólica*, in *Ius Canonicum*, 21/41 (1981), p. 381-417.

(33) *AAS* 58 (1966), p. 760. The provision was later substantially incorporated into the 1983 Code (can. 268 § 1).

the Sacred Congregation for the Clergy rejected his recourse. The Plaintiff therefore initiated an action before the *Sectio Altera*.

It was agreed that the Plaintiff had lawfully moved from one diocese to the other; that he had repeatedly expressed in writing his desire to be incardinated in the new diocese; and that the Ordinary of the diocese which he had left had no objection to the change of incardination. The principal questions, therefore, which the tribunal considered had to be addressed were whether the five year period had in fact elapsed (the Ordinary of the new diocese claiming that only such time should be taken into account as the Plaintiff had devoted to pastoral work in the diocese: on this basis the five years would not have been completed), and whether the Ordinary of the new diocese *contrariam scripto mentem intra quattuor menses significaverit*, various somewhat vague communications having been made in different forms and at different times to the Plaintiff, which according to the Ordinary demonstrated his *mens contraria*. In the particular circumstances of the case the tribunal held that the five-year period should include the whole of the time lawfully spent in the diocese by the Plaintiff, irrespective of whether or not he was engaged in pastoral tasks, and that the communications from the Ordinary of the new diocese to the Plaintiff did not constitute a clear written manifestation of his opposition to the Plaintiff's being incardinated in his diocese: furthermore they were not made within four months of the initial request for incardination presented by the Plaintiff. Accordingly the decree of expulsion was held to be unlawful as it had not fulfilled the requirements stipulated in *Ecclesiae Sanctae*, I, Art. 3 § 5.

The main point of contention in this case was whether or not there was *ipso facto* incardination. Without resolving this issue, the lawfulness of the decree of expulsion, and of the rejection of the Plaintiff's hierarchical recourse by the Sacred Congregation for the Clergy, could not be established. The *pars expositiva* of the sentence clearly addressed the central issue, which was one of subjective rights (the right of the Plaintiff to incardination in the new diocese *ipso iure*), and found in the Plaintiff's favour; but the *pars dispositiva* of the sentence was presented on the basis that the tribunal was incompetent to examine the question of rights, and merely stated that Sacred Congregation's rejection of the Plaintiff's recourse was unlawful *in decernendo*. It did not even declare that the decree of expulsion was null (34).

(34) Cf. LABANDEIRA, *La incardinación...*, p. 415-416.

A second example may be seen in the decision of the Signatura given on 22nd August 1987 ([35]). That case related to a dispute in Spain over the property of certain goods of historical and artistic value which were originally owned by monastery V, and which were deposited with a study and research centre in diocese L, for conservation and display purposes. The monastery was later disbanded, and legal title to the goods passed to monastery S, also in diocese L. Some time afterwards some of the members of monastery S were transferred to a new foundation, monastery Z, located in a separate diocese; and after a lengthy interval monastery Z claimed title to the goods, arguing that monastery S had issued a document confirming such title.

The Bishop of the diocese of monastery S opposed the claim, and denied the value of the document produced by monastery Z. The matter was eventually referred to the Sacred Congregation for Religious, which felt that the goods should belong to monastery Z, and proposed that an amicable arrangement be come to. The Congregation appointed an executor to arrange for the transfer of the goods to monastery Z, even though doubt remained as to their true title. The archivist of diocese L contested the dispositions subsequently given by the executor regarding the transfer of the goods to monastery Z, and submitted a formal hierarchical recourse to the Congregation, which definitively stated the goods to belong to monastery Z.

A contentious-administrative action was then brought before the *Sectio Altera* ([36]); and after studying the relevant provisions both of canon law and of Spanish civil law (applicable by virtue of can. 1529 of the 1917 Code; cf. can. 1290 of the 1983 Code), the tribunal declared that the property was that of monastery S, and that the decree of the Congregation declaring that monastery Z held title to the goods was unlawful.

Again in this case the real issue was over the rights of the respective parties: indeed, the sentence specifically stated in its *pars expositiva* that the « *quaestio fundamentalis est condicio iuridica inter*

([35]) SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL. Legionen., Iurium, 22nd August 1987, Card. Stickler *Ponens*, in *Revista Española de Derecho Canónico*, 47 (1990), p. 269-274.

([36]) The action was initially brought by the diocesan archivist, but it was considered that he lacked *legitimatio* for the action (see note 6, above). As a result the Bishop himself appeared as Plaintiff.

litigantes circa obiectum litis. Absque dubio agitur de contractu depositi, quis scl. sit deponens et quis sit depositarius bonorum de quibus agitur et quaenam iura regant huiusmodi contractum » (37).

Only by resolving the question of whether the contract regarding the deposit of the goods with the study and research centre was now between the centre itself and monastery S, or between the centre and monastery Z, could the question of legal title to the goods be resolved; and only by resolving the question of legal title could the lawfulness or otherwise of the Congregation's decree be determined. It was impossible to arrive at the « lawfulness » without a thorough study of the « merits »; yet once again, the *pars dispositiva* of the sentence limited itself to stating: « *constare de violatione legis in decernendo relate ad actum Congregatione pro Religiosis* » (38).

Another recent decision involving similar considerations is that of 29th September 1989 (39). The case involved a decree issued by a diocesan Bishop, and later confirmed by the Congregation for the Clergy, regarding certain property rights. The Plaintiff was a Confraternity which claimed that the decree infringed various Papal privileges granted to it in 1526. The Signatura was therefore called upon to examine the lawfulness of the act of the Congregation for the Clergy confirming the original decree.

To reach its decision the Signatura carried out a thorough examination of the historical and canonical aspects of the case, and found in the Confraternity's favour. Nevertheless, as in the previous cases, the *pars dispositiva* of the sentence was limited to the declaration of the unlawfulness of the Congregation's decree, and in fact contained a specific reference to the incompetence of the tribunal to enter into the merits of the case: « *Hoc Supremum Signaturae Apostolicae Tribunal de merito pastorali causae iudicare non potest, sed tantum videre debet "de conformitate vel minus" Decreti Congregationis pro Clericis Decretum Episcopi...conformantis cum lege "sive in procedendo sive in decernendo"* » (40).

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(37) SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, Legionen., 22nd August 1987, Card. Stickler *Ponens*, p. 273.

(38) *Ibid.*, p. 274.

(39) SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL. Iurium, Sentence 29th September 1989, Card. Stickler *Ponens*, in *Revista Española de Derecho Canónico*, 48 (1991), p. 307-323.

(40) *Ibid.*, p. 319.

Yet it is difficult to reconcile such a statement with the actual study of the merits which the tribunal had had to carry out in order to reach its decision regarding the unlawfulness of the administrative act. The only way in which the declaration of incompetence for *meritum* can have any sense in this case is to take it in the limited sense of « good administration », « fittingness », etc.: indeed the use of the phrase *de merito pastorali causae* seems to support this interpretation.

Nevertheless a study of the *pars dispositiva* of other published sentences of the *Sectio Altera* reveals the tribunal's steadfast refusal on the theoretical level to enter into the *meritum* of the case in any sense (41), despite the practical realities (42).

5. *No alteration of « petitum » in Art. 123 § 1 of « Pastor Bonus ».*

Against this background the provision in Art. 123 § 1 of *Pastor Bonus* that a contentious-administrative action can be brought against singular administrative acts issued or approved by Dicasteries of the Roman Curia « *quoties contendatur num actus impugnatus legem aliquam...violaverit* » appears to introduce no substantial modification as regards the *petitum*, and certainly provides no additional support or argument to those who wish to interpret the competence of the *Sectio Altera* in such a way as to include subjective rights (43). In essence, therefore, it appears to relate essentially to the possibility of a declaration of the unlawfulness of the administrative act, together with the supplementary *petitum* of the suspension of execution of the act pending the tribunal's decision.

C. *Competence for damages in Art. 123 § 2 of « Pastor Bonus ».*

The major innovation in Art. 123 is that contained in its second paragraph, which provides that where an administrative act is found to be unlawful, the Plaintiff can also request damages for

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(41) Cf. SALERNO, *Il giudizio...*, p. 169.

(42) So anxious has it been to avoid making any pronouncement on the merits of the case that it has sometimes failed to address even the lawfulness aspect: instead of issuing a clear judgment regarding the lawfulness of the administrative act, « se conforma con apreciar la *causa petendi* sin apreciar sobre el *petitum*, en lo cual se asemeja a un órgano consultivo »: LABANDEIRA, *El objeto...*, p. 161.

(43) Cf. MONETA, *La tutela...*, p. 24; LLOBELL, *Il « petitum »...*, p. 144-145.

the harm caused by the act. Antecedents for this additional competence can be found in the various *Schemata* for the 1983 Code relating to administrative tribunals (44), which it is thought would automatically have included the *Sectio Altera* (45). The Code itself appeared to suggest the possibility of a request to the Signatura for damages for harm arising out of administrative acts (46); but the matter was left vague and indeterminate, on account of the last-minute withdrawal of the proposed legislation on administrative tribunals, and in practice it was not accepted that the Code had extended the competence of the *Sectio Altera* in any way (47).

The question now arising is to what extent the additional *petitum* of damages which may now be obtained through the *Sectio Altera* affects the fundamental orientation of the Church's administrative justice.

1. *Damages in relation to lawfulness and merits.*

It should be pointed out first of all that Art. 123 § 2 contemplates the request for damages as a *supplementary* issue, which may or may not be attached to the principal action, namely that relating to the lawfulness of the administrative act, as provided for by Art. 123 § 1 (48). Nevertheless, when such a request is presented, the

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(44) Cf. cann. 18 § 1, 26 § 2 of the 1972 *Schema*; can. 1703 § 1 of the 1980 *Schema*; can. 1751 § 1 of the 1982 *Schema*; MONTINI, G., *Il risarcimento del danno provocato dall'atto amministrativo illegittimo e la competenza del Supremo Tribunale della Segnatura Apostolica*, in *La giustizia amministrativa nella Chiesa, Città del Vaticano*, 1991, p. 179-200, at p. 180-184.

(45) Cf. MONTINI, *Il risarcimento...*, p. 184.

(46) Cf. cann. 57 § 3 and 128; also can. 1445 § 2, which does not mention a specific *petitum*, but refers generically to the Signatura's competence in respect of « contentiones ortae ex actu potestatis administrativae », which could be taken as referring to any dispute or « controversia » within the meaning of can. 1400 § 2: cf. LLOBELL, *Il « petitum »...*, p. 140-141.

(47) Cf. for example SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL., Miamiensi, 30th October 1990, in *Notitiae*, 26 (1990), p. 711-713, where in response to a request for damages the tribunal declared: « huius Signaturae Apostolicae in casu non est videre de damnis, nam actus impugnatus positus est antequam art. 123, § 2, Const. Ap. « Pastor Bonus » vigere incepit » (p. 712).

(48) The pre-Code *Schemata* contemplated the possibility of « autonomous » requests for damages, in which the question of lawfulness would be looked at only « incidentally »: cf. can. 26 § 2 of the 1972 *Schema*, can. 1703 § 1 of the 1980 *Schema*, and can. 1751 § 1 of the 1982 *Schema*. Art. 123 does not incorporate such

tribunal, having established the unlawfulness of the administrative act, has to decide how to approach the damages issue. The damages must relate to the harm caused by the unlawful act (*damna actu illegitimo illata*), and consequently the tribunal needs to establish the basis upon which it can proceed from a mere recognition of the unlawfulness of the act, to the conclusion that a particular award of damages is appropriate in the specific case. In other words, it must consider whether a necessary step in that process is the examination of the substantive issue, namely the extent of the injustice suffered by the Plaintiff, which would necessarily involve a study of the merits of the case; or whether it can altogether by-pass the need to enter into the merits, while still arriving at an appropriate award of damages ([49]).

From the point of view of strict logic, the latter approach seems to be untenable ([50]). If damages are intended in some way to remedy or compensate for the harm done, they must take into account the difference between the situation of injustice which has actually been produced, and the situation of justice which ought to have been brought about, or at least respected. Of necessity this requires an assessment of all the relevant objective and subjective factors, amounting to a true judgment on the merits of the case in question. To omit such a step would lead to awards being made on a totally arbitrary basis, which would not only constitute a serious injustice in itself, but would do violence to the wording of Art. 123 § 2.

Furthermore, an administrative act that is deemed unlawful does not necessarily constitute a substantive « injustice » ([51]), and some

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a possibility, although MONTINI regards it as allowable: cf. *Il risarcimento...*, p. 199. « Nulla infatti lo vieta », he says, though it is difficult to see how he arrives at such a conclusion, since the action for unlawfulness is clearly presented as a pre-requisite (« In his casibus... ») to the claim for damages.

([49]) Cf. LLOBELL, *Il « petitum »...*, p. 145-146. COPPOLA, commenting in 1991 on Art. 123 § 2, says: « In forza di tale nuova disposizione (finora inapplicata perché non è stata ancora prodotta alcuna richiesta di danni dai ricorrenti) le garanzie di tutela in proposito vengono estese dalla sede tradizionale del ricorso gerarchico...al giudizio davanti alla *Sectio altera* della Segnatura, *senza alcun riferimento diretto alla situazione soggettiva lesa* » (the italics are his): COPPOLA, R., *Problematica delle posizioni giuridiche soggettive: profili sostanziali ed operativi dopo il nuovo Codice di Diritto Canonico*, in *La tutela delle situazioni giuridiche soggettive nel diritto canonico, civile amministrativo*, Milano, 1991, p. 45-64, at p. 59.

([50]) Cf. MIRAS, *El contencioso-administrativo...*, p. 422.

([51]) Every unlawful act appears to constitute some form of « injustice », since the law is presumed to be « just ». However, where the unlawfulness is merely

investigation of the merits appears to be a necessary pre-requisite to the consideration of whether any damages should be awarded at all. For example, we may imagine that an ecclesiastical office-holder is found by his Bishop to have been grossly negligent or fraudulent in the exercise of his office, and is removed from office by a decree from the Bishop. The individual unsuccessfully pursues the hierarchical recourse procedure to have the decree set aside and to be reinstated to office. He then presents an action before the *Sectio Altera* requesting that the decree be declared unlawful, and claiming damages for loss of income as a result of his being deprived of office. The *Sectio Altera* may then find that the decree is unlawful for having failed to observe some technical requirement which can be easily remedied; but may consider that, since the decision to remove the Plaintiff from office was obviously well-founded, the question of damages does not arise. In coming to such a conclusion, the tribunal necessarily takes into account the merits of the case: otherwise it would find itself constrained to make awards of damages (on some totally undefined basis) every time a decree were to be found unlawful, regardless of whether the unlawfulness were of a technical or a substantial nature.

Accordingly the *Sectio Altera* ought to be able to enter into the merits of the case whenever necessary, provided that it take care not to encroach upon the area of true discretion (*merito* in the more limited sense described earlier) which the Administration requires in order to perform its task adequately (52).

2. *« Extrinsic » arguments in favour of competence for merits.*

The foregoing considerations relate to what may be considered the internal or intrinsic logic of the situation arising from the attribution to the *Sectio Altera* of the new competence for damages. A number of supporting arguments may be drawn from « extrinsic »

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technical, the injustice is merely technical too, and may be remedied through correcting the technical flaw. A substantive injustice on the other hand refers to a real violation of the rights of the individual, and cannot be resolved by means of purely technical remedies. As was indicated earlier, the dividing line between the *petitum* and the *causa petendi* is not always clear: this is particularly so in this area.

(52) Cf. MIRAS, *El contencioso-administrativo...*, p. 422.

considerations or situations having elements of substantial overlap with the current state of administrative justice in the Church (53).

a) *Historical argument: the « appellatio extraiudicialis ».*

The competence of the *Sectio Altera* now appears to bear similarities to that of the tribunals formerly empowered to deal with the *appellatio extraiudicialis*, which existed from the times of Gratian, and represented the first systematic attempt by the Church to regulate disputes between the faithful and the ecclesiastical authority (54). It consisted of an action before the « ordinary » judge, in which the aggrieved party challenged the lawfulness of an « extrajudicial » act (55) issued by his Bishop or superior, and at the same time alleged actual or potential harm as a result of that act. The principal concern of the *appellatio extraiudicialis* was the « injustice » caused to the individual, rather than the objective violation of the law; and to achieve its purpose it allowed the tribunal to examine the merits of the case. It would therefore seem logical for the *Sectio Altera* to be directed by the same sort of considerations in the exercise of the similar competence which it now enjoys (56).

b) *Arguments from comparative law.*

In general the restrictive interpretations regarding the competence of the *Sectio Altera* have been based on a transfer into canon law of Italian administrative law concepts, particularly those

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(53) These arguments are based in the main upon those given in LLOBELL, *Il « petitum »...*, pp. 146-148.

(54) Cf. GORDON, *De iustitia...*, p. 257-280; ID., *Origine e sviluppo della giustizia amministrativa nella Chiesa*, in *De iustitia administrativa in Ecclesia*, Roma, 1984, p. 1-18, at p. 2-4; VALDRINI, P., *Conflits et recours dans l'Eglise*, Strasbourg, 1978, p. 63; RANAUDO, A., *Alcune brevi considerazioni sulla istituzione dei Tribunali amministrativi ecclesiastici*, in PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS. *Acta et documenta Pontificiae Commissionis Codici Iuris Canonici Recognoscendo, Congregatio Plenaria 1981*, Typ. Polygl. Vaticanis, 1991, p. 172-175, at p. 172-173. The most comprehensive study of the *appellatio extraiudicialis* is that of SCHMITZ, H., *Appellatio extrajudicialis. Entwicklungslinien einer kirchlichen Gerichtsbarkeit über Verwaltungsakte im Zeitalter der klassischen Kanonistik (1140-1348)*, München 1970, XX (Münchener Theologische Studien, III/29), to whom other writers on the subject are indebted: cf. GORDON, *Origine...*, p. 2, note 2.

(55) That is, an act not constituting a judicial decree or sentence.

(56) Cf. LLOBELL, *Il « petitum »...*, p. 146.

of *diritti soggettivi*, questions regarding which are referred to the ordinary courts, and *interessi legittimi*, which are the concern of the special administrative tribunals. However, there are two fundamental considerations which should be taken into account in this context. First, the division in civil law is possible because the ordinary courts really do have competence for cases involving *diritti soggettivi*. In the Church, where such competence was expressly prohibited to the ordinary tribunals ([57]), it seems absurd, and above all unjust, to attempt to superimpose criteria which are peculiar to one civil legal order onto a situation that is in no way analogous.

Secondly, even the Italian administrative tribunals recognize certain exceptional situations in which the question of merits can be investigated by them, whereas those who have maintained a « lawfulness only » approach have recognized no corresponding exceptions within the Church order ([58]).

If comparisons with the civil order are to be made, it would surely be logical for the Church tribunals to have powers at least as wide-ranging as their civil counterparts; and since the *Sectio Altera* currently constitutes the only tribunal competent for contentious-administrative affairs, the same logic would require that it be given the full range of powers within the contentious-administrative ambit ([59]).

Interestingly a comparison with English law, where judicial review of unlawful administrative action recognizes the distinction between lawfulness and merits ([60]), reveals that that legal system also

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([57]) Cf. Decree of the Roman Rota, 30th April 1923 (*AAS* 15 (1923), p. 296-302) and Reply of the Commission for the Interpretation of the 1917 Code, 22nd May 1923 (*AAS* 16 (1924), p. 251).

([58]) Cf. LABANDEIRA, *Tratado...*, p. 742-743; LLOBELL, *Il « petitum »...*, p. 141-142.

([59]) Cf. LLOBELL, *Il « petitum »...*, p. 146, where the suggestion is made that the *Sectio Altera* should be compared not to the Italian *Consiglio di Stato*, but rather (if to anything) to the system of specialized ordinary jurisdiction existing in Spain, or to the special administrative jurisdictions of France, Germany or Austria. « Si la deuxième section est créée pour "dirimer" les contentieux, elle doit avoir le pouvoir de tout faire pour qu'avec la prononciation du juge, la justice soit totalement rétablie et que le contentieux ne soit pas restitué. En autres termes, la compétence "de légitimé" ne peut, en aucun cas, suffire à dirimer tous les contentieux »: VALDRINI, *Injustices...*, p. 84; cf. also STRAUB, *De obiecto...*, p. 553.

([60]) In England the public authority is *prima facie* liable in contract and tort in the same way as a private individual, and in such cases the court examines and

finds it difficult to maintain a strict division of the two concepts in practice (61). « The judges have been deeply drawn into this area, so that their own opinion of the reasonableness or motives of some government action may be the factor which determines whether or not it is legal....But unless the courts are prepared to act boldly in this direction, they can give but feeble protection against administrative wrongdoing. The whole problem is centred on the question of discretionary power, which lies at the heart of administrative law » (62).

c) *Argument from the Signatura's own case-law*

An indication as to how the Signatura should approach cases in which damages are requested is given in one of its own decisions prior to *Pastor Bonus* (63), in which, by virtue of a « grace » granted by the Cardinal Secretary of State, the tribunal was empowered to judge the merits of the case as well as the lawfulness of the administrative act being contested (64).

The dispute arose as the result of the dismissal from office of a professor of a Catholic University for lack of « scientific honesty », after it was found that the course-notes which he issued under his own name to his students contained writings copied from other authors, without acknowledgment of those sources. After unsuccessfully attempting to have the decision withdrawn through the

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judges the merits of the dispute: cf. HOOD PHILLIPS, O.; JACKSON, P., *O. Hood Phillips' Constitutional and Administrative Law*, 6th edition, London, 1978, pp. 609-615. Where the public authority is empowered to override the rights and interests of individuals, it may do so only in the manner and for the purposes foreseen by law, and its activity may be challenged for unlawfulness, the difference between English and Continental systems being that in England actions for unlawfulness are referred to what would be the equivalent of « ordinary » courts in Continental legal systems, and not to the administrative tribunals. In such cases the court limits its examination to the lawfulness aspect.

(61) Cf. WADE, H.W.R., *Administrative Law*, 5th edition, Oxford, 1982, pp. 36-38.

(62) *Ibid.*, p. 37; cf. also BAKER, J.H., *An Introduction to English Legal History*, 2nd ed., London, 1979, p. 132.

(63) SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL. Romana, Dimissionis a munere docendi, 27th October 1984, Card. Ratzinger *Ponens*, in *Il Diritto Ecclesiastico*, 96/2 (1985), p. 260-269; see the analysis in LLOBELL, *Il « petitum »...*, p. 146-148; also MONTINI, *Il risarcimento...*, p. 194.

(64) SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, Romana, Dimissionis a munere docendi, 27th October 1984, p. 264.

hierarchical recourse procedure, the Plaintiff initiated a contentious-administrative action against both the University and the Sacred Congregation for Catholic Education which had confirmed the University's decision. His contention was that the act of dismissal was not only « unlawful », but also « unjust », and in consequence he sought damages by way of compensation.

The Signatura in arriving at its decision considered the matter in three stages. First, it examined whether there had been a violation of law *in procedendo vel in decernendo*, and in the particular circumstances it held that the act of dismissal had violated the law in both respects: the manner in which the act was issued, and its legal basis, were both found to be deficient, and consequently the act of dismissal was null (65).

Secondly the tribunal considered whether the unlawful act had brought about an « injustice ». The elements which it considered relevant in this respect were whether there really had been « plagiarism » on the part of the Plaintiff; and whether the notes issued by the Plaintiff had been influential in securing him promotion to the position of professor in the University. On neither count was there conclusive evidence, and as a result the motives which might have « justified » the decision taken by the University against the Plaintiff could not be proved. Accordingly the Signatura held that the act of dismissal was « unjust » (66).

The Plaintiff was therefore entitled to damages, although the Signatura considered that its own competence was limited to stating the general principle, whereas the specific sum to be awarded should be determined by the appropriate office of the Holy See (67). Nevertheless, the College of Cardinals, considering at a later date the question of competence to determine the award of damages, declared that the « competent office » was the Signatura itself (68).

From this case it is evident that the Signatura accepted that the ogical manner of determining whether damages should be awarded as to examine the « lawfulness » of the administrative act, and bsequently to consider its « justice » (or merits), before reaching

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(65) *Ibid.*, p. 264-268.
(66) *Ibid.*, p. 268-270.
(67) *Ibid.*, p. 270.
(68) SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, Decree 1st June 1985, *Diritto Ecclesiastico*, 96/2 (1985), p. 261, footnote.

its decision on damages. Now that the *Sectio Altera* has specific competence for damages, and is not dependent on a « grace » from the Secretary of State, it would seem only natural for it to follow a similar manner of reasoning in future actions for damages.

3. *Basis and measure of damages.*

a) *General basis of liability for damages.*

The 1983 Code establishes a general obligation of making good any damage occasioned by an unlawful juridical act, or « by any other act which is deceitful or culpable » (69). This latter part of the provision was presumably inserted on the basis that there could be deceitful or culpable acts which were nevertheless « lawful » (70), although in contentious-administrative cases such acts would normally be considered as constituting a *violatio legis* in the broad sense. *Pastor Bonus* omits any reference to deceit or culpability, and makes the liability of the administrative authority dependent simply upon there being a causal link between the unlawful act and the damage suffered by the Plaintiff (71).

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(69) « Quicumque illegitime actu iuridico, immo quovis alio actu dolo vel culpa posito, alteri damnum infert, obligatione tenetur damnum illatum reparandi »: can. 128; cf. COPPOLA, *In tema...*, p. 167.

(70) Cf. MOLANO, E., Commentary on can. 128, *Código de Derecho Canónico*, 4th ed., Universidad de Navarra, Pamplona, 1987.

(71) Cf. KRUKOWSKI, J., *Responsibility for Damage Resulting from Illegal Administrative Acts in the « Code of Canon Law » of 1983*, in *Le nouveau Code de Droit Canonique (Actes du Ve Congrès de Droit Canonique)*, Ottawa, 1986, p. 231-241, at p. 233-236; GORDON, I., *La responsabilità dell'Amministrazione Pubblica Ecclesiastica*, in *Monitor Ecclesiasticus*, 98 (1973), p. 384-419, at p. 395-396. Cf. th proposals in can. 18 § 3 of the 1972 *Schema*, can. 1703 § 3 of the 1980 *Schema* an can. 1751 § 3 of the 1982 *Schema*; also can. 386 § 3 of the 1982 *Schema canonu de tutela iurium seu de processibus* (Nuntia 14 (1982), p. 3-108) and can. 1006 of t 1986 *Schema Codicis Iuris Canonici Orientalis* (Nuntia 24-25 (1987), p. 180-182), the effect that liability rested with the « office » rather than the person who issu the act (BERNARDINI had argued that the reverse should be the case, so that in event of the death, etc., of the official concerned, responsibility would pass to personal successors, rather than to his successors in office: cf. BERNARDINI, *Problemi di contenzioso amministrativo canonico specialmente secondo la giurisprud della Sacra Romana Rota*, in *Acta Congressus Iuridici Internationalis, Romae 1 novembris* 1934, vol. 4, Romae, 1937, p. 357-432, at p. 425-432). The « off however, would not necessarily be precluded from pursuing a separate actio

In the case of the Public Ecclesiastical Administration, the special privileges and position of authority which it enjoys give rise to a presumption that *any* violation of law on its part is culpable; and although it has been suggested that such a presumption is rebuttable in respect of juridical acts in general (72), *Pastor Bonus* does not appear to accept any such possibility in the specific sphere of the contentious-administrative action.

Nevertheless it is not to be thought that canon law incorporates any notion equivalent to that of « strict liability » on the part of the Public Administration. The ultimate basis for an award of damages in the Church is that of the natural law (73); and for the same reason the concept of « vicarious liability » as existing in English law finds no exact reflection in canon law, where the liability of a superior requires some fault on his own part (74).

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recovery of its outlays against the individual responsible for the unlawful act: such a principle would not be new to canon law, since it already exists as regards Auditors of the Roman Rota (cf. can. 1445, § 1, 3). Obviously actions of this kind would not be of a « contentious-administrative » nature, and would fall within the competence of the ordinary tribunals. If the individual involved were a Bishop, the case would have to be judged by the Roman Rota (cf. can. 1405 § 3, 1).

(72) Cf. MONTINI, *Il risarcimento...*, p. 195.

(73) Cf. MAXWELL, P.F., *Comparatio fundamenti rationalis de damno resarciendo in lege Ecclesiae et in iure Foederatarum Civitatum Americae Septentrionalis*, in *Periodica*, 75 (1986), p. 511-524, at p. 516-524, where the author also refers to his own dissertation, *A Comparison of the Rationale Underlying Unjust Damage (Torts) and Allocation of Liability in Church Law and American (USA) Law*, Pontificia Universitas Gregoriana, Facultas Iuris Canonici, Romae, 1986, in which this idea is developed more fully.

(74) In this connection see FISCHER, K.E., *« Respondeat superior redux »: May a Diocesan Bishop Be Vicariously Liable for the Intentional Torts of his Priests?*, in *Studia canonica*, 23 (1989), p. 119-148. DELLA ROCCA, F., *Problemi di giustizia amministrativa nel diritto canonico*, in *Nuovi saggi di diritto processuale canonico*, Padova, 1988, p. 13-19; MAXWELL, *Comparatio...*, p. 520; COPPOLA, *In tema...*, p. 172; BERNARDINI, *Problemi...*, p. 415-425. In a recent Rotal sentence it was held that a Religious Congregation was responsible for damage caused by the unlawful activity of one of its members, where there was evidence of culpable conduct on the part of the Religious Superior through lack of due diligence in the exercise of his function (in the case in question, the Congregation had consented to the member's engaging in certain commercial activities for which the Holy See's consent was required, and had not been obtained). A third party suffering harm as a result of the unlawful activity of the member was entitled to bring an action against the Congregation: cf. SACRA ROMANA ROTA, Romana, Iurium, Sentence c. Palestro, 15th June 1988, in *Ius Ecclesiae*, 1 (1989), p. 587-614. cf. also 1917 Code, cann. 536 § 2, 580 § 2; 1983 Code, cann. 639 § 2, 668 § 3.

No indication is given in *Pastor Bonus* regarding the apportionment of liability for damages as between the lower and superior administrative authorities (75); and in this regard the *Sectio Altera* will be called upon to develop its own principles, having regard to canonical tradition (76) and the criteria in can. 19 (77).

b) *Types of harm for which damages may be awarded.*

Although both the Code and *Pastor Bonus* refer to *damnum*, no definition of this notion is given in either document. Through reference to canonical tradition and to other provisions within the 1983 Code itself, what appears clear is that in Church law the notion cannot be limited simply to economic or physical losses. The tradition emerging from the 1917 Code and developed by authors is to the effect that *damnum* includes « spiritual » or non-physical harm (78); while the emphasis of the 1983 Code upon the fundamental rights of the faithful, many of which are on the « spiritual » level, has as a consequence that the protection offered in respect of those rights should include awards of damages (79).

Damnum, therefore, can be seen as including any harm occasioned to any material or spiritual interest for which the law offers protection (80). The problem, however, is knowing where the line should be drawn between those non-material interests which are

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(75) Cf. the proposals in can. 18 § 3 of the 1972 *Schema*, can. 1703 § 3 of the 1980 *Schema* and can. 1751 § 3 of the 1982 *Schema*; also can. 386 § 3 of the 1982 Eastern *Schema* and can. 1006 of the 1986 Eastern *Schema*.

(76) Cf. can. 6 § 2.

(77) SALERNO argues that, where the Dicastery confirms the act of the lower authority, the latter is responsible for damages since the Dicastery's involvement is essentially one of hierarchical control. He also argues that this approach is more in line with the letter of the law, which requires a causal relationship between the harm and the unlawful act from which it arises: cf. *Il giudizio...*, p. 156 (this was also the fundamental approach of the pre-Code *Schemata*). LABANDEIRA proposes as a general principle of canon law that « salvo excepción, el acto es propio de quien lo realiza »: *Tratado...*, p. 162.

(78) Cf. can. 2355 of the 1917 Code, which allowed damages for harm caused to a person's reputation.

(79) Cf. MONTINI, *Il risarcimento...*, p. 188-189. « È questo anzi lo scopo specifico dell'istituzione della stessa *Sectio Altera* della Segnatura Apostolica, introdotta «ad summa eaque principalia fidelium iura aptius tuenda» (*Pastor Bonus*, 5, b) »: *ibid.*, p. 189, note 42.

(80) Cf. *ibid.*, p. 190-191; cf. also KRUKOWSKI, *Responsibility...*, p. 234-235; GORDON, *La responsabilità...*, pp. 391-395.

to be considered as meriting legal protection, and those which are not. To some extent the fundamental rights specified in the Code may provide some sort of guideline; but this is clearly an area where the Signatura will be required to develop its own principles on a case-by-case basis (81).

c) *Notion of damages.*

Although can. 128 of the 1983 Code refers to the obligation *damnum illatum reparandi*, it offers no definition of what *reparatio* consists of. However, authors have distinguished two types of *reparatio* in the Code: one « general », consisting of monetary compensation, and corresponding in broad terms to « damages » in English law (82), the other « specific », aimed at restoring in a real manner the situation existing before the harm was caused (83).

Art 123 § 2 of *Pastor Bonus* refers to *reparatio damnorum*, and it would appear therefore that the *Sectio Altera* would in principle be empowered to grant either « general » or « specific » *reparatio*,

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(81) As in secular legal systems, not all forms of harm or damage give rise to a right of action. Both English and Continental legal systems have developed classifications, either through case-law or through specific legislation, of the types of harm against which remedies are available, and of those considered juridically « irrelevant » (*damnum sine iniuria*): in English law, for example, most forms of grief and sorrow are included in the latter category. On the various objections and difficulties which the civil legal orders have had to overcome in order to be able to offer protection against certain forms of non-physical damage (*daño moral*), see MARTIN CASALS, M., *Notas sobre la indemnización del daño moral en las acciones por difamación de la LO 1/1982*, in ASOCIACION DE PROFESORES DE DERECHO CIVIL. *Centenario del Código Civil (1889-1989)*, vol. II, Madrid, 1990, p. 1231-1273, at p. 1231-1234.

One interesting principle emerging from a recent decision of the Signatura, though not concerning harm caused by the administrative act itself, is that the *legal representative* of the Plaintiff can be held liable for expenses incurred by the tribunal where he challenges the initial decision of the Congress without having solid grounds for doing so: cf. SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, Québec, 20th April 1991, Card. Gantin *Ponens*, p. 415.

(82) Cf. can. 1062 § 2 (damages for breach of promise of marriage).

(83) Cf. MONTINI, *Il risarcimento...*, p. 189-190; GORDON, *La responsabilità...*, p. 396. The distinction is not to be confused with that of « general » and « special » damages in English law, where « general » damages are those relating to losses which are incapable of precise estimation (such as loss of reputation, or pain and suffering); while « special » damages relate to losses which are quantifiable (such as loss of earnings, or out-of-pocket expenses).

according to the nature of the case (84). This conclusion finds support in the case involving the uiniversity professor, studied earlier (85), where the third *dubium* to be resolved by the tribunal had asked: « ... *an damnis recurrens sarciendus sit et an hoc Supremum Tribunal competens sit ad quaestionem solvendam de refectione damnorum* » (86).

The tribunal initially replied: « «*Affirmative*», *et iuxta modum. Modus autem est quod de re videant competentia Officia Sanctae Sedis* » (87); and after establishing, at a later date, its own competence for resolving the question (88), declared: « *Ideo hoc Supremum Tribunal decernit [recurrentem] restituendum esse in munere docendi..., nisi alia aequa solutio concorditer inter partes inveniatur* » (89).

Clearly therefore the Signatura interpreted the concept of *refectio damnorum* in a much broader sense than that of merely financial compensation, and it is to be assumed that it would follow a similar approach in respect of the competence for *reparatio damnorum* granted to it by Art. 123 § 2 (90).

The same conclusion would be reached from a study of the concept of *risarcimento del danno* in Italian law, where a distinction is drawn between *risarcimento per equivalente*, or financial compensation (*compensatio lucri cum damno*), and *risarcimento in forma specifica*, consisting of alternative remedies for restoring the injured party as nearly as possible to the position in which he would have been but for the unlawful damage (91).

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(84) Cf. the example given in MONTINI, *Il risarcimento...*, p. 191-192.

(85) SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, Romana, Dimissionis a munere docendi, 27th October 1984, Card. Ratzinger *Ponens*, in Il Diritto Ecclesiastico, 96/2 (1985), p. 260-269.

(86) *Ibid.*, p. 264.

(87) *Ibid.*, p. 270.

(88) Cf. Decree 1st June 1985, in *Il Diritto Ecclesiastico*, 96/2 (1985), p. 261, footnote.

(89) *Ibid.*

(90) If the specific form of *reparatio* is to be awarded, the argument to the effect that the *Sectio Altera* must necessarily enter into the merits of the case acquires even greater cogency.

(91) Cf. SALVI, C., *Risarcimento del danno*, in *Enciclopedia del Diritto*, vol. XL, 1989, p. 1084-1106. « Non vi è quindi ragione di ritenere che la finalità riparatoria sia conseguibile solo attraverso il pagamento di una somma di denaro. Anzi, quella finalità può in alcuni casi...esprimersi più adeguatamente attraverso modalità non pecuniarie, idonee a "ripristinare" la dignità della persona offesa »: *ibid.*, p. 1104.

d) *Measure of damages.*

In assessing the damages to be awarded, the tribunal should take into account the precise request of the Plaintiff, who sets out the terms of the dispute and thus provides the limits within which the tribunal is to operate (92).

There are very few specific criteria to assist the Signatura in determining the extent of monetary damages in this new area of competence, although the Rotal decision of 15th June 1988 (93) may provide some guidelines for the future. In that case, where the the Plaintiff had been unjustly deprived, over a very lengthy period, of payment under a contract, damages were allowed for *a*) the reduction in the value of the contract price from the time of the contract itself until that of the tribunal's decision; *b*) compound interest in order to compensate for the non-enjoyment of the money while it was unlawfully withheld; *c*) increased expenses incurred by the Plaintiff through delays in paying debts as a result of the non-availability of the contract monies; *d*) expenses in respect of the trial itself; and *e*) the inconvenience and delays experienced by the Plaintiff in obtaining justice. Whilst having no binding effect on the Signatura, nevertheless this decision may be of value in helping the Signatura determine whether damages are payable in a given set of circumstances, and the basis on which they are to be calculated. Although it is a case involving breach of contract, and consequently differing substantially from contentious-administrative disputes (which arise out of unilateral administrative acts), the considerations of equity and canonical tradition upon which the Rota based its decision may be of equal application in the contentious-administrative context.

Several other issues will have to be addressed by the Signatura in calculating the damages to be awarded in particular cases, such as the effect of failure on the part of the Plaintiff to take reasonable measures to mitigate his loss; the liability of the Administration for unforeseen or unforeseeable harm flowing from the unlawful act;

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(92) Cf. MONTINI, *Il risarcimento...*, p. 192.

(93) SACRA ROMANA ROTA, Romana, Iurium, Sentence c. Palestro, 15th June 1988 (cf. LLOBELL, J., *Aspetti del diritto alla difesa, il risarcimento dei danni e altre questioni giurisidizionali in alcuni recenti decisioni rotali*, in *Ius Ecclesiae*, 1 (1989), p. 587-611); also Decree on incidental question, c. Palestro, 13th April 1988, in *Ius Ecclesiae*, 1 (1989), p. 581-586.

and the possibility of combining « general » and « specific » *reparatio* where the latter is insufficient of itself.

As regards *reparatio* for non-material damage, the Signatura will need to clarify what exactly it wishes to achieve in granting such a remedy. In cases where the « loss » cannot be precisely calculated, the Plaintiff cannot be « compensated » as such: rather, the remedy should aim to « satisfy » him in some way (94). Nevertheless in the absence of any body of case-law which might provide a yardstick by way of comparisons with awards granted in similar situations and with the factors taken into account in arriving at those awards, it is very hard to formulate any *a priori* principles in this regard; here too, the Signatura will have responsibility for formulating and developing a body of guiding principles, having due regard for canonical tradition and equity (95).

4. *Formal extension of « petitum » to include subjective rights.*

Since the award of damages necessarily demands the recognition of the right of the Plaintiff, it would seem desirable for

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(94) In the civil sphere, SALVI refers to the « appagamento del senso di giustizia della vittima, che vede per tale via riconosciuto il torto che ha subito » (*Risarcimento...*, p. 1099), a secondary aim in such cases being the « punishment » of the Administration. There is no indication in *Pastor Bonus* or anywhere else that the competence of the *Sectio Altera* to award damages extends to this secondary « punitive » aspect; and in consequence there appears to be no authority for suggesting that an award of damages may be increased, along the lines of the controversial awards of « exemplary » damages in Anglo-American law (cf. MARTIN CASALS, *Notas...*, p. 1252-1263), on this count alone.

(95) The danger should obviously be guarded against of basing awards of damages *solely* on awards made in cases involving similar circumstances; otherwise, what is intended as a safeguard against arbitrariness on the part of the administrative authority may open the door to arbitrariness on the part of the judge. The escalation of damages which is seen to occur in some civil legal orders seems to be the result of a certain detachment of the awards from objective criteria, resulting in a disproportion, or at least the absence of any clear idea as to the inherent relationship, between the harm suffered and the remedy obtained. In the Church, where the fundamental concern is substantive justice, it is essential that each award should entail the objective factors of proportion, adequacy and fairness *in the particular circumstances of the case*. Hence the importance (and difficulty) of the Signatura's role in establishing the principles upon which later comparisons will be made, in order to ensure that no conflict can arise between the objective justice of the award, and the principle that like cases should be treated alike.

such recognition to be set on a formal basis, in order to provide a coherent and logical body of remedies in the contentious-administrative sphere: the annulment of the administrative act, the declaration of the right of the Plaintiff, and damages to compensate the harm caused to that right. The current legislation explicitly incorporates the first and last of these three remedies: it now needs to give formal recognition to the second, so that the protection offered to the individual is complete (96).

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(96) « La primera manera de tutelar los derechos subjetivos de los fieles es reconocerlos por vía legislativa; la segunda, reconocerlos por vía jurisdiccional »: LABANDEIRA, *El objeto...*, p. 166. The recognition of such a remedy would give firm foundation to an action for damages for infringement of the Plaintiff's subjective right even where no ecclesiastical law is violated: cf. ARRIETA, J. I., *Diritto soggettivo: II) Diritto Canonico*, in *Enciclopedia giuridica*, vol. XI, Roma, 1989, p. 1-8, at p. 5-6; LABANDEIRA, *Il ricorso...*, p. 84. At present the possibility of such an action depends upon whether the « injustice » may or may not be considered to constitute a *violatio legis*. MONTINI is of the opinion that no further legislative innovation is necessary: the competence which the *Sectio Altera* now has for damages is seen by him to represent an opportunity to « creare attraverso una riparazione dei danni coraggiosamente interpretata una Giustizia Amministrativa più reale, sostanziale e celere, pur senza mutare il quadro normativo di riferimento attuale »: *Il risarcimento...*, p. 200.

Arguably the system might be further perfected by the introduction of remedies equivalent to the injunction and the prohibition order available in England, which prevent the public authority from making an invalid decision or from breaking the law; and the order of *mandamus*, which commands the authority to carry out some public duty (on the remedies available in English law, see WADE, *Administrative Law...*, p. 513-576; BAKER, *Introduction...*, p. 116-132; HOOD PHILLIPS-JACKSON, *Constitutional...*, p. 616-630; SMITH, K.; KEENAN, D.J., *English Law*, 6th ed., London, 1979, p. 77-83). To some extent the last-mentioned remedy finds an equivalent in the provisions of cann. 57 § 3 and 1735 regarding « administrative silence »; in general, however, the remedies offered by canon law are available only *after* the administrative act has been issued.