

UNITED STATES CONFERENCE OF CATHOLIC BISHOPS

PROCEDURES
for RESOLVING
CONFLICT



JANUARY 2002

The document *On Due Process* was developed in 1969 and published in 1972 as a resource by the Committee on Canonical Affairs of the National Conference of Catholic Bishops on the basis of a study done by the Canon Law Society of America. The *Committee on Conciliation and Arbitration: Procedures Adopted by the General Membership* were developed by that Committee of the National Conference of Catholic Bishops and approved by the full body of U.S. Catholic bishops at its November 1979 meeting. The reissuing of both documents has been authorized by the undersigned.

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General Secretary, USCCB

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*Committee on Conciliation and Arbitration:
Procedures Adopted by the General Membership*

FOREWORD

From time to time the bishops of the United States have addressed questions involving the resolution of conflicts and disputes within the Church. In doing so, the bishops have sought to balance the good of the Church, the rights and duties of all the faithful, and the directives of the *Code of Canon Law*. Toward that end, in 1972, the National Conference of Catholic Bishops published the booklet *On Due Process* containing recommendations drawn from a study by the Canon Law Society of America that was presented to the Bishops in 1969. It was revised and received a *nihil obstat* from the Holy See in 1971. At their November 1979, General Meeting the bishops approved procedures to govern the action of the Committee on Conciliation and Arbitration. Those procedures were published in 1980.

Nearly thirty years have passed since the publication of *On Due Process*, and more than twenty years since publication of the *Committee on Conciliation and Arbitration: Procedures Adopted by the General Membership*. However, the proposals, suggestions, and commentaries contained therein remain a valuable resource. For this reason, the Committee on Canonical Affairs is reissuing these documents in one publication so that bishops and faithful might more conveniently avail themselves of their content.

Most Reverend A. James Quinn, Chairman
Committee on Canonical Affairs
United States Conference of Catholic Bishops

On Due Process



REVISED EDITION

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I. THE NCCB ON THE SUBJECT OF DUE PROCESS

In November of 1969, during the course of the semi-annual meeting of the National Conference of Catholic Bishops, the Committee on Canon Law reported to the general membership on the matter of due process. This was not the first time that the question had been brought to the floor for discussion during a general meeting of the U.S. bishops. At a similar meeting held a year before in November of 1968, the subject had been discussed in detail. The outcome of that discussion was a brief statement which concluded with these words:

The National Conference of Catholic Bishops is eager to assist in the formidable task of revising the Code of Canon Law. It is equally eager to promote adequate protection of human rights and freedoms. For this reason, the Conference earnestly invites, with due regard for the fundamental differences of the civil and ecclesial societies, specific suggestions.

Five months later, during the general meeting of the bishops held in Houston, Texas, in the spring of 1969, the Canon Law Committee reported to the bishops that subsequent to the Conference statement issued during the previous meeting “. . . many individuals and groups, notable among them the Canon Law Society of America, have undertaken studies, promoted dialogue and sought the fruits of scholarly research and pastoral experience relative to the protection of ecclesial rights and freedom.” In reply to this heartening development the Bishops’ Conference (NCCB) passed the following resolution:

Be it resolved: That the National Conference of Catholic Bishops, more than ever aware of the urgency of the problem, encourages and supports these efforts, shares their concern and awaits their results. On receipt of specific suggestions, the Conference stands ready within the limits of its competence to suggest to its members experimentation with workable procedures and the prompt implementation on the diocesan, provincial and regional levels of well-conceived plans for the greater protection of human rights and freedom within the Church.

When, therefore, the matter of due process came before the bishops for a third time in November of 1969, it met with much anticipated interest. The Conference carefully listened to a report from Bishop Ernest Primeau, Chairman of the Canon Law Committee. As part of his report, Bishop Primeau called upon Father Robert P. Kennedy, Chairman of a special due process study commission of the Canon Law Society. Father Kennedy presented to the bishops the results of his committee's studies. In presenting this report, he spoke to them briefly and offered a few additional words of explanation and commentary. (The text of Father Kennedy's remarks as well as the report of his committee are contained in the documentation following this section.)

At the conclusion of Bishop Primeau's report and the discussion of it, the general membership of the Bishops' Conference approved the following resolution:

The promotion of adequate protection of human rights and freedoms within the Church is central to the bishops' role of service to the people of God. This Conference, therefore, consistently has encouraged and supported the scholarly efforts of those who proposed

more effective procedures by which human and ecclesial rights might be guaranteed at all times in the Church.

The report of the Canon Law Society of America to the NCCB on the subject of due process is gratefully acknowledged as an initial positive response to the request of this Conference, made in November 1968, for concrete suggestions for procedures which could operate to safeguard rights and freedoms where existing procedures are found to be inadequate. We believe that what is proposed in this document is balanced, sufficiently cognizant of the specific differences between ecclesial and civil society, pastoral in its orientation, and that its implementation is both feasible and needed.

Therefore, BE IT RESOLVED, That the National Conference of Catholic Bishops, properly aware of the urgency of the problem, recommends to its members experimentation with procedures such as are outlined in the Agenda Report on what is called Due Process, adapted where necessary to local circumstances, and to the prompt implementation on the diocesan, provincial and regional levels of this and other well-conceived plans which may become advisable for that secure protection of human rights and freedoms which should always be among the goals of the Church.

At the beginning of 1970, a summary of all these proceedings was published by the National Conference of Catholic Bishops under the title "On Due Process."

The American effort became an item of special interest in view of current revision of the Code of Canon Law. A special commission had been established to study the Church's judicial procedures in administrative law. In this connection the United

States Plan for due process was examined as a model for conciliation and arbitration for the rest of the Church. After several meetings in Rome, the Holy See, on October 23, 1971, offered to give a “nihil obstat” to the plan, provided a few changes were made and until such times as other provisions might be made in the general law of the Church. The changes, few in number, have been incorporated into the text of the current edition.

+ Joseph L. Bernardin
General Secretary
National Conference of Catholic Bishops
1 March 1972

II. DOCUMENTATION

A. Report of the Canon Law Society of America to the National Conference of Catholic Bishops on the Subject of Due Process

PREAMBLE

In accordance with the authentic teaching of the Catholic Church, the members of this Society express their conviction that all persons in the Church are fundamentally equal in regard to their common rights and freedoms,¹ among which are:

The right and freedom to hear the Word of God and to participate in the sacramental and liturgical life of the Church;²

The right and freedom to exercise the apostolate and share in the mission of the Church;³

The right and freedom to speak and be heard and to receive objective information regarding the pastoral needs and affairs of the Church;⁴

The right to education, to freedom of inquiry and to freedom of expression in the sacred sciences;⁵

The right to free assembly and association in the Church;⁶ and such inviolable and universal rights of the human person as the right to the protection of one's reputation, to respect of one's person, to activity in accord with the upright norm of one's conscience, to protection of privacy.⁷

The dignity of the human person, the principles of fundamental fairness, and the universally applicable presumption of freedom⁸ require that no member of the Church arbitrarily be deprived of the exercise of any right or office.

NOTION OF DUE PROCESS

The adequate protection of human rights and freedoms is a matter of concern to all men of good will; the adequate protection of specifically ecclesial rights and freedoms has become a matter of increasing concern to all members of the Church.

Rights are protected in many ways. Indirectly, they are protected by education, growth of moral consciousness, development of character; directly, they are protected by law. Rights without legal safeguards, both preventive and by way of effective recourse, are often meaningless. It is the noblest service of law to afford effective safeguards for the protection of rights, and, where rights have been violated, to afford effective means for their prompt restoration.

Phrased in abstract terms, the question whether there ought to be “due process” in the Church answers itself since everyone is obviously entitled to whatever process is “due.” In all governmental procedures respect should be paid to the rights of all persons involved, whatever this may require. The question becomes real only when specific content is given to the expression “due process” so that what is asked is whether certain specific substantive and procedural protections are due, in given sets of circumstances, in order that the rights of persons involved be adequately safeguarded.

Most of the current discussion and writing about “due process” in the Church is conditioned by Anglo-American common law tradition which requires, substantively, that no fundamental

right or freedom shall be denied without adequate justification; and procedurally, that every individual be accorded certain specific protections in administrative and judicial procedures. Among such procedural protections are, for example, the right to be informed of proposed actions which might prejudicially affect one's rights, the right to be heard in defense of one's rights, the right, in the face of accusation which could result in the imposition of a penalty, to confront one's accusers, and those who testify in support of the accusation, the right not to be judged by one's accusers. Any nuanced statement of due process will have to make distinctions between many different types of situations; the notion of due process is not univocal but analogous. It is a principle of justice rather than a specific rule of law.

ECCLESIOLOGICAL IMPLICATIONS

a. *Unity of Authority in the Bishop*

It is questioned at times whether this very notion of due process has any proper place in the Catholic Church which we understand to be, by divine institution, a hierarchical society in which the fullness of governmental power is vested in the episcopate.

Bishops govern the particular churches entrusted to them as the vicars and ambassadors of Christ . . . This power, which they personally exercise in Christ's name, is proper, ordinary, and immediate, although its exercise is ultimately regulated by the supreme authority of the Church, and can be circumscribed by certain limits, for the advantage of the Church or of the faithful. In virtue of this power, bishops have the sacred right and the duty before the Lord to make certain laws for their subjects, to pass judgment on them, and to moderate

everything pertaining to the ordering of worship and the apostolate.

The pastoral office or the habitual and daily care of their sheep is entrusted to them completely . . .⁹

It is the opinion of some that there cannot be in the Church any such separation of powers as exists, for example, in the American form of government, in which authority is divided among legislative, executive and judicial branches of government.

The unity of authority is a necessary element of the hierarchical structure of the Church and a juridical expression of the oneness of the spiritual authority derived from Christ.¹⁰

If the bishop has the fullness of governmental power—legislative, executive, and judicial—it is argued that no one could enforce specific requirements of the American concept of “due process” against the bishop; he would (in person or through his delegate), by reason of the unity of authority centered in himself, be legislator, administrator, law-enforcer, prosecutor, judge, and jury.

In response to this approach, three considerations seem to be pertinent. First: a constitutionally dictated separation of powers, as realized, for example, in the United States, is a special doctrine of government whose particular features are not to be identified with the requirements of “due process.” Many of the requirements of “due process,” both substantive and procedural, are relevant to all forms of government, even the most centralized. The right to be heard in defense of one’s rights, for example, is not limited to those who live in a government characterized by separation of powers. The particular way in which authority is distributed, or not distributed, in a given society differs

according to the nature and traditions of the society itself; guaranteeing fundamental fairness against abuse of authority should be the concern of every society regardless of the particular arrangement of legislative, executive, and judicial powers in the governmental structure of the society.

Secondly: the approach, if valid, would argue against protections from abuse of authority already provided in the Church by the present Code of Canon Law. Elaborate procedures are prescribed which a bishop must follow in the removal of pastors;¹¹ detailed rules concerning the competence of courts, right to counsel, admissibility of evidence, burden of proof, number of judges, and availability of appeal, surround the exercise of judicial power;¹² and a bishop is required regularly to enact diocesan legislation “in synod.”¹³ All of these are in the nature of procedural limitations upon the bishop, and yet they have been thought to be consistent with the centralization of all governmental authority in the local bishop.

Thirdly: the approach seems to presume that securing the protection of basic human rights to members of the ecclesial society is equivalently to undermine the authority of the bishop. “Due process” does place limitations on a bishop’s exercise of power, but, so far from undermining his authority, it does much to win respect for it, and so enables him to govern more effectively. The declaration and protection of fundamental rights by guaranteeing proper substantive and procedural safeguards is one of the most important exercises of governmental authority by the bishop. If they are genuine rights, the bishop loses nothing by being required to respect them.

b. *Vatican II Development*

It seems to the members of this Society that the present moment in the history of mankind imperatively calls for further development in the recognition of fundamental fairness in the

governmental life of the Church. We believe this position to be solidly founded in the teaching of the Second Vatican Council:

A sense of the dignity of the human person has been impressing itself more and more deeply on the consciousness of contemporary man. And the demand is increasingly made that men should act on their own judgment, enjoying and making use of responsible freedom, not driven by coercion but motivated by a sense of duty. The demand is also made that constitutional limits be set to the powers of government, in order that there may be no encroachment on the rightful freedom of the person and of associations.¹⁴

If conscientious cooperation between citizens is to achieve its happy effect in the normal course of public affairs, a positive system of law is required. In it should be established a division of governmental roles and institutions, and, at the same time, an effective and independent system for the protection of rights. Let the rights of all persons, families, and associations, along with the exercise of those rights, be recognized, honored and fostered.¹⁵

Each of these statements refers directly not to the Church but to civil society. But they have obvious implications for the Church, since the Church is and must ever be “a sign and a safeguard of the transcendence of the human person.”¹⁶ It would be unfortunate if, while civil societies labored to build “an effective and independent system for the protection of rights,” the Church allowed itself to remain at a lower stage in the development of adequate safeguards for the protection of human rights. The ferment of the gospel, which is especially active in the Church of our time, is arousing in the hearts of Christians an irresistible demand that the human dignity of each member of the faithful should be recognized and protected by suitable legal guarantees.¹⁷

That the Church must develop adequate institutions to keep pace with modern society is implicit in the whole program of *aggiornamento* which inspired the Second Vatican Council. The Council fathers declared that the Church must always remain in harmony with the temporal order “so that the mission of the Church may correspond more adequately to the special conditions of the world today.”¹⁸ In this regard, the ecclesiology of Vatican II developed earlier ecclesiologies in a manner consonant with secular developments in the field of human rights, particularly in the new emphasis placed on the rights and dignity of each member of the laity.

Let sacred pastors recognize and promote the dignity as well as the responsibility of the layman in the Church. . . . Let them confidently assign duties to him in the service of the Church, allowing him freedom and room for action. Further, let them encourage the layman so that he may undertake tasks on his own initiative . . . Furthermore, let pastors respectfully acknowledge that just freedom which belongs to everyone in this earthly city.¹⁹

The characteristics of a free man are precisely that he has rights, that he is not dependent for the enjoyment of his rights upon the good will of his superiors, and that his rights are effectively protected so as to be legally inviolable. The aim of “due process” is precisely to give such inviolability. For men of our time, the legal protection of inviolable rights in the Church would be an especially persuasive sign of that just freedom proclaimed by the gospel as belonging to all men. To the extent that authorities in the Church are able to secure the fundamental rights of Christians they are fulfilling an important part of their service as pastors.

c. Disciplinary Matters

It may be asked how resort to the protective procedures of “due process” is to be reconciled with the virtue of obedience to one’s bishop. It seems to the members of this Society that the obedience a bishop legitimately expects when he seeks the unity of the diocesan apostolate never requires a person unwillingly to give up his Christian rights. Moreover, obedience may take on new significance as God’s People accept not only the decisions of their bishop but the consensus of their fellow Christians and the Christian community at large which explicitly concurs in and supports those decisions. “Due process” is simply one of the effective ways in which authority is exercised and obedience realized.

A more precise question may be asked whether in cases where the local ordinary is himself a party to the dispute he can be bound to accept, or responsibly can bind himself to accept, a decision made by members of his own diocese.

In purely disciplinary matters it would seem evident that there is no theological obstacle to a bishop agreeing, with regard to particular cases and even with regard to whole classes of cases, to abide by decisions of boards or courts over which he has no direct control, just as at present he is bounded by canon law to refer disputes involving his own rights, or temporal goods, or those of the diocesan curia to tribunals for decision.²⁰ By freely submitting to the determinations of impartial boards or tribunals in matters to which he is a party, a local ordinary would win greater respect for his own integrity and thus govern more effectively.

d. Doctrinal Area

The more difficult question concerns disputes arising in the doctrinal area. Here the bishop cannot abdicate his responsibility as teacher; he must retain his traditional function of giving official expression to Catholic doctrine. But it is the opinion of the

members of this Society that he must exercise that responsibility with due regard to the total theological situation. A local ordinary may not make an absolute norm out of his own personal theological interpretations and arbitrarily forbid the dissemination of views which are tolerated elsewhere in the Church.

The bishops of a region or of the nation should be mutually solicitous for the welfare of the Church in every diocese.²¹ Should a serious question arise as to whether a given bishop is excessively strict or excessively permissive, there would be nothing inconsistent with his episcopal office if he were to allow the matter to be referred to a panel of his brother bishops for their judgment. Nor, in the opinion of the members of this Society, would it be at all inconsistent with his office as bishop if he were to allow a like referral to a panel of theologians who have a reputation among their colleagues for theological competence. Such a panel, on the national level, would be comparable to the international theological commission recently established to advise the Congregation for the Doctrine of the Faith. The members of this Society recommend to the American hierarchy the establishment of such a national theological commission.

In view of the great complexity of doctrinal questions at the present moment and the increasingly acute sensitivity of the faithful to the right of free inquiry and expression in the Church, it is the opinion of this Society that bishops will best maintain their authority by involving experts of different theological tendencies and thus taking advantage of the full resources of the theological community. In this way they will increase, rather than undercut, confidence in their own authority as official teachers.

Thus, “due process” should be viewed as a means to an end. It is useful and important as an instrument to help the Church realize itself as a community of freedom and truth. Those securing it, in positions of authority in the Church, show their love

for the People of God, their trust in the working of the Spirit, and their personal disinterestedness by effectively safeguarding the rights of those entrusted to their care.

GOVERNMENTAL CONTEXT

Assessment of the adequacy of present structures in the Church for the protection of rights and resolution of disputes entails a study of the entire legislative, judicial, and administrative structure of the Church.

In the area of legislation, such a study reveals, on the one hand, underutilization of the diocesan synod in the practice of most dioceses,²² and on the other, recent experimentation with a type of legislative “synod” or “diocesan council” which goes beyond the Code provisions for synods especially in regard to frequency of sessions and participation by religious and laity. In regard to prosynodal legislation by the bishop, recent development of priests’ senates and pastoral councils as consultative and collaborative bodies has opened new opportunities for effective participation in law-making and in the consequent resolution of conflicting interests in the Church through the medium of legislation.

In regard to adjudication, Church law affirms the availability of a judicial remedy for the protection of every right,²³ but practice has revealed understaffed tribunals and the consequent unavailability of tribunal processes for all but marriage conflicts. Moreover, the law recognizes no right to judicial review of administrative decisions of ecclesiastical authorities.

Administrative decisions of bishops are reviewable only by one or another of the Sacred Congregations at Rome, a process which experience often has shown to be unsatisfactory because of distance, requirements of secrecy, unavailability of evidence and witnesses, decisions rendered without accompanying findings and

reasoned opinions, and other failures in regard to contemporary standards of fundamental procedural fairness.

The contemplated revision of the Code of Canon Law envisions a broader use of courts for the judicial resolution of conflicts of all kinds, and, in particular, envisions the creation of administrative tribunals in the Church.²⁴ The Synod of Bishops, meeting in Rome on October 7, 1967, voted unanimously for the establishment of courts to provide review of administrative decisions. Such courts will fit easily into the legal climate of this nation in which the process of judicial review traditionally has sought to provide effective protection against arbitrary administrative action. It is expected that the new Code will delineate the forms such tribunals will take, their competence, and rules of procedure applicable to them. The value of judicial precedent and the interpretation of law afforded by the adjudication of concrete cases will enrich the societal life of the faithful.

It is in the administrative area of government that the Church is experiencing the fastest rate of growth, with the creation of increasing numbers of administrative boards, departments, and agencies to supplement the bishop's personal administrative activities. Personnel boards, liturgical commissions, parish councils, and other administrative bodies are emerging in nearly every diocese. The proliferation of administrative powers necessarily entails an increase in the number of persons entitled to exercise the discretion proper to administrative authority, and hence, an increase in the dangers to human rights and freedom that are inherent in uncontrolled and unchecked discretionary power.

The Code of Canon Law is not without concern for limiting administrative discretion, but such checks as it establishes (e.g. synodal examiners, diocesan consultants, councils of temporalities) have been minimal and are, in many ways, unsuited to the forms of administrative entity coming into existence today.

Procedural fairness in all aspects of the administrative life of the Church is one of the pressing needs of our time; indeed, it is the conviction of the members of this Society that the greatest promise for removing causes of conflict in the Church lies in the elimination of unnecessary discretionary power in ecclesiastical administrators, and in the development of effective guidelines, controls, and checks upon necessary discretionary power.

It is, consequently, to the resolution of conflicts involving the exercise of administrative authority in the Church that this report principally directs itself; it is in this area that present-day conflicts are most numerous, and it is in this area that grievances most often are based on the denial of fundamental Christian rights.

PROCESS FOR CONCILIATION

Love your enemies, do good to those who hate you, bless those who curse you, pray for those who treat you badly. To the man who slaps you on one cheek, present the other cheek too; to the man who takes your cloak from you, do not refuse your tunic. Give to everyone who asks you, and do not ask for your property back from the man who robs you. Treat others as you would like them to treat you.²⁵

It is not the litigious, but the poor in spirit who are called blessed by Jesus;²⁶ not judges, but peacemakers who are promised a special reward in the kingdom.²⁷ Forgiveness from the Father is asked as “we have forgiven those who are in debt to us.”²⁸

The teaching of Christ on love of enemies, peace-making, and forgiveness is specifically applied by St. Paul to litigation. Christians are rebuked by him for litigating with one another before unbelievers.²⁹ Christians are told that “it is bad enough for you to

have law suits at all against one another; oughtn't you to let yourselves be wronged, and let yourselves be cheated?"³⁰

In secular situations, litigation is a last resort. Few controversies capable of judicial resolution are judicially resolved. Conflicts so acute that the parties to them seek the counsel of lawyers are normally resolved by the lawyers through a negotiated settlement. Even in the administration of the criminal law, compromise is the usual procedure. Courts function chiefly to set the outer limits within which compromise will be made. They could not possibly adjudicate all conflicts which lawyers could put before them. Without lawyers to resolve most conflicts the courts could not work at all.

Litigation as a way of reaching a just result requires some sort of equality between the parties, an equality which courts try to insure by isolating the judicial procedure from factors extraneous to the issue, but which no court can insure if the parties are unequal in their resources and ability to engage in protracted litigation. Few persons have the resources and ability to engage in protracted litigation with an institution.

The Code of Canon Law itself discourages litigation as a method of resolving disputes, and urges, in its stead, a process of conciliation:

Since it is highly desirable that litigation be avoided among the faithful, the judge shall admonish the parties between whom some civil controversy about their own private affairs has arisen and which they have taken to court to have settled by judicial trial, to come to a compromise, if there appears to be some hope of a friendly settlement. The judge can satisfy this duty either before the parties are summoned to court or when they are for the first time in court or finally at any time that he deems most opportune and effective for proposing a compromise.³¹

For these several and convergent reasons, the members of this Society believe that in the Church, which should not only study secular example but also provide example for the world, the primary process for the resolution of disputes should not be a process for the assertion of legal rights but a process for the conciliation of human persons.

It is the opinion of the Society that the following elements are essential to any process for conciliation:

1. Each participant must have the opportunity of a face-to-face dialogue with the person with whom he is in conflict. To be treated as a human person is to be given not only a hearing, but a response. There is no substitute for the dialogue of persons.
2. Unmediated dialogue may become debate; each participant, therefore, must have the opportunity of stating his side of the conflict to a conciliator who will attempt to lead the participants to be reconciled with one another. The conciliator should be informed of the facts and feelings of each participant so that he may understand what each participant believes to be “the real reason” for the dispute.
3. Dialogue and mediation will fail if either side is convinced that abstract principles such as “the right of conscience” or “the rights of authority” be vindicated at any cost. There are few imperatives of conscience that make only one course of action mandatory, and few rights of authority which can be asserted in only one specific way.
4. Delay and concealment of relevant information have no place in a process of conciliation. Wounds should be healed quickly. Persons should not be left in suspense about their status for protracted periods. The candor of brothers, not

the paternalistic assumption that the truth cannot be borne, must characterize exchange designed to heal.

5. The obligation rests with each person in authority or guided by authority to teach by his example that he belongs to a religion whose essence is love.

There is appended to this report a suggested plan for the establishment and procedures of a Process for Conciliation (Appendix A). The plan is intended to be only a model, and it would be expected that individual dioceses would adapt its provisions to local needs, or otherwise improve upon them in furtherance of the common good of the faithful.

PROCESS FOR ARBITRATION

Hopefully the vast majority of controversies will be settled through the Process for Conciliation. But because this will not always be possible, it is the opinion of the Society that there should be established a Process for Arbitration for the resolution of disputes not resolved by conciliation.

Arbitration is defined as the reference of a dispute, by voluntary agreement of the parties, to an impartial person or persons for determination on the basis of evidence and arguments presented by such parties, who agree in advance to accept the decision of the arbitrator or arbitrators as final and binding.

In referring a matter to arbitration, parties are presumed to have explored every avenue of negotiation and settlement. It is as a last resort that they call upon impartial persons for a definitive decision and agree to abide by the result. There is a note of formality in arbitration proceedings, commensurate with the seriousness and importance which should characterize issues brought for resolution to such a process, and there should be

some form of recording the proceedings. The time element involved in the various steps of arbitration should be enforced since undue delay prolongs injustice, and so is itself unjust.

An arbitrator must personally be neutral; he must be objective, a person with judicial temperament, able to listen well, to ask good questions, to understand each party's point of view. The principle of subsidiarity would call for a decision being made on a local level whenever sufficient competence is available; on the other hand, the principle of impartiality would indicate that a panel of arbitrators should be selected on a broader basis than the merely diocesan. A regional panel of arbitrators would be highly desirable.

As with the Process for Conciliation, so in regard to Arbitration, the proposals of this Society do not represent a radical innovation in the governmental life of the Church. The Code of Canon Law, in discouraging judicial litigation as a means of resolving disputes, urges in its stead a process for arbitration:

In order to avoid judicial litigation, the parties may also make an agreement by which the controversy is committed to the judgment of one or several persons who shall decide the dispute according to law, or deal with the affair according to the rules of equity. If they are to follow the rules of law, they are called *arbitri*; if they are to follow the dictates of equity, they are called *arbitratores*.³²

There is appended to this report a suggested plan for the establishment of a Process for Arbitration (Appendix B). The plan is intended to be only a model, and it would be expected that individual dioceses would adapt the provisions to local needs, or otherwise improve upon them in furtherance of the common good of the faithful. Moreover, in a matter so complex as this, there are definite advantages to broad experimentation. For this reason, dioceses which already have initiated arbitration procedures

according to a plan different from the one proposed in this report are encouraged to continue with what they have so that eventually a proper evaluation can be made of all programs operative in this nation before any particular process or processes be solidified into legislation.

JUDICIAL PROCESS

Notwithstanding the Christian preference for resolving disputes through a process of conciliation of persons rather than through a process for the assertion of legal rights, there remain values indigenous to the judicial process which should not be unavailable to the societal life of the Church. Judicial interpretation of law, judicial delineation of rights, increasingly more precise from case to case, and judicial precedent, especially in the area of defining and protecting Christian rights, are values which the members of this Society would regard as fundamental to an enriching of the governmental life of the Church.

It is the recommendation of the Society, therefore, that pending the establishment of administrative tribunals as part of the revision of the Code of Canon Law, Ordinaries delegate jurisdiction either to existing diocesan tribunals, or to newly created experimental tribunals, for the resolution of disputes between persons in the Church and administrative authorities or bodies within the diocese. It would be hoped that the experience of such judicial processes would provide the Church with a valuable source of direction in the ongoing studies of the Commission for the Revision of Canon Law.

STRUCTURING ADMINISTRATIVE DISCRETION

Not only is it important for ecclesial society to provide mechanisms for the peaceful and orderly conciliation, arbitration, and

judicial resolution of disputes when they arise, but also to create, as far as is possible, an atmosphere of Christian living in which disputes are less likely to occur. As indicated earlier in this report, disputes between individual members of the Church and persons in positions of authority in service to the Church arise from a variety of situations in which individuals consider themselves aggrieved by administrative action on the part of authority.

Administrative action usually involves the exercise of a large amount of discretion on the part of administrators; and to the extent that such discretion is uncontrolled and unchecked there exist wide possibilities not only for administrative actions which are in fact arbitrary and unjust, but, more significantly for the rise of disputes in the ecclesial community, manifold possibilities for widespread supposition on the part of those affected that the actions were arbitrary and unjust. Whence arise a proliferation of complaints against authority, of accusations and counter-accusations, and of long and bitter conflicts.

No governmental system in history has been without significant discretionary power; none can be, and the Church's governing authority should be no exception. Discretion is indispensable for tailoring decisions to unique facts and circumstances in particular cases, and for creative solutions to new problems. Total elimination of discretionary power would cripple authority's service to the people by depriving that service of all flexibility.

The conceded need for necessary discretionary power in Church administrators, however, must not be allowed to becloud one's vision either of the large opportunities for abuse of such powers or of the co-existence of much unnecessary discretionary power which has been allowed to grow up in the Church.

There is appended to this report a series of proposals for structuring administrative discretion (Appendix C); it is the opinion of the members of this Society that the preventive steps therein

suggested would do much to eliminate unnecessary discretionary power in ecclesiastical administrators, and to minimize the likelihood of injustice, real or supposed, following upon the exercise of administrative authority in the Church.

Appendix A PROCESS FOR CONCILIATION

ARTICLE I. ESTABLISHMENT

1. Each diocese accepting this proposal shall set up a “Council of Conciliation,” composed as follows:

Two persons appointed by the Ordinary of the diocese;

Two persons elected by the Priests’ Senate of the Diocese or, if there is no senate, by all the clergy of the diocese;

One person elected by the faculty of the Catholic college of the diocese. If there is more than one Catholic college, the colleges, in alphabetical order, shall rotate the election. If there is no Catholic college, then the Priests’ Senate shall elect three persons, or if there is no senate, all the clergy of the diocese shall elect three persons.

2. The term of office shall be three years.
3. These exceptions shall apply to the initial members of the Council:

The first appointee of the Ordinary shall have a term of three years.

The person receiving the largest vote from the Priests’ Senate or clergy shall have a term of two years.

The person elected by the Catholic college faculty shall have a term of two years.

The second appointee of the Ordinary shall have a term of one year.

The person receiving the second largest vote from the Priests' Senate or clergy shall have a term of one year.

4. The Council shall elect its Chairman, Secretary and Treasurer.
5. The diocese shall reimburse the Council for its expenses upon presentation of a statement signed by the Chairman and Treasurer.
6. The establishment of the Council, its purposes, the biographies of its members, and its rules of operation shall be announced by a letter from the Ordinary to the clergy and faithful of the diocese and by appropriate publicity in the diocesan and secular press.

ARTICLE II. STARTING THE PROCESS

1. Any person in conflict with the Ordinary of the diocese, an appointee of the Ordinary, a priest in the diocese, a Catholic college, hospital, or other charitable or educational institution in the diocese, a parish or a diocesan council, a parish or diocesan school board, a Catholic cemetery organization or burial association, or any other person, group or institution exercising administrative authority in the diocese, may have recourse to the Council.
2. A person having recourse to the Council shall be styled the "initiating participant," and the person, group or institution with whom he is in conflict shall be styled the "convoked participant." Recourse to the Council shall be styled "the initiative," and the acceptance of a process for reconciliation by the

convoked participant shall be styled “an affirmative response.” The conflict shall be designated as “the problem.”

3. An initiating participant may take the initiative by sending to any Member of the Council a statement that he has a problem involving one or more of the persons, groups or institutions described in paragraph one, and setting forth the gist of the problem.

4. The Member receiving this statement shall contact the convoked participant both in writing and by telephone, shall apprise him of the problem stated by the initiating participant, and shall inquire if he will accept conciliation. The convoked participant shall be given a description of the purposes of the Council of Conciliation, the biographies of its members, and a copy of its rules of procedure. He shall be asked if he would accept as a conciliator the Member addressed by the initiating participant or if he would prefer that the Chairman designate a different Member or Members. He shall be advised that the Council is supposed to proceed with dispatch and that his affirmative response to the initiative is expected within two weeks of the notice to him.

5. If the convoked participant fails to give an affirmative response, the Member shall refer the matter to the Chairman who shall endeavor to persuade the convoked participant to give such response.

6. If, four weeks from the date of the initiative, no affirmative response has been made by the convoked participant, the Member shall refer the matter to the Ordinary who shall endeavor to persuade the convoked participant to give such response.

7. In the event that the convoked participant is the Ordinary of the diocese himself, the provisions of paragraph six shall not apply, and if, four weeks from the date of the initiative, there is

no affirmative response, the Member shall refer the matter to the Chairman of the Bishops' Committee on Arbitration and Mediation, who, by telephone and letter and, if possible, by personal conference, shall endeavor to persuade the Ordinary to give such response.

8. In the event that the Member fails to discharge any of his responsibilities for referring the matter to the Ordinary or the Chairman of the Bishops' Committee, as the case may be, the initiating participant may ask the Chairman of the Council of Conciliation to make the referral; should the Chairman fail to do so, the initiating participant may make the referral himself.

ARTICLE III. THE PROCESS

1. The Member addressed by the initiating participant and agreed to by the convoked participant shall act as conciliator in the process. In the event there is no agreement, the Chairman shall designate a Member or Members to act as conciliator or conciliators in the process.

2. Within three weeks of the affirmative response, the conciliating Member shall meet alone with each participant for oral discussion of the problem.

3. Within one week of the second of these conferences, the Member shall meet with both participants together and endeavor to guide them to a peaceful resolution of their problem. The Member shall schedule as many of these joint meetings as seem to him to be necessary in order to progress to conciliation.

4. The Member shall endeavor to assure that each participant answers the questions which the other participant believes are essential if he is to understand the actions of the other. While the Member should exercise his discretion, he should act in the

knowledge that paternalistic concealment of facts is no longer an acceptable mode of behavior to many persons, and he should, therefore, encourage a trust in candor on both sides.

5. The first joint meeting of the participants and the Member shall be restricted to these persons. Thereafter, in the discretion of the Member, each participant may have with him one or two advisers—theologians, lawyers, friends, or whomever he chooses. In the event that one participant desires to have such advisers, and the Member agrees, the Member shall notify the other participant that he may come with an equal number of advisers. In the discretion of the Member and with the agreement of the participants other Members of the Council of Conciliation or other persons may join the meetings from time to time.

6. If the problem is resolved by agreement, the Member shall prepare a summary statement of the problem and its resolution, and shall submit it for the approval and signature of the participants. If the problem is unresolved after the meetings arranged by the Member have been held, and in any event if the problem is unresolved six months from the initiative, the Member shall ask the participants if they are willing to continue discussion of the problem with him, with another Member of the Council, with a person designated by the Ordinary, or, in a case where the Ordinary is a participant, with a person designated by the Chairman of the Bishops' Committee on Arbitration and Mediation. If the participants agree in their response, the Member shall arrange the desired continuation. If one or more participants declines to engage in further discussion, the Member shall file a report with the Council and, where the Ordinary is a participant, with the Chairman of the Bishops' Committee on Arbitration and Mediation. This report shall contain the names of the participants, a summary of the problem and the discussions taken to resolve it, and certification by the Member that, despite the good faith of the participants, no resolution could be reached.

7. The Arbitrator or Council Member shall have no power to force the participants to adopt a solution. He shall have power, however, to determine that any participant is not cooperating in good faith. Such facts as failure to attend three scheduled meetings, failure to respond to a substantial number of questions which the Members believe appropriate, or failure to suggest any way of accommodating the interests of the other participant may be taken as evidence of a lack of good faith. In the event that for these or other good reasons the Member believes that a participant is not cooperating in good faith, he shall notify the Ordinary of the diocese, or if the Ordinary is a participant, the Chairman of the Bishops' Committee on Arbitration and Mediation. The Ordinary or the Chairman shall endeavor to persuade the participant to cooperate.

8. Meetings shall be private without publicity. All communications made to a Member or between participants shall be treated as confidential by all who share in them. If the problem is resolved by agreement, and the parties agree to publicizing the solution, announcement of it shall be made. If there is no agreement on a solution or on publicizing it, no announcement shall be made.

Appendix B PROCESS FOR ARBITRATION

ARTICLE I. ESTABLISHMENT

1. Each diocese accepting this proposal shall set up an “Office of Arbitration.” The Office shall consist of five persons, two of whom shall be appointed by the Ordinary, and three shall be selected by the Priests’ Senate, or, if there is no senate, by all the clergy of the diocese.

2. The members of the Office of Arbitration shall serve for a term of three years. No member shall have more than two consecutive terms in office.

For the purposes of continuity, the terms of the initial members shall be staggered in the following manner:

The first appointee of the Ordinary shall have a term of three years.

The second appointee of the Ordinary shall have a term of two years.

The first person chosen by the Priests’ Senate, or clergy of the diocese, shall have a term of three years.

The second person chosen by the Priests’ Senate, or clergy of the diocese, shall have a term of two years.

The third person chosen by the Priests’ Senate, or clergy of the diocese, shall have a term of one year.

3. The Office of Arbitration shall select from its own members a chairman and a secretary-treasurer, each of whom shall serve for a term of one year in that respective capacity.
4. It shall be the responsibility of the Office of Arbitration:
 - a. to select a sufficient number of qualified persons to be arbitrators;
 - b. to accept all complaints made to it in writing by any member of the diocese and to determine whether or not the case falls within the competence of the Office as set forth in Article IV;
 - c. to assist the parties in the selection of an arbitrator;
 - d. to supervise and administer the overall program and to interpret rules of procedure to be followed in arbitration when questions are referred to it by either the arbitrators or the parties themselves.

ARTICLE II. SELECTION OF ARBITRATORS

1. Arbitrators should be selected for their impartiality and competence.
 - a. Impartiality. The arbitrator must receive no direct benefit from the outcome of the decision he makes.

The following, therefore, are disqualified to serve as arbitrators:

- i. Anyone related by consanguinity or affinity to one or another of the parties, or who is a guardian of one of the parties.

ii. Anyone involved with one or another of the parties in such a way as to have a particular interest in the outcome of the dispute.

iii. Anyone who can be shown to be inimical to one of the parties.

b. Competence. The arbitrator should have some understanding of how a hearing should be conducted. Expertise in the area under discussion is helpful, but not absolutely necessary. If the arbitrator is not himself an expert, he should feel free to call in experts during the hearing.

2. *Method of Selection in General*

a. It is the responsibility of the Office of Arbitration in each diocese to select a panel of arbitrators from among the laity, religious, and clergy. It is not necessary that a person be a member of the diocese in order to be included on the panel of arbitrators. It is recommended that there be an exchange of panels between neighboring dioceses where possible.

b. The Office of Arbitration has the responsibility of screening candidates for the panel of arbitrators. The Office shall solicit nominations from any organized group in the diocese, or in any other way to be determined by the Office itself.

c. There shall be maintained a minimum panel of ten arbitrators in order to insure an adequate choice of selection for the parties.

3. *Method of Selection for a Specific Case*

a. If the arbitration agreement applicable to a particular case provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act, and no provision has been made for the appointment of his successor, the Office of Arbitration on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

b. In the event the arbitration agreement does not provide a method of appointment of arbitrators, the Chairman of the Office of Arbitration shall appoint arbitrators according to the following procedure:

i. The Chairman of the Office of Arbitration shall submit to each party a list of arbitrators, large enough to assure adequate choice.

ii. The parties shall strike out those names not acceptable to themselves and list the others in the order of their preference.

iii. The Chairman of the Office of Arbitration shall then appoint three arbitrators, following as closely as possible the selection of the parties.

iv. The Office of Arbitration shall draft and enforce its own rules with regard to time limits for making the selection, and the consequence of not observing the time limits.

ARTICLE III. PROCEDURE

1. *Initiation of Arbitration*
The parties shall submit to the Chairman of the Office of Arbitration a written statement setting forth the nature of the dispute and the remedies sought.
2. *Time and Place of Hearing*
The arbitrators shall appoint a time and place for hearings and notify the parties not less than five days before each hearing.
3. *Representation by Counsel*
Parties to the dispute may be represented at hearings by counsel or other authorized representative.
4. *Attendance at Hearings*
Persons having a direct interest in the arbitration are entitled to attend hearings. It shall be in the discretion of the arbitrators to determine the propriety of the attendance of any other person.
5. *Adjournments*
For good cause the arbitrators may adjourn the hearing upon the request of a party or upon their own initiative, and shall adjourn when all the parties agree thereto.
6. *Arbitration in the Absence of a Party*
Arbitration may proceed in the absence of any party who, after due notice, fails to be present or fails to obtain an adjournment.
7. *Evidence*
The arbitrators shall hear and determine the controversy upon the evidence produced. Parties may offer such evidence as they desire and shall produce such additional

evidence as the arbitrators may deem necessary to an understanding and determination of the dispute. The arbitrators shall judge the relevancy and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties except where any of the parties is absent in default or has waived his right to be present. The arbitrators may require the parties to submit books, records, documents, and other evidence.

8. *Evidence by Affidavit*

The arbitrators shall have the power to administer oaths and to take evidence from witnesses by deposition whenever witnesses cannot attend the hearing.

9. *Order of Proceedings*

A hearing shall be opened by the recording of the place, time, and date of hearing, the presence of the arbitrators and parties, the presence of counsel, if any, and the receipt by the arbitrators of initial statements setting forth the nature of the dispute and the remedies sought.

The arbitrator may, in his discretion, vary the normal procedure under which the initiating party first presents his claim, but in any case shall afford full and equal opportunity to all parties for presentation of relevant proofs.

The names and addresses of all witnesses, and exhibits offered in evidence, shall be made a part of the record.

10. *Majority Decision*

In the course of the hearing, all decisions of the arbitrators shall be by a majority vote. The award shall also be made by majority vote unless the concurrence of all is expressly required by the terms of a particular arbitration agreement.

11. *Closing of Hearings*
The arbitrators shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the arbitrator shall declare the hearings closed. The hearings may be reopened by the arbitrators on their own motion, or on the motion of either party, for good cause shown, at any time before the award is made.
12. *Time of Award*
The award shall be rendered promptly by the arbitrators and, unless otherwise agreed by the parties, not later than thirty days from the date of closing the hearings, or if oral hearings have been waived, then from the date of transmitting the final statements and proofs to the arbitrator.
13. *Form of Award*
The award shall be in writing and shall be signed by the arbitrators.
14. *Stenographic Record*
Provision for recording the entire proceedings may be made at the request of either party, or at the discretion of the arbitrators. The total cost of such a record shall be shared equally among parties ordering copies, unless the parties agree otherwise.
15. *Interpretation and Application of Rules*
Questions concerning the interpretation of these rules shall be referred to the Office of Arbitration for final decision.

ARTICLE IV. COMPETENCE

1. The Process for Arbitration shall extend:
 - a. To all disputes between individual members of the Church, or groups within the Church, where the controversy concerns an ecclesiastical matter;
 - b. To all disputes between a person and a diocesan administrator or administrative body, where it is contended that an act or decision (including administrative sanctions and disciplinary actions) has violated Church law or natural equity;
 - c. To all disputes between administrative bodies of the diocese when the dispute involves conflict of competency.
2. The following, however, shall not be subject to settlement by arbitration:
 - a. Criminal cases in the strict sense (not administrative sanctions and disciplinary actions). The process for arbitration shall extend to disputes about penalties imposed or declared administratively only if the arbitrators confine themselves to investigating whether or not the norms on the manner of proceeding have been justly and equitably observed, so that if they judge that the manner of proceeding is not to be approved, they shall refer the matter to the bishop;
 - b. Non-criminal cases where there is a question of dissolving a marriage;
 - c. Matters pertaining to benefices when there is litigation about the title itself to a benefice unless the legitimate authorities sanction arbitration;

d. Spiritual matters whenever the award requires payment by means of temporal goods.

3. Disputes involving temporal ecclesiastical goods or those things which, though annexed to the spiritual, can be dealt with apart from their spiritual aspect, may be settled through arbitration, but the formalities of law for the alienation of ecclesiastical property must be observed if the matter is of sufficient importance.

ARTICLE V. EXPENSES

1. All members of the Office of Arbitration, as well as all arbitrators shall serve gratis. The parties involved in the arbitration, however, shall be assessed a fee in an amount to be determined by the Office of Arbitration to cover office expenses.

2. The expenses of witnesses shall be paid by the respective parties producing witnesses. Traveling and other expenses of the arbitrators, and the expenses of any witnesses or the cost of any proofs produced at the direct request of the arbitrators, shall be borne equally by the parties unless they agree otherwise, or unless the arbitrator in his award assesses such expenses or any part thereof against any specified party or parties.

ARTICLE VI. COURT OF ARBITRATION

1. There shall be established in each diocese a Court of Arbitration. This Court will function as a board of review. It will not review the merits of the case as such, but rather its purpose will be to hear and render decisions on complaints of nullity or requests for corrections or modifications of the award.

If a tribunal already exists in a particular diocese, this tribunal will perform the function of the Court of Arbitration. A special *turnus* of judges shall be assigned to handle matters of this nature.

2. The Court of Arbitration shall be competent to review an arbitration award where it is alleged that:

- a. The award was procured by corruption, fraud, or other undue means;
- b. There was evident partiality on the part of an arbitrator;
- c. The arbitrators exceeded their powers;
- d. The arbitrators refused to postpone a hearing notwithstanding the showing of sufficient cause for such postponement, or refused to hear evidence material to the controversy, or otherwise conducted the hearing so as prejudicially to affect a substantial right of one of the parties;
- e. The method of selection of arbitrators, agreed upon by the parties beforehand, was not followed;
- f. The decision was based on documents which are spurious;
- g. New evidence has been discovered of a character which demands a contrary decision;
- h. Principles of fundamental procedural fairness were violated.

3. Where the Court of Arbitration decides in favor of the nullity of an arbitration award, the Court can order a re-hearing either before the arbitrators who made the award or before entirely new arbitrators chosen in the same manner as the original arbitrators.

Where an application to vacate an award or nullify a decision is denied, the Court of Arbitration shall confirm the award.

4. *Correction or Modification of the Award*

Where it is alleged that there was a material error in transcribing the award, in relating the petitions of the parties or the facts, in describing any person, thing, or property referred to in the award, in making calculations or in matters of form not affecting the merits of the controversy, corrections may be made by the arbitrators themselves upon petition of the party, unless the other party opposes such corrections. In the latter event the matter shall be referred to the Court of Arbitration for decision and, where appropriate, for correction or modification of the award.

ARTICLE VII. FORM OF AGREEMENT

In individual instances of submission of disputes to arbitration it is advisable for the parties to sign a specific agreement covering such matters as the number of arbitrators, the method of their selection, and the voluntary commitment to accept the decision of the arbitrator(s) as binding.

A sample agreement might read:

We, the undersigned parties, hereby agree to submit to arbitration under the rules of the Office of Arbitration, the following controversy: *(Cite briefly.)* We further agree that the above controversy be submitted to (1) (3) arbitrators submitted by the Office of Arbitration. We further agree that we will faithfully observe this agreement and the rules, and that we will abide by and perform any award rendered by the arbitrators.

Appendix C

STRUCTURING ADMINISTRATIVE DISCRETION

I. DELINEATION OF COMPETENCE

The first step in confining discretionary power within proper limits, and in controlling its exercise within those limits, is a clear delineation of the competence of the particular administrative organ or individual administrator. Such delineation should be found in the enabling legislation, or if none such, in the decree of episcopal or presbyteral authority, which brings the particular administrative organ into existence.

When the limits of competence are not known either to those charged with the responsibility of administration or to those who are to be affected by the acts of administration, opportunity for misunderstanding, mistrust, and conflict is great.

II. POLICY-STATING

There should be published by an administrator or administrative body the considerations, the criteria, the standards that will guide decisions to be made in individual cases.

Thus, for example, a School Board should state its basic policies in regard to hiring and firing teachers; a diocesan Personnel Board should make known its criteria for recommending appointments to pastorates; a Building Commission should publish the guidelines that will govern its decisions on applications for construction; a pastor should make clear his standards

for the admission of students to the parochial school within his parish.

Such detailed and precise policy statements would give some assurance of consistency in reaching decisions, and hence some assurance of equal justice by moving from a system of ad hoc determinations of policy in particular cases to a system of pre-announced policy determinations. By giving parties prior knowledge of the administrator's position, knowledgeable efforts to meet standards and so to receive a favorable administrative decision are made possible. Moreover, it becomes possible to obtain intelligent review, not only of published policies before proper authorities, but also, in conciliation, arbitration, or judicial proceedings, to obtain review of alleged unfair or arbitrary decisions in individual cases.

Policy-stating should be preceded by an open policy-making procedure which makes available to interested persons information concerning what policy problems are under consideration, what criteria are being considered, and the reasons underlying the proposed policy. Interested persons should be invited to offer suggestions and criticisms.

Such a procedure would gain for administrative bodies and administrators the benefit of ideas contributed by many qualified persons, and would minimize subsequent tensions arising out of the application to individuals of policies of which they had no knowledge and to which they had no opportunity to raise objections.

III. FINDINGS, REASONS, PRECEDENTS

Written findings of fact and reasoned opinions in support of administrative decisions should be issued whenever discre-

tionary power is exercised in such a way as adversely to affect the rights of persons in the Church.

Such a procedure would minimize careless or hasty action, insure the consideration of important facts and ideas, and enable an adversely affected party to change his circumstances, if possible, so as to obtain a favorable decision in the future. It would also facilitate judicial review of administrative decisions, and make possible, in conciliation and arbitration proceedings, intelligent review of alleged arbitrariness or unfairness.

The writing of reasoned opinions should lead to the development of a system of precedents to guide future administrative decisions and to furnish affected parties with a basis for making intelligent estimates of future administrative action. The resulting growth in consistency of administrative action in the Church will do much to minimize suspicion of arbitrariness and injustice.

It is essential that findings, decisions, and precedents be as open as possible, consistent with appropriate protection of privacy and confidentiality. Openness is a natural enemy of arbitrariness in the exercise of discretion, and a natural protection against the hostility and conflict that abound in an atmosphere of suspected injustice. Few things spawn as much conflict in the Church as uncontrolled discretionary power exercised through administrative decisions secretly made, insulated from criticism, unsupported by findings of fact, unexplained by reasoned opinions, and free from any requirement of consistency in the light of precedents.

IV. FAIRNESS OF PROCEEDINGS

Justice to individual parties in the Church is administered or denied far more outside than within formal tribunal procedure.

Whatever is to be said of the adequacy of provisions in Church law for the protection of the rights of persons in ecclesiastical court proceedings, it is essential that adequate procedural protections be developed for the rights of persons likely to be affected by extrajudicial discretionary determinations of ecclesiastical administrators.

It is a mandate of fundamental fairness that a person likely to be adversely affected by administrative action be informed of the proposed action and of the reasons underlying it, and be given adequate opportunity to respond.

It is a mandate of fundamental fairness that information concerning a person is not to be used as a basis for administrative action adversely affecting that person without disclosing to the person that the information is to be used, and without affording opportunity for explanation, rebuttal, or denial of the “information” in question. Exceptions to this principle of fundamental fairness should be extremely rare and only in the interest of protecting confidentiality deemed essential to the good order of the ecclesial community.³³

NOTES

1. “. . . the chosen People of God is one . . . As members, they share a common dignity from their rebirth in Christ. They have the same filial grace and the same vocation to perfection. They possess in common one salvation, one hope, and one undivided charity. Hence, there is in Christ and in the Church no inequality on the basis of race or nationality, social condition or sex . . . all share a true equality with regard to the dignity and to the activity common to all the faithful for the building up of the Body of Christ.” Vat. Conc. II, *Lumen Gentium*, #32.

“Since all men possess a rational soul and are created in God’s likeness, since they have the same nature and origin, have been redeemed by Christ, and enjoy the same divine calling and destiny, the basic equality of all must receive increasingly greater recognition. True, all men are not alike from the point of view of varying physical power and the diversity of intellectual and moral resources. Nevertheless, with respect to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language, or religion, is to be overcome and eradicated as contrary to God’s intent.” Vat. Conc. II, *Gaudium et Spes*, #29.

“Furthermore, let pastors respectfully acknowledge that just freedom which belongs to everyone in this earthly city.” Vat. Conc. II, *Lumen Gentium*, #37.

2. “The laity have the right, as do all Christians, to receive in abundance from their sacred pastors the spiritual goods of the Church, especially the assistance of the Word of God and the sacraments.” Vat. Conc. II, *Lumen Gentium*, #37.

“Mother Church earnestly desires that all the faithful be led to that full, conscious, and active participation in liturgical celebrations which is demanded by the very nature of the liturgy. Such participation by the Christian people . . . is their right and duty by reason of their baptism.” Vat. Conc. II, *Sacrosanctum Concilium*, #14.

3. “. . . the laity . . . share in the priestly, prophetic, and royal office of Christ and therefore have their own role to play in the mission of the whole People of God in the Church and in the world. They exercise a genuine apostolate by their activity on behalf of bringing the gospel and holiness to men, and on behalf of penetrating and perfecting the temporal sphere of things through the spirit of the gospel . . . The laity derive the right and duty with respect to the apostolate from their union with Christ their Head.” Vat. Conc. II, *Apostolicam Actuositatem*, #2, 3.

“Upon all the laity, therefore, rests the noble duty of working to extend the divine plan of salvation ever increasingly to all men of each epoch and in every land. Consequently, let every opportunity be given them so that according to their abilities and the needs of the times, they may zealously participate in the saving work of the Church.” Vat. Conc. II, *Lumen Gentium*, #33.

“Bishops, pastors of parishes and other priests of both branches of the clergy should keep in mind that the right and duty to exercise the apostolate is common to all the faithful, both clergy and laity, and that the laity also have their own proper roles in building up the Church.” Vat. Conc. II, *Apostolicam Actuositatem*, #25.

“Let sacred pastors recognize and promote the dignity as well as the responsibility of the layman in the Church. Let them willingly make use of his prudent advice. Let them confidently assign duties to him in the service of the Church, allowing him freedom and room for action. Further, let them encourage the layman so that he may undertake tasks on his own initiative.” Vat. Conc. II, *Lumen Gentium*, #37.

4. “Every layman should openly reveal to (his sacred pastors) his needs and desires with that freedom and confidence which befits a son of God and a brother in Christ. An individual layman by reason of the knowledge, competence, or outstanding ability which he may enjoy, is permitted and sometimes even obliged to express his opinion on things which concern the good of the Church. When occasions arise, let this be done through the agencies set up by the Church for this purpose. Let it always be done in truth, in courage, and in prudence, with reverence and charity toward those who by reason of their sacred office represent the person of Christ . . . Let sacred pastors . . . consider with fatherly love the projects, suggestions, and desires proposed by the laity.” Vat. Conc. II, *Lumen Gentium*, #37.

“. . . by reason of the gift of the Holy Spirit which is given to priests in sacred ordination, bishops should regard them as necessary helpers and counselors . . . as . . . brothers and friends . . . (the bishop) should gladly listen to them, indeed, consult them, and have discussions with them about those matters which concern the necessities of pastoral work and the welfare of the diocese. In order to put these ideals into effect, a group or senate of priests representing the presbytery should be established.” Vat. Conc. II, *Presbyterorum Ordinis*, #7.

“In dioceses, as far as possible, there should be councils which assist the apostolic work of the Church either in the field of making the gospel known and men holy, or in the charitable, social, or other spheres. To this end, clergy and religious should appropriately cooperate with the laity . . .

Councils of this type should be established as far as possible also on the parochial, interparochial and interdiocesan level as well as in the national or international sphere.” Vat. Conc. II, *Apostolicam Actuositatem*, #26.

“. . . there must be made available to all men everything necessary for leading a life truly human, such as . . . the right . . . to appropriate information.” Vat. Conc. II, *Gaudium et Spes*, #26.

“By the natural law, every human being has the right . . . to be informed truthfully about public events.” John XXIII, *Pacem in Terris*, #12.

“In addition, the use of the media is a testament to the Church’s belief in two fundamental principles of communications, namely, the right to information; and the necessity of public opinion within the Church . . . Man’s right to be informed is a natural, inherent right. It is given him by God himself. It is not a privilege conferred by any authority . . . If there have been abuses of this right by any authorities in the Church, we members of the people of God can only regretfully acknowledge the fact and at the same time strive to amend our ways . . . The right to information, however, we firmly believe must be stressed today because only a true and complete knowledge will enable society and man as an individual to stand secure in an age of intellectual and moral turmoil. Moreover, the corollary of the right to information is the right to full expression. The distinguished Commission on Freedom of the Press observed twenty years ago that ‘public discussion is a necessary condition of a free society and that freedom of expression is a necessary condition of adequate public discussion’ . . . History affords its many examples of the fact that freedom suffers the moment man’s inherent right to information begins to be curtailed . . . Closely associated with man’s right to information is the necessity of both Church and State to cultivate a healthy public opinion . . . Public opinion, as a symbol and factor of social cohesion, is always an important element in every decision that leaders of both Church and State must make. Those will govern most wisely who attempt most assiduously to evaluate decisions in terms of such a public opinion . . . (As) Pope Pius XII enunciated: ‘There would be something missing from the Church’s life if there were no public opinion within her, a defect for which pastors as well as the faithful would be responsible.’” U.S. Bishops’ Committee for Social Communications, *Statement for World Communications Day* (1967).

5. “. . . while adhering to the methods and requirements proper to theology, theologians are invited to seek continually for more suitable ways of communicating doctrine to the men of their times. For the deposit of faith or revealed truths are one thing; the manner in which they are formulated without violence to their meaning and significance is another . . . Theological inquiry should seek a profound understanding of revealed truth without neglecting close contact with its own times. As a result, it will be

able to help those men skilled in various fields of knowledge to gain a better understanding of the faith . . . This common effort will very greatly aid in the formation of priests. It will enable them to present to our contemporaries the doctrine of the Church concerning God, man, and the world in a manner better suited to them with the result that they will receive it more willingly. Furthermore, it is to be hoped that many laymen will receive an appropriate formation in the sacred sciences, and that some will develop and deepen these studies by their own labors. In order that such persons may fulfill their proper function, let it be recognized that all the faithful, clerical and lay, possess a lawful freedom of inquiry and of thought, and the freedom to express their minds humbly and courageously about those matters in which they enjoy competence.” Vat. Conc. II, *Gaudium et Spes*, #62.

“By the natural law, every human being has the right to . . . freedom in searching for truth and in expressing and communicating his opinions within the limits laid down by the moral order and the common good.” John XXIII, *Pacem in Terris*, #12.

6. “There is a great variety of associations in the apostolate . . . As long as the proper relationship is kept to Church authorities, the laity have the right to found and run such associations and to join those already existing.” Vat. Conc. II, *Apostolicam Actuositatem*, #19.

“Worthy too of high regard and zealous promotion are those associations whose rules have been examined by competent Church authority, and which foster priestly holiness in the exercise of the ministry through an apt and properly approved rule of life and through brotherly assistance. Thus these associations aim to be of service to the whole priestly order.” Vat. Conc. II, *Presbyterorum Ordinis*, #8.

“From the fact that human beings are by nature social, there arises the right of assembly and association. They have also the right to give the societies of which they are members the form they consider most suitable for the aim they have in view, and to act within such societies on their own initiative and on their own responsibility in order to achieve their desired objectives.” John XXIII, *Pacem in Terris*, #23.

7. “. . . there is a growing awareness of the exalted dignity proper to the human person, since he stands above all things, and his rights and duties are universal and inviolable. Therefore, there must be made available to all men everything necessary for leading a life truly human, such as . . . the right . . . to a good reputation, to respect . . . to activity in accord with the upright norm of one’s own conscience, to protection of privacy and to rightful freedom in matters religious too.” Vat. Conc. II, *Gaudium et Spes*, #26.

“By the natural law, every human being has the right to respect for his person, to his good reputation . . .” John XXIII, *Pacem in Terris*, #12.

“Every human being has the right to honor God according to the dictates of an upright conscience, and therefore the right to worship God privately and publicly.” John XXIII, *Pacem in Terris*, #14.

8. “In the use of all freedoms, the moral principle of personal and social responsibility is to be observed. In the exercise of their rights, individual men and social groups are bound by the moral law to have respect both for the rights of others and for their own duties toward others and for the common welfare of all . . . For the rest, the usages of society are to be the usages of freedom in their full range. These require that the freedom of man be respected as far as possible, and curtailed only when and in so far as necessary.” Vat. Conc. II, *Dignitatis Humanae*, #7.
9. Vat. Conc. II, *Lumen Gentium*, #27.
10. 8 *New Catholic Encyclopedia* 61 (McGraw-Hill, 1967)
11. C.I.C., cc. 2147-2167.
12. C.I.C., cc. 1552-1924; 1933-1959. Cf. Krol, *The Defendant in Contentious Trials* (C.U., 1942).
13. C.I.C., cc. 356-362.
14. Vat. Conc. II, *Dignitatis Humanae*, #1.
15. Vat. Conc. II, *Gaudium et Spes*, #75.
16. Vat. Conc. II, *Gaudium et Spes*, #76.
17. Vat. Conc. II, *Gaudium et Spes*, #26.
18. Vat. Conc. II, *Lumen Gentium*, #36.
19. Vat. Conc. II, *Lumen Gentium*, #37.
20. C.I.C., c. 1572.
21. “As lawful successors of the apostles and as members of the episcopal college, bishops should always realize that they are linked one to the other, and should show concern for all the churches. For by divine institution and the requirement of their apostolic office, each one in concert with his fellow bishops is responsible for the Church.” Vat. Conc. II, *Christus Dominus*, #6.

“From the very first centuries of the Church the bishops who were placed over individual churches were deeply influenced by the fellowship of fraternal charity and by zeal for the universal mission entrusted to the apostles. And so they pooled their resources and unified their plans for the common good and for that of the individual churches.” Vat. Conc. II, *Christus Dominus*, #36.

22. Canon 356 requires a diocesan synod every ten years. Although such synods were frequent in the pre-Code Church in America, few dioceses have adhered to the law in this regard in recent decades.
23. C.I.C., c. 1667.
24. The reorganization of the Roman Curia, accomplished by the Apostolic Constitution *Regimini Ecclesiae Universae* (1967), pointed the way to the establishment of administrative courts elsewhere in the Church. The Constitution enlarged the competency of the Apostolic Signatura to include review of contentions arising from the exercise of administrative ecclesiastical authority by one or another of the departments of the Roman Curia.
25. Luke 6:27-31.
26. Mt. 5:3.
27. Mt. 5:9.
28. Mt. 6:12.
29. 1 Cor. 6:1-6.
30. 1 Cor. 6:7-8.
31. C.I.C., c. 1925.
32. C.I.C., c. 1929.
33. For an excellent treatment of the need to structure administrative discretion, as applied to American civil law, see Davis, *Discretionary Justice* (L.S.U. Press, 1969).

Commentary by
FATHER
ROBERT T. KENNEDY

Below is the formal text submitted by Father Robert Kennedy subsequent to the November 1969 meeting of the National Conference of Catholic Bishops. The text corresponds substantially to his remarks made to the bishops at that time.

Few issues in the Church of our day have become immersed in emotion and confusion to the extent of the issue of “due process.” It is necessary to defuse it of the emotion and extricate it from the confusion if it is to be truly understood and appreciated.

The expression “due process” is borrowed from Anglo-American jurisprudence, where the full expression is “due process of law.” It is a technical expression, not easily definable, analogously applicable to a great number of differing situations. It has to do with rights, with the protection of rights, but more particularly with insuring the availability of structures to protect rights should they be threatened, and to vindicate rights when in fact they have been impaired.

“Due process of law” is not limited to criminal court proceedings, though much of what one hears and reads today about due process in the Church could incline one to believe that it is so limited; so much is said about the rights of an accused, the right to a speedy and public trial, and the right to trial by jury. Such rights form one aspect of due process, but they do not exhaust its content. Nor is “due process” limited to court procedures considered generally, as encompassing both criminal and non-criminal matters. Again, much of what is said and much of what

is written these days would incline one to think that due process concerns only “courtroom rights” such as the right to cross-examine witnesses, the right to counsel, the right of appeal. Such rights do form one aspect of due process, but the notion is not confined to them.

This is why concern for due process in the Church is not solely, nor even principally, concern for the revision of the Church’s judicial procedures as set forth in the Code of Canon Law. The fact is that the 1918 Code does contain a good deal of what is entailed in Anglo-American due process as applied to judicial procedures. It does not contain it all, but it does contain a good deal of it. It could and perhaps should be part of the revision of the Code of Canon Law to have it reflect to a greater extent the values of the governmental experience of English-speaking nations as regards court procedures.

That, however, is not our concern; it is not the urgent need to which we were asked to respond. Due process applies also to *administrative* activities of government, and, to a lesser extent, even to legislative activities. It is in the area of administrative action that we believe the need for due process is most urgent in the Church. An immense amount of the governmental activity of our Church is administrative, and it is, to a large extent, unstructured. Moreover, there are scant and inadequate procedures available for the resolution of disputes that arise out of the exercise of administrative authority in the Church. So it is to this area that our concern for due process is primarily directed.

Moreover, the Anglo-American notion of due process is not even confined to procedures. In addition to procedural due process, Anglo-American jurisprudence knows what it calls “substantive” due process. This is simply a principle of justice according to which no one is to be deprived of the exercise of any right without adequate justification, without sufficient reason. Notwithstanding perfectly adequate procedures, it is still

possible that reasons offered in support of a given decision might be found to be insufficient to support the decision. In such a case, the decision would be set aside as violative of substantive due process. Such a notion is confusing for us clerics because the word “process” to canonically trained clerics necessarily connotes just “procedures.” The fourth book of the Code, dealing exclusively with procedures, is entitled *De Processibus*. But in American jurisprudence the expression “due process” applies not only to procedural fairness but also to this substantive notion that there is to be no infringement of a right without adequate justification and without grave reason.

Now, both procedural and substantive due process in the American experience are ordained to the protection of the dignity of the human person, the freedom of the human person and the basic rights of the human person. These are values which we understand the Second Vatican Council to have emphasized as distinctively Christian and belonging to the core of the Gospel message. That is why we see the origin of the due process issue in the ecclesiology of the Second Vatican Council, and not in any particular conflict or dispute which has grown up in the life of the Church during the past couple of years.

The problem we face in regard to human rights and freedom in the Church is not so much injustice as it is *supposed* injustice. What we are seeking in introducing notions of due process into the administrative life of the Church is not protection of the people from the human weaknesses of bishops or diocesan administrators or pastors; what we seek is protection for all of us from the effects of that human weakness which inclines us to be suspicious of the unknown. When one does not *know* that a particular decision was made fairly, when there is no guarantee that it will be made fairly, human beings are exposed to rather widespread suspicion of arbitrary action. I think that bishops suffer immensely from the effects of this common weakness in the people they serve; you are very often accused unjustly of

being arbitrary and unfair, simply for the want of structures and procedures of which people are aware and from which they derive assurance of the fairness of your actions.

In looking to Anglo-American jurisprudence for this notion of adequate protection of rights, it is true that we are looking to secular society and to secular law, but the Church has always done so for governmental structures and forms. Revelation contains no specific directions as to forms of governmental activity or structures for the protection of rights. The 1918 Code of Canon Law is borrowed in large measure from secular Roman law, with intermingled elements from secular Germanic law. Moreover, for the Church to borrow some structures and procedures from Anglo-American experience would be nothing more than reclaiming Christian capital which we invested a long time ago. The dignity of the individual, his rights and freedoms and their recognition and protection have always been part of the Christian message and came to a particular flowering in Christian England several centuries ago. In post-Reformation times those values tended to get lost in the Church which, for historical reasons, found it necessary to emphasize the rights of authority rather than the rights of the individual person, but they continued to flourish in the civil society of England and were brought to this country. They stemmed from Christian England's understanding of the core of the Gospel message regarding the dignity of the individual. So in borrowing them from Anglo-American civil jurisprudence we do little more than reclaim for the governmental life of the Church the fruits of the Christianization of English society. In yet another sense, I would agree with those who object that the Church should not follow secular society; I don't think we should follow secular society; I think we should lead it in this area of protection of rights which is so distinctly Christian.

What we have tried to do in submitting the results of our study to the Bishops' Committee on Canonical Affairs is to suggest a

threefold structure for the resolution of disputes which arise in the Church.

The first aspect of the threefold structure is conciliation. It is the heart of conciliation that two disputants agree to engage the services of a third person or persons who will seek to bring them to agreement. The conciliator or mediator makes no decision. He simply offers his services in an attempt to bring the disputing parties to agreement. We believe this to be the most distinctly Christian aspect of the proposed structure. Christian notions of forgiveness, peace-making and fraternal charity argue that the primary process for resolving disputes in the Church should involve a conciliation of human persons rather than the assertion of legal rights.

The second aspect of the proposed structure for resolving disputes is arbitration. Arbitration differs from conciliation, as you know, in that it entails decision-making by the intervening third party or parties. The disputants agree to submit their dispute for decision by an arbitrator or arbitrators and to be bound by the decision so made.

Specific suggestions for setting up a Process of Conciliation and an Arbitration Process in a particular diocese are offered in Appendices A and B of the report. None of these specific provisions are incontestable; some of them do not even represent the unanimous opinion of those of us who studied them and now propose them. They are offered to you as models which must be tailored to your own diocesan circumstances and to which must be added your wisdom, your learning and your experience. It is our understanding that we were asked to submit something concrete, something specific; that is why we went into such detail. We have not presumed to offer you the *only* way, but simply to suggest a way in which to begin.

The third aspect of the proposed structure for resolving disputes in the Church is a suggestion that a judicial process be used on rare occasions. The reason for this suggestion is that both conciliation and arbitration offer *ad hoc* solutions to disputes. It does seem that in our evolving Church increasingly precise meaning must be given, authoritatively, to just what a Christian's rights are in given situations. Some sort of body of precedents should gradually emerge so that your declarations at the Second Vatican Council regarding the human and ecclesiastical rights of persons in the Church can be more specifically delineated through experience as time goes on. Such gradual delineation of the content of Christian rights can best be achieved, we believe, through careful adjudication of disputes involving conflicting assertions of rights.

The availability of a judicial process would also seem advisable for the resolution of disputes in the Church where one or the other party is unwilling to conciliate or submit to arbitration.

No one of these suggested procedures—conciliation, arbitration or adjudication—represents a radical departure from what is already to be found in Canon Law. Canons 1925 to 1928, for example, express the wish that, in order to avoid litigation in the Church, parties would engage the services of someone who could bring them to an out-of-court settlement. The canons declare the right of an ecclesiastical judge to suggest at any stage of the proceedings that the parties settle their dispute outside of the judicial environment. This, in effect, is conciliation. Similarly, regarding arbitration, canons 1929 to 1932 of the present Code again express the wish that litigation be avoided wherever possible and, to that end, suggest that parties submit disputes to the judgment of an independent person or persons called "*arbitri*" or "arbitrators." Canon 1667 asserts the fundamental canonical principle that every right can be enforced in court; thereby affording the basis for the suggestion that judicial processes be made available for the resolution of disputes

involving conflicting claims of rights by persons in the Church. Heretofore, ecclesiastical courts only rarely have been so used; being bogged down with the intricacies of marriage cases has, in fact, prevented their being so used.

There is one significant departure that the proposals of our Report do make from the Code provisions for dispute-solving procedures. We suggest that conciliation, arbitration and adjudication be applicable to disputes arising out of the exercise of administrative authority on all levels in the Church. The Code itself does not extend its provisions to such disputes. According to the Code, disputes arising out of administrative action are resolved administratively. Recourse for one aggrieved by administrative action is by way of appeal to the next highest echelon of administrative authority. The experience of the last fifty years has taught us that the largest area of conflict in the Church arises out of the exercise of administrative authority and that merely administrative avenues of recourse for the resolution of such disputes are not effective. We suggest, therefore, experimentation with para-canonical processes such as are outlined in the Report.

Thus far we have spoken of proposed structures for the resolution of disputes which arise in the Church, with particular emphasis on those which arise from the exercise of administrative authority. I would now direct your attention to the last part of the Report, entitled "Structuring Administrative Discretion." While the resolution of disputes is an area of great concern in the Church today, an area which must be of even greater concern is the creation of an atmosphere of Christian living in which disputes are less likely to arise.

We have already indicated our belief that it is in the field of administrative action that conflict is most often spawned today. This is due, we believe, to the immense amount of unstructured and uncontrolled discretionary power exercised by administrative authorities. Where the exercise of discretion is unlimited

and unchecked, there exist manifold opportunities for widespread supposition on the part of those adversely affected by administrative decisions that the actions were arbitrary and unjust. The greatest promise for minimizing conflicts in the Church and for easing tension lies in eliminating unnecessary discretionary power where it exists and in limiting and controlling necessary discretionary power which must exist in any kind of governmental system. Consequently, there are suggested in Appendix C of the Report four areas in which we think steps could and should be taken to eliminate conflicts and disputes.

The first concerns the competence of administrative authorities or bodies. Whenever an administrative authority is established in the Church, it is essential to the peace of the Church that the precise competence of the particular body or the particular administrator be clearly delineated. One of the great causes of unrest and frustration in the Church is lack of knowledge as to who made a particular decision. This spawns many charges of arbitrariness. Not only is it difficult, and at times impossible, to pin down who made a particular decision, but competence of administrative bodies often is seen to overlap without any clear delineation.

Secondly, once the competence of an administrative body or an administrator has been defined, we urge that these bodies or administrators make policies and state them. It is crucial to the minimizing of disputes that there be made known what standards and what criteria will be used by particular administrators or administrative bodies in reaching decisions in individual cases. Thus, for example, a school board should make known what its standards will be for hiring and firing teachers; a personnel board should make known what the criteria will be according to which it will recommend men for pastorates; a building commission should make known what its standards will be for authorizing construction or demolition; a pastor should make known what the criteria will be according to

which he will admit or not admit students to the school in his parish. The great value of announcing policies is that it lessens tension and it forestalls a great deal of the feeling of arbitrariness in decisions subsequently made in individual cases. It gives people an assurance of consistency. We would move away from *ad hoc* determinations of policy in each individual case to a system which would give greater assurance to people that like cases will be treated in like manner.

Moreover, pre-announced policies make it possible for people to adjust the circumstances of their lives so as to obtain favorable administrative decisions. Where the policies and the standards which are going to be used have not been announced beforehand, it is very difficult, if not impossible, for people to know exactly what it is they are supposed to do and, consequently, there is great opportunity for them to assume that the decision in a particular case will be arbitrary and without rational basis.

There is yet another value in making policies and stating them. It permits intelligent review of a particular administrative action. When someone claims to have been treated arbitrarily or unjustly and there are no pre-announced standards according to which he was supposed to have been treated, he has a free field to claim that he was treated arbitrarily and no one can point to pre-announced policy and say, "You have been done no injustice. These policies were announced beforehand and everything was done in accord with them; you simply do not measure up to this or that criteria." The formulation and publication of policy can do much to save authority from many charges of arbitrariness.

It is also suggested in the Report that the making of policy, so far as is possible, should be open. That is, an administrative body or individual administrator should announce a proposed policy as "proposed" and invite interested parties to direct their thoughts, objections or criticisms to it. This would serve to

assure people that the administrator or administrative body is trying to utilize a wide range of ideas. It also would insure greater acceptability of policies by people who would realize that they did have the opportunity to contribute to the formulation of the policy. Few things, I think, spawn unrest and cater to the human fear of the unknown as much as administrative decisions secretly made, isolated from criticism, unsupported by findings of fact, unexplained by reasoned opinions and free from any requirement that they be related to past precedents.

Thirdly, once the competence of administrative authority is clearly delineated and policy openly has been made and stated, it is important to the elimination of disputes that administrative decisions made in individual cases be accompanied by clearly stated findings of fact and supporting reasons.

Fourthly and lastly, the administrative procedure itself which leads to administrative decisions on all levels in a diocese should be fair and should be seen to be fair. Here again, the problem is not that bishops or administrative agencies or pastors make a practice of dealing unfairly. The problem is that, for want of established structures and procedures, it is not *known* that people have been dealt with fairly, simply because people do not know what steps have preceded the administrative decision itself. The People of God need to *know* that a bishop or a pastor or other diocesan authority hears before he acts, that there has been a fair hearing, a process due the dignity of Christian persons, and that whatever action is taken is consequent upon such a process. Unquestionably, in the vast majority of cases, the bishop or other administrative authority does investigate thoroughly, does give manifold and fair hearings, and does reach decisions affecting individual persons impartially. But that is not the point. The people have no knowledge that such was done, they observe no procedural guarantee that such will be done, and they are aware of no procedural reminder for administrators that such must be done.

Thus, whenever administrative action is to affect a person adversely, we believe he should be notified of the action before it takes place. This will do much to defuse not only his feelings of being dealt with unjustly but, more importantly, the feelings of others who will learn of the action and might think that there was no preceding confrontation of the person with the proposed action and with the opportunity to be heard. Moreover, where information is to be used in reaching an administrative decision, we urge that the information be made known to the parties concerned. There will be times when exceptions will have to be made to such a rule of procedure; but we urge that exceptions in the interest of confidentiality and privacy be made only where it is in the interest of the community and not simply in the interest of an individual who does not wish to be embarrassed by the communication.

There are other aspects of the Report on due process about which I would like to speak but the time allotted to me has just about expired. What is offered in this study is in response to what we understood to be your request for something specific, something concrete. It is offered as a beginning, not as the last word. Several dioceses have been working on approaches to due process and have developed plans of various sorts; we have learned from them and are indebted to them. What we offer is, we believe, a more comprehensive and more detailed study on this subject than is available at present. We also believe that this study will quickly be surpassed by the application to it of your own learning, your experience and that of those who work with you in your respective dioceses. It is offered to you as something with which to start, not something on which to rest.

We have been moved by a sense of urgency to offer a report to you on due process because we do not want the issue of due process to become the property of radicals, rabble rousers and wild men in the Church, who attack authority on every front and seem to be seeking to shake the structures of the Church. It

is not their cause; it is yours; it is ours. It belongs to *all* the members of the Church. I would not like to see it become theirs by default. I think due process is your issue more than anyone else's. Filling the structural and procedural gap in the Church's concern for the rights of all Christians, especially in the area of administrative activity, is an opportunity for you to demonstrate the great concern for justice and fundamental fairness that rests in every one of you. Once structures and procedures are established, both to minimize suspected injustice and to afford peaceful, orderly means for the resolution of disputes, the rabble rousers of our day quickly will be defused. Publicity will not gather around them because people will realize there are perfectly adequate structures for the airing of grievances; those who claim grievances but who will not resort to adequate procedures for their resolution will not rally the emotional support of the public. Much of the criticism leveled at positions of authority in the Church will be effectively dissipated. Consequently, the effectiveness of your own authority will be enhanced.

That we offer something new necessarily implies, I suppose, a certain amount of criticism on our part of what has been and what is now. I hope, however, that you will not misunderstand such criticism as bespeaking a lack of reverence or a lack of love on the part of those of us who offer it. The Roman Catholic Church is that to which our lives are dedicated. We believe that one may criticize what one reveres, and that the greater the love, the greater the freedom to criticize. We believe it would be less than devotion if, perceiving what we think to be the ideal of the Church's future, we hesitated to point it out or press toward it with all our hearts.

Mr. Justice Holmes once said: "We must sail, sometimes with the wind, sometimes against the wind, but we must sail and not drift or lie still at anchor." We think that future learning in this area of affording protection for rights in the Church should

come from experience, from experimentation. Consequently, we offer you a small craft in which to set out and the bare beginnings of a course on which to sail. The craft will have to be made stronger and the course will have to be altered many times. But we offer you a beginning. Whether you judge it opportune to set sail now or not, we assure you of our continuing devotion and our continuing efforts to serve you in any way we can.

Table of Corresponding Canons Cited in *On Due Process*: 1917 Code with 1983 Code

1917 CODE

1983 CODE

cc. 356-362

cc. 460-468

cc. 1552-1924, 1933-1959

cc. 1400-1670, 1717-1731

cc. 1572

cc. 1419

cc. 1667

cc. 1491; 1492§2

cc. 1925

cc. 1446; 1713

cc. 1925-1928

cc. 1713-1715

cc. 1929

cc. 1713

cc. 1929-1932

cc. 1713-1716

cc. 2147-2167

cc. 1740-1752

Committee on
Conciliation and Arbitration:
Procedures Adopted by the
General Membership



NOVEMBER 14, 1979
NATIONAL CONFERENCE OF CATHOLIC BISHOPS

INTRODUCTION

During the November 1979 General Meeting of the National Conference of Catholic Bishops, the Committee on Arbitration presented procedures to govern the Committee's action. Bishop Roger Mahony, then Chairman of the Committee, introduced the document in these words:

Ten years ago, at the Conference Meeting held in November of 1969, the Committee on Arbitration was charged by the bishops to develop rules of procedure to guide the Committee in dealing with cases which might legitimately reach the Committee.

The Committee was asked to bring these procedures "into line with procedures already endorsed (by the bishops) for use on the diocesan level."

During these past ten years, most due process attention was focused at the local, diocesan-level as the bishops attempted to implement due process structures at that level to help resolve local disputes. At this time, 94 arch/dioceses have a due process program, and another 18 are planning to implement one. It was advantageous to have this local-level focus during these years, since that is where the most fruitful resolution of disputes can take place.

The Committee on Arbitration, however, feels that it is opportune to implement the original mandate of the bishops in 1969 and to adopt procedures to help guide it in functioning at the Conference level. The work of the Committee over the years has been that of encouraging the local-level resolution of problems and disputes. But

should a case reach the Committee for more formal action, it would be most important to have in place a set of procedures to guide the Committee and the parties in working towards a resolution of the problem.

The proposed Procedures which this Committee proposes to the bishops of the Conference do not signal a new due process program, or a new entity within the Conference. Rather, these procedures will serve the already existing Committee on Arbitration if and when they are called upon to assist in the resolution of a dispute.

These Procedures contain no *vis obligativa* and impose no burden upon any bishop of the Conference. They are to be used by the Committee on Arbitration only in those cases in which a member of the Conference freely chooses to utilize the services of the Committee. The Procedures presuppose a totally voluntary participation by a member of the Conference, and become operative only when any member so wishes to be involved.

You will note that the Procedures track very closely the local-level guidelines for the process of Conciliation and the process of Arbitration approved by the bishops in 1969, and approved by the Holy See with a *nihil obstat* in 1971.

I would like to review with you some of the main features of the proposed Procedures which provide the following:

1. These Procedures are designed to assist in resolving claims of injustices. The competence of the Committee on Arbitration has been limited to disputes in which a violation of a right is alleged, and does not allow recourse to the Committee whenever a dispute arises over a matter of prudential judgment which is not alleged to involve justice.

2. For the first time, this Committee of the Conference will have in place procedural guidelines for all parties should a case legitimately reach the Committee.
3. The name of the Committee will be changed to NCCB “Committee on Conciliation and Arbitration,” to reflect more accurately this twofold function of the Committee.
4. In general, the Procedures for both processes track closely the guidelines approved in 1969 by the bishops, and which received a *nihil obstat* from the Holy See on October 23, 1971.
5. The Procedures give competence to the Committee in those cases involving a member, a group of members, or structural affiliates of the NCCB as one or more parties.
6. There is a built-in screening mechanism to be certain that frivolous petitions are dismissed early, and a requirement that a *prima facie* case be presented before the Committee is activated.
7. The Procedures provide a balance whereby informal conflict resolution is encouraged, but also whereby the rights of all parties are protected.
8. While these Procedures do stress the local-level resolution of disputes, and although they do require some good-faith effort in that regard, they nonetheless do provide for the first time an available mechanism for those parties not having a local-level due process program and who wish to avail themselves of this service.
9. Appeal from the process of arbitration, under the provisions of the Procedures, may be taken either to the full

Committee on Conciliation and Arbitration, or to the Apostolic Signatura.

Your Committee on Arbitration feels that these Procedures will be very helpful to the Committee and to the Conference in making available a due process program at the Conference level within the limits outlined in the Procedures.

The procedures were approved by the bishops on November 14, 1979 and will serve as a guide to the Committee and those who seek to make use of its services.

I would like to thank Bishop Mahony and the other members of the Committee who gave of their time working on these Procedures: Bishop John F. Kinney, Bishop Daniel P. Reilly and Bishop Sylvester W. Treinen. A special word of appreciation is due Reverend Robert T. Kennedy of the Department of Canon Law, the Catholic University of America, for his background and experience in the field of due process which he shared so generously through several drafts of the new Procedures. I am also grateful to the Reverend Daniel F. Hoye, Associate General Secretary of the NCCB, for his valued assistance.

Most Rev. George F. Guilfoyle
Bishop of Camden
Chairman, NCCB Committee on
Conciliation and Arbitration

ARTICLE I.
FUNCTIONS OF THE BISHOPS' COMMITTEE ON
CONCILIATION AND ARBITRATION

1. It shall be the primary function of the Bishops' Committee on Conciliation and Arbitration to facilitate the resolution of disputes which involve claims of injustice,^a which have not been resolved on the local or regional level,^b and which involve individual members, groups of members or structural affiliates of the National Conference of Catholic Bishops as one or more parties.
2. Such facilitation shall involve the Bishops' Committee on Conciliation and Arbitration, according to the norms set forth in the Articles which follow, in two forms of dispute-resolution: conciliation and arbitration.
3. It shall be the secondary function of the Bishops' Committee on Conciliation and Arbitration to be available as a resource to assist, upon request, with the development and improvement of local-level structures for the resolution of disputes.

ARTICLE II.
RELATIONSHIP TO NCCB AND TO
APOSTOLIC SIGNATURA

In facilitating the resolution of disputes in accord with the norms which follow, the Bishops' Committee on Conciliation and Arbitration acts for the National Conference of Catholic Bishops. Recourse from decisions of the Bishops' Committee may be taken, in accord with the norms which follow, solely to the Apostolic Signatura.

ARTICLE III.
COMPETENCE OF THE COMMITTEE

Any person or group of persons in conflict with a member, group of members, or structural affiliate of the National Conference of Catholic Bishops may seek the assistance of the Bishops' Committee on Conciliation and Arbitration provided the following conditions are fulfilled:

1. The dispute involves injustice, that is, the claim that some action or inaction has violated a right recognized as such in the law of the Church or in the documents of the magisterium;^c
2. Good faith efforts at local resolution of the dispute have been unsuccessful.

ARTICLE IV.
ACCESS TO THE COMMITTEE

1. Access to the Committee shall be by written petition directed to the Chairman of the Bishops' Committee on Conciliation and Arbitration.
2. Such petition shall set forth the names of all parties to the dispute, the basic facts and issue or issues involved in the dispute according to the understanding of the petitioner, a precise statement of the right or rights alleged to have been violated or threatened with violation, and the details of fulfillment of the conditions hereinabove set forth in Article III.
3. Such a petition directed to the Chairman of the Bishops' Committee on Conciliation and Arbitration shall be construed as a petition for the assistance of the Bishops' Committee in facilitating *conciliation* of the dispute in

accord with the norms set forth in the Articles which follow. Only after every reasonable effort at resolution of the dispute through the Christian informality of conciliation has failed will the Bishops' Committee consent to facilitate *arbitration* of the dispute.

4. Upon receiving such a petition, the Chairman of the Bishops' Committee shall contact, both by telephone and in writing^d the party or parties named in the petition as respondent(s), apprise said party or parties of the contents of the petition, forward a copy or copies of the written petition, and request that a written response to the petition be sent promptly to the Chairman of the Bishops' Committee on Conciliation and Arbitration.
5. Upon receiving a written response to the petition, the Chairman of the Bishops' Committee, after consulting the other members of the Committee if in the judgment of the Chairman such consultation seems advisable, shall determine if the petition states a *prima facie* case for conciliation in accordance with these procedures. If such determination is negative, the petition shall be dismissed and notice of such dismissal, with the reasons for it, shall be sent to all parties. If such determination is affirmative, the Chairman shall inquire if the respondent(s) will accept conciliation, requesting a prompt reply to such inquiry.

ARTICLE V. SELECTION OF CONCILIATOR

1. Upon receiving an affirmative response to the inquiry concerning acceptance of conciliation, the Chairman shall inquire of the respondent(s) which of the members of the Committee would be acceptable as conciliator, requesting a prompt reply to such inquiry.

2. Upon learning which of the members of the Committee would be acceptable to the respondent(s) as conciliator, the Chairman shall forward the acceptable names to the petitioner and ask for prompt indication of which of the submitted names would be acceptable to the petitioner.
3. If no member of the Committee is mutually acceptable to petitioner and respondent(s), the Chairman of the Committee shall ask each party to submit promptly a list of five names of persons, preferably but not necessarily bishops, who would be acceptable as conciliators. The Chairman may also suggest names of possible conciliators.
4. Upon receiving indications of mutually acceptable persons as conciliators, the Chairman of the Bishops' Committee shall select *one* of the mutually acceptable persons to act as conciliator in the dispute.
5. If no mutually acceptable conciliator can be found after several attempts by the Chairman to elicit mutually acceptable names, the process of conciliation cannot proceed. The Chairman shall prepare a brief document indicating the inability of the Bishops' Committee to aid in the resolution of the dispute by conciliation due to the failure of the parties to agree upon a mutually acceptable conciliator.
6. If the respondent(s) express unwillingness to enter into a process of conciliation, the Chairman shall make every reasonable effort to persuade said respondent(s) to cooperate with such a process. If all such efforts fail, the process of conciliation cannot proceed. The Chairman shall prepare a brief document indicating the inability of the Bishops' Committee to aid in the resolution of the dispute by conciliation due to the unwillingness of the respondent(s) to enter such a process.

ARTICLE VI.
PROCESS OF CONCILIATION

1. Within two weeks of the selection of the Conciliator by the Chairman of the Bishops' Committee, the Conciliator shall meet with each participant separately for oral discussion of the dispute.
2. Within one week of the second of these conferences, the Conciliator shall meet with both participants together and endeavor to guide them to a peaceful resolution of their problem. The Conciliator shall schedule as many of these joint meetings as seem to be necessary in order to achieve conciliation.
3. The Conciliator shall endeavor to assure that each participant answers the questions which the other participant believes are essential if he is to understand the actions of the other. The Conciliator should encourage a trust in candor on both sides.
4. The first joint meeting of the participants and the Conciliator shall be restricted to these persons. Thereafter, in the discretion of the Conciliator, each participant may be accompanied by one or two advisers of the participants' own choosing. In the event one participant desires to have such advisers, and the Conciliator agrees, the Conciliator shall notify the other participant of the opportunity to be accompanied by an equal number of advisers. In the discretion of the Conciliator, and with the agreement of the participants, other members of the Bishops' Committee on Conciliation and Arbitration or other persons may join the meeting from time to time.
5. If the problem is resolved by agreement, the Conciliator shall prepare a summary statement of the dispute and its

resolution, and shall submit it for the approval and signature of the participants. If the problem is unresolved after the meetings arranged by the Conciliator have been held, and in any event if the problem is unresolved within six months, the Conciliator shall ask the participants if they are willing to continue discussion of the problem with the same or another conciliator. If the participants agree in their response, the Conciliator shall arrange the desired continuation. If one or more participants decline to engage in further discussion, the Conciliator shall file a report with the Bishops' Committee on Conciliation and Arbitration. This report shall contain the names of the participants, a summary of the dispute and the discussion taken to resolve it, and certification by the Conciliator that, despite the good faith of the participants, no resolution could be reached.

6. The Conciliator shall have no power to force the participants to adopt a solution. He shall have power, however, to determine that any participant is not cooperating in good faith. Such facts as failure to attend three scheduled meetings, failure to respond to a substantial number of questions which the Conciliator believes appropriate, or failure to suggest any way of accommodating the interests of the other participant may be taken as evidence of a lack of good faith. In the event that for these or other good reasons the Conciliator believes that a participant is not cooperating in good faith, he shall notify the Chairman of the Bishops' Committee on Conciliation and Arbitration. The Chairman shall endeavor to persuade the participant to cooperate.
7. Meetings shall be private and without publicity. All communications made in the process of conciliation shall be treated as confidential by all who share in them. If the dispute is resolved by agreement, and the parties agree to publicizing the solution, announcement of it shall be made, after consultation with the Ordinaries of the participants. If

there is no agreement on a solution or on publicizing it, no announcement shall be made.

8. Expenses incurred in the process of conciliation shall be borne equally by the parties, unless they agree otherwise, or unless the Conciliator determines otherwise according to the circumstances of a particular case.

ARTICLE VII. INITIATION OF ARBITRATION

1. When a dispute which is within the competence of the Bishops' Committee on Conciliation and Arbitration cannot be resolved by conciliation because of inability to select a mutually acceptable conciliator (cf. Article V, 5, *supra*), or because of unwillingness on the part of the respondent(s) to conciliate (cf. Article V, 6, *supra*), or because no resolution could be reached despite good faith participation in the conciliation process (cf. Article VI, 5, *supra*), any party to the dispute may petition the Bishops' Committee for assistance in facilitating arbitration of the dispute.
2. Such petition shall set forth the names of all parties to the dispute, the basic facts and issue or issues involved in the dispute according to the understanding of the petitioner, a precise statement of the right or rights alleged to have been violated or threatened with violation, and a statement regarding the failure of the conciliation process to have resolved the dispute.
3. Such petition shall be accompanied by the appropriate document from the Chairman of the Bishops' Committee (cf. Article V, 5 and 6, *supra*) or from the Conciliator (cf. Article IV, 5, *supra*) attesting to the failure of efforts to resolve the dispute by conciliation.

ARTICLE VIII.
EXCLUSIONS FROM ARBITRATION

1. The following shall not be subject to settlement by arbitration:
 - a. Criminal cases in the strict sense (not administrative sanctions and disciplinary actions). The process for arbitration shall extend to disputes about penalties imposed or declared administratively only if the arbitrators confine themselves to investigating whether or not the norms on the manner of proceeding have been justly and equitably observed, so that if they judge that the manner of proceeding is not to be approved, they shall refer the matter to the bishop;
 - b. Non-criminal cases where there is a question of dissolving or annulling a marriage;
 - c. Matters pertaining to benefices when there is litigation about the title itself to a benefice unless the legitimate authorities sanction arbitration;
 - d. Spiritual matters whenever the award requires payment by means of temporal goods.
2. Disputes involving temporal ecclesiastical goods or those things which, though annexed to the spiritual, can be dealt with apart from their spiritual aspect, may be settled through arbitration but the formalities of law for the alienation of ecclesiastical property must be observed if the matter is of sufficient importance.

ARTICLE IX.
SELECTION OF ARBITRATORS

1. Upon receiving a petition in accord with the provisions of Article VII, *supra*, the Chairman of the Bishops' Committee on Conciliation and Arbitration shall contact, both by telephone and in writing, the party or parties named in the petition as respondent(s), apprise said party or parties of the contents of the petition, forward a copy or copies of the written petition, and inquire if said party or parties will accept arbitration, requesting a prompt reply to such inquiry.
2. Upon receiving an affirmative response, the Chairman shall request the respondent(s) to submit a prompt written response to the petition. The Chairman also shall forward to the respondent(s) two lists of persons judged by the Bishops' Committee to be qualified as arbitrators, one list being composed of the names of bishops, and the other list being composed of priests, men and women religious and laity. The Chairman of the Bishops' Committee shall inquire of the respondent(s) which names on each list would be acceptable as arbitrators, requesting a prompt reply.
3. Upon learning which persons from each list would be acceptable to the respondent(s) as arbitrators, the Chairman shall forward the acceptable names to the petitioner and ask for prompt indication of which of the submitted names from each list would be acceptable to the petitioner.
4. If no mutually acceptable name is presented from the list of bishops, or two mutually acceptable names are not presented from the list of non-bishops, the Chairman of the Bishops' Committee shall ask each party promptly to submit a list of five names of bishops and five names of persons who are not bishops. The Chairman may also suggest names of possible arbitrators.

5. Upon receiving indications of mutually acceptable persons as arbitrators, the Chairman of the Bishops' Committee shall select three of the mutually acceptable persons to act as arbitrators in the dispute. At least one of those selected must be a bishop.
6. If no mutually acceptable arbitrators can be found after several attempts by the Chairman of the Bishops' Committee to elicit mutually acceptable names, the process of arbitration cannot proceed. The Chairman shall prepare a brief document indicating the inability of the Bishops' Committee on Conciliation and Arbitration to aid in the resolution of the dispute by arbitration due to the failure of the parties to agree upon mutually acceptable arbitrators.
7. If the respondent(s) express unwillingness to enter into a process of arbitration, the Chairman shall make every reasonable effort to persuade said respondent(s) to cooperate with such a process. If all such efforts fail, the process of arbitration cannot proceed. The Chairman shall prepare a brief document indicating the inability of the Bishops' Committee on Conciliation and Arbitration to aid in the resolution of the dispute by arbitration due to the unwillingness of the respondent(s) to enter into such a process.

ARTICLE X. ARBITRATION AGREEMENT

Within five days of receiving the names of three arbitrators chosen by the Chairman of the Bishops' Committee in accord with Article IX, 5, *supra*, the parties to the dispute shall submit to the Chairman in writing their acceptance of the named arbitrators, their agreement to submit to arbitration under the norms set forth in Article XI, *infra*, and their commitment to accept the decision of the arbitrators as binding.

ARTICLE XI.
THE ARBITRATION PROCESS

1. *Time and Place of Hearing*
The Arbitrators shall appoint a time and place for hearings and notify the parties not less than five days before each hearing.
2. *Representation by Counsel*
Parties to the dispute may be represented at hearings by counsel or other authorized representative.
3. *Attendance of Hearings*
It shall be in the discretion of the Arbitrators to determine the propriety of the attendance of persons, other than parties, having a direct interest in the arbitration or of any other persons.
4. *Adjournment*
For good cause the Arbitrators shall adjourn the hearing upon request of a party, upon their own initiative, or when all the parties agree thereto.
5. *Arbitration in the Absence of a Party*
Arbitration may proceed in the absence of any party who, having received due notice, fails to be present without reason judged by the Arbitrators to be sufficient.
6. *Evidence*
The Arbitrators shall hear and resolve the controversy upon the evidence produced. Parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrators may deem necessary to an understanding and determination of the dispute. All testimony shall be given under oath. The Arbitrators shall judge the relevancy and materiality of the evidence offered, and conformity to

legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all the Arbitrators and all of the parties except where any of the parties is absent in default or has waived his right to be present. The Arbitrators may require the parties to submit books, records, documents, and other evidence.

7. *Evidence by Affidavit*

The Arbitrators shall have the power to administer oaths and to take evidence from witnesses by deposition whenever witnesses cannot attend the hearing.

8. *Order of Proceedings*

A hearing shall be opened by the recording of the place, time and date of hearing, the presence of the Arbitrators and parties, the presence of counsel, if any, and of any persons admitted pursuant to Section 3 of this Article, and the receipt by the Arbitrators of initial statements setting forth the nature of the dispute and the remedies sought. The Arbitrators may, in their discretion, vary the normal procedure under which the petitioner first presents evidence, but in any case shall afford full and equal opportunity to all parties for presentation of relevant proofs. The names and addresses of all witnesses, and exhibits offered in evidence, shall be made a part of the record.

9. *Majority Decision*

In the course of the hearing, all decisions of the Arbitrators shall be by a majority vote. The award shall also be made by majority vote unless the concurrence of all is expressly required by the terms of a particular arbitration agreement.

10. *Closing of Hearings*

The Arbitrators shall inquire of all parties whether they have any further proofs to offer or witnesses to be heard.

Upon receiving negative replies, the hearings shall be declared closed. The hearings may be reopened by the Arbitrators on their own motion, or on the motion of either party, for good cause shown, at any time before the award is made.

11. *Time of Award*

The award shall be rendered promptly by the Arbitrators and, unless otherwise agreed by the parties, not later than ten days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the Arbitrators.

12. *Form of Award*

The award shall be in writing and shall be signed by the Arbitrators.

13. *Record of Proceedings*

Upon agreement of all parties, the entire proceedings shall be tape recorded; and, at the request of either party, or at the discretion of the arbitrators, a written transcript shall be prepared of all or of portions of the recorded proceedings. The total cost of the tape recording shall be shared equally among parties, and the cost of providing written transcripts shall be shared equally among parties, and the cost of providing written transcripts shall be shared equally among all parties ordering copies of the transcripts, unless the parties agree otherwise, or unless the Arbitrators determine otherwise according to the circumstances of a particular case.

14. *Meetings*

Meetings shall be private and without publicity. All communications made in the process of Arbitration shall be treated as confidential by all who share in them. If the dispute is resolved, and the parties agree to publicizing the

solution, announcement of it shall be made after consultation with the Ordinaries of the participants. If the dispute is not resolved by Arbitration, or if the parties do not agree on publicizing the solution, no announcement shall be made.

15. *Interpretation and Application of Rules*

Questions concerning the interpretation of these rules shall be referred for final decision to the Chairman of the Bishops' Committee on Conciliation and Arbitration.

16. *Expenses*

The expenses of witnesses shall be paid by the respective parties producing witnesses, unless the Arbitrators determine otherwise according to circumstances of a particular case. Traveling and other expenses of the Arbitrators, and the expenses of any witnesses or the cost of any proofs produced at the direct request of the Arbitrators, shall be borne equally by the parties unless they agree otherwise, or unless the Arbitrators determine otherwise according to circumstances of a particular case.

ARTICLE XII.

APPEAL FROM DECISION IN ARBITRATION

1. Since the parties to arbitration have voluntarily committed themselves to abide by the decision of the Arbitrators (cf. Article X), no appeal on the merits may be taken from a decision in arbitration.
2. Appeal from a decision in arbitration may be taken only where it is alleged that:
 - a. The award was procured by corruption, fraud, or other undue means;

- b. There was evident partiality on the part of an Arbitrator;
 - c. The Arbitrators exceeded their powers;
 - d. The Arbitrators refused to postpone a hearing notwithstanding the showing of sufficient cause for such postponement, or refused to hear evidence material to the controversy, or otherwise conducted the hearing so as prejudicially to affect a substantial right of one of the parties;
 - e. The decision was based on documents which are spurious;
 - f. New evidence has been discovered of a character which demands a contrary decision;
 - g. Principles of fundamental procedural fairness were violated.
3. Such appeal as is allowed by this Article, Section 2, shall be taken either to the full membership of the Bishops' Committee on Conciliation and Arbitration, or to the Apostolic Signatura, at the option of the appealing party.

ANNOTATIONS

- a. “. . . disputes involving claims of injustice . . .” This expression is intended to limit the competence of the Committee to disputes in which a violation of a *right* is alleged, and not allow recourse to the Committee whenever a dispute arises over a matter of *prudential judgment* which is not alleged to involve justice.

One of the serious confusions that has arisen in the area of ecclesiastical conciliation and arbitration has resulted from pulling these processes out of the “due processes” context into which the NCCB plan had placed them, and viewing them instead as they are generally viewed in American civil society. “Due process” is concerned with the protection of *rights*, with the alleviation of injustice (be it deliberate or, as is more often the case, inadvertent). In American society, however, Conciliation and Arbitration are chiefly used not as instruments for the resolution of conflicts of *rights*, but for the resolution of conflicts of *interest* (chiefly in labor-management disputes). Such was not the intention of the NCCB in employing Conciliation and Arbitration (which have canonical roots in the Code of Canon Law) as instruments in a “due process” concern for *rights*. Hence, in the Church, Conciliation and Arbitration should not be available for the resolution of grievances that arise simply because the “aggrieved” party *disagrees prudentially* with the judgment, policy, or decision of an administrator or administrative body. Where administrative authority is involved, discretionary judgment has been vested in the administrator; there it must remain, and not be subject to overthrow by a panel of arbitrators. In such cases, Conciliation and Arbitration should be confined to grievances in which it is claimed that the administrative use of discretion had violated some *right* of the aggrieved party, has worked (or is threatening to work) some injustice.

- b. “. . . which have not been resolved on the local or regional level . . .” This expression is intended to make clear the preference for local resolution of disputes whenever such resolution is possible. Inability to resolve a dispute on the local level could stem *either* from the unwillingness of one party to utilize such local structures as do exist, *or* from the failure of local efforts to resolve the dispute.
- c. “. . . recognized as such in the law of the Church or in the documents of the magisterium . . .” This phrase is intended to give some measure of specificity to the notion of “rights,” a claimed violation of which is essential to the Committee’s cognizance of the dispute.

While in civil society the sole source of recognized rights is the positive law of the society, such is not the case in the Church. In addition to universal and particular law, the Church also has the *magisterium* as a source of the

Church's understanding of the rights of its people—human rights (flowing from the dignity of the human person and often said to be dictates of the “natural law”), ecclesial rights (flowing from baptism), and ecclesiastical rights (flowing from a particular office or responsibility in the Church). The documents of Vatican II, for example, are replete with teaching on all three categories of rights. The positive *law* of the Church does not presume to be a comprehensive compendium of all of the rights of the People of God. Nor does it propose to resolve by antecedent legislation all of the possible conflicts of rights that can arise in ecclesial society. Hence, restriction of the processes of Conciliation and Arbitration to disputes involving claimed *violations of law* would be far too limited a concern for justice within the Church.

- d. “. . . both by telephone and in writing . . .” The suggested requirement of contact by telephone is in the interest of informality, personal concern, urgency, and certainty of direct communication with the named respondent(s). The requirement of written contact is in the interest of an accurate record of the actions of the Committee.

