HARMONIZING THE CANONS

DHARMARAM CANONICAL STUDIES

Institute of Oriental Canon Law (IOCL), DVK
Bengaluru-560029, INDIA

Dharmaram Canonical Studies **16**

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Pablo Gefaell

Dharmaram Publications
Bengaluru
2016

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ISBN: 978-93-84964-47-4

First Eddition:
June, 2016
Published For:
Dharmaram Vidya Kshetram, Bengaluru, India
Publisher:
Dharmaram Publications, Bengaluru, 560029

Layout and Cover Design: Prakash Chettri
Printed at: Matha Press, Bengaluru

Price: ₹ 300/ $ 25/ € 20

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Preface

In July 2015 I was invited by the Oriental Canon Law Society of India to give a course at Thiruvalla (Kerala). Taking advantage of this occasion, Rev. Prof. Varghese Koluthara, CMI, kindly asked me also to travel to Bangalore to present some papers at the Institute of Oriental Canon Law of *Dharmaram Vidya Kshetram*. I was very pleased to accept Prof. Koluthara's proposal, because it meant a happy fulfilment of an old desire to visit such a prestigious Institute, after a previous invitation in 2003 was unsuccessful due to technical problems.

Once my papers were presented, I was asked to publish them in the collection of the Institute, adding some other topics in order to complete a book.

The title of the book "Harmonizing the Canons" tries to express the main aim of these pages, that is to achieve harmony among the different canonical disciplines: Oriental and Latin, Catholic and Orthodox.

The first three chapters of this book deal with intra-Catholic issues, and comprise articles that at present are still not published, although originally they were presented in Italian in other conferences, and will appear in the near future in that language. The second part of the book focuses on ecumenical canonical issues and is composed of three other papers, already published in Italian, but which I deem interesting to make available to English speaking canonical scholars.

The first chapter presents the recent legislative projects for harmonizing CIC and CCEO. The Pontifical Council for Legislative Texts has granted permission for publishing this English version of the paper.

The second Chapter - on applying the norms of CCEO to Latin discipline by means of express but implicit indication - could serve as a small complement to Jobe Abbass' book on similar topic, published in a former issue of "Dharmaram Canonical Studies".

The third chapter is on the eparchial bishop's duty to govern his flock in harmony with the decisions of the Synod of bishops of his own Church *sui iuris*. It analyses the canonical decisions of some eparchies in relation to the liturgical issues within the Syro-Malabar Major Archiepiscopal Church, and tries to offer a reasonable technical solution.

As we have said, the second part of the book is on canonical aspects of some ecumenical issues: the fourth chapter tries to explain the essential canonical aspects of the Petrine ministry as guarantee of ecclesial unity; the fifth chapter is on the recognition of the legislative competence of Orthodox authorities over their own faithful and its canonical implications in mixed marriages with Catholics; the last chapter deals with the consequences in the Catholic canonical process of the recognition of Orthodox judicial competence over their faithful.

I hope that this book may be useful to scholars and pastors, and I renew my thankfulness for being allowed to visit India, its charming people and lively Syro-Malabar, Syro-Malankar and Latin Churches.

May 2016 *Pablo Gefaell*

Abbreviations

AAS	*Acta Apostolicae Sedis,* Romae 1909-
AA.VV.	Auctores Varii [Collective work]
A.D./a.D.	Anno Domini [Year of the Lord, after Christ]
Ap. Const.	Apostolic Constitution
Ap. Exhort.	Apostolic Exhortation
art./artt.	article/articles
ASS	*Acta Sanctae Sedis,* Romae 1867-1908
can./cc.	canon, canons
cap.	Caput [Chapter]
CCEO	*Codex Canonum Ecclesiarum Orientalium*
CCC	*Catechism of the Catholic Church*
CD	Vatican II Decree *Christus Dominus*
cit.	citatum [cited]
Cfr./cf.	Confert [compare]
CIC	*Codex Iuris Canonici*
CIC83	*Codex Iuris Canonici of 1983*
CIC17	*Codex Iuris Canonici of 1917*
CDF	Congregation for the Doctrine of the Faith
CLSA	Canon Law Society of America
col.(s)	Column (s)
DE 1993.	*Directory for the Application of Principles and Norms on Ecumenism*, 25 March 1993
DC	Instr. *Dignitas Connubii*
ed./eds.	editor/editors
et post.	et posteriores [and following]
ibid.	*ibidem* [same author and same title]
Instr.	Instruction
Litt. Ap.	Litterae Apostolicae
LG	Vatican II dogmatic constitution *Lumen Gentium*

MIDI	M.p. *Mitis Iudex Dominus Iesus*
MMI	M.p. *Mitis et misericors Iesus*
M.p./m.p.	Motu proprio
no./nos.	number/numbers
OE	Vatican II Decree *Orientalium Ecclesiarum*
o.c.	opus citatum [mentioned work]
p./pp.	page/pages
§/§§	paragraph/paragraphs
PCCICOR	Pontificia Commissio Codici Iuris Canonici Orientalis Recognoscendo
PCCICR	Pontificia Commissio Codici Iuris Canonici Recognoscendo
PCPCU	Pontifical Council for Promoting Christian Unity
PCLT	Pontifical Council for Legislative Texts
P.I.O.	Pontificium Institutum Orientale
P.N./Prot.N.	Protocol Number
≈	Similar to
UR	Vatican II Decree *Unitatis Redintegratio*
UUS	Encyclical *Ut unum sint*

First Part

Catholic Internal Canon Law Questions

Chapter 1

Harmonizing the two Codes: Open Legal Issues*

1. Introduction

The Necessary Harmonization Is Not to Uniform Both Disciplines

The harmony between the two codes existing in the Catholic Church – Latin and Oriental – was a need felt from the beginning of the canonical codifying enterprise. Certainly, the various drawing-up and revising Commissions made a sincere and praiseworthy effort to achieve that. However, as happens to every human enterprise, the work accomplished leaves always room for improvement. Now we are celebrating the twenty-fifth anniversary of the promulgation of CCEO and, along the years, the problems that arose in the context of pastoral relations between the faithful and pastors of the various Eastern Catholic Churches and the Latin Church have made come to light some discrepant points between the two

* This is an updated and translated paper presented at the Conference: «Giornata di Studio "Il Codice delle Chiese Orientali – Problematiche attuali e sviluppi legislativi", in the XXV Anniversary of the Promulgation of the Code of Canons of the Oriental Churches 18 October 1990 – 18 October 2015», organized by the Pontifical Council for Legislative Texts and the Congregation for the Oriental Churches, in collaboration with the Pontifical Council for the Promotion of Christian Unity and the Pontifical Oriental Institute, and with the adhesion of the Society for the Law of the Oriental Churches, Vatican City 3 October 2015. The original Italian version of the paper will be published in the Proceedings of that Conference. This article is published with the gracious permission of the Pontifical Council for Legislative Texts (PCLT).

disciplines that urged the convenience of making them more compatible.

Obviously, the Latin Code of Canon Law of 1983 and the Code of Canons of the Eastern Churches of 1990 have areas of competence and peculiarities that, in principle, make them mutually independent (cf. CIC can. 1; CCEO can. 1). However, in addition to the content belonging to the constitution of the Catholic Church that is common to both Codes, there are other provisions of these two legal bodies that it is convenient to be concordant, since they are characteristics not exclusively Oriental or Latin, and are often involved in legal affairs in which one part belongs to the Latin Church and the other to one of the Eastern Catholic Churches. In affairs of this kind, in fact, the existence of strident rules in the two applicable disciplines is to be avoided as much as possible, in order not to run into the consequent doubts of law.

This need is especially urgent today, due to the strong immigration phenomenon. In fact, the increased mobility of the world population in recent decades has meant that a large number of Eastern Christians, Catholics and non-Catholics, have left their traditional place of origin to settle in the so-called Western countries, bringing with them their own liturgical, spiritual, theological and disciplinary heritage, which constitutes their ritual and cultural identity.

The presence of a considerable number of Eastern faithful in Western territories generates multiple inter-Church pastoral issues that must be resolved with clear and certain rules. These faithful are obliged to observe their own rite wherever they are (CCEO can. 40 § 3; cf. OE no. 6) and, in consequence, the competent ecclesiastical authority has the serious responsibility to offer them adequate means to enable them fulfil this obligation (CCEO can. 193 § 1; cf. CIC can. 383 §§ 1-2; *Pastores Gregis* no. 72). The harmonization of legislation will provide the Eastern Catholic Churches the necessary conditions to

flourish[1] (cf. CCEO Can. 39) and be able to effectively carry out the tasks assigned to them for the benefit of the whole Church (cf. OE nos. 1 and 24).

As St John Paul II pointed out, the territories that are historically of Latin majority but where there is now an ever more consistent and stable Eastern faithful presence peacefully coexisting within a pluralistic society, «could be an ideal environment for improving and intensifying cooperation between the Churches (...). I particularly urge [continues saying the Saint Pontiff] the Latin Ordinaries in these countries to study attentively, grasp thoroughly and apply faithfully the principles issued by this Holy See concerning (...) the pastoral care of the faithful of the Eastern Catholic Churches, especially when they lack their own hierarchy. I invite the Eastern Catholic Bishops and clergy to collaborate closely with the Latin Ordinaries for an effective apostolate which is not fragmented, especially when their jurisdiction covers immense territories where the absence of cooperation means, in effect, isolation.»[2] So, even at the regulatory level it is necessary to avoid chances of interference between the different legal systems in order to facilitate the harmonious and fruitful work of evangelization and pastoral activity.

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[1] «I fully share in the esteem that the Council showed your Churches in the Decree *Orientalium Ecclesiarum* which my venerable Predecessor John Paul II reaffirmed in particular in his Apostolic Exhortation *Orientale Lumen*. I also share in the hope that the Eastern Catholic Churches will "flourish" in order "to fulfil with new apostolic strength the task entrusted to them", so as to foster "the unity of all Christians, in particular of Eastern Christians, according to the principles laid down in the decree of this holy Council, "On Ecumenism" (*Orientalium Ecclesiarum* no. 1).» Benedict XVI, *Address in the ecumenical meeting with Eastern Catholic Patriarchs and Major Archbishops, Castelgandolfo, 19 September 2009*. Original Italian version in *Insegnamenti di Benedetto XVI*, V/2 (2009), p. 224. English translation is from www.vatican.va.

[2] John Paul II, Ap. Lett. *Orientale Lumen*, 2 May 1995, in AAS 87 (1995), pp. 745-774, no. 26. English translation is from www.vatican.va.

The rules of the CIC must also be integrated with explicit provisions parallel to those existing in CCEO on the legal relationship with the Eastern non-Catholics. It is known that, for the specific circumstances of life of the subjects it addresses, the Eastern Code has been more sensitive than the Latin one in defining the canonical consequences of ecumenical issues. The Eastern Catholic faithful, in fact, often live in countries with an Orthodox majority and, for that reason, have to attend to many matters with the non-Catholic Eastern brethren. Today, the immigration of large numbers of Orthodox in the West requires the Latin discipline solve problems similar to those already faced by the Eastern Code and, therefore, the answers may be similar.

The goal, then, of this new harmonizing effort is to achieve a harmonious discipline that can provide certainty in how to act pastorally in concrete and frequent cases.

To this end, on September 27, 2007 Pope Benedict XVI granted an audience to the President and the Secretary of the Pontifical Council for Legislative Texts [PCLT], during which the need to better harmonize the regulation of the two codes of the Catholic Church was put on the table. Shortly after a Commission of canonists, both Latin and Eastern, was established for this purpose, which held eight sessions from 29 May 2009 to 20 April 2010. As a result of those sessions, on 15 February 2011 was drafted a text with "Proposals for harmonization of the canons to be introduced in the CIC and the CCEO", then sent to 22 consultants and experts in Canon Law and to the authorities of the Latin Ordinariates for Oriental faithful. The answers were collected on October 20 of that year in the text "Observations of consultants and experts to the proposals for harmonization of canons to be introduced in the CIC and the CCEO defined by the working Commission of the Pontifical Council for Legislative Texts." These observations were forwarded to the members of the Commission and, therefore, discussed at its meeting on 8 November 2011. Later, on 23

February 2012 a text of proposals was prepared to be sent to the Plenary meeting of the Pontifical Council for Legislative Texts. This Plenary studied these proposals and approved them on 31 May 2012. The final text, drafted on 15 June 2012, consists of eleven articles and perhaps could be the basis for a future Motu Proprio on the concord between Codes.

2. The Proposals of Harmonization Collected in the Final Text

I will present here only the points which the Plenary has been deemed opportune to harmonize now in the two disciplines, Latin and Eastern. There would be many other points to be harmonized, but primarily those concerning the ascription to the Church *sui iuris* and those concerning marriage were preferred, because they were more urgent.

Preliminarily, it should be observed that a general standardization of terminology was proposed regarding the name of the organizational structure that in the CIC is called indiscriminately "ritual Church" (cf. cc. 111 § 1 and 112 § 2, 3rd CIC), "ritual Church *sui iuris*" (cf. cc. 111 § 2 and 112 § 1 CIC), or "rite" (cf. can. 383 § 2 CIC). In CCEO instead it is always called "Church *sui iuris*" (cf. can. 27 CCEO). Since this hierarchical figure, although it has a rite, is not a rite but an organizational structure, it seemed more convenient to use the terminology of the CCEO also in the CIC.

a) The Latin Canon on Ascription to a Church *sui iuris* at the Moment of Baptism

The final text of the proposals includes adding to canon. 111 of the CIC a new paragraph after the first, in which is established what can. 29 § 1 of the CCEO already states; namely that, if only one parent is Catholic, by baptism the child belongs to the Church of the Catholic parent.

As it is well known, in this regard there has been a lot of doctrinal discussion,[3] but both the Congregation for the

[3] Cf. D. Salachas, *Lo status giuridico del figlio minorenne nei matrimoni misti tra cattolici ed ortodossi. Un problema ecclesiologico, giuridico ed ecumenico*,

Oriental Churches and the Congregation for the Doctrine of the Faith stated this criterion when responding to a particular case in which an Eastern Catholic woman, abandoned by her Orthodox husband, asked what to do so that her son, baptized Orthodox, might be considered a Catholic. The response of the Congregations was that she should not do anything because, by applying the criterion of can. 29 § 1 CCEO, even if the child had been baptized in the Orthodox Church he is considered always a Catholic from the beginning, until after turning 14 years of age he make a personal choice to belong to the non-Catholic confession.

Personally I do not agree that this answer – reasonable for the special case because the woman wanted to educate their children in the Catholic Church – be generalized to all cases, because if the children were deliberately baptized and educated in an Orthodox Church [or Protestant denomination] it would seem inconsistent to consider them anyway Catholics according to this too literal interpretation of can. 29 § 1 CCEO.

In fact, if such children were to be considered as Catholics until they make a conscious personal choice to be Orthodox, they would then incur in the crime of schism and should be excommunicated from the Catholic Church. But this seems unthinkable to me.

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in H. Zapp, - A. Weiss, - S. Korta, (Hrsgg.), *Ius canonicum in Oriente et in Occidente*, Festschrift für Carl Gerold Fürst zum 70. Geburtstag (Adnotationes in ius canonicum 25), Frankfurt/M. 2003, pp. 743-758; R. Ahlers, *Rituszugehörigkeit und Rituswechsel nach CIC und CCEO*, in Zapp, *Ius canonicum in Oriente et in Occidente…*, o.c., pp. 423-432 [here, pp. 425-428]; G. Trevisan (ed.), *Quando si diventa cristiani. I sacramenti dell'iniziazione: indicazioni canoniche e pastorali,* Milano 2003, p. 293; A. Kaptijn, *Le statut juridique des enfants mineurs nés des mariages mixtes catholiques-orthodoxes*, in «L'année canonique» 46 (2004), pp. 259-268, [here, p. 259]; P. Gefaell, *Matrimonio misto ed ascrizione ecclesiastica dei propri figli: una questione riaperta? Riflessioni su alcune considerazioni recenti*, in «Folia Canonica» 12 (2009), pp. 153-166.

b) The Actual Moment of the Change of Church *sui iuris*

It is known to scholars that can. 112 of the CIC, when determining the circumstances in which a faithful can change Church *sui iuris*, does not offer a specific criterion to know the actual time of such transfer. The can. 36 of CCEO instead is clear on this. Therefore it has been proposed to add a new paragraph 3 to can. 112 CIC where it is determined that such transfer has value from the moment of the declaration made by the person in front of the local Ordinary of that Church or the proper parish priest or the priest delegated by either of them, as well as two witnesses, unless the rescript of the Apostolic See provides otherwise. The text of the proposal adds that the transfer is to be recorded in the baptismal register, but this is already established in can. 535 § 2 CIC.

c) The Record of the Ascription to the Church *sui iuris* in the Register of Baptisms

In the proposal draft is also included to state in can. 535 § 2 CIC the duty to record in the register of baptisms also to what Church *sui iuris* the newly baptized is enrolled in. So far, in the Latin canon is required only the record of the change of Church, but in the Eastern Code is stated that this must be done also on the occasion of the initial ascription at baptism (cf. cc. 37, 269 and 689 § 2 § 1 CCEO). Can. 37 CCEO already bound explicitly Latin parish priests, but this requirement is not known to them, so it was convenient to also indicate it in the Latin Code.

d) The Possibility to Baptize a Child of Non-Catholic Parents

§ 5 of can. 681 CCEO, that does not exist in the parallel can. 868 CIC, offers the Catholic minister of baptism the possibility to lawfully baptize the child of non-Catholic parents if they, or at least one of them or his legitimate guardian, ask it spontaneously, and if for them it is physically or morally impossible to access a minister of their own Christian denomination.[4] Given that this

[4] Cf. M. Brogi, *Aperture ecumeniche del Codex Canonum Ecclesiarum*

situation may arise also in the West, it is proposed to include this possibility in the Latin discipline too, adding it as the third paragraph of can. 868 CIC.

This possibility implies that the child will not be Catholic, and therefore should not be entered in the register of baptisms of the Catholic parish but should give a certificate to the parents, so that – when they have the occasion – they communicate the fact of the baptism to the legitimate authority of their religious denomination, who is the competent to record it in their books.[5]

e) The Blessing of the Priest Needed for the Validity of Eastern Faithful Marriages

For the validity of the canonical form of marriage, can. 828 of CCEO requires the blessing of the *priest*. The deacon in the East cannot bless and, then, no one doubts that the Eastern

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Orientalium, in «Antonianum» 66 (1991), pp. 466-467; D. Salachas, *I battezzati non cattolici e la promozione dell'unità dei cristiani alla luce del nuovo codice dei canoni delle Chiese orientali,* in D.J. Andrés Gutiérrez, C.F.M. (ed.), *Vitam impendere Magisterio. Profilo intellettuale e scritti in onore dei professori Reginaldo M. Pizzorni, O.P. e Giuseppe Di Mattia, O.F.M.CONV.,* Roma 1993, p. 333.

[5] «In questo caso, il battesimo non deve essere registrato nel registro dei battesimi della parrocchia cattolica, bensì in un apposito registro diocesano, consegnando il relativo certificato ai genitori.» Conferenza Episcopale Italiana – Ufficio nazionale per l'ecumenismo e il dialogo interreligioso & Ufficio nazionale per i problemi giuridici, *Vademecum per la cura pastorale delle parrocchie cattoliche verso gli orientali non cattolici*, 23 febbraio 2010, no. 10, in www.chiesacattolica.it. The same thing is established by the Conferencia Episcopal Española, *Servicios pastorales a orientales no católicos. Orientaciones*, in «Boletín Oficial de la Conferencia Episcopal Española», Year XX, no. 76 (30 June 2006), pp. 51-55, no. 7. Cf. P. Gefaell, *Nota ai documenti della Conferenza Episcopale Spagnola "Orientaciones para la atención pastoral de los católicos orientales en España (17–21 de noviembre de 2003)" e "Servicios pastorales a orientales no católicos. Orientaciones (27–31 de marzo de 2006)"*, in «Ius Ecclesiae» 18 (2006), pp. 861-876; Idem, *Rapporti tra orientali cattolici ed ortodossi nel CCEO*, in «Eastern Canon Law» 1/1-2 (2012), pp. 249-274, [here, pp. 256-257].

deacon is not able to perform the canonical form of marriages of faithful who belong to Eastern Churches. Can. 1108 of the CIC, instead, foresees the deacon as a valid assistant for the canonical form, and the LG n. 29 says that deacons can bless marriages. So, for decades there had been much discussion on the validity of a Eastern marriage blessed by a Latin deacon.[6] So far, the particular replies of the PCLT merely say that the deacon should not celebrate such marriages, but there was no definitive answer on their validity if so performed.

So, now the harmonization proposal is to add a third paragraph to can. 1108 of the CIC, in which it be clearly stated that only the priest assists validly a marriage between Eastern parties or between a Latin party and an Eastern one, both Catholic or non-Catholic.

Thus, it will be clear that no deacon may assist validly such marriages. Nevertheless, those previously celebrated are to be considered valid, at least because in the case of *dubium iuris* the law (on the requisite of priestly blessing) did not oblige (cf. can. 14 - CIC can. 1496 CCEO).[7]

This addition to can. 1108 CIC will require some adjustments in other canons of the CIC.

Specifically, can. 1127 § 1 CIC will have to change the expression «the intervention of a sacred minister is required» for «the intervention of the priest is required», so that it remains clear that in mixed marriages with an Orthodox party the intervention

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[6] For the two contrary opinions cf., for example, J. Prader, *Il matrimonio in Oriente e in Occidente*, Roma 2003, p. 266, who says that those matrimonies are valid; and D. Salachas – K. Nitkiewicz, *Inter-Ecclesial Relations between Eastern and Latin Catholics: A Canonical-Pastoral Handbook*, English edition by George Dimitry Gallaro, CLSA, Washington D C 2009, p. 29, who say that they are invalid.

[7] Cf. P. Gefaell, *Some Canon Law issues on the Pastoral Care of Eastern Faithful outside of their Church sui iuris*, in L. Lorusso – L. Sabbarese (eds.), *Oriente e Occidente: respiro a due polmoni*, Studi in onore di Dimitrios Salachas, Urbaniana University Press, Rome 2014, pp. 21-36 [here, p. 32].

of a deacon is not enough but is needed that of a priest. Rather more, since it is not a matter of admitting whatever kind of "intervention", it would be even more clear to say: «the blessing of the priest is required.»

In addition, at the end of can. 1111 § 1 CIC, which deals with the delegation of the faculty to assist marriage, it seems convenient to add: «without prejudice to § 3 of can. 1108», to make it even more clear that for this kind of marriages delegation cannot be given to deacons.

Although obvious, it is also appropriate to add the same clause («without prejudice to § 3 of can. 1108») at the end of the first paragraph of can. 1112 CIC, to reaffirm that the Bishop cannot delegate lay-faithful to assist such marriages.

f) Latin Sacred Minister Competent to Celebrate the Marriage of Two Eastern Faithful

The current can. 1109 CIC states that the Ordinary and the parish priest of the place can assist validly marriages not only of their subjects, but also of non-subjects, provided that at least one of those to be married belongs to Latin rite.[8]

However, the wording of this canon can be misinterpreted in the sense of retaining mistakenly that, if both spouses-to-be do not belong to the Latin Church, the parish priest and the local Ordinary will always be incompetent to assist their marriage, even if those spouses-to-be are their subjects (for example, by virtue of can. 916 § 5 CCEO). The possibility of confusion is not merely theoretical or hypothetical. In fact, that misinterpretation was included in no. 29 of the Spanish Bishops' Conference document "*Orientaciones para la atención pastoral de los católicos orientales*", of 21 November 2003.[9]

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[8] Can. 1109 CIC: «Loci Ordinarius et parochus [...] vi officii [...] valide matrimoniis assistunt non tantum subditorum, sed etiam non subditorum, *dummodo eorum alteruter sit ritus latini*.»

[9] «Para asistir y bendecir el matrimonio canónico de dos católicos orientales, el Ordinario del lugar y el párroco latinos son, de suyo, incompetentes, aunque los contrayentes sean súbditos.» Conferencia

On the contrary, by the words of can. 829 CCEO (in the official Latin text[10]) remains clear that the Ordinary and the parish priest are incompetent only if the parties are not their subjects («valide benedicunt matrimonium, sive sponsi sunt subditi *sive, dummodo alterutra saltem pars sit ascripta propriae Ecclesiae sui iuris, non subditi*»). This wording of can. 829 CCEO has superseded the old response of the Pontifical Commission for the Redaction of the Eastern Code of Canon Law, of 3 May 1953, on can. 86 § 1, no. 2 of M.p. *Crebrae Allatae*, in which such competence seemed to be denied to the Hierarch and to the parish priest.[11] So now it is definitively clear that, if at least one of those to be married is a subject of the local Hierarch[12] or of the parish priest of the place,[13] these are certainly competent to bless this marriage, even if the parties belong to another Church *sui iuris*.

This clarification, proceeding from the wording of can. 829 CCEO, seems appropriate to be introduced in can. 1109 CIC, changing the words of its final clause to this other (or similar): «...valide matrimonium assistunt *non tantum subditorum sed etiam, dummodo alterutra saltem pars sit adscripta Ecclesiae latinae, non subditorum*».

Episcopal Española, *Orientaciones para la atención pastoral de los católicos orientales*, LXXXI Asamblea plenaria, 17-21 November 2003, no. 29, in «Boletín Oficial de la Conferencia Episcopal Española» Year 17, no. 71 (2003), pp. 56-63.

[10] Because at least the Italian, Spanish and English translation of can. 829 CCEO, follow instead the misleading wording of can. 1109 CIC.

[11] AAS 45 (1953), only when oriental faithfhul had their own parish in the place: cf. S.C. Pro Eccl. Orient., Decl. Part. ad Delegatum Apostolicum in S.F.A.S. Prot. N. 576/56, 30.XI.1956, in X. Ochoa, Leges Ecclesiae, vol. VI, Roma 1987, n. 4617.

[12] In the case that they do not have a Local Hierarch of their own Church *sui iuris* (cf. can. 916 § 5 CCEO).

[13] In the case that the Latin parish priest has received from their Hierarch the task of being their parish priest (cf. can. 916 § 4 CCEO). And he would be also competent in the case that he has received a delegation to celebrate that marriage (cf. can. 830 § 1 CCEO).

g) The Catholic Priests Who Bless the Marriage of Two Orthodox Faithful

Can. 833 CCEO affirms that the (Oriental) Hierarch of the place may grant to any Catholic priest (also Latin) the faculty to bless the marriage of two Orthodox in certain circumstances.[14] The CIC instead does not say anything about this. It therefore seems appropriate to add a § 3 to can. 1116 CIC collecting substantially the mentioned Eastern canon. Saying, for example: «in the same circumstances mentioned in § 1, nos. 1 and 2, the local Ordinary may give to any Catholic priest the faculty to bless the marriage of members of the Eastern Churches not having full communion with the Catholic Church, if they request it spontaneously and provided that nothing precludes the valid and licit celebration of the marriage. The same priest is to inform the competent authority of the Catholic Church, if this can be done prudently.»

This provision is to be introduced in can. 1116 CIC (on the extraordinary form of the marriage) because, as I have written elsewhere, it is not that the Catholic priest "celebrates" this marriage, but he rather imparts only a blessing to a marriage already valid in itself, celebrated in the extraordinary form. However, one must admit that for the Eastern mind the blessing of the priest is seen as an essential part of the celebration, and this can lead to misunderstandings.[15] So, «in any case, after receiving the power of the local Ordinary, the priest will be able to bless this Orthodox marriage only if the marriage itself is valid and lawful. And it will be valid and lawful only if the Hierarchy of the interested Orthodox Church recognizes

[14] CCEO can. 833: «§1. The local Hierarch can give to any Catholic priest the faculty of blessing the marriages of the Christian faithful of an Eastern non-Catholic Church if those faithful cannot approach a priest of their own Church without great difficulty, and if they spontaneously ask for the blessing as long as nothing stands in the way of a valid and licit celebration. §2. Before he blesses the marriage, the Catholic priest, if he is able, is to inform the competent authority of those Christian faithful of the fact.»

[15] Cf. P. Gefaell, *Some Canon Law Issues*, o.c., p. 34.

it as such. Thus, it is important to clarify this point with the Orthodox Church in question.»[16]

3. Other Issues Proposed in the Commission but Settled by Other Means

The work of the Commission had initially identified more issues to be harmonized, but in the meantime some of them have been resolved in other ways. Concretely:

a) An "Explanatory note on can. 1 CCEO" issued by the PCLT on 8 December 201117 has already clarified that the Latin Church is implicitly involved in any rule of CCEO which explicitly mentions the "Church sui iuris" in the context of inter-Ecclesial relations.

b) The above clarification has solved many discussed issues. Mainly, this solves the doubt about the valid passage of a faithful from an Eastern Church to the Latin Church if the Bishops involved give their written consent, considering therefore presumed the consent of the Apostolic See. During several years, in fact, the practice of the Congregation for the Oriental Churches did not accept this kind of transfer of Oriental faithful to the Latin Church as the can. 32 § 2 CCEO does not name "explicitly" the Latin Church, the can. 112 CIC did not provide for such a possibility, and the Rescriptum ex audientia of 26 November 199218 was limited to the transfer from the Latin Church to an Eastern Church and not vice versa.

c) On 23 February 2012, the PCLT has written a letter to the President of the Episcopal Conference of the United States[19]

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[16] P. Gefaell, *I documenti della Conferenza Episcopale Spagnola sui cristiani orientali, cattolici e non cattolici*", in S. Marinčák (ed.), *Diritto particolare nel Sistema del CCEO. Aspetti teoretici e produzione normativa delle Chiese orientali cattoliche*, (Orientalia et Occidentalia, vol. 2), Centrum spirituality Východ – Západ Michala Lacka, Kosiče 2007, pp. 355-371 [here: p. 368].

[17] Cf. PCLT, *Nota explicativa quoad can. 1 CCEO*, in «Communicationes» 43 (2011), pp. 315-316.

[18] AAS, LXXXV (1993), p. 81.

[19] PCLT, *Litterae ad Conferentiam episcopalem Civitatum Foederatarum Americae Septentrionalis missae quibus pastores christifidelium Ecclesiarum*

to clarify that the criterion laid down in can. 916 § 4 CCEO (on the necessary agreement between the respective Bishops to assign a parish priest to the Oriental faithful domiciled in a territory having its own Oriental Hierarch but without a parish) abrogates the old practice introduced by the Congregation for the Oriental Churches in 1955,[20] according to which those faithful were automatically assigned to the local Latin parish priest.

4. Issues Proposed in the Commission but That Were Not Accepted

a) Given the different opinions of canonists and the complexity of the subject, the proposal to harmonize can. 1102 CIC according to the different and broader norm of can. 826 CCEO on the invalidity of marriage celebrated under all kind of conditions was discarded.21

b) In the case of an Orthodox faithful who asks to enter into full communion with the Catholic Church there was discussion among authors about the validity of his ascription to a Church (usually the Latin) other than the Oriental Catholic Church parallel to the Orthodox Church of provenience, against what is foreseen in can. 35 CCEO although this canon has not an invalidating clause (cf. OE no. 4). In the CIC there is no rule

orientalium ibi commorantium designantur, Prot. N. 13533/2012, of 23 February 2012, in «Communicationes» 35 (2012), pp. 36-37.

[20] Cf. Sacred Congregation for the Oriental Church, *Letter to the Apostolic Exarch of Pittsburgh of the Rutenians*, 30 May 1955, Prot. N. 803/48, in «X. Ochoa, *Leges Ecclesiae,* vol. VI, Roma 1987, no. 4615. Later, the criterion was extended to «all the Orientals who are in the same situation», cf. *Servizio Informazione Congregazione Orientale*, January-February 1982, p. 16. This was further confirmed by a letter from the Apostolic Delegate Mons. Pio Laghi, to the Rev.mo John R. Roach, President of the Episcopal Conference of the USA, dated 24 June 1982: cf. *Roman Replies and CLSA Advisory Opinions 1984*, Washington D.C. 1984, pp. 5-9.

[21] On this topic, see P. Gefaell, *Il matrimonio condizionato durante la codificazione pio-benedettina. Fonte del c. 826 CCEO*, in «Ius Ecclesiae» 7 (1995), pp. 581-625 [especially, pp. 619-623].

about this situation. The PCLT has deemed convenient not to give an answer because – as claimed by two particular Replies of PCLT, one in 2012[22] and the other in 2015[23] – «no *dubium juris* has been found, as the rule in question is clear in itself.»[24]

Nevertheless, in my opinion the position taken by the PCLT is not too clear and needs further elucidation. In fact, on the one hand, in the Annex to the 2012's Reply is said that in can. 35 CCEO «the *mens* of the supreme Legislator was not that of establishing a rule for the valid transfer of non-Catholics faithful to the Catholic Church, but for formulating *ad liceitatem* a rule capable of protecting the ecclesial identity of these faithful» (no. 1).[25] On the other hand, however, the same Annex to the Reply of 2012 states that «if a Latin priest, without the Apostolic See's permission required by can. 35 CCEO, ascribes two Orthodox faithful to the Latin Church and then assists at their marriage, the marriage is null for defect of form of celebration prescribed by cann. 828, 829 § 1 CCEO to which these faithful would be bound» (no. 4).[26] From this assertion it follows clearly that such marriage is null because those faithful received into the Catholic Church, despite having been (invalidly) ascribed to the Latin

[22] PCLT, *Particular Reply Prot.N. 13812/2012*, of 5 November 2012, published in http://delegumtextibus.va.

[23] PCLT, *Particular Reply Prot.N. 14839/2015*, of 17 April 2015, published in http://delegumtextibus.va.

[24] «...non si è ravvisato alcun *dubium iuris*, in quanto la norma in oggetto è chiara in se stessa.» PCLT, *Particular Reply of 5 November 2012*. My translation.

[25] «...la *mens* del Legislatore supremo non era quella di stabilire una norma per il valido transito dei fedeli acattolici alla Chiesa cattolica, ma per formulare *ad liceitatem* una norma capace di proteggere l'identità ecclesiale di questi fedeli.» PCLT, *Particular Reply of 5 November 2012*, Annex, no. 1. My translation.

[26] «...se un parroco latino, senza la licenza della Sede Apostolica richiesta dal can. 35 *CCEO*, ascrive due fedeli ortodossi alla Chiesa latina e poi assiste al loro matrimonio, il matrimonio è nullo per difetto di forma di celebrazione prescritta dai cann. 828, 829 § 1 *CCEO* a quale sarebbero tenuti questi fedeli.» PCLT, *Particular Reply of 5 November 2012*, Annex, no. 4. My translation.

Church, *actually are not Latin but Orientals* and, therefore, the Latin pastor is incompetent to celebrate their marriage (cf. can. 829 § 1 CCEO). For its part, the most recent particular reply of 2015 reiterates that there is no need of an authentic interpretation, since «the immemorial praxis of the Church is quite clear on the obligation of each Christian faithful to retain their proper rite.»[27] Then, everything suggests that the norm of can. 35 CCEO is not just for the licit ascription (as no. 1 of the Annex to 2012's Reply seems to say), but for its validity (as deduced from no. 4 of the Annex to the 2012's Reply and from that of 2015). In short, I think that the PCLT considers to be clear that according to can. 35 CCEO the ascription to the Catholic Church *sui iuris* corresponding to the non-Catholic Church of provenience is done *ipso iure* (automatically) and that any other ascription should be considered void. But in my opinion this should have been said more explicitly, leaving no room for uncertainties.

c) For the Orientals, dispensation from canonical form of marriage is reserved to the Patriarch or to the Apostolic See (cf. can. 835 CCEO), unlike the Latin discipline where such faculty is the competence of the local Ordinary, and only for mixed marriages (cf. can. 1127 § 2 CIC). Therefore, a request was made that in places outside the territory of the patriarchal Church this dispensation could also be granted by the Nuncio or even by the local Hierarch or Ordinary, because in those areas is not easy to resort to the Patriarch. Eventually, bearing in mind the importance of the sacred rite for the celebration of marriage in the Oriental tradition, the PCLT decided not to change the current regulations.

Here we have reported and commented the proposals studied and approved by the PCLT. Of course, the last word will always belong to the supreme Legislator.

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[27] PCLT, *Particular Reply of 17 April 2015.*

Chapter 2

The Relationship Between CIC'83 and CCEO'90 in the Light of the PCLT's "Explanatory Note" of 2011*

As it is well known, on December 8, 2011, the Pontifical Council for Legislative Texts (PCLT) has published an "Explanatory Note on the can. 1 of CCEO." The central affirmation of the note is the following:

> «It must be assumed that the Latin Church is implicitly included by analogy whenever the CCEO explicitly uses the term "Church *sui iuris*" in the context of interecclesial relations.»[1]

In the words of Jobe Abbass, «the Pontifical Council's Explanatory Note constitutes a significant decision that will certainly affect canonical interpretation for years to come.»[2]

To understand the extent of the Note, we must remember what is established by can. 1 of the CCEO:

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* Updated and translated version of the original paper presented in Italian at the Conference "Il diritto canonico orientale a 50 anni dal Concilio Vaticano II", Pontifical Oriental Institute, April 23th-25th, 2014 (in publication).

[1] «...si deve ritenere che la Chiesa latina è implicitamente inclusa per analogia ogni volta che il CCEO adopera espressamente il termine "Chiesa *sui iuris*" nel contesto dei rapporti interecclesiali.» PCLT, *Nota explicativa quoad can. 1 CCEO*, in «Communicationes» 43 (2011), pp. 315-316.

[2] J. Abbass, *The Explanatory Note Regarding CCEO can. 1: a Commentary*, in «Studia canonica» 46 (2012), pp. 293-318 [here, p. 294].

> «The canons of this Code affect all and solely the Eastern Catholic Churches, unless, with regard to relations with the Latin Church, it is expressly stated otherwise».

The note explains that in doctrine there was no complete unanimity about the significance of the term "*expresse*" used in the text of this canon, «some authors have claimed that the Latin Church is included only when it is "explicitly" named by the norms of CCEO. The majority of the authors, instead, believe that the express mention of the Latin Church in the canons can be done either in an "explicit" or in an "implicit" way, when it clearly emerges from the context in which the norm is located.»[3]

Well, in this regard I must point out that, in my first article on the relationship between the CIC and the CCEO[4] I not even asked myself about the question of the distinction "*expliciter-impliciter*" within the adverb "*expresse*". However, several authors[5] have

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[3] «...alcuni autori hanno affermato che la Chiesa latina è inclusa solo quando risulta "esplicitamente" nominata dalle norme del CCEO. La maggioranza degli autori, invece, ritiene che la menzione espressa della Chiesa latina nei canoni può avvenire sia in modo "esplicito" che in modo "implicito", quando ciò emerge chiaramente dal contesto in cui è posta la norma.» PCLT, *Nota explicativa...*, o.c., p. 316.

[4] P. Gefaell, *Rapporti tra i due 'Codici' dell'unico 'Corpus iuris canonici'*, in J.I. Arrieta – G.P. Milano (eds.), *Metodo, Fonti e Soggetti del Diritto canonico. Atti del Convegno Internazionale di Studi, «La Scienza Canonistica nella seconda metà del '900. Fondamenti, metodi, prospettive in D'Avack, Lombardía, Gismondi e Corecco», Roma 13-16 novembre 1996,* Pontificia Università della Santa Croce, Università di Roma Tor Vergata, Libreria Editrice Vaticana 1999, pp. 654-669. Published also in Spanish and in French: P. Gefaell, *Relaciones entre los dos códigos del único 'Corpus iuris canonici'*, in «Ius Canonicum» 39 (1999), pp. 605-626; P. Gefaell, *Relations entre les deux 'codes' de l'unique 'corpus iuris canonici'*, in «L'Année Canonique» 41 (1999), pp. 165-180.

[5] Cfr. G. Nedungatt, *The Spirit of the Eastern Code*, Rome – Bangalore 1993, p. 102; J. Abbass, "CCEO and CIC in Comparison", in G. Nedungatt (ed.), *A Guide to the Eastern Code*, (Kanonika 10), PIO, Roma 2002, p. 882; I. Žužek, *Presentazione del 'Codex Canonum Ecclesiarum orientalium'* in «Monitor ecclesiasticus» 95 (1990) pp. 604-606; R. Metz,

claimed that distinction, because, as it is explained by the PCLT's Note, «the term *expresse* would be opposed only to *tacite* while an express mention might be made either in an explicit or an implicit way.»[6]

In fact, Jobe Abbass says that the distinction "explicit-implicit" is «a classical rule of interpretation»,[7] «the usual interpretation given to *expresse*»,[8] «the classical interpretation given to the term *expresse*».[9] It is true that the commentators of can. 6, n. 6º of the Latin Code of 1917 explained this difference.[10] Indeed, specifically

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Preliminary Canons (cc. 1-6), in Nedungatt, *A Guide…*, o.c., p. 72; A. Kaptijn, *L'iscription à l'Eglise de droit propre*, in «L'Année Canonique» 40 (1998), p. 62; L. Lorusso, *Gli orientali cattolici e i pastori latini – Problematiche e norme canoniche*, (Kanonika 11), PIO, Roma 2003, pp. 37 e 73; Idem, *L'ambito d'applicazione del Codice dei Canoni delle Chiese Orientali. Commento sistematico al can. 1 del CCEO*, in «Angelicum» 82 (2005), pp. 451-478. Among the modern Latin canonists who refer to this distinction, are for example: E. Baura, *Parte generale del diritto canonico: diritto e sistema normativo*, Edusc, Roma 2013, p. 293 (on the express indication of the irritant or inhabilitant character of a law) and p. 429 (on the express approval of a custom).

6 «...il termine *expresse* si opporrebbe soltanto a *tacite* mentre una menzione espressa potrebbe essere fatta sia in modo esplicito sia in modo implicito.» PCLT, *Nota explicativa*, o.c., p. 315.

7 J. Abbass, *The Explanatory Note...*, o.c., p. 294.

8 J. Abbass, *CCEO can. 1 and absolving Eastern Catholics in the Latin Church*, in «Studia Canonica» 46 (2012), pp. 75-96 [here, p. 76].

9 J. Abbass, OFM Conv., *the Eastern Code (Canon 1) and its Application to the Latin Church*, (Dharmaram Canonical Studies 8), Dharmaram Publications, Bangalore 2014, p. 2. However, Jobe Abbass refers only to Luigi Chiappetta, who in his turn does not provide any source: cfr. L. Chiappetta (ed.), *Il Codice di Diritto Canonico – Commento giuridico pastorale*, Dehoniane, Rome 1996, vol. I, p. 38, footnote 4 [as quoted by J. Abbass, *The Eastern Code...*, o.c., p. 2, footnote 4]. Neither the older (1988) or newer (2011) editions of Chiappetta's book provide any classical source for his assertion.

10 For example, Michiels wrote: «Expressum ergo, cui directe opponitur *impressum*, seu (...) *praesumptum*, reipsa idem est ac manifestatum. (...) voluntas legislatoris in verbis duplici modo contineri potest, seu quod idem est, per verba legis exprimi aut manifestari, scilicet explicite vel implicite. *Explicite* aliquid in lege continetur seu manifestatur

about the Orientals, already on 4 June 1631 a commission of theologians had established the criterion that the Eastern Catholics were bound to the new papal constitutions only in the case of dogma of faith or if in those constitutions they were *explicitly* mentioned, or finally, if a disposition was *implicitly* made about them; and this criterion was approved by the Roman Pontiffs Benedict XIV and Leo XIII and accepted in the *praxis* of the Congregation *de Propaganda Fide*.[11] However, Herman acknowledged that from that criterion was not clear to know in which cases the Orientals had to be implicitly considered,[12] and also Wernz and Vidal found similar difficulties with regard to can. 6, no. 6th of the CIC 1917.[13]

Nonetheless, the possibility of the indication expressed in an implicit way is acceptable, since, from the logical point of view, it can be said that within the generic meaning of a word used in

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quand, ut ipsa vocis etymologia indicat, in lege est ex-plicatum, i.e. ex plico interiori verborum erutum, in actu, distincte et nominatim apparens; *implicite* e contra, quando est in plico verborum abditum seu occultatum, ita ut in actu manisfestum seu apparens non fiat, nisi plicus ille aperiatur seu ex-plicetur» G. Michiels, *Normae Generales Juris Canonici*, 2nd ed., Vol. 1, Desclée et Socii, Parisiis – Tornaci – Romae 1949, p. 133; cfr. also pp. 336-337.

[11] Cfr. G. Michiels, *Normae Generales...*, o.c., pp. 43-45. Here is the text: «Subditi quattuor Patriarcharum Orientis non ligantur novis pontificiis constitutionibus, nisi in *tribus casibus*: primo in materia dogmatum fidei; secundo, si Papa explicite in suis constitutionibus faciat mentionem et disponat de praedictis; tertio, si implicite in iisdem constitutionibus de eis disponat, ut in casibus appellationum ad futurum Concilium.» Michiels, *Normae Generales...*, o.c., p. 44; cfr. also F.X. Wernz – P. Vidal, *Ius Canonicum*, t. 1, Romae 1938, p. 112, no. 81. Michiels quotes this text as referred by Benedict XIV, in the Const. *Allatae sunt*, of 26 June 1755, no. 44 (*Collect. S.C. de Prop. Fide*, I, n. 395, p. 252).

[12] E. Herman, *De 'ritu' in jure canonico*, in «Orientalia Christiana» XXXII, n. 89 (1933), pp. 96-158 [here, p. 131].

[13] «*Expressa* provocatio ad ius praecedens ipsa canonum textu sistitur et difficultate caret; at non adeo facile est per principium generale definire quando canones Codicis *implicite* continent legem praecedentem in codice non relatam» Wernz – Vidal, *Ius Canonicum*, o.c., pp. 138-139.

the express indication it can be included implicitly something more concrete, as per the *Regula Juris*: «*In toto partem non est dubium contineri*».[14] So, in our case, the Latin Church would be implicitly included as a *pars* of the *totum* indicated by the term «Church *sui iuris*.»[15]

In my articles written before 2012 I thought it was inadequate to admit the use of the *express but implicit* indication. For example, as I wrote in 2005:

> «If (...) we want to apply to the Latin Church the canons which speak of the Church *sui iuris*, arguing that it would be an "express but implicit" indication, such argument seems to me lacking legal certainty, which is precisely the purpose for which the express indication of something is required.»[16]

However already at that time I recognized that:

> «I understand that, with the current wording of the CCEO, if we limited ourselves to accept only those cases that indicate explicitly the Latin Church, we would be in front

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[14] Bonifacius VIII, *Liber sextus Decretalium Domini Bonifacii Papae VIII, Lib. V., De Regulis Juris*, Regula LXXX, in Ae. Friedberg, *Corpus Iuris Canonici*, Pars Secunda Decretalium Collectiones, Akademische Druck – U. Verlagsanstalt, Graz 1955, col. 1124.

[15] So, the real novelty of the *Nota explicativa* that we are commenting would be the official recognizing the assimilation of the Latin Church to a Church *sui iuris* by analogy, as we will see later.

[16] «Se (...) si vogliono applicare alla Chiesa latina i canoni dove si parla di Chiesa *sui iuris*, argomentando che sarebbe una indicazione "espressa ma implicita", tale argomento mi pare carente di certezza giuridica, che è proprio lo scopo per cui si richiede l'indicazione espressa di qualcosa.» P. Gefaell, *L'impegno della Congregazione per le Chiese orientali a favore delle comunità orientali in diaspora*, in «Folia canonica» 9 (2006) pp. 117-137 [here, p. 129]. This article was a paper presented in a Congress at the Canon Law Institute Pius X (Venice, Italy), on 23-25 April 2005, whose Proceedings were published later in the book of L. Okulik (ed.), *Nuove terre e nuove Chiese: Le comunità di fedeli orientali in diaspora,* Marcianum Press, Venezia 2008, [my paper is in pp. 125-146, and the quoted text is at p. 137].

> of many normative points in which it would be logical to involve her even if this is not explicitly said.»[17]

One of these cases, for example, is the can. 916 § 4 of the CCEO. In fact, already at that time it seemed strange to me that the Latin Church had been explicitly mentioned in § 5 of the same canon, while in § 4 she was not mentioned explicitly, without any reason. Another similar case is the one of can. 701 of the CCEO, where it is clear that the majority of cases of concelebrations between priests and bishops of different rites involves the Latin Church, even if not explicitly mentioned.

That is why I said that in the Commission there were two trends: one that considered it necessary to explicitly state any case in which the Latin Church was involved, and for this reason in several places the clause «etiam Ecclesia latina» had been inserted. The other trend instead considered sufficient the implicit indication, as it can be seen clearly in these words of the report on the Schema "De Baptismo" of March 1975:

> «But the words "diversi ritus" drew the attention of the group. Do they also include the Latin rite? The old base text considered it necessary to add "Latini quoque" and "Latino non excepto." Our group, enthused by the ideas of equality between the rites, and wanting to avoid any discrimination, declares in a note appended to the text of the new can. 4 that these words include the Latin rite itself and dispense us from having to add every time "Latini quoque".»[18]

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[17] «Capisco che, con l'attuale redazione del CCEO, se ci limitassimo ad accettare solo i casi in cui si indica esplicitamente la Chiesa latina ci troveremmo davanti a molti punti normativi in cui sarebbe logico coinvolgerla anche se non lo si dice esplicitamente.» P. Gefaell, *L'impegno della Congregazione...*, o.c., p. 126.

[18] «Mais les paroles "diversi ritus" ont retenu l'attention du groupe. Incluent-elles aussi le rite latín? L'ancien texte-base trouvait nécessaire d'ajouter "latini quoque" et "latino non excepto". Notre groupe, imbu des idées d'égalité entre les rites, et voulant éviter toute discrimination, déclare par une note jointe au texte du nouveau can. 4 que ces paroles incluent le rite latin lui-même et nous dispensent de devoir ajouter cheque fois "latini quoque".» PCCICOR - Coetus de sacramentis

We see, therefore, that at least the "Coetus de sacramentis" (whose *Relator* was Chorepiscop Moussa Daoud) declared itself in favour of the implicit indication. Instead, other groups felt the need to explicitly indicate every time the involvement of the Latin Church. Otherwise we cannot understand why they have explicitly included the Latin Church in nine canons (cc. 37, 41, 207, 322, 432, 696 §§ 1-2, 830 § 1, 916 § 5 and 1465). If there had been unanimity in accepting the implicit indication there would be no reason to have to mention her explicitly in any canon.

However nine canons are very few in comparison with the number of matters in which it seems logical to involve the Latin Church.

With the clause "*expresse*" of can. 1 CCEO the intention was to establish in a peremptorily manner (i.e. *taxative*: meaning, excluding any other) the cases in which the Latin Church remained bound by the norms of the Oriental Code. I have already explained elsewhere[19] the reason for this statement and I reiterate it today, even if Jobe Abbass does not agree with it. He affirms that the way in which the *Coetus* in charge of the *denua recognitio* of the 1984 Schema spoke of the *taxative* nature of the first canon of the CCEO was just to rule out peremptorily the possibility for the future Oriental Code to be also applied to the Orthodox.[20] It is not so. In fact, can. 8 of the Scheme of 1984 established:

(Chorévêque Moussa Daoud, consultore), *Un nouveau schema de canons 'de baptismo' (Mars 1975)*, in «Nuntia» 4 (1977), p. 21, can. 4.

[19] P. Gefaell, *L'impegno della Congregazione...*, o.c., p. 128.

[20] «From a complete examination of the *iter* of CCEO can. 1, it is clear that the expression *ex natura rei* was omitted as superfluous in the context of excluding peremptorily the possibility that the future Eastern Code intended to apply also to the Orthodox. That is the sense in which the special study group entrusted with the *denua recognitio* of the 1984 Schema spoke of the peremptory nature of the Code's first canon». J. Abbass, *CCEO can. 1 and absolving...*, o.c., p. 83.

> «Whenever the canons of this Code prescribe or recommend that the Hierarchy, clerics or other Christian faithful of any rite do or omit something, they also include the Hierarchs, clerics and faithful Christians of the Latin Rite.»[21]

The *Relatio* on the review of this canon informs us that:

> «To this canon six organs of consultation have made observations. Four of them have proposed drafting amendments. The fifth requested to list peremptorily the canons which oblige also the faithful of the Latin Church. The sixth, finally, pointed out the inconsistency between this canon and can. 1.»

And the answer of the *Coetus* to these observations was the following:

> «The study group agreed on what has been already observed during the examination of the can. 1 in which the clause "iis exceptis in quibus .... expresse aliud statuitur" is inserted, and revealed in this regard that the clause introduced in this matter an absolute peremptoriness and made completely superfluous the can. 8. Therefore it was decided to omit it.»[22]

Actually, the canon 1 of the 1984 Schema had been modified by introducing the clause of the express indication:

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[21] «Quoties in canonibus huius Codicis praescribitur vel commendatur ut Hierarchae, clerici vel ceteri christifideles cuiusvis ritus aliquid agant vel omittant, Hierarchae, clerici et christifideles latini quoque ritus comprehenduntur.» («Nuntia» 22 [1986], p. 22).

[22] «A questo canone sei Organi di consultazione hanno fatto delle osservazioni. Quattro di essi hanno proposto emendamenti redazionali. Il quinto ha richiesto di elencare in modo tassativo i canoni che obbligano anche i fedeli della Chiesa latina. Il sesto, infine, ha sottolineato l'incongruenza esistente tra questo canone e il can. 1. (...) Il gruppo di studio ha concordato su quanto è stato osservato già in occasione dell'esame del can. 1 in cui si è inserita la clausola "iis exceptis in quibus.... expresse aliud statuitur" ed ha rivelato in proposito che la clausola ha introdotto in questa materia un'assoluta tassatività ed ha reso del tutto superfluo il can. 8. Pertanto si è deciso di ometterlo.» («Nuntia» 22 [1986], p. 22).

> «The new text of the canon, as it was formulated by the study group after the acceptance of the motions 2, 4 and 5 indicated above, is the following: *Canones huius Codicis omnes et solas Ecclesias Orientales catholicas respiciunt, iis exceptis, in quibus relationes cum Ecclesia Latina quod attinet, expresse aliud statuitur.*»[23]

I think that no further explanation is needed to refute the conclusion of Jobe Abbass.

However, even if the clause establishes the obligatory nature of the cases in which the Latin Church is bound by the norms of the CCEO, this is not equivalent to saying that all the cases should be indicated "explicitly". In fact, the cases will also be mandatory if they are expressly established in an implicit way.

In this regard, yet, it has to be clarified when what is implicit in some norm can be truly considered as said in an express manner. In fact, without a clearly discriminatory criterion it would be easy to confuse the implicit with the tacit way. Implicit indication can be considered established expressly if in the text there is a positive and unequivocal reference to it.

So, in our case, one has to start from some positive expression in the norm under examination that, by the context, can reasonably include implicitly the Latin Church. For instance, there would be a "positive" reference if in the norm the term "Church *sui iuris*" appears, but that term alone is not enough. Indeed, in many cases, this term does not refer to the Latin Church because, from the text or context, it is clear that they are norms specifically addressed to the Oriental Churches.[24]

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[23] «Il nuovo testo del canone, così come è stato formulato dal gruppo di studio dopo l'accettazione delle mozioni 2, 4 e 5 suindicate, è il seguente: *Canones huius Codicis omnes et solas Ecclesias Orientales Catholicas respiciunt, iis exceptis, in quibus relationes cum Ecclesia latina quod attinet, expresse aliud statuitur.*» («Nuntia» 22 [1986], p. 14). For all the proposals on can. 1, see *ibid*., pp. 12-13.

[24] In this sense, Jobe Abbass indicates well the norms that – in spite of using the expression "Church *sui iuris*" – do not obblige the Latin Church (cfr. J. Abbass, *The explanatory Note...,* o.c., pp. 296-305).

Therefore, a positive and "unequivocal" indication is required, taking into account the text and context (cfr. can. 1499 of CCEO). Thus, the Explanatory Note of 2011 pointed out that the Latin Church is included every time that the term "Church *sui iuris*" is used «in the context of interecclesial relations». In this way the will of the legislator to include the Latin Church in those norms is indubitable, even if implicit.

To understand the reason of the difficulty for Jobe Abbass to accept the peremptory nature of the cases in which the Latin Church is bound to the norms of the CCEO, we must point out that he would like to go beyond what the Explanatory note said on the the CCEO can. 1. Indeed, he maintains that the provisions of the CCEO should be applied to the Latin Church even in those cases where the nature of the matter (*ex natura rei*) so requires.[25] There are several authors who share the same opinion.[26] For example, Abbas believes that:

> «Especially in the interecclesial context of an Eastern penitent confessing before a Latin priests, the distinctive Eastern norms on reserved sins surely regard the Latin priest *ex natura rei*. To be sure, if the Eastern priest who absolves a Latin penitent under censure does so validly, but illicitly, even though *CIC* can. 1 sets up no interrelationship of the Codes, then that should be all the more reason to hold that the Latin priest who absolves the Eastern penitent of a reserved sin also does so validly, but illicitly, since the

[25] At least this is what I have understood, because his discourse is not very clear for me:: «The omission of the phrase [ex natura rei] certainly could not have intended to exclude the application of the Eastern Code to the Latin Church *ex natura rei* where the canons expressly (*expresse*) established that. (...) canon 1 (...) also meant to concern the Latin Church where that is established expressly, that is explicitly or implicitly *ex natura rei* in interecclesial relations.» J. Abbass, *CCEO can. 1 and absolving*..., o.c., p. 83.

[26] For example, René Metz wrote: «Some other CCEO canons concern the Latin Church *ex natura rei*, that is, affect the Latin Church because of the nature of the matter treated». R. Metz, *Preliminary Canons (cc. 1-6)*, in Nedungatt, *A Guide*..., o.c., p. 72.

> *CCEO* can. 1 actually does establish a relationship between the two Codes of the Church's one body of canon law.»[27]

However, I think that it would be enough to clarify what is the meaning of the bond *ex natura rei*. I have already written elsewhere that «I believe that the criterion "ex natura rei" can be admitted if understood in the sense of seeking the "res iusta" in the specific situation; but in the case of merely human norms the search for justice does not allow to go against the dictates of the existing positive law.»[28] In the particular example mentioned above on the reserved sins, it seems to me that this is not the way to solve the problem, because in the oriental discipline the reserved sin concerns the confessor (not the penitent), while the *latae sententiae* penalty of the Latin law regards the penitent (not the confessor). In addition, I cannot find legal justification for the assertion of Abbass that the absolution would be valid but illicit.

I think, moreover, that Jobe Abbass sometimes identifies the bond *ex natura rei* with the cases of indirect interrelation between the codes; that is to say: in legal acts between parties belonging to different Churches it is necessary to find a valid norm for all parties involved. In this regard, I consider interesting what Péter Szabó writes:

> «Note that this peremptory nature [established by the CCEO can. 1] does not exclude at all the possibility of further legal relationship between the two systems on a level different from that of the abrogatory or derogatory effect, as are those of the interpretation and "indirect interrelation".»[29]

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[27] J. Abbass, *CCEO can. 1 and absolving*..., o.c., p. 95.

[28] «...ritengo che il criterio "ex natura rei" potrebbe essere ammesso se capito nel senso di cercare la "res iusta" nella situazione concreta; ma nel caso di una normativa meramente umana tale ricerca della giustizia non permette di andare contro il dettame della norma positiva esistente.» P. Gefaell, *L'impegno della Congregazione*..., o.c., p. 129.

[29] «Si noti, questa tassatività [stabilita dal CCEO can. 1] non esclude per niente la possibilità di ulteriori rapporti giuridici tra i due ordinamenti su un livello diverso da quello dell'effetto abrogatorio o derogatorio, come sono quelli dell'interpretazione e della "interrelazione indiretta".

The Explanatory Note of 2011 wanted to point out that, in these cases, the term "Church *sui iuris*" is applied to the Latin Church "by analogy", because

> «the characteristics of the Latin Church, while not completely coinciding with those of the Church *sui iuris* outlined in cc. 27 and 28 § 1 CCEO, are however, in this regard, substantially similar.»[30]

In fact, the problem to identify tout court the Latin Church with the concept of the Church *sui iuris* outlined by the CCEO lies not only in the fact that the head of the Latin Church coincides with the Primate of the universal Church and, therefore, his power cannot be limited by Canon Law, as it happens in the Patriarchal Oriental Churches; and not even for the reason that its special bond with the Roman Pontiff ensures that the "autonomy" of the Latin Church becomes less evident (e.g. in what concerns the appointment of bishops, the legislative capacity, etc.).[31] There is, actually, another diversity. Unlike

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» P. Szabó, *L'ascrizione dei fedeli orientali alla Chiese sui iuris*, in P. Gefaell (ed.), *Cristiani orientali e pastori latini*, Giuffré, Milano 2012, pp. 210-211, nota 143.

[30] «Le caratteristiche della Chiesa latina, pur non coincidendo totalmente con quelle della Chiesa *sui iuris* delineate nei cann. 27 e 28 § 1 del CCEO, risultano tuttavia, a questo riguardo, sostanzialmente somiglianti.» PCLT, *Nota explicativa*, o.c., p. 316.

[31] This was already underlined, for example, by Ivan Žužek: «Non è fuori luogo notare qui, per quanto riguarda la Chiesa latina, anch'essa "Ecclesia ritualis *sui iuris*", come è ovvio dai canoni 111 e 112 del CIC, che la sua natura è tale da esulare dalle figure giuridiche delineate sopra, anche se tra i titoli del romano pontefice vi è quello di "patriarca". Nel parlare del romano pontefice come "patriarca dell'Occidente" e della Chiesa latina come del "patriarcato d'Occidente", è doveroso tener presente che nella potestà primaziale conferita da Cristo a Pietro e ai suoi successori non vi è luogo per "adequatae distinctiones" tra i poteri che gli sono propri come vescovo di Roma, arcivescovo e metropolita della provincia di Roma, primate d'Italia, patriarca d'Occidente. È perciò impossibile che la struttura della Chiesa latina sia uguale o analoga ad una "Ecclesia patriarchalis" orientale, nella quale (...) al patriarca viene data solo una potestà limitata "ad normam iuris" e

the Oriental *sui iuris* Churches, the Latin Church is composed of a multiplicity of "peoples", each with their own culture, history and social identity. Therefore, the "Latin Rite" does not coincide completely with the concept of "rite" established by can. 28 of CCEO.

However, there is no denying that the Latin Church is formed by a group of faithful around a hierarchy (see. can. 27 of CCEO) and is governed by a particular law legitimately recognized by the Supreme authority (CIC, particular laws of Bishop Conferences, etc.). Therefore, it is clear that, in substance, the Latin Church is a Church among the Churches that compose the one Catholic Church, and all «have equal dignity, so that none of them prevails over the others by reason of the rite» (OE 3).[32]

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non raramente condizionata al "consensus" di un Sinodo di vescovi.» I. Žužek, *Le 'Ecclesiae sui iuris' nella Revisione del Diritto Canonico*, in Idem, *Understanding the Eastern Code*, (Kanonika 8), Rome 1997, pp. 94-109 [here, pp. 104-105] (original in R. Latourelle (ed.), *Vaticano II: bilancio e prospettive venticinque anni dopo (1962-1987)*, Assisi 1987, vol. II, p. 869-882). As it is known, in 2006 Pope Benedict XVI decided to cancel from the *Annuario Pontificio* the title "Patriarch of the West" (cfr. Pontificio Consiglio per l'unità dei cristiani, *Communicato circa la soppressione del titolo "Patriarca di Occidente" ne l'Annuario Pontificio*, 22 marzo 2006, in www.vatican.va); nevertheless, I think that one can continue saying that the Pope, aside from his universal ministry, has also the specific task of Head of the Latin Church, because there are many concrete points that reveal his governing roll in the Latin Church, put into practice in a more close and direct way than that what he does regarding the oriental Churches. However, this shows, again, the singularity of the Latin Church and her Head. In fact, John Faris affirms: «Under the present provisions of law, one must clearly state that the Latin Church as a patriarchal church cannot be placed into any of the categories delineated in the Eastern code. To place it under the category of patriarchal churches would be misleading. Therefore, at this time, the Latin Church is a Church *sui iuris and sui generis*.» J. Faris, *The Latin Church 'sui iuris'*, in «The Jurist» 62 (2002), pp. 280-293 [here p. 290].

[32] Cfr. P. Valdrini, *L'aequalis dignitas des Églises d'Orient et d'Occident*, in A. Al-Ahmar – A. Khalifé – D. Le Tourneau (eds.), *Acta Symposii Internationalis circa Codicem Canonum Ecclesiarum Orientalium, Kaslik 24-*

Finally, I would like to say that there is a part of the Explanatory Note of 2011 which seems confusing to me. It is the following § 2: «the working Commission of the Pontifical Council made a deep study on the topic in question, verifying the contexts in which the canons of CCEO *use the term expresse in regard to* the relationships between the different Churches *sui iuris* and trying to make clear if the Legislator intended to include in such situations also the Latin Church.»[33] Clearly it was not the case of examining in the canons the use of the term *expresse*, but the term *Church sui iuris*. Therefore, in fact this part of the Note should say: «... verifying the contexts in which the canons of the CCEO *deal with* the relationship between the various Churches *sui iuris*...». I suppose that this last-minute change was made

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29 aprilis 1995, Université Saint-Esprit de Kaslik, Kaslik (Libano) 1996, pp. 51-68. Indeed, as it is well known, in the project of *Lex Ecclesiae Fundamentalis* the Latin Church was included explicitly among the other Churches *sui iuris*: «Can. 2 § 2: Variae Ecclesiase particulares in plures coniunguntur coetus organice constitutos, quorum quidem praecipui sunt *Ecclesiae rituales sui iuris* secundum ritum, disciplinam atque propriam, infra supremam Ecclesiae auctoritatem, hierarchicam ordinationem praesertim inter se distinctae, *videlicet Ecclesia latina et variae Ecclesiae orientales* aliaque quae, suprema Ecclesiae auctoritate probante, constituuntur.» Coetus Studiorum de Lege Ecclesiae Fundamentalis, *Postrema recognitio schematis*, in «Communicationes» 12 (1980), p. 31. [Italics are mine]. However, there were many discussions at this regard: cfr. those quoted in P. Gefaell, *Le Chiese sui iuris: Ecclesiofania o no?* in L. Okulik (ed.), *Le Chiese sui iuris: Criteri di individuazione e delimitazione,* Atti del Convegno di Studio svolto a Košice (Slovacchia) 6-7.03.2004, Marcianum Press, Venezia s/d, pp. 7-26 [specifically, p. 19, notes 56, 57 e 58]; G. Grigoriță, *Il concetto di Ecclesia 'sui iuris': Un indagine storica, giuridica e canonica*, Roma 2007 [specifically: pp. 83-97].

[33] «La Commissione di lavoro del Pontificio Consiglio, ha avviato un approfondito studio sul tema in questione, verificando i contesti in cui i canoni del CCEO *usano il termine expresse a proposito* dei rapporti tra diverse Chiese *sui iuris* e cercando di far emergere se il Legislatore intendesse includere in tali situazioni anche la Chiesa latina». PCLT, *Nota explicativa*, o.c., p. 136. (Italics are mine, in order to indicate the less clear text).

with the intention of improving the style text of the Note, but I think that, unfortunately, it made it more confusing. In any case, the core of the Note remains clear, i.e.: in the context of the interecclesial relationships the Latin Church is included in the term "Church *sui iuris*".

Appendix
Text of the Explanatory Note

«Communicationes» 34 (2011) pp. 315-316

Nota Explicativa Quoad Can. 1 CCEO[34]

Da alcuni anni il Pontificio Consiglio per i Testi Legislativi, col contributo di un ampio gruppo di Consultori, porta avanti lavori per armonizzare le previsioni normative del CIC e del CCEO, che più immediatamente toccano l'ordinaria attività pastorale, secondo quanto emerso dall'esperienza di questi anni.

Uno degli argomenti esaminati ha riguardato il can. 1 CCEO e, concretamente, la portata che nel suddetto canone e nell'intera disciplina del Codice orientale possiede il termine *expresse*, questione che in modo ricorrente incide in molteplici situazioni di rilievo pastorale considerate dal CCEO. La Commissione di lavoro del Pontificio Consiglio, ha avviato un approfondito studio sul tema in questione, verificando i contesti in cui i canoni del CCEO usano il termine *expresse* a proposito dei rapporti tra diverse Chiese *sui iuris* e cercando di far emergere se il Legislatore intendesse includere in tali situazioni anche la Chiesa latina.

Mentre per altre questioni attualmente in fase di studio questo Pontificio Consiglio intende presentare al Legislatore alcune modifiche legislative, per quanto riguarda invece la rilevanza del termine *expresse* del can. 1 CCEO, seguendo le proposte della Commissione di lavoro, si è ritenuto sufficiente redigere una Nota esplicativa, che ne dia ufficiale spiegazione, senza, per altro, dover ricorrere a una Interpretazione autentica.

Sul tema in questione non c'è stata in dottrina completa unanimità. Come si sa, nei lavori della Codificazione orientale si è deciso che siano assolutamente tassativi i casi in cui

[34] An English translation of this *Nota explicativa* can be found in J. Abbass, *the Eastern Code (Canon 1) and its Application to the Latin Church,* (Dharmaram Canonical Studies 8), Dharmaran Publications, Bangalore (India) 2014, pp. 9-11. Here we offer its original Italian text as a complement.

la Chiesa latina rimanga vincolata dalle norme del CCEO («Nuntia» 22, p. 22, cfr. anche *ibid.* p. 13), il che impone un criterio stretto nel valutare se una norma orientale includa espressamente la Chiesa latina. In tale senso, alcuni autori hanno affermato che la Chiesa latina è inclusa solo quando risulta «esplicitamente» nominata dalle norme del CCEO. La maggioranza degli autori, invece, ritiene che la menzione espressa della Chiesa latina nei canoni può avvenire sia in modo «esplicito» che in modo «implicito», quando ciò emerge ragionevolmente dal contesto in cui è posta la norma. Infatti, il termine *expresse* si opporrebbe soltanto a *tacite*, mentre una menzione espressa potrebbe essere fatta sia in modo esplicito sia in modo implicito.

Secondo tale distinzione, che pare ragionevolmente confermata dai provvedimenti normativi del CCEO, oltre ai canoni in cui la Chiesa latina viene «esplicitamente» nominata ci sono altri canoni dello stesso Codice in cui essa viene inclusa «implicitamente», se si tiene conto del testo e del contesto della norma, come esige il can. 1499 CCEO. Occorre, dunque, partire dalle espressioni contenute nella norma da interpretare e dal contesto in cui si pone per concludere se la Chiesa latina risulti in essa implicitamente inclusa o meno. Questo è il caso, per esempio, delle norme del CCEO che riguardano negozi giuridici tra diverse Chiese dell'unica Chiesa cattolica.

Di conseguenza, si deve ritenere che la Chiesa latina è implicitamente inclusa per analogia ogni volta che il CCEO adopera espressamente il termine «Chiesa *sui iuris*» nel contesto dei rapporti interecclesiali. Si dice «per analogia» tenendo conto che le caratteristiche della Chiesa latina, pur non coincidendo totalmente con quelle della Chiesa *sui iuris* delineate nei cann. 27 e 28 § 1 del CCEO, risultano tuttavia, a questo riguardo, sostanzialmente somiglianti.

Città del Vaticano, 8 dicembre 2011

+ Francesco Coccopalmerio, *Presidente*
+ Juan Ignacio Arrieta, *Segretario*

Chapter 3

The Eparchial Bishop, Shepherd of his Flock: Legal Implications*

Summary

Introduction: Some Eparchial Bishops have decided to dispense their faithful from a new liturgical law established by the Synod of Bishops of their Church *sui iuris*. This specific case will help us to ponder the extent and limits of the exercise of the eparchial Bishop's power as Pastor of his flock. **2. – The Eparchial Bishop, Vicar of Christ**: CCEO, can. 178 speaks of eparchial Bishop as «vicar and *legatus* of Christ» (cfr. LG 27). This was introduced in the legal text to prevent seeing him as vicar of the Pope, but also so that his personal responsibility not be diluted in that of the higher authority of the Church *sui iuris*. The *episkopé* is the sacramental re-presentation of Christ Jesus' authority as Head and Shepherd of the Church. That of the bishops is not simply a legal but a sacramental vicariety. This gives to every Bishop a deep personal responsibility for the flock entrusted to him. **3. – The relationship between the individual Bishop and the Episcopal body**: The fact that all bishops re-present Christ, Christ being one, implies also that the single Bishop cannot be Vicar of Christ in isolation but inside the communion of the Episcopal College. A personal

* Updated and translated version of the paper originally presented in Italian at the Conference "Episcopal Ordination and Episcopal Ministry According to Catholic and Orthodox Doctrine and Canon Law", Faculty of Theology of the University of Friburg, Switzerland, April 3rd – 6th 2013 (in publication).

action would be adequate only if consistent with the intention of the entire College of bishops. Synodality is, therefore, an important dimension in the governance of the Church, and the Supreme authority of the Church can and must regulate the exercise of the power of individual bishops and synods. **4. – The Bishop has *omnis potestas* to govern his Eparchy**: CIC can. 381 § 1 asserts that diocesan Bishop enjoys «all the authority» necessary to govern his diocese. However, the power of the individual Bishop is not unlimited. Although the single Bishop exerts the *oikonomia* in his Eparchy for the salvation of souls, it should be put into practice in accordance with the parameters established by the entire Church's Supreme *oikonomos*. **5. – Limits to the exercise of the eparchial Bishop's pastoral authority**: The exercise of Episcopal power is subject to the principle of legality: i.e., it must follow the rules of law laid down by the higher hierarchical authority. Some examples of these limits are given for the legislative function of the eparchial Bishop (legalitas in legislando, hierarchy of norms); for his judicial function (criteria of competence, courts levels); and for his executive function (administrative legality, hierarchical recourses). **6. – Eparchial Bishop's resources for rendering Canon Law flexible**: In Catholic canon law the *oikonomia* is implemented through various techniques which are bounded to the principle of legality (dispensation, radical sanation, *Ecclesia supplet*, etc.). There is no doubt that eparchial Bishop can dispense from superior laws (CCEO can. 1538 § 1). However, going back to the example pointed earlier, a perpetual, general, and mandatory dispense does not seem acceptable, and even more if it involves the imposing of an alternative rule of conduct to the faithful (to fill the legal vacuum produced by the dispensation of the superior law). Yet, a possible solution to the dilemma might be that eparchial Bishop have recourse to *remonstratio* before the Roman Pontiff against the superior law.

1. Introduction

My lecture builds on the doctoral thesis of one of my students at the Pontifical Oriental Institute which addressed the specific issue of the ability of the Eparchial Bishop to dispense from higher laws.[1] In that work it concludes among other things that the Eparchial Bishop can dispense all the faithful of the eparchy from a liturgical law established by the synod of bishops of each Church *sui iuris*. I will not dwell on all the details of this hypothesis, but will assume as a starting point to reflect on the more general issue that we will face now. I must start by saying that although it is a good study on the topic of dispensation in general I do not agree with the conclusion of its author, and will try to explain why.

I must necessarily begin with a reflection on the expression used by the can. 178 CCEO regarding the Eparchial Bishop as vicar and legate of Christ in his eparchy, as well as its relation with the entire body of bishops. Then I will analyze the meaning of the expression *Omnis Potestas* used by canon 381 of the CIC, which refers to the extention of the capacity of pastoral governance that the Diocesan / Eparchial Bishop has. Finally, I will explain some of these capacity limits pausing particularly on the power to dispense from higher laws (can. 1538 § 1 CCEO can. 87 § 1 CIC).

2. The Eparchial Bishop, Vicar of Christ

It is interesting to note that the canons of the two codes on the figure of the eparchial/diocesan bishop have opted for the use of different qualificative expressions about his role, although they are all taken from the conciliar Constitution *Lumen Gentium*. In CCEO can. 178 It states that the Eparchial Bishop governs the eparchy entrusted to him "as vicar and legate of

[1] A. Kavilpurayidathil, *The Dispensing Power of an Eparchial Bishop - A Juridical Analytical Study on CCEO c. 1538 § 1*, Dissertatio ad Doctoratum, PIO, Romae 2012.

Christ" while, as we will see later, the CIC does not use these terms to describe his role (cfr. CIC cc. 375 and 381 § 1).

I consider this difference between the codes interesting, as I would have expected it to be rather the CIC to put particular emphasis, also from the theological perspective, on the figure of the diocesan / Eparchial Bishop. It is well known in the East as the synodality in the government of the Church is particularly emphasized (can. 34 of the Apostles). And it is to the point of risking to overshadow the personal responsibility of the individual Eparchial Bishop against his flock, especially when we consider that in the East there are intermediate hierarchical authorities between the individual Bishop and the supreme authority of the Church.

Collegiality at the local level is certainly also experienced in the Latin Church, for instance at the Conferences of Bishops. Nevertheless, in its case the local Episcopal body is not an intermediate hierarchical between the diocese and the Roman Pontiff, which makes even more clearly identifiable the proper and original responsibility of the Diocesan Bishop. In fact, even if using some oversimplification, it is customary to say that in the West, the Bishop does not respond to other human authority except the Pope. However, it should be remembered, the Dogmatic Constitution *Lumen Gentium* would explicitly point out that the diocesan/eparchial Bishop is the vicar of Christ,[2] and this to avoid the erroneous ecclesiological

[2] As Philip Goyret recalls: «Sui vescovi come vicari di Cristo si parla già dai tempi di san Cipriano (cf *Epist.* 59,5; 63;14; 65,4; 68,5; 75,16). Il concilio si occupa di riportare una non piccola raccolta di testimonianze patristiche e magisteriali su questo tema (cf AS II-I, p. 252)», Ph. Goyret, *Il Vescovo, vicario e delegato di Cristo nel governo della Chiesa particolare*, in Idem (a cura di), *I Vescovi e il loro ministero*, LEV, Città del Vaticano 2000, p. 158.

universalistic vision[3] that considered him vicar of the Roman Pontiff.[4]

There was, in the East, a danger that this universalistic distorted ecclesiological vision also extended to the level of the Church *sui iuris* reducing the responsibility of the individual Eparchial Bishop, transformed into a mere executor of the indications of the Synod of Bishops or the Patriarch, and thus determining the substantial dilution of its role as a Pastor in the anonymity of the group. In practice, this could happen, for example, if the Synod in legislating unjustifiably invades the competences of individual bishops in their eparchies. This risk is more imminent if we consider that the Synod has theoretically general legislative competence, but not mandatory, on any matter. I therefore believe that, in this case, the reference to the need to respect the principle of subsidiarity is not a simple matter of technical-legal character, but rather a substantial theological requirement.[5]

In the process of oriental codification the expression "ut vicarius et legatus Christi" was taken directly from LG 27, not wanting to use instead the one of the CIC can. 375 ("Apostolorum successores") borrowed from LG 23.[6] The

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[3] For example, following such universalistic ecclesiology Wernz asserted that to the Roman Pontiff was entrusted as dioceses the whole world: «cui solus universus orbis terrarum datus est in dioecesim», F.X. Wernz, *Ius Decretalium*, t. II, pars 2: *Ius Constitutionis Ecclesiae Catholicae*, 5th ed., Prato 1915, p. 501.

[4] In fact, when talking about bishops who are head of a Particular Church, LG explicitly says: «The pastoral office or the habitual and daily care of their sheep is entrusted to them completely; nor are they to be regarded as vicars of the Roman Pontiffs, for they exercise an authority that is proper to them» (LG 27 § 2).

[5] On subsidiarity in legislative activity, cfr. P. Gefaell, *La capacità legislativa delle Chiese orientali in attuazione del CCEO*, in Pontificio Consiglio per i Testi Legislativi, *Il Codice delle Chiese orientali – La storia, le legislazioni particolari, le prospettive ecumeniche*, LEV, Roma 2011, pp. 137-155 [here, pp. 140-144].

[6] Cfr. «Nuntia» 9 (1979), p. 6, can. 2; «Nuntia» 23 (1986), p. 6, can. 146.

Journal *Nuntia* does not expressly mention the reasons for this choice, but knowing the existing doctrinal discussions about the topic and the personal opinion of Ivan Žužek, Secretary of PCCICOR, it is easy to understand why it was decided to emphasize this aspect in oriental canon. In fact, as explained by Abraham Kavilpurayidathil,[7] in the years of the council Wilhelm De Vries had tried to explain the origin and nature of the power of the Patriarch compared to that of the Eparchial Bishop having the Patriarch as «a Bishop who embodies the fullness of the episcopal power and in whose favor the other bishops have renounced part of their rights for the sake of better government in the Church.»[8] Ivan Žužek strongly criticized this view, saying that the power of the Eparchial Bishop is of divine origin and therefore inalienable. He also argued that the power of governance in the Church unfolds in two ways: through the supreme authority and through the Diocesan/Eparchial Bishop, both in the East and West. The intermediate authority like the one of the Patriarchs and the Synods that have supra-episcopal and supra-metropolitan power does not stem from the granting, by the Eparchial Bishops, of a portion of their power in their favor, but from the fact that the intermediate authority participates by Canon Law, not by Divine Law, in the supreme authority of the Church.[9] This was also the position of the PCCICOR.[10] then sanctioned

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[7] Kavilpurayidathil, *The dispensing power...*, o.c., pp. 63-65.

[8] W. De Vries, *The "College of Patriarchs"*, in «Concilium» 8/1 (1965), p. 65.

[9] Cfr. I. Žužek, *The authority and Jurisdiction in the Oriental Catholic Tradition*, in Idem, *Understanding the Eastern Code*, (Kanonika 8), Roma 1997, pp. 459-475.

[10] In *Nuntia* it is explained that «dans chaque Eglise et malgré que différents organes (Synode des évêques, Métropolites, Patriarches) ont [sic!] un pouvoir supraépiscopal, les évêques sont, quant au *ius divinum,* totalement égaux entre eux et que [sic!] aucun Synode – pas même par une décision unanime (théorie du *cedere proprium ius)* – ne peut limiter l'exercice de ce *ius,* sinon dans la mesure où il en reçoit l'autorisation de la Suprême Autorité de l'Eglise universelle. L'on a fait également remarquer combien ce dernier point avait

by the Apostolic Constitution *Sacri Canones* promulgating the CCEO.[11] Therefore, the Apostolic Exhortation *Pastores Gregis* reiterates that «Those in the Eastern Church who exercise supra-episcopal and supralocal power – such as the Patriarchs and the Synod of Bishops of the Patriarchal Churches – (...) exercise this power with respect not only to that of the primacy of the Roman Pontiff, but also to that of the office of the individual Bishops, without intruding into their areas of competence or limiting the free exercise of the functions proper to them.»[12]

On the one hand it appears, in theory, simple to state that the autonomy of the Eparchial Bishop has to be respected. On the other hand the reason why there are limits to his government has to be clarified, providing a theological explanation. Given the divine origin of his power, a sociological or legal reasoning

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été souligné lors de la réunion des Membres de la Commission, en Assemblée Plénière, du 18 au 23 mars 1974, où il fut décidé d'insérer parmi les "Principes directeurs pour la révision du CICO" le n. 27 de la Constitution dogmatique *Lumen Gentium* sous le titre "principe de subsidiarité" (...) dans le but précis de prévenir toute *deminutio capitis* chez les évêques orientaux vis-à-vis des évêques de l'Eglise Latine où il n'existe pas d'organes intermédiaires, entre le Souverain Pontife et l'épiscopat, avec pouvoirs supraépiscopaux aussi étendus qu'en Orient.» («Nuntia» 9 [1979], pp. 6-7). Cfr. also J.D. Faris, *The Eastern Catholic Churches: Constitution and Governance According to the Code of Canons of the Eastern Churches*, St. Maron Publications, New York 1992, p. 437; Kavilpurayidathil, *The dispensing power...*, o.c., p. 64.

[11] «Idem etiam constat ex variis hierarchicae constitutionis Ecclesiarum orientalium formis, inter quas Ecclesiae patriarchales, in quibus Patriarchae et Synodi iure canonico supremae Ecclesiae autoritatis participes sunt, insigniter eminent» (John Paul II, Ap. Const. *Sacri Canones*, in AAS 82 [1990], p. 1034).

[12] «Idcirco quicumque apud Orientales Ecclesias potestatem exercet supraepiscopalem et supralocalem – uti Patriarchae et Synodi Episcoporum Ecclesiarum patriarchalium – (...) quidem potestatem exercet non tantum respectu habito Primatus Romani Pontificis sed etiam officii singulorum Episcoporum, quin transgrediatur ambitum propriae competentiae, vel liberum circumscribat exercitium eorum functionum», John Paul II, Ap. Exhort. *Pastores Gregis*, 16.X.2003, no. 61, in AAS 96 (2004), pp. 825-924 [here: pp. 906-907].

would not suffice. For this purpose, it is appropriate to reflect on the *episkopé* as visible presence of Christ's authority over the Church: «In the bishops (...) Our Lord Jesus Christ, the Supreme High Priest, is present in the midst of those who believe» (LG 21); then, «he who hears them, hears Christ, and he who rejects them, rejects Christ and Him who sent Christ» (LG 20). As Philip Goyret[13] explains, these texts emphasize the presence of Jesus Christ in the "community of his pontiffs" in tones that, according to their strength, amount to say that the one who really acts in the performance of the episcopal ministry is Christ himself, who «by their [i.e. Bishops'] wisdom and prudence ... directs and guides the People of the New Testament in their pilgrimage toward eternal happiness» (LG 21). It is not therefore just a legal but a sacramental way of being vicar: in the bishops not just a mere "representation" of Christ as their principal takes place, but a sacramental "re-presentation" of Jesus Christ, Head and Shepherd of the Church.[14]

3. The Relationship between the Individual Bishop and the Episcopal Body

The topic on the sacramental re-presentation of Christ goes together with another key issue: although all the bishops re-present Jesus Christ, he is a single person (not many) and, accordingly, also the Episcopal ministry must be somehow one.[15] The previous statement is at the root of the appearance

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[13] Cfr. Goyret, *Il vescovo...*, o.c. [note 2], p. 160.

[14] J.M.R. Tillard, *Chiese di Chiese. L'ecclesiologia di comunione*, Queriniana, Brescia 1989, pp. 223-232. «Sunt igitur presbyteri in Ecclesia et pro Ecclesia velut repraesentatio sacramentalis Christi Capitis et Pastoris», John Paul II, Ap. Exhort. *Pastores dabo vobis*, no. 15, in AAS 84 (1992), pp. 657-864 [here, p. 680] (applied to presbyters, but it fits *a fortiori* for bishops).

[15] Moreover, given that Eucharist is the Body of Christ, one can say also that «The Episcopate is *one*, just as the Eucharist is *one*: the one Sacrifice of the one Christ, dead and risen» («Episcopatus namque unus est sicuti una est Eucharistia: unum quidem sacrificium unius

of communal (from communion) aspect of the apostolic succession and, therefore, of the collegial nature of the Episcopal order (cfr. LG 22). The bishops, in fact, «are not individuals unrelated to each other but, in the Church, but together form a single body or *Collegium* and form the *Ordo episcoporum*. Because of this supernatural and indivisible unity, each Bishop is called to exercise his mission in *communio episcoporum*. The doctrine of the collegial union of the bishops is one of the most challenging statements of Vatican II.»[16] And «the question has its importance with respect to the individual Bishop in charge of a Particular Church, because while holding it as the vicar of Christ, he does so always as a member of the College, within the communion of bishops. (...) The fact that he does not act in isolation, but as a member of a college, is a parameter to take seriously into account. A hypothetical guidance of his Church through roads that are not shared by the *episcoporum communion* implies a contradiction in his being Bishop. (...) The individual Bishop is not vicar of Christ in isolation, but in the communion of the Episcopal College.»[17] Each bishop can indeed repeat what St. Paul wrote about his "daily concern, the solicitude for all the Churches" (2 Cor 11:28), and this concern is also reflected through the traditional Synodal structures of the Churches *sui iuris*. In addition, as we know, the collegial aspect is also expressed through the liturgical rite of the episcopal ordination, which is celebrated usually with the

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Christi, qui mortuus est et resurrexit»). Congregation for the Doctrine of the Faith, Letter *Comunionis notio*, 28 May1992, no. 14, in AAS 85 (1993), pp. 838-850 [here, pp. 846].

[16] M. Semeraro, *Mistero, comunione e missione. Manuale di Ecclesiologia*, Bologna 1996, p. 176.

[17] Cfr. Goyret, *Il vescovo*..., o.c., p. 164. In fact, already Yves Congar dared to say that «the Bishop is not Shepherd of the Local Church unless he occupies his place in the *Ordo episcoporum*» («El Obispo no es pastor de la Iglesia local sino ocupando su puesto en el *Ordo episcoporum*»), Y. M.-J. Congar, *La consagración episcopal y la sucesión apostólica ¿constituyen cabeza de una Iglesia local o miembro del colegio?*, in Idem, *Ministerios y comunión eclesial*, Madrid 1973, p. 130.

participation of three bishops (cfr. LG 22, CCEO can. 746, CIC can. 1014). As just mentioned, in the Second Vatican Council the same definition of the sacramentality of the episcopate is connected to this communional modality of the exercise of the *episkopé*. In fact, the dogmatic constitution *Lumen Gentium* states: «For the discharging of such great duties [i.e., for exercising *episkopé*], the apostles were enriched by Christ with a special outpouring of the Holy Spirit coming upon them, and they passed on this spiritual gift to their helpers by the imposition of hands, and it has been transmitted down to us in Episcopal consecration. (...) But Episcopal consecration, together with the office of sanctifying, also confers the office of teaching and of governing, which, however, of its very nature, can be exercised only in hierarchical communion with the head and the members of the College» (LG 21).

Despite the sacramental character of the episcopate, «the power of the Holy Spirit does not guarantee all acts of ministers in the same way. While this guarantee extends to the sacraments, so that even the minister's sin cannot impede the fruit of grace, in many other acts the minister leaves human traces that are not always signs of fidelity to the Gospel and consequently can harm the apostolic fruitfulness of the Church» (Catechism of the Catholic Church, no. 1550). It can happen that a single bishop carries out acts not suitable to the *episkopé*. Therefore, in order to discern the authenticity of a concrete act of government it is necessary to refer to the intention of the *communio episcoporum*.[18]

The supreme authority of the Church can and must therefore regulate the exercise of the powers of the individual bishops. As a result, the intermediate hierarchical structures that participate in the supreme power of the Church, as it was said, are also competent according to the law to regulate the powers of the individual bishops. However, in this respect the *Pastores Gregis* reiterates that «Synodality does not destroy or diminish

[18] Cfr. Goyret, *Il vescovo...*, o.c., pp. 180-181.

the legitimate autonomy of each Bishop in the governance of his own Church; rather it affirms the spirit of collegiality of the Bishops who are coresponsible for all the particular Churches within the Patriarchate.»[19] However, the way to ensure this legitimate autonomy has to be understood properly.

4. The Bishop Has *omnis potestas* to Govern His Eparchy

Let us now consider the expression used by CIC can. 381 § 1: «In the diocese entrusted to his care, the diocesan Bishop has all the ordinary, proper and immediate power required for the exercise of his pastoral office, except in those matters which the law or a decree of the Supreme Pontiff reserves to the supreme or to some other ecclesiastical authority». On the other hand the parallel CCEO can. 178[20] does not use the expression «all the power» but simply speaks of the «power which he exercises personally in the name of Christ». Moreover, the CCEO has opted not to use the words of the CIC, by which the causes of the exclusive competence of law or of the Pope are excluded from this *omnis potestas*. However, also the oriental canon chose to reaffirm that the exercise of this power, «is ultimately regulated by the Supreme Authority of the Church and can be defined with certain limits should the usefulness of the Church or the Christian faithful require it». From these considerations it can be concluded that the two codes use basically similar expressions but with different nuances.

In fact, what it is meant by "*omnis potestas*"? Certainly this is not an unlimited power, but aimed at the service that

[19] «Item synodalitas nec delet nec minuit legitimam cuiusque Episcopi autonomiam in regenda propria Ecclesia; confirmat tamen affectum collegialem inter Episcopos, qui curam adhibent de omnibus Ecclesiis particularibus ad Patriarchatum pertinentibus», John Paul II, Ap. Exhort. *Pastores Gregis*, o.c., no. 61.

[20] «...; This power, which he exercises personally in the name of Christ, is proper, ordinary, and immediate, although its exercise is ultimately regulated by the Supreme Authority of the Church and can be defined with certain limits should the usefulness of the Church or the Christian faithful require it» (CCEO can. 178, second part).

diocesan/eparchial Bishop must do through his pastoral office. Therefore, its scope should be determined by it. It was nice to hear Benedict XVI, in his last general audience as Supreme Pontiff, making the following statement: «I have always known that the Lord is in that boat, and I have always known that the barque of the Church is not mine but his.»[21] The Pope, and *a fortiori* the Eparchial Bishop, is not the owner of the Church: their ministry is service. The government of the Eparchial Bishop must be aimed exclusively to the salvation of souls and the good of the Church, not other purposes. But how to know what is the true good of souls and of the Church?

We all know that the *oikonomia*[22] is a traditional principle for the government of the Church. Simplifying a lot, it could be said that this principle consists in relying on the wisdom of the Bishop to resolve some specific situation requiring extraordinary and temporary deviation from the general principle of *akribeia* (i.e., the strict application of the rule). Such flexibility should not, however, be considered unlimited. In fact, according to Catholic Canon Law, *oikonomia* is practiced by the Eparchial Bishop respecting the parameters established by the supreme authority of the Church, those that he, as supreme *Oikonomos*, deems necessary for the true good of souls.

5. The Limits to the Exercise of the Pastoral Power of the Eparchial Bishop

Regulation of the exercise of power of the Eparchial Bishop emerges primarily from the fact that there are rules set by the higher law (namely both the common law as well as the particular law of each Church *sui iuris*) from which ordinarily the Eparchial Bishop must not deviate in his government,

[21] Benedict XVI, *General Audience, 27 February 2013*, in w2.vatican.va.

[22] On this topic, cfr. P. Gefaell, *Fondamenti e limiti dell'*oikonomia *nella tradizione orientale*, in «Ius Ecclesiae» 12 (2000), pp. 419-436; Idem, *Oikonomia*, in Javier Otaduy – A. Viana – J. Sedano (eds.), *Diccionario General de Derecho Canónico*, vol. V, Aranzadi, Pamplona 2012, pp. 695-700.

because they are considered necessary for the general good of souls. Let us see some examples.

In its legislative function the Eparchial Bishop must first of all fulfill the formal requirements laid down to issuing laws (the principle of legality[23] applied to the activity of legislating: see CCEO can. 985 § 2 – CIC can. 135 § 2). He must also respect the principle of hierarchy of norms according to which the laws promulgated by the lower authority must be in harmony with the law established by the higher authority.[24] Later we will discuss the capacity of the Eparchial Bishop to dispense the higher laws.

In his judicial function, the Eparchial Bishop is bound to observe the procedural rules established, that in this case are not dispensable (cfr. CCEO can. 1537 CIC can. 86) since the

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[23] Cfr. W.L. Daniel, *The Principle of Legality in Canon Law*, in «The Jurist» 70 (2010), pp. 29-85.

[24] Cfr. Gefaell, *La capacità legislativa...*, o.c., pp. 149-151; Idem, *Il diritto particolare nell'attuale sistema del diritto canonico. Approfondimento tecnico dell'interpretazione del CIC c. 135 § 2 e del CCEO c. 985 § 2*, in «Folia Canonica» 10 (2007), pp. 179-196; E. Tawil, *Le respect de la hiérarchie des normes dans le droit canonique actuel*, in «Revue de Droit canonique» 52 (2002/1), pp. 167-185; Ph. Toxé, *La hiérarchie des normes canoniques latines ou la rationabilité du droit canonique*, in «L'Année Canonique» 44 (2002), pp. 113-128; E. Baura, *L'attività normativa dell'amministrazione ecclesiastica*, in «Folia Canonica» 5 (2002), pp. 59-84; V. De Paolis, *Tipologia e gerarchia delle norme canoniche*, in Gruppo Italiano Docenti di Diritto Canonico (ed.), *Fondazione del diritto. Tipologia ed interpretazione della norma canonica*, XXVII Incontro di Studio, Centro Dolomiti "Pio IX", Borca di Cadore (BL) 26-30 giugno 2000, (Quaderni della Mendola 9), Glossa, Milano 2001, pp. 123-151; R. Puza, *La hiérarchie des normes en droit canonique*, in «Revue de Droit canonique» 47 (1997), pp. 127-142; Javier Otaduy, *La prevalencia y el respeto: principios de relación entre la norma universal y la particular*, in Pontificium Consilium de Legum Textibus Interpretandis (ed.), *Ius in vita et in missione Ecclesiae*, Acta Symposii internationalis iuris canonici occurrente X anniversario promulgationis Codicis iuris canonicis, diebus 19-24 aprilis 1993 in Civitate Vaticana celebrati, Libreria Editrice Vaticana, Città del Vaticano 1994, pp. 475-490.

higher authority considers them necessary to ensure, in the processes, the search for the substantial truth and fundamental rights of the faithful. This dispensation is granted by the supreme authority only in very rare cases.[25]

Other limits to the exercise of the judicial function of the Eparchial Bishop are those relating to the criteria of competency and degrees of courts. The Eparchial Bishop cannot judge some contentious or criminal matters because they are reserved to the Roman Pontiff, to the Apostolic See or to another authority (cfr., e.g., CIC can. 1405 – CCEO cc. 1060-1061; and the special norms on the more grave delicts.[26] In addition, an Eparchial Bishop cannot decide a judicial case in all its instances up to final judgment (see, e.g., CIC can. 1438 – CCEO can. 1064), and this is obviously a limit to the exercise of his authority. A particular limit in the CCEO is the fact that the Eparchial Bishop can not establish his own tribunal if there is already a Intereparchial one of first instance (see CCEO can. 1067 § 3),[27] while the CIC can. 1423 does not establish such limitation.[28]

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[25] Cfr. Secretaria di Stato, *Rescritto di concessione alla Segnatura Apostolica della facoltà di dispensare dalle norme processuali del CCEO*, 22 November 1995, Prot. N. 381.775, in J. Llobell, *La competenza della Rota Romana nelle cause delle Chiese cattoliche orientali*, in «Quaderni dello Studio Rotale» 18 (2008), p. 39, note 87. Cfr., moreover, Benedict XVI, *Rescriptum ex audientia Ssmi. Facoltà speciali da valere per un triennio, concesse al Decano della Rota Romana*, 11 February 2013, no. IV: «Il Decano della Rota Romana ha la potestà di dispensare per grave causa dalle Norme Rotali in materia processuale.»

[26] John Paul II, motu proprio "*Sacramentorum sanctitatis tutela" regarding the Norms on more grave delicts reserved to the Congregation for the Doctrine of Faith*, 30 April 2001, in AAS 93 (2001), pp. 737-739; Congregatio pro Doctrina Fidei, *Epistula ad totius Catholicae Ecclesiae Episcopos aliosque Ordinarios et Hierarchas interesse habentes de delictis gravioribus eidem Congregationi pro Doctrina Fidei reservatis*, 18 May 2001, in AAS 93 (2001), pp. 785-788.

[27] Cfr. P. Gefaell, *Tribunali delle Chiese 'sui iuris' non patriarcali*, in «Ius Ecclesiae» 16 (2004), pp. 111-132 [here, p. 112].

[28] Cfr. J. Llobell, *Quaestiones disputatae sulla scelta della procedura giudiziaria nelle cause di nullità del matrimonio, sui titoli di competenza,*

Lastly, judicial activity in individual eparchies is subject to supervision not only on the part of the Apostolic Signatura, but also by the General Moderator of Justice in the Patriarchal Church (CCEO can. 1062 §§ 2 and 5).[29]

In his executive function, the Eparchial Bishop must follow the norms of the common law and the ones of the particular law of each Church *sui iuris* as well (if his eparchy is located in the territory of that very Church). That means that the Bishop is subject to the principle of administrative legality. There is also the possibility of the administrative appeal against the merit of a particular administrative act of the Eparchial Bishop (cfr. CCEO tit. XXII, cc. 996-1006). If that appeal came to the Apostolic See and it is believed that there has been violation of the law in "*decernendo vel in procedendo*", it is also possible to introduce the litigious administrative process before the second section of the Apostolic Signatura (CIC can. 1445 § 2; this possibility is also given to the Orientals: cfr. Const. ap. *Pastor Bonus*, Art. 123 and Art. 34 § 1 of the *Lex propriae* of the Apostolic Signatura[30]). All these (and other) factors indicate clearly the presence of limits to the exercise of administrative power of the Eparchial Bishop.

6. Resources of the Eparchial Bishop to Make Canon Law Flexible

We have already mentioned the "*oikonomia*" as the guiding criterion of the government of the Church. In this sense, «the concession of a somewhat greater liberty to bishops

sul libello introduttorio e sulla contestazione della lite, in «Apollinaris» 70 (3-4/1997), pp. 591-594.

[29] Cfr. P. Gefaell, *Il moderatore generale dell'amministrazione della giustizia nel Sinodo dei Vescovi della Chiesa patriarcale*, in L. Sabbarese (ed.), *Strutture sovraepiscopali nelle Chiese orientali. Riflessione teoretica e prassi: bilancio dell'epoca del CCEO*, Urbaniana University Press, Roma 2010, pp. 131-142.

[30] Benedict XVI, motu proprio *«Antiqua ordinatione», quo Supremi Tribunalis Signaturae Apostolicae "lex propria" promulgatur*, 21 June 2008, in AAS 100 (2008), pp. 513-538.

will manifest yet more clearly the pastoral character of the Code.»[31] In Catholic Canon Law this principle of governance is not absolute but must be implemented through different techniques of flexibilization subjected to the principle of legality (such as the dispensation, "*sanatio in radice*", the principle of *Ecclesia supplet*, the clauses that require discretionary powers in law enforcement, etc.).

The canonical dispensation is therefore only one of the many ways to apply "*oikonomia*" that, in the Catholic Church is governed by Canon Law. In this sense, there are rules that are not dispensable by the Eparchial Bishops, even though they are provisions of merely human law (like the procedural norms, for instance).[32]

However the two codes, Latin and Oriental, following the provisions of the Council's Decree *Christus Dominus* no. 8, explicitly recognize that the Eparchial Bishop, if he deems it right and if there is no reserve by the supreme authority, in specific cases can dispense his subjects from a higher law. In fact, the CCEO can. 1538 §1 (≈ CIC can. 87 § 1) establishes:

> «As often as he judges that a dispensation will contribute to the spiritual good of the Christian faithful who are subject to him according to the norm of the law, the Eparchial Bishop can dispense from both the common law and the particular laws of his own Church *sui iuris* in a special case, unless a reservation has been made by the authority which made the laws».

The Eparchial Bishop has the responsibility to evaluate the extent to which the general rules are convenient for the salvation of a soul or a specific group of souls. The correct use of the dispensation is, therefore, always to be assessed on the basis of whether or not a just cause exists. The simple resistance

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[31] PCCICOR, *Guidelines for the Revision of the Code of Oriental Canon Law*, in «Nuntia» 3 (1976), p. 21.

[32] Cfr. J.M. Huels, *Categories of Indispensable and Dispensable Laws*, in «Studia canonica» 39 (2005), pp. 48-62.

of the faithful to the general rule should not be considered a just cause, except in the case where such resistance is reasonable; but the ultimate judgment on such reasonableness remains the sole responsibility of the ecclesiastical authority, and nobody else. The request for exemption must therefore include the indication the alleged just cause (cfr. CCEO cc. 1529 § 2 and 1536 § 1 – CIC cc. 63 § 2 and 90 § 1). And if the authority does not grant the dispensation for not considering as just the cause alleged, the party can certainly apply to the superior hierarchical authority, asking again the dispensation, but should indicate that it was denied by the lower authority; and the higher authority should not grant it without knowing the reasons for the previous refusal (cfr. CCEO can. 1530 ≈ CIC can. 65).[33] As we can see, the just cause of the specific case is the key point in the granting the dispensation, since this cause is what justifies an exception to the law, which is valid for most cases.[34] In this regard the Oriental Code clarified that the spiritual good of the Christian faithful is a just and reasonable cause (CCEO can. 1536 § 2) as if it is a real spiritual good, it will benefit the common good of the whole Church.[35]

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[33] In my opinion, it would be possible to apply to the superior authority even in the case that the negative answer of the lower authority were deduced by its silence (cfr. CCEO can. 1518 ≈ CIC can. 57 §§ 1-2, on administrative silence that, although referring to decrees, I think that by analogy it can be also applied to a request of rescript that does not receive an answer).

[34] «È proprio la causa il fattore che rende razionale, confacente con l'ordinamento giuridico, l'eccezione alla legge. Ma è anche la causa a determinare quando si debba rilasciare una dispensa, quando la si debba negare, quando debba cessare (...). Non è necessario, però, che la causa da sola esima dall'osservanza della legge, bastando che le peculiarità del caso facciano sì che la situazione che si verrebbe a creare con la dispensa sia giusta, nel senso forte del termine. Insomma, l'atto dispensatorio sarà sempre un atto prudenziale, giacché la valutazione della causa dipende da una decisione prudenziale», E. Baura, *La dispensa canonica dalla legge*, Milano 1997, pp. 272-273.

[35] «Nelle prime riflessioni dottrinali sulla dispensa si insisteva sull'idea che essa deve concedersi per l'utilità della Chiesa, non per quella

However, if a Eparchial Bishop considers that there are just and reasonable causes to dispense from a higher law, some other factors should also be taken into account. In the particular case that we indicated at the beginning of our lecture, the bishop wants to dispense all the faithful of his eparchy from a liturgical law established by the synod of bishops of his own Church, because such law was not accepted in the eparchy and has indeed caused big disagreements, especially among priests. Let us examine those that, in my opinion, are the inconveniences of this solution.

First of all, as we have said, the Bishop must seriously ask himself whether this resistance to the common law is beneficial to the true spiritual good of the faithful, that is, if it is reasonable and just in the eyes of the Lord. This assessment commits seriously the pastoral responsibility of the Bishop.

In addition, in the proposed solution the dispensation seems to be granted to the entire eparchy and without time limits, therefore not "*in casu speciali*" as required by the CCEO can. 1536 or "*in casu particulari*" according to CIC can. 85.[36]

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del singolo. Ad ogni modo, mi pare evidente che se c'è un beneficio legittimo per il singolo, che non reca danno alcuno né ad altri, né alla società ecclesiale nel suo insieme (non provoca scandalo, ecc.), quel beneficio è già utilità della Chiesa e quella del singolo si dà solo nel caso di utilità del singolo poco confacenti con il fine della Chiesa. Perciò il Codice orientale, al can. 1536, § 2, offre come criterio della ragionevolezza della causa il bene spirituale dei fedeli, giacché se si tratta di un vero *bene* spirituale gioverà senz'altro al bene di tutta la Chiesa» (BAURA, *La dispensa...*, o.c., pp. 273-274). «Nell'ordinamento ecclesiale mai potrà darsi contrasto tra bene comune e quello individuale, perché – come è intuitivo – n la salvezza delle anime e di tutti comprende e ingloba sempre quella del singolo fedele», R. BERTOLINO, *Il nuovo diritto ecclesiale tra coscienza dell'uomo e istituzione*, Torino 1989, p. 156.

[36] The adjectives "special" and "particular" used by the Codes are, actually, equivalent (cfr. BAURA, *la dispensa...*, o.c., pp. 131-133). «Semmai, la presenza di questi vocaboli può rivelare la mente del legislatore, che vuole che non si dispensi da una determinata prescrizione se non in casi davvero eccezionali. Ed è proprio l'eccezionalità la nota essenziale

Actually, the dispensation implies neither the abrogation nor the derogation of the general law, and it should therefore have the characteristic of "uniqueness" [singularity]. It is true that the canonical doctrine[37] has spoken of different degrees of singularity in the dispensation, that is: a) dispensation given to one person for a single act;[38] b) dispensation granted to one person for more subsequent acts of the same kind[39]; and c) dispensation given to a particular group of people or even to the whole community for more acts of the same kind, but only for a specified time.[40] However, as we see, «in all these hypotheses there is a definition of the object of the dispensation that allows us to talk about singularity as something opposed to the generality of the law.»[41] It follows that the dispensation granted to any particular community cannot be perpetual.

Moreover, the dispensation we are talking about would be converted into a "mandatory" dispensation for all the faithful of the eparchy who from that moment on they could not

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della dispensa che, a mio parere, riassume la differenza con la legge: la regola comune è la legge (l'applicazione normale della legge), mentre in qualche caso, eccezionale, si potrà dispensare dalla sua osservanza», *Ibid*., p. 133.

[37] Cfr. G. Michiels, *Normae Generales Juris Canonici, commentarius libri I Codicis Juris Canonici*, Editio altera, Vol. 2, Parisii – Tornaci – Romae 1949, pp. 678-679; A. Blat, *Commentarium textus Codicis Iuris Canonici. Liber I. Normae generales*, Romae 1921, p. 175.

[38] It is the so called *dispensa simplex* (for example, to dispense a person from a matrimonial impediment).

[39] For example, to dispense a person from the abstinence of Lent. This dispensation is traditionally called dispensation *cum tractu successivo*: cfr. CIC17 can. 86.

[40] At times called *dispensa multiplex.* It happens «quando *subjectum passivum* dispensationis (...) sunt plures personae in individuo determinatae, v.g. omnia membra alicujus familiae aut paroecia singulariter sumpta, vel imo quando subjectum istud est communitas tota pro qua lex, a qua dispensatur, fuit constituta, dummodo in hoc casu relaxatio legis sit temporanea», Michiels, *Normae generales...*, o.c., p. 678.

[41] Baura, *La dispensa...*, o.c., p. 131.

follow the liturgical law established by the Synod. It seems to me instead that since the dispensation is a grace, it should not impose an obligation but rather allow a conduct other than that stipulated by the law, but without precluding the possibly to opt for the observance of the law.

As mentioned, the right of the Eparchial Bishops to dispense from higher laws, namely those issued by the Supreme authority of the Church as well as those from the Synod of Bishops of his Church, is out of question because this is explicitly established by the CCEO can. 1538. Therefore, if the dispensation is applied to individual cases, there are no problems. The difficulty arises, however, when it is addressed to groups of people, indeed the whole eparchy. This quasi "general" character of the dispensation would perhaps be still acceptable in the case of "permissive" and "optional" dispensation, namely those designed not to follow the law but without imposing on all the individuals in the community an exemption from the law, because it is a "particular" case (e.g., a dispensation from fasting granted to the whole community of the eparchy in a year following a calamity). Paradoxically, the theoretical and practical difficulties of the aforementioned general and imperative dispensation for the whole eparchy could become obvious in disregard of the *salus animarum* of individual cases which, wishing to follow the liturgy established by the Synod, perhaps they would feel wronged by so-called "mandatory dispensation".

Finally, the dispensation from liturgical law established by the Synod would create a "legal vacuum" with regard to liturgical laws to follow in the eparchy. In fact, with which liturgical norms one will have to celebrate in the eparchy since the liturgical law of the Church *sui iuris* has been dispensed? Someone could say: with the liturgical laws that existed before the new liturgical law was established by the Synod. But this would suppose a "reactivation" of the old liturgical law repealed, and this reactivation can only be made through a new promulgation (cfr. CCEO can. 1488 = CIC can. 7), in this

case at the eparchial level. Therefore, it would be basically a "new" liturgical law issued by the Eparchial Bishop, but that would go against the principle of hierarchy of norms,[42] because a eparchial law must be in harmony with the higher laws, such as those of the *sui iuris* Church.

How to reach a solution? If the higher law is formally legitimate but it is believed that, for just and reasonable causes it should not be applied to his own eparchy, the Bishop could resort to the *remonstratio*, «traditional canonical institution by which the bishops addressed to the Pope to ask the non-application of a universal law [in our case it would be a law of the particular law of the Church *sui iuris*] within limit of their jurisdictions; the petition produced suspensive effect.»[43] This right to *remonstratio* is not established by the codes any longer, but in reality it is so just because it was considered unnecessary to point it out since it was obvious.[44]

In this case, in my opinion it is very reasonable to entrust to the supreme authority of the Church the resolution of a conflict between the intermediate hierarchical instance and the Eparchial Bishop: this turning to the Roman Pontiff to ask for a solution would be in the end a *remonstratio*.

Every activity of the pastoral governance is to be accomplished with a delicate respect for the rules of Canon Law, which are not simple and arid organizational tools but assurance of that ecclesial communion so essential to the proper exercise of the *episkopé*.

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[42] Vide supra, note 24.

[43] E. Baura, *La posizione del diritto particolare in seguito alla nuova codificazione*, in J. Conn – L. Sabbarese (eds.), *Iustitia in Caritate: Miscellanea di studi in onore di Velasio de Paolis*, Urbaniana University Press, Città del Vaticano 2005, pp. 161-177 (here, p. 168); cfr. also E. Labandeira, *La "remonstratio" y la aplicación de las leyes universales en la Iglesia particular*, in «Ius Canonicum» 48 (1987), pp. 711-740.

[44] H.-J. Guth, *"Ius remonstrandi": l'institution juridique du droit de remontrance épiscopal*, in «Revue de droit canonique» 52/1 (2002), pp. 153-165 [here, p. 164].

Second Part

Ecumenical Canonical Questions

Chapter 4

The Ecclesiological Foundations of the Ecumenism and the Primacy of the Successor of Peter*

1. Introduction
2 Ecumenical Dialogue and the Certainty of the Faith
3. The Point of Departure for our Reflections: *Koinonia*
4. The "Sister Churches" and Eucharistic Ecclesiology
5. The Fullness of the Local Church?
6. The Exercise of the Petrine Ministry and its Essence: Primacy of Jurisdiction & Infallibility

1. Introduction

The majority of the more recent orthodox authors who have written on Primacy in the Church base their arguments on Eucharistic Ecclesiology and the Ecclesiology of Communion in its different aspects. Their critical reflections have also strongly stimulated the development of Catholic thinking regarding this. When someone is immersed in this research, enriching as it is, the need to be all the more connected to the centre of unity in the Church becomes more evident and also more urgent. Here, it is interesting to present, as a point of comparison, a Catholic vision of Eucharistic Ecclesiology and the Ecclesiology of Communion, as a basis for explaining Primacy in its value in the service of unity, within the context of ecumenical relationships.

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* Updated version of the article of P. Gefaell, *L'ecclesiologia eucaristica e il Primato del Romano Pontefice*, in «Folia Canonica» 1 (1998), pp. 129-149.

I will treat these arguments using concepts of ecclesiology, but with the specific vision of a canonist, and I will try to solve certain prejudices on the concept of jurisdiction that qualifies Primacy. This work is centred on the unipersonal office of the Primate, and therefore the role of the Episcopal College as subject of the Supreme power in the Church will not be considered directly, but, instead, taken as a given.

2. Ecumenical Dialogue and the Certainty of the Faith

The present exposition is based on the recent documents of Magisterium which have touched on the argument at different levels, namely:

a) The Ecumenical Directory, emanating from the Pontifical Council for Promoting Christian Unity on 25 March 1993[1] (hereafter, *DE 1993*);

b) The Catechism of the Catholic Church (*CCC*);[2]

c) The letter *Communionis Notio* from the Congregation for the Doctrine of the Faith;[3]

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[1] PONTIFICAL COUNCIL FOR PROMOTING CHRISTIAN UNITY [PCPCU], *Directory for the Application of Principles and Norms on Ecumenism*, original version in French in AAS, 85 (1993) pp. 1039-1119; English version in «L'Osservatore Romano» weekly edition, 16 June 1993. Cfr., also, E.I. CASSIDY, *Il nuovo "Direttorio ecumenico" della Chiesa cattolica. Un passo avanti nel cammino dell'ecumenismo*, in «Studi Ecumenici» 12 (1994), pp. 9-28; and E. FORTINO, *The Revised Ecumenical Directory: Process, Content, Supporting Principles,* in «Information Service» 84 (1993/II-IV), pp. 138-142.

[2] The first vernacular version is from 1992 but the official version in Latin (with important corrections of the vernacular version) was approved by St JOHN PAUL II with the Apostolic Letter *Laetamur magnopere*, of 25 August 1997, in AAS 89 (1997), pp. 819-821.

[3] CONGREGATION FOR THE DOCTRINE OF THE FAITH [CDF], *Litterae ad Catholicae Ecclesiae episcopos de aliquibus aspectibus Ecclesiae prout est Communio,* 28 May 1992, in AAS 85 (1993), pp. 838-850; English translation in www.vatican.va [hereafter *Communionis notio*].

d) The encyclical letter of St John Paul II on ecumenism *Ut unum sint*;[4]

e) The *Note on the expression "Sister Churches"*, from the Congregation for the Doctrine of the Faith;[5] and, finally,

d) The encylical letter *Ecclesia de Eucharistia*.[6]

Moreover it will make the due references to the Council texts and other important documents. This Chapter is centred on the relationships with the Orthodox Churches, leaving to one side those Christian communities born from the Reformation. The above mentioned revised edition of the Ecumenical Directory incorporates other prior documents published, fruits of theological reflection and ecumenical dialogue.[7].

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[4] John Paul II, Encyclical Letter *Ut unum sint,* 25 May 1995, in AAS 87 (1995), pp. 921-982 [English version in www.vatican.va]. Cfr., also the respective presentations of Cardinal Cassidy and of Msgr. E. Fortino, in «L'Osservatore Romano», 31 May 1995, pp. 1 e 9.

[5] CDF, *Note on the expression "Sisters Churches"*, 30 June 2000, in «L'Osservatore Romano», 28 October 2000, p. 6. [English translation in «Origins» 30 (2000), pp. 222-224, and www.vatican.va].

[6] John Paul II, Encyclical Letter *Ecclesia de Eucharistia*, 17 April 2003, in AAS 95 (2003), pp. 433-475. English translation in www.vatican.va.

[7] The documents which are taken in consideration are principally that of The Joint International Commission for the Theological Dialogue between the Catholic Church and the Orthodox Church (as a Whole); Especially the following declarations:

a) *The Mystery of the Church and the Eucharist in the Light of the Mystery of the Holy Trinity*, Munich (Germany), 6 July 1982, in «Information Service» 49 (1982/II-III), pp. 107-111. Digital version available at www.vatican.va.

b) *Faith, Sacraments and the Unity of the Church*, 15 June 1987, in «Information Service» 64 (1987/II), pp. 82-87. Digital version available in www.vatican.va.

c) *The Sacrament of Order in the Sacramental Structure of the Church, with Particular Reference to the Importance of the Apostolic Succession for the Sanctification and Unity of the People of God*, Valamo (Finland), 26 June 1988, in «Information Service» 68 (1988/III-IV), pp. 173-178. Digital version available at www.vatican.va.

d) *Uniatism, Method of Union of the Past, and the Present Search for Full*

All these documents intend to guarantee that ecumenical activity conforms to the unity of faith and discipline that unites Catholics to each other, avoiding the doctrinal confusion and abuses that could lead to ecclesiological indifference or proselytising (cfr. *DE 1993*, nos. 6 and 23). In any case, maintaining a vision of ecumenism that takes account of all the demands of the revealed truth does not mean a prejudicial opposition to all types of dialogue. On the contrary, among the more incisive affirmations of John Paul II in the encyclical *Ut unum sint* are those on the importance of ecumenism and the spirit of dialogue that mutually enriches the dialoging parties (cfr. *Ut unum sint,* nos. 8, 9, 20, 28 and 29). The fact of sustaining with conviction the revealed truth, therefore, intends only to warn the ecumenical movement from seeking solutions that are only apparent but produce results that are neither firm nor solid (cfr. *Ut unum sint*, no. 79). «In the Body of Christ, "the way, and the truth and the life" (Jn 14:6), who could consider legitimate a reconciliation brought about at the expense of the truth?» (*ibid.*, no. 18).

The Catholic Church, therefore, sustains with firmness the fundamental questions, but does not do so out of disregard towards the other Churches. In this first point we shall try to explain reasons in faith for Primacy, with the maximum respect for the positions of the Orthodox Churches, but explaining the arguments that enlighten and confirm the credibility of the

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Communion, Balamand (Liban), 23 June 1993, in «Information Service» 83 (1993/II), pp. 96-99 (Here after: *Balamand document*). Digital version available at www.vatican.va.

e) *Ecclesiological and Canonical Consequences of the Sacramental Nature of the Church. Ecclesial Communion, Conciliarity and Authority*, Ravenna 13 October 2007, in «Information Service» 126 (2007/IV), pp. 178-184. Digital version available at www.vatican.va. (Here after: *Ravenna Statement*).

See also the document of PCPCU, *Ecumenical Dimension in the Formation of Those Engaged in Pastoral Work*, 9 March 1998, in «Origins» vol. 27, no. 39 (March 19, 1998), pp. 653-661. Also in www.vatican.va.

doctrine of Catholic faith. There are three principal arguments that will be treated here:

a) the Catholic doctrine teaches that the Catholic Church constitutes in the world the full realization of the Church of Christ precisely because its members are in full communion with the See of the successor of Peter;

b) Catholic doctrine sustains that the petrine ministry of unity has to be carried out with a binding character on the social level; and

c) Catholic doctrine considers as an essential condition for the carrying out of the petrine ministry its infallibility regarding the doctrine of faith and of morals. As we will see, these three aspects coincide inseparably if explained from the perspective of Eucharistic Ecclesiology.

These are certainly affirmations that non-Catholics refuse. However, Catholics should know how to explain them in ecumenical dialogue – above all to themselves - why so much importance is attached to them. As the Ecumenical Directory of 1993 sets out: «In all their contacts with members of other Churches and ecclesial Communities, Catholics will act with honesty, prudence and knowledge of the issues. (...) Above all they should know their own Church and be able to give an account of its teaching, its discipline and its principles of ecumenism», so that they are able to explain all this and justify it (*DE 1993,* nos. 23 & 24). It is specifically on this objective that I will focus what follows.

3. The point of departure for our reflections: Koinõnia

To explain the Catholic principles regarding the search for Christian unity we must, as is logical, base things in the doctrine of Vatican Council II, and therefore in the doctrinal affirmations of the Ecumenical Directory and of the Encyclical *Ut unum sint*, where the principal emphasis falls on the Church

as communion.[8] «The communion in which Christians believe and for which they hope is, in its deepest reality, their unity with the Father through Christ in the Spirit. Since Pentecost, it has been given and received in the Church, the communion of saints. It is accomplished fully in the glory of heaven, but is already realized in the Church on earth as it journeys towards that fullness» (*DE 1993,* no. 13). In a context of honesty and sincerity, all these documents cannot hide the fact that, in spite of their personal weaknesses, [9] «Catholics hold the firm conviction that the one Church of Christ *subsists* in the Catholic Church "which is governed by the successor of Peter and by the Bishops in communion with him" (*LG* no. 8)» (*DE 1993* no. 17; cfr. *Ut unum sint* no. 86; etc.). It would be therefore wrong to sustain that on earth no Church enjoys full unity (cfr. *DE 1993*, no. 18).

However, in affirming that the unique Church of Christ, «constituted and organized in this world as a society, *subsists*

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[8] *DE 1993* nos. 13-17 and *Ut unum sint* nos. 5-14 and 18-20.

[9] Saint Josemaría Escrivá expressed it like this: «For more than twenty-five years, when I have recited the creed and asserted my faith in the divine origin of the Church: "One, holy, catholic and apostolic," I have frequently added, "in spite of everything." When I mention this custom of mine and someone asks me what I mean, I answer, "I mean your sins and mine".» J. Escrivà de Balaguer, *Christ is passing by*, [original title: *Es Cristo que pasa*, Madrid 1973], English translation used here: Little Hills Press – Scepter Press, New Rochelle (NY) – Crows Nest (NSW Australia), 1990, no. 131.
And in another occasion he wrote: «The Church, Spouse of Christ, does not have to intone any *mea culpa*. But we do: *mea culpa, mea culpa, mea maxima culpa.* This is the true *meaculpism*, the personal one, not the one which attacks the Church, pointing out and exaggerating the human defects which, in this Holy Mother, result from the action in Her of men, as far as men can go, but which can never destroy, nor even touch, that which we called the original and constitutive holiness of the Church.» J. Escrivà, *Loyalty to the Church* [original title: *Lealtad con la Iglesia*, a homily given on 4 June 1972], English translation in Idem, *In God's Household – Homilies by Josemaría Escrivá*, Sinag-Tala Pub., Manila 1990, pp. 7-8.

in the Catholic Church»,[10] the ecclesiology of Vatican II does not claim exclusivity in the identification of the Catholic Church with the unique Church of Christ.[11] Indeed, the verb 'to subsist' allows us to recognize contemporaneously, on one hand, the ecclesiality of the other Churches and Ecclesial communities as true means of salvation that participate in the specific mission of the unique Church of Christ (*UR* no. 3),[12] and on the other, to also affirm that the Catholic Church is the only complete realisation on earth of this Church of Christ.[13] This point was recalled once more in the declaration *Dominus Iesus*.[14]

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[10] *LG* no. 8. cfr., also, *CCEO* c. 7 §2 and *CIC* c. 204 §2.

[11] V.I. Papež, "Diritto canonico ed ecumenismo", in Pontificio Consiglio per l'Interpretazione dei Testi Legislativi, *Ius in vita et in missione Ecclesiæ (Acta Symposii Internationalis Iuris Canonici occurrente X Anniversario promulgationis Codicis Iuris Canonici diebus 19-24 aprilis 1993 in Civitate Vaticana celebrati),* Libreria editrice vaticana 1994, p. 1190-1193. Cfr., also, A. González-Montes, *Enchiridion Oecumenicum*, vol. 1, Salamanca 1986, p. XVII-XX.

[12] Cfr. *DE 1993*, no. 104 b.

[13] Cfr. *Acta Synodalia Sacrosanti Concilii Oecumenici Vaticani Secundi*, vol. III, pars I, Typis Poliglottis Vaticanis 1973, p. 176. Cfr. also *UR* no. 4c; and also, U. Betti, *Chiesa di Cristo e Chiesa cattolica*, in «Antonianum», 61 (1986), p. 742; M.M., Garijo-Guembe, *Gemeinschaft der Heiligen. Grund, Wesen und Struktur der Kirche*, Düsseldorf 1988, p. 120-121.

[14] «With the expression *subsistit in,* the Second Vatican Council sought to harmonize two doctrinal statements: on the one hand, that the Church of Christ, despite the divisions which exist among Christians, continues to exist fully only in the Catholic Church, and on the other hand, that "outside of her structure, many elements can be found of sanctification and truth" (*UUS* 13, *LG* 15, *UR* 3), that is, in those Churches and ecclesial communities which are not yet in full communion with the Catholic Church. But with respect to these, it needs to be stated that "they derive their efficacy from the very fullness of grace and truth entrusted to the Catholic Church" (*UR* 3).» CDF, Declaration *Dominus Iesus*, on the unicity and salvific universality of Jesus Christ and the Church, in AAS 92 (2000), pp. 742-765, no. 16 (English version form www.vatican.va). «The interpretation of those who would derive from the formula *subsistit in* the thesis that the one Church of Christ could subsist also in non-Catholic Churches and ecclesial communities is therefore contrary

We speak of "*Complete* realisation of the Church of Christ" in the sense that the Catholic Church, as well as having all the means of salvation (cfr. *UR* no. 3; *CCC* no. 816, *Ut unum sint* no. 86), is the only one that preserves the full union with the petrine ministry of Pope, something – as we will see later – that is one of the constituent internal elements of the ecclesial essence of a Church (cfr. *Communionis notio*, no. 17). «the fullness of the unity of the Church of Christ has been maintained within the Catholic Church» (*DE 1993* no. 18). This, obviously, does not mean that the unity cannot grow. I think, indeed, that – using the expressions of many

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to the authentic meaning of *Lumen gentium*. "The Council instead chose the word *subsistit* precisely to clarify that there exists only one 'subsistence' of the true Church, while outside her visible structure there only exist *elementa Ecclesiae,* which – being elements of that same Church – tend and lead toward the Catholic Church".» CDF, *Dominus Iesus*, no. 16, foonote 56.

And still: «In number 8 of the Dogmatic Constitution *Lumen gentium*, "subsistence" means this perduring, historical continuity and the permanence of all the elements instituted by Christ in the Catholic Church, in which the Church of Christ is concretely found on this earth. It is possible, according to Catholic doctrine, to affirm correctly that the Church of Christ is present and operative in the churches and ecclesial Communities not yet fully in communion with the Catholic Church, on account of the elements of sanctification and truth that are present in them. Nevertheless, the word "subsists" can only be attributed to the Catholic Church alone precisely because it refers to the mark of unity that we profess in the symbols of the faith (I believe... in the 'one' Church); and this 'one' Church subsists in the Catholic Church.» «The use of this expression, which indicates the full identity of the Church of Christ with the Catholic Church, does not change the doctrine on the Church. Rather, it comes from and brings out more clearly the fact that there are "numerous elements of sanctification and of truth" which are found outside her structure, but which "as gifts properly belonging to the Church of Christ, impel towards Catholic Unity".» CDF, *Responses to Some Questions Regarding Certain Aspects of the Doctrine on the Church*, 29 June 2007, in AAS 99 (2007), pp. 604-608; Responses to the questions 2 and 3. English version in www.vatican.va.

theologians, also orthodox theologians,[15] although applied to the characteristic of catholicity – one could distinguish between the '*qualitative* or *intensive* full unity', already existing in the Catholic Church, and '*quantitative* or *extensive* full unity', which we hope to reach progressively as a gift of the Spirit and of the personal conversion of our hearts. This 'quantitative' unity gives meaning to the following affirmations in the Encyclical *Ut unum sint*: «Full unity will come about when all share in the fullness of the means of salvation entrusted by Christ to his Church» (no. 86). This 'qualitative' unity is, however, indicated by another passage: «It is not a matter of adding together all the riches scattered throughout the various Christian Communities in order to arrive at a Church which God has in mind for the future. (...) This reality is something already given. (...) The elements of this already-given Church exist, found in their fullness in the Catholic Church and, without this fullness, in the other Communities» (*ibid*., no. 14).

«Therefore, when Catholics use the words "Churches", "other Churches", "other Churches and ecclesial Communities" etc., to refer to those who are not in full communion with the Catholic Church, this firm conviction and confession of faith must always be kept in mind" (*DE 1993*, n. 17).[16]

«Hence it is possible to apply the concept of communion *in analogous fashion* to the union existing among particular

[15] Cfr., e.g., P. Evdokimov, *L'Ortodossia*, Il Mulino, Bologna 1965, p. 224; or S.N. Bulgakov, *Das Selbstbewusstein der Kirche*, in «Orient und Occident» 3 (1930), p. 5 (cited in A. Nichols, *Theology in the Russian Diaspora: Church, Fathers, Eucharist in Nikolai Afana'ev (1893-1966)*, Cambridge University Press, Cambridge 1989, p. 149).

[16] We should remember that in the ecclesiological field the term "Church" is reserved for the Christian communities that preserve the valid Eucharist, while «On the other hand, the ecclesial communities which have not preserved the valid Episcopate and the genuine and integral substance of the Eucharistic mystery are not Churches in the proper sense; however, those who are baptized in these communities are, by Baptism, incorporated in Christ and thus are in a certain communion, albeit imperfect, with the Church.» CDF, *Dominus Iesus*, no. 17.

Churches, and to see the universal Church as a *Communion of Churches*» (*Communionis Notio*, no. 8). Sometimes, however, «it is asserted that every particular Church is a subject complete in itself, and that the universal Church is the result of a *reciprocal recognition* on the part of the particular Churches. This ecclesiological unilateralism, (…) betrays an insufficient understanding of the concept of communion» (*Ibid.*). Indeed, as the same document affirms: "some approaches to ecclesiology suffer from a clearly inadequate awareness of the Church as a *mystery of communion*, especially insofar as they have not sufficiently integrated the concept of *communion* with the concepts of *People of God* and of the *Body of Christ*.» (*Communionis Notio*, no. 1).

4. The "Sister Churches" and Eucharistic Ecclesiology

In spite of the long ecumenical journey, not everyone yet understands how the Catholic Church might recognise other communities as "Churches" without for that reason falling into the error of considering the One Church of Christ as a federation of Churches.[17] To give an adequate response, we must integrate the concept of communion with that of the Body of Christ, that is to say to integrate the Ecclesiology of Communion with Eucharistic Ecclesiology. The pioneer of Eucharistic Ecclesiology was the orthodox canonist Nicolaj Afanasieff (1893-1966).[18] However, it is Catholic theology

[17] John Paul II, indeed, has clearly attested that «this universal Church cannot be conceived as the sum of the particular Churches, or as a federation of particular Churches.» John Paul II, *Address to the Bishops from USA, 16 Settember 1987*, in *Insegnamenti di Giovanni Paolo II,* X, 3, (1987), p. 555. Electronic version in w2.vatican.va. Cfr. also CDF, *Dominus Iesus*, no. 17c.

[18] Afanasieff or Afanasiev, depending on the transliteration. For his bibliography, cfr. «Irenikon» (1967/II), pp. 297-300. Despite critics who considered him too localist, Afanasieff was a teacher of teachers and with his genious was the forerunner of the strong development of today's Eucharistic Ecclesiology.

that has developed Eucharistic Ecclesiology[19] – introduced thereafter in Council Vatican II – correcting many elements of this orthodox author's ecclesiology, principally those arguments contrary to Primacy, particularly based on the claimed 'fullness' of the Local Church. But on this we will return later.

Following the Magisterium of Vatican Council II,[20] the new catechism teaches: "*The Eucharist makes the Church*" (*CCC* no. 1396).[21] Where there is a Christian community that *constitutionally* (therefore individual cases are not enough) celebrates the Eucharist validly,[22] there we find the Church of Christ, with a greater or lesser fullness.[23]

Thanks to the existence of apostolic succession, of priesthood and of the valid Eucharist (cfr. *UR* n. 15c), this ecclesiality

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[19] Catholic theologians have written on this argument as contemporaries, in dialogue with Afanasieff, or perhaps even before him. Cfr. H. De Lubac, *Meditation sur l'Eglise,* Paris 1953, pp. 129-137.

[20] Cfr. *SC* no. 41b; *LG* nos. 3b, 11b, 26a; *CD* no. 30; *UR* no. 2a.

[21] Cfr. H. De Lubac, *Meditation sur l'Eglise,* Paris 1953, pp. 135-136. Cfr. also A. Bandera, *La Iglesia "communio sanctorum": Iglesia y Eucaristía*, in AA.VV., *Sacramentalidad de la Iglesia y Sacramentos. IV Simposio internacional de Teología de la Universidad de Navarra,* Pamplona 1983, p. 355. This truth, and its consequences, is confirmed with force by John Paul II in the Encyclical meaningfully titled *Ecclesia de Eucaristia*, of 17 April 2003, above all in the chapters 2-4: nos. 21-46.

[22] "Valid Eucharist" is the expression used by many post Conciliar documents, simplifying the Conciliar expression «genuine and integral substance of the Eucharistic mystery.» (*UR* no. 22c).

[23] Also some Orthodox theologians – from their point of view – admit this reasoning. Evdokimov, for example, has written: «L'Eglise reste une et indivise (…). Si les sacrements sont célébrés et si le salut est donné, la séparation aparent perd quelque chose de sa force négative d'exclusion et d'excommunication.» P. Evdokimov, *Quels sont les souhaits fondamentaux de l'Eglise orthodoxe vis-à-vis de l'Eglise catholique?*, in «Concilium» 14 (1966), p. 70. The same thing is affirmed, among others, by N. Nissiotis, *L'appartenence a l'Eglise*, (cited in Y. Spiteris, *La Chiesa Ortodossa riconosce veramente quella Cattolica come «Chiesa sorella»?*, in «Studi Ecumenici» 14 (1996), pp. 43-82 [here: p. 70]).

is particularly recognised in the Oriental non-Catholic Churches. Pope John Paul II, in the allocution addressed to the representatives of the Orthodox Church in Poland said: «Today we see more clearly and understand better the fact that our Churches are Sister Churches. To say "Sister Churches" is not just a polite phrase, but rather a fundamental ecumenical category of ecclesiology»[24] (cfr., also, *Ut unum sint*, no. 56). This reciprocal recognition as Sister Churches was confirmed in no. 14 of the famous document of Balamand[25] and in no. 2 of the *Common Declaration of Pope John Paul II and of the Ecumenical Patriarch Bartolomaios I*.[26] The absolute novelty of these last two documents is found in the *reciprocity* of the recognition.[27] However, «It must always be clear ... that the one, holy, catholic and apostolic Universal Church is not sister but *mother* of all the particular Churches. One may also speak of *sister* Churches, in a proper sense, in reference to particular Catholic and non-catholic Churches; thus the particular Church of Rome can also be called the *sister* of all other particular Churches. However, as recalled above, one cannot properly say that the Catholic Church is the *sister* of a particular Church or group of Churches.»[28] The Congregation

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[24] John Paul II, *Address to representatives of the Orthodox Church in Poland, Bialystok, June 5, 1991,* in «Information Service» 77 (1991/II), p. 39.

[25] The Joint International Commission for the Theological Dialogue between the Catholic Church and the Orthodox Church (as a Whole), *Uniatism, Method of Union of the Past, and the Present Search for Full Communion,* Balamand (Liban), 23 June 1993, o.c.

[26] *Common Declaration of Pope John Paul II and of the Ecumenical Patriarch Bartholomaios I,* 29 June 1995, in «L'Osservatore Romano» 30 June - 1 July 1995, p. 1.

[27] However, the Greek Orthodox Church doesn't accept the document of Balamand precisely because it doesn't accept the recognition of the Roman Catholic Church as Sister Church. Cfr. Y. Spiteris, *La Chiesa Ortodossa riconosce veramente quella Cattolica come "Chiesa sorella"?*, o.c., pp. 75-80.

[28] Congregation For The Doctrine Of The Faith, *Note on the expression "Sister Churches"*, 30 June 2000, in «L'Osservatore Romano», 28 October 2000, p. 6, nos. 10-11. English version from www.vatican.va.

for the Doctrine of Faith repeats, once more: «it must also be borne in mind that the expression *sister Churches* in the proper sense, as attested by the common Tradition of East and West, may only be used for those ecclesial communities that have preserved a valid Episcopate and Eucharist.»[29]

The Orthodox Churches are recognized by the Catholic Church as "Particular Churches" (*UR* no. 14) because, in every valid celebration of the Eucharist, the Church one, holy, catholic and apostolic, is truly present,[30] as the Congregation for the Doctrine of Faith reminds us in no. 17 of *Communionis notio*. The visible ecclesial communion of the mystical body of Christ that is the Church, has its root and its centre in the Holy Eucharist,[31] true Sacramental Body of Jesus.

5. The Fullness of the Local Church?

However, – as we have mentioned above – the Orthodox theologians who propose Eucharistic Ecclesiology base on this their arguments against Primacy, making central the 'fullness'

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[29] *Ibid*., n. 12.

[30] «Through the celebration of the Lord's Eucharist in these single Churches, the Church of God is edified and grows» (*UR* no. 15a).

[31] Cfr. *LG* no. 11; *CD* no. 30; *Communionis notio* no. 5; *Ecclesia de Eucharistia* nos. 3, 23, 34. However, the Pope clarifies that «The celebration of the Eucharist, however, cannot be the starting-point for communion; it presupposes that communion already exists, a communion which it seeks to consolidate and bring to perfection. The sacrament is an expression of this bond of communion both in its invisible dimension, which, in Christ and through the working of the Holy Spirit, unites us to the Father and among ourselves, and in its visible dimension, which entails communion in the teaching of the Apostles, in the sacraments and in the Church's hierarchical order. The profound relationship between the invisible and the visible elements of ecclesial communion is constitutive of the Church as the sacrament of salvation. Only in this context can there be a legitimate celebration of the Eucharist and true participation in it. Consequently it is an intrinsic requirement of the Eucharist that it should be celebrated in communion, and specifically maintaining the various bonds of that communion intact.» (*Ecclesia de Eucharistia*, no. 35).

of the Particular Church. Zizioulas, for example, opines that Catholicity means the completeness and fullness and totality of the body of Christ exactly as it is put in act in the eucharistic community, and that in the primitive Church every eucharistic community was in full communion with the rest in virtue *not of an added external structure but* in virtue of Christ totally represented in every one of them.[32]

To respond to this objection, John Paul II, in 1987, affirmed: «we must see the ministry of the Successor of Peter, not only as a 'global' service, reaching each particular Church from 'outside' as it were, but *as belonging already to the essence of each particular Church from 'within'*»[33], because «communion with the universal Church, represented by Peter's Successor, is not an external complement to the particular Church, but one of its internal constituents» (*Communionis notio*, no. 17).

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[32] Cfr. J. D. Zizioulas, *The Eucharistic Community and the Catholicity of the Church*, in «One in Christ» 6 (1970), pp. 319 e 327.
Most of these Orthodox ecclesiologists refuse to speak of a 'Universal' Church because for them this term acknowledges a 'universal ecclesiology' – something they refuse –, although they do not deny the 'ecumenical' aspect of the Church. (Due to this terminological difficulty, I note that in this article the terms '*Universal Church*' and '*Church of Christ*' are used synonimously to refer to this aspect). Perhaps this refusal can be explained by erroneous conception of the universal aspect of Catholic ecclesiology. In truth, Catholic doctrine does not accept the theory of the Pope as a 'universl bishop'. The point of view held by Florovskii and others is, on the contrary, closer to the Catholic position, through the deepening of understanding on the essentiality of the universal aspect of the Church (cfr. J.R. Villar, *La teologia ortodossa della Chiesa locale*, in P. Rodríguez (ed.), *L'Ecclesiologia trent'anni dopo la 'Lumen Gentium'*, Roma 1995, pp. 201-223).

[33] John Paul II, *Address at the Meeting with the Bishops of the United States of America, Los Angeles 16 September 1987*, no. 4, in *Insegnamenti di Giovanni Paolo II*, X-3 (1987), p. 556 (English translation from www.vatican.va; italics are in the original text). Cfr. also, J. Card. Ratzinger, *Intervento durante la presentazione della Lettera 'Communionis notio'*, 15 giugno 1992, in «L'Osservatore Romano» 15-16 giugno 1992, p. 9. Cfr. *Communionis notio*, no. 18.

I will try to show the foundation of this assertion:

Developing Afanasieff's thought and correcting it somewhat, another orthodox theologian – Florovksii – said that each "*small Church*" is a comprehensive image of the whole Church, inseparable from its unity and its fullness,[34] and Zizioulas completes the idea by sustaining that the Eucharist of each Local Church includes the whole Church, as a condition *sine qua non* for the Eucharistic celebration.[35] As one can see, the approach of these orthodox theologians can become ambient of fertile ground for meeting with the catholic position.

As Villar has said correctly, if we accept the mutual interiority between the Universal Church and the Local Church, that is to say, if each local celebration of the community is truly the whole Body of Christ, we should accept that those who celebrate there are *the* Church of Christ, simultaneously Local and Universal.[36] Consequently, «each legitimate Eucharistic celebration of the People of God requires the constitutive structure of the Church as an organically structured priestly body, and for this reason the communional bond of the Local Church with its bishop, and of the bishop with his brothers in the episcopacy and its Head, the College that is a continuation of the apostolic body.»[37] This is the reason why, in the case of Orthodox Churches, their valid Eucharistic celebration recalls

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[34] Cfr. NICHOLS, *Theology in the Russian Diaspora,* o.c., p. 160. Also P. Trembelas and D. Staniloae are close to Florovskii regarding the essentiality of the universal aspect of the Church. These authors contrast in certain measure with the localist vision of Afanasieff, Schmemman, Evdokimov, etc. Cfr. J.R. VILLAR, *La teologia ortodossa della Chiesa locale*, o.c.

[35] Cited in Y. SPITERIS, *La teologia ortodossa neo-greca*, EDB, Bologna 1992, p. 414.

[36] Cfr. J.R. VILLAR, *La teologia ortodossa della Chiesa locale*, o.c., p. 222.

[37] EDITORIAL, *La Chiesa come Comunione. A un anno dalla pubblicazione della Lettera «Communionis notio» della Congregazione per la Dottrina della Fede*, in «L'Osservatore Romano», 23 June 1993, pp. 1 and 4. (My translation).

objectively the communion *with Peter* (cfr. *Communionis notio* no. 14).

Having said this, we must still explain in what sense the "fullness" of the Local Church is incompatible with ecumenism. There is no doubt that in the Particular Churches «the Universal Church is rendered present with all its essential elements» (*Communionis notio*, no. 7). However, «in one of the previous drafts of *CD* no. 11 it was said that "in her (in the Particular Church) is truly and *fully* present and active" the universal Church. The text was modified, eliminating the adverb *fully,* because "the Church of Christ is not present fully in the Particular Church": the mystery of *the whole* is present in the *part*, precisely because it is *part of the whole*, without ceasing to be so.»[38] The meaning of this phrase is not to deny *a priori* the fullness of the Local Church, less still (see above) to consider the Universal Church as the sum of its "parts".[39] The meaning is rather that of denying the ecclesial fullness of the Local Church if it purports to live isolated and independent from the others. In fact, «as Cardinal J. Ratzinger efficiently explains, the Eucharist, as presence of Christ and his sacrament, builds the Church ... Christ is present not in part, but in all its reality, so that the Church is present in its totality wherever He is found ... The opposite is true, however: Christ can only be one, so there can only be all of Christ together with the others, that is to say in unity.»[40] With the necessary nuances, even an orthodox writer – Schmemann – affirms the same: «it is

[38] J.L. Gutiérrez, *Organización jerárquica de la Iglesia*, in AA.VV. *Manual de Derecho Canónico*, Eunsa, Pamplona^2 1991, p. 349. (My translation).

[39] Afanasieff does not like the term "part" because – he says – the local Church is not a "part" of the Church of Christ but an empirical manifestation of this (just as the Eucharist is unique but in the different Eucharistic assemblies). Cfr. N. Afanasieff, *La Chiesa che presiede nell'amore*, in E. Cullmann et al., *Il Primato di Pietro nel pensiero contemporaneo,* Il Mulino, Bologna 1965, pp. 487-555.

[40] J. L. Gutiérrez, *Organización jerárquica,* o.c., p. 349.

only in accord with the other Churches that the Local Church possesses fullness.»[41]

But the only realistic way for the Churches to stay fully open to agreement with the other Churches resides in the communion with the visible centre of unity: the Bishop of the Church of Rome. The orthodox bishop Kallistos of Diokleia has written: «It is easy to say that the Eucharist creates the unity of the Church. But Eucharistic ecclesiology, if not accompanied by a firm and practicable doctrine of Primacy, is in fact unachievable.»[42] It is, indeed, a tragic reality that neither having the same Eucharist nor reciprocal recognition between the Churches have been sufficient as criteria for the full visible unity of the Church of Christ. Experience shows the formation of isolated groups of Churches, in communion within their own groupings, but without communion among them. This happens because there is no reference to an element of visible assembly – the successor in the See of Peter – that in a mysterious way is in the service of the effective force of full and visible unity, required dramatically by the Body of Christ, broken by our divisions.[43]

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[41] A. Schmemann, *La nozione di primato nell'ecclesiologia ortodossa*, in Cullmann et al., *Il Primato di Pietro nel pensiero contemporaneo,* Il Mulino, Bologna 1965, p. 632.

[42] Kallistos di Diokleia, *Un primato diverso e necessario*, in «Il Regno-Attualità» (8/1997), p. 247. (My translation).

[43] Schatz expresses well the problematic of nationalism at the base of many of divisions in the Church: «When things arrive at loggerheads, when there is no dialogue and no discussion in the level of blocking the situation, when it arrives directly to face the persecution and the oppression from outside, then the elementary question that the Church has to put is where to find the centre of unity, towards which orient oneself in the last analysis, from which one cannot be separated at no cost and through which one acquires the proper identity of the Church of Christ: whether it is found in the same state, in the proper nation in accord with the determined impulse of proper time or in Rome. Obviously this identity is, ultimately, the same Christ crucified and resurrected. But the sacramental structure of the Catholic Church requires that it appears also in a perceptible ecclesial sign, that does

«it is precisely the Eucharist that renders all self-sufficiency on the part of the particular Churches impossible. Indeed, the unicity and indivisibility of the eucharistic Body of the Lord implies the unicity of his mystical Body, which is the one and indivisible Church (...) For this reason too, the existence of the Petrine ministry, (...) bears a profound correspondence to the eucharistic character of the Church» (*Communionis notio*, no. 11). «All the Churches are in full and visible communion, because all the Pastors are in communion with Peter and therefore united in Christ» (*Ut unum sint*, no. 94).[44]

Although all the Local Churches are truly members of the Universal Church, they become a complete realisation of it only when they are open to communion with the other Particular Churches and recognise the will of Jesus Christ concerning the Petrine ministry of the successor of Peter (cfr. *Ut unum sint* no. 97) as a ministry of unity, not of domination. Unity in a visible Church[45] that – as St John Paul II clarified – means neither absorption nor fusion,[46] but the richness of variety in the truth.

Considering all this, it can be affirmed that the movement of the different Churches towards full unity with the successor

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not identify with the power this world and neither it depends on it.» K. Schatz, sj., *Primato, ministero di comunione*, in «Il Regno-Attualità» (8/1997), p. 240. My translation.

[44] All this may also serve for undoing the prejudice of seeing with suspicion the adjective "Roman" applied to the Catholic Church. Some identify "Roman" with "Latin" or even "Italian", with connotations of domination and superimposing of one Church on others, something that does not at all correspond to the reality. Catholics, Orientals or Occidentals, of all the origins, feel "Roman". «This Catholic Church is Roman. I savor that word: Roman! I feel myself Roman, for Roman means universal, catholic; for it leads me to love tenderly the Pope, *il dolce Cristo in terra*, as St Catherine of Siena, whom I count as a most beloved friend, liked to repeat.» J. Escrivá, *Loyalty to the Church*, o.c., p. 11.

[45] Cfr. *DE 1993* no. 20; *Ut unum sint* no. 78.

[46] Cfr. John Paul II, Encyclical Letter *Slavorum Apostoli*, 2 June 1985, no. 27a, in AAS 77 (1985), p. 807.

of Peter is certainly the path towards the fullness of their own internal unity.[47]

Communion with Peter, in this hoped-for case, should find in the future a visible expression in harmony with what existed during the first millennium (cfr. *Ut unum sint* no. 95; *Communionis notio* no. 18). «The Orthodox Churches would find it difficult to accept a Roman primacy that differs from that of the first centuries, even if some orthodox feel the need for a ministry of unity in a different form from the one currently exercised by the Patriarch of Constantinople.»[48]

Since St John Paul II, the Popes, in fact, have been asking courageously for new ideas on how to exercise the Petrine ministry: «I am convinced – says the great Polish Pope – that I have a particular responsibility in this regard, above all in acknowledging the ecumenical aspirations of the majority of the Christian Communities and in heeding the request made of me to find a way of exercising the primacy which, while in no way renouncing what is essential to its mission, is nonetheless open to a new situation (…). I insistently pray the Holy Spirit to shine his light upon us, enlightening all the Pastors and theologians of our Churches, that we may seek – together, of course – the forms in which this ministry may accomplish a service of love recognized by all concerned» (*Ut unum sint* no. 95).[49]

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[47] Cfr. R. Lanzetti, *La Iglesia como comunión*, in CDF, *El misterio de la Iglesia y la Iglesia como comunión, Introducción y comentarios*, Madrid 1994, p. 175.

[48] J.-M.R. Tillard, *Primato*, in AA.VV., *Dizionario del movimento Ecumenico,* EDB, Bologna 1994, pp. 883-885 (here p. 884). My translation.

[49] «We express our sincere and firm resolution, in obedience to the will of our Lord Jesus Christ, to intensify our efforts to promote the full unity of all Christians, and above all between Catholics and Orthodox. As well, we intend to support the theological dialogue promoted by the Joint International Commission, instituted exactly thirty-five years ago by the Ecumenical Patriarch Dimitrios and Pope John Paul II here at the Phanar, and which is currently dealing with the most difficult questions that have marked the history of our division and that require careful and detailed study. To this end, we offer the assurance of our

6. The exercise of the Petrine ministry and its essence: Primacy of Jurisdiction and Infallibility

The principal Orthodox criticisms of the role of the Roman Pontiff come from not accepting the Catholic conception of the primacy of jurisdiction and infallibility. The declaration made in 1988 by the "North American Orthodox – Roman Catholic Consultation" recognises frankly that the disaccord between the Orthodox Church and Roman Catholic Church is principally centred on the way in which to actualise in the life of the Church the *leadership* exercised by Peter in expressing and confirming the faith of the other disciples.[50]

The Orthodox have affirmed with vigour that the role of Peter in the Apostolic College is reflected principally in the role of the bishop in the Local Church. For example, among many others, Evdokimov writes: «Saint Peter is the *first* bishop who celebrates the *first* supper of the Lord; in this sense he is "stone", "rock", Eucharistic foundation that will last until the *Parousia*. (...) Christ founded his Church on Peter as first bishop-president of the first supper of the Lord and, therefore, first manifestation of the apostolic episcopate. Every bishop (...) of every diocese is therefore the direct successor of Peter, of the apostolic power to celebrate the Eucharist.»[51]

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fervent prayer as Pastors of the Church, asking our faithful to join us in praying "that all may be one, that the world may believe" (Jn 17:21).» Pope Francis and Patriarch Bartholomaios I, *Common Declaration*, 30 November 2014, Phanar (Istambul), in www.vatican.va.

[50] Cfr. North American Orthodox - Roman Catholic Consultation, *Primacy and Conciliarity*, 26-28 October 1989, in «Origins» 19 (1989), pp. 471-472. Cfr., also, *Ut unum sint*, no. 88.

[51] P. Evdokimov, *L'Ortodossia*, Il Mulino, Bologna 1965, p. 188-189. (My translation). Also Zizioulas has written that «every bishop sits on the chair of Peter.» J. Zizioulas, *La continuità apostolica della Chiesa e la successione apostolica nei primi cinque secoli*, in G. Puglisi (ed.), *Continuità apostolica della Chiesa e successione apostolica*, Corso breve di ecumenismo, vol. IX, Centro Pro Unione, Roma 1996, p. 50 (My translation).

But this reasoning does not explain the supra-local role that Peter carried out. Among others, Evdokimov resolves the problem of the necessary unity of faith and of life among the Churches by recourse to the *consensus ecclesiae* or *receptio*[52] concepts that – without denying their importance and richness of content – are too general[53] and therefore impracticable on their own as criteria for maintaining visible unity.[54] Indeed, "reception", given its character as a sociological phenomenon, requires the verification of data within very broad margins of space and time. Therefore, it would be impossible to discern authentic reception without reference to a guarantor who gives authoritative and definitive testimony to the truth of this reception. As we will see later Afanasieff tries to overcome this difficulty when he speaks of the "Priority Church" in the testimony of reception, but even this is not sufficient.

The supra-local role of vigilance over unity carried out not only by the College but also singularly by the Bishop of Rome is an incontestable fact in the first millennium,[55] and is also

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[52] Cfr. P. Evdokimov, *L'Ortodossia*, o.c., pp. 227-229.

[53] «En las últimas tres décadas se ha manifestado esta tendencia a extender cada día más el empleo de esta palabra a fenómenos de recepción o, respectivamente, no-recepción en la Iglesia, que no presentan un denominador común y están expuestos al peligro de que se volatilice el núcleo esencial de la recepción.» A. Antón, *La "recepción" en la Iglesia y eclesiología (I)*, in «Gregorianum» 77 (1996), pp. 57-96 (with rich bibliography). Cfr. also H.J. Pottmeyer, *Reception and submission*, in «The Jurist» 51 (1991), pp. 269-292. In the canonical side we can cite also the article of J.A. Coriden, *The canonical doctrine of reception*, in «The Jurist» 50 (1990), pp. 58-82.

[54] «Toda reflexión, por tanto, sobre un determinado "proceso de recepción", cualquiera que éste sea, para que tenga validez, es preciso que parta del análisis de los datos que sobre la realidad concreta de la *recepción* aportan la unidades eclesiales dentro de coordenadas espacio-temporales suficientemente amplias. Este postulado hace aún más difícil en el futuro la tarea de discernir la "recepción" auténtica de la meramente aparente o de la "no-recepción".» (A. antón, *La "recepción" en la Iglesia*, o.c., p. 461).

[55] Cfr. M. Maccarrone (ed.), *Il Primato del Vescovo di Roma nel Primo*

recognised by almost all the medieval orthodox authors: Fozio, Palamas, Camateros, Cabasilas, etc., although they usually condition it to remaining in the orthodoxy of the faith.[56] Precisely for this reason I retain that the question of infallibility is fundamental for Primacy, as we will have opportunity to say later.

Many Orthodox accept universal primacy as a "primacy of honour" granted to a *primus inter pares*.[57] According to this

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millennio. Ricerche e testimonianze, Atti del Symposium storico-teologico, Roma 9-13 ottobre 1989, Città del Vaticano 1991.

[56] Cfr. J. Meyendorff, *San Pietro, il suo Primato e la sua successione nella teologia bizantina,* in Cullmann et al., *Il Primato di Pietro*, o.c., pp. 587-613.

[57] As we know, the Russian Orthodox Church did not attend the 2007 Ravenna meeting nor approved its Statement [see footnotes 7 and 61], and in 2013 it published its own position on Primacy in the Universal Church: «On the level of *the Universal Church* as a community of autocephalous Local Churches united in one family by a common confession of faith and living in sacramental communion with one another, primacy is determined in conformity with the tradition of sacred diptychs and represents *primacy in honour*. (...) In the first millennium of church history, the primacy of honour used to belong to the chair of Rome. After the Eucharistic community between Rome and Constantinople was broken in the mid-11th century, primacy in the Orthodox Church went to the next chair in the diptych order, namely, to that of Constantinople. Since that time up to the present, the primacy of honour in the Orthodox Church on the universal level has belonged to the Patriarch of Constantinople as the first among equal Primates of Local Orthodox Churches. The source of primacy in honour on the level of the Universal Church lies in the canonical tradition of the Church fixed in the sacred diptychs and recognized by all the autocephalous Local Churches. The primacy of honour on the universal level is not informed by canons of Ecumenical or Local Councils. The canons on which the sacred diptychs are based do not vest the primus (such as the bishop of Rome used to be at the time of Ecumenical Councils) with any powers on the church-wide scale. The ecclesiological distortions ascribing to the primus on the universal level the functions of *governance* inherent in primates on other levels of church order are named in the polemical literature of the second millennium as 'papism'.» The Russian Orthodox Church – Department

vision Primacy was given by the other Churches to the Church of Rome for reasons of that time: i.e. its being the capital of the empire, as one reads in the polemical canon 28 of Calcedonia, never accepted by the Catholics. Roman-Catholics, instead, have claimed for the bishops of Rome, not only the first place in honour among their episcopal colleagues, but also the genuine 'Petrine' role.[58] However, we should say that – as it is now well known – the expression 'primacy of honour' in the context of first councils did not signify only homage and dignity.[59] Even Zizioulas (and others), within his orthodox conception of Primacy weighted by synodality (according to can. 34 of the Apostles), does not consider the ministry of the so-called 'Protos' only *ad honorem*, because – he says – being the representative of unicity is just as constitutive of the Church as communion is.[60]

Despite this, the key point of the dialogue with the orthodox on Primacy in the universal Church is not, in my opinion, that of the necessity of this ministry of unity: I believe that on this necessity almost all agree.[61] The real central point is that of

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for External Church Relations, *Position of the Moscow Patriarchate on the Problem of Primacy in the Universal Church*, 26 December 2013, in https://mospat.ru/en/2013/12/26/news96344.

[58] Cfr. North American Orthodox-Roman Catholic Consultation, *Primacy and Conciliarity*, o.c.

[59] B.E. Daley, *Position and Patronage in the Early Church: The original meaning of "Primacy of Honour"*, in «Journal of Theological Studies» 44 (1993), pp. 529-553.

[60] Cfr. J. Zizioulas, *Las Conferencias episcopales: reacciones ecuménicas. Causa nostra agitur? Punto de vista ortodoxo*, in H. Legrand, J. Manzanares, A. García (eds.), *Las Conferencias episcopales,* Salamanca 1988, pp. 465-466.

[61] In this sense, the *Ravenna Statement* has said: «at the universal level, where those who are first (*protoi*) in the various regions, together with all the bishops, cooperate in that which concerns the totality of the Church. At this level also, the *protoi* must recognize who is the first amongst themselves.» The Joint International Commission for the Theological Dialogue between the Catholic Church and the Orthodox Church (as a Whole), *Ecclesiological and Canonical Consequences of the Sacramental Nature of the Church. Ecclesial Communion, Conciliarity and*

explaining the legitimate succession of the Bishop of Rome in the Petrine universal ministry: managing to see that the universal ministry of the apostle Peter is perpetuated in the bishops of the city where he had his episcopal see when the day of his martyrdom came. This is posited as the only possible criteria for the designation of the successor of St Peter to this role of guarantor of unity in the Church of Christ. If indeed, the criterion was the political importance of a city or another type of human parameter, the holding of Primacy would be subject to such uncertainty as to render impossible this role of guarantor. For this reason, in spite of the limits of his setting of the argument, Afanasieff cannot avoid recognizing that the role of 'Priority Church' does not originate in a human concession but in a "gift-election from God".[62]

a) Jurisdiction?

We have said that, also for the orthodox, Primacy is not simply "ad honorem". I agree, but if the ministry of unity carried out by the Primate is not only "ornamental", how do the orthodox explain it?

Schmemann affirms that [orthodox] Eucharistic ecclesiology does not exclude Primacy, but rather the idea of power.[63] Indeed, Afanasieff affirmed that for preserving ecclesiality, the multitude of Churches *has to be* in agreement by means of the authority of testimony of a 'Priority' Church. Afanasieff explains that every Local Church must be in harmony with the others, because they are the same Church. This reception-testimony would be the proof that what happens in another Local Church is in conformity with the will of God. In spite of the fundamental equality of all the Local Churches there is a hierarchy of Churches, founded on the authority of the testimony of each single Local Church, with greater authority

Authority, Ravenna 13 October 2007, in «Information Service» 126 (2007/IV), pp. 178-184 [here, p. 180, no. 10].

[62] Cfr. N. Afanasieff, *La Chiesa che presiede nell'amore*, o.c., p. 515 et post.

[63] A. Schmemann, *La nozione di primato nell'ecclesiologia ortodossa*, o.c., p. 632.

where the Church's love is greater. As we have said, according to Afanasieff, among the Churches there is one that has the priority of authority by means of a gift and election by God, and the reception-testimony of this Priority Church has a decisive value for the others, but without that this implying juridical power – the incoherence of this reasoning can be found here – or that it can impose its testimony in a binding way.[64] In the end, Afanasieff admits that «the concept of primacy is the same as that of priority, but understood in its juridical aspect.»[65] However, I believe that if we accept Afanasieff's affirmation regarding the necessity of harmony between the Churches by means of the testimony of the Priority Church, this "authority" cannot be anything other than "power" (in the good sense of the word), because that *duty* of harmony cannot be anything other than 'juridical'. Indeed, a testimony that cannot externally oblige does not possess sufficient authority to guarantee visible unity.

The fundamental problem, I believe, is found in the need to strip away the negative meanings of the terms 'power' and 'jurisdiction' and to restore their more genuinely positive meaning of service.

For this, it might be useful to indicate the conclusion reached by the Anglican-Catholic Commission: it is enlightening, despite its limits. Having defined jurisdiction as «the authority or power (*potestas*) necessary for exercising an office», the Commission affirms that «also universal primacy exercises the jurisdiction needed for carry out its functions». In this way «universal primacy has the right, in particular cases, to intervene in the affairs of the diocese or of receiving appeals against the decisions of a diocesan bishop» because the primate «has the task of safeguarding the faith and the unity of the Church.»[66] Almost the same words are used by the Pope: «The

[64] Cfr. N. Afanasieff, *La Chiesa che presiede nell'amore*, o.c.
[65] *Ibid.*, p. 552.
[66] Commissione Internazionale Anglicana - Cattolica Romana, *Dichiarazione*

mission of the Bishop of Rome within the College of all the Pastors consists precisely in "keeping watch" (*episkopein*), like a sentinel, so that, through the efforts of the Pastors, the true voice of Christ the Shepherd may be heard in all the particular Churches. (...) With the power and the authority without which such an office would be illusory, the Bishop of Rome must ensure the communion of all the Churches» (*Ut unum sint*, no. 94 bc).

The challenge comes – as we have seen – in how this authority is exercised, in order to render it more consonant with its true nature of service: «my ministry is that of servus servorum Dei. This designation is the best possible safeguard against the risk of separating power (and in particular the primacy) from ministry. Such a separation would contradict the very meaning of power according to the Gospel: "I am among you as one who serves" (Lk 22:27), says our Lord Jesus Christ, the Head of the Church» (*Ut unum sint,* no. 88).

b) Infallibility?

If, as Afanasieff said,[67] the testimony of the 'Priority Church' has to be such that it can guarantee the indication of where the will of God for His Church is to be found, it is not clear how this testimony can be fallible. Afanasieff – and in general all the orthodox – sustains that the testimony can fail and lose its 'priority', that would then pass to another Church.[68] This is in line with the thought of the medieval orthodox theologians who made the Petrine role conditional on permanence of

concordata sull'autorità nella Chiesa II, Windsor 1981, in *Enchiridion Oecumenicum* 1, Dialoghi internazionali 1931-1984, Bologna 1986, pp. 1-88, nos. 118-122. Similar ideas are expressed by J.M-R. Tillard, *The Bishop of Rome*, Glazier Inc., Wilmington (Delaware) 1983, pp. 123-157.

[67] Vide supra.

[68] Cfr. N. Afanasieff, *La Chiesa che presiede nell'amore*, o.c., p. 517.

orthodoxy in faith.[69] However, if things were thus, how could there be true certainty in the Church?[70]

The orthodox (among others) vehemently criticise the dogmatic definition of Council Vatican I on the infallibility of

[69] Vide supra.

[70] Schatz affirms the «ecclesial "right of resistence" of a supra-juridical nature» before a Pope who is heretical, has gone mad or acts to damage the Church (K. SACHTZ, *Primato, ministero di comunione*, o.c., p. 245). In my opinion, even if I understand the point being made, Schatz's affirmation is imprecise (how are we to understand a 'right' that is 'supra-juridical'?), and, to some extent, dangerous because this right is affirmed in a negative sense as 'resistence'. Besides, given that the college of bishops without its head lacks the objective criteria for affirming itself as a legitimate ecclesial instance for judging the existence of this situation, in the end there would be the risk that, faced with papal decision that did not suit them, each member of the faithful might subjectify this judgment to suit their own ends. It is true, however, that Primacy must always seek harmony with the episcopal college (cfr. K. SCHATZ, *La primauté du Pape. Son histoire des origines à nos jours*, Ed. du Cerf, Paris 1992, pp. 258-261). Also, it cannot be denied that one person might with reason consider that some orientations of government taken centrally (curia) are not consonant with the Church of God. If we were to think – wrongly – that the doctrine of the Roman Pontiff's infallibility is applied to all of the Pope's decisions of government and those of the Roman Curia, then the critiscism would be understandable. However, this is not the content of the doctrine of infallibility. Not all the Pope's decisions are without defect (only those where the requirements of infallibility are reached) and besides, acts of government by the Roman Curia do not always directly involve the Roman Pontiff (only those approved by him in *specific form*: cfr. *Regolamento della Curia Romana*, art. 110). Therefore, faced with the possibility of a curial decision believed to be damaging (not something exceptional) there are formal means for contesting it. For decisions made personally by the Pope, however, there are no formal means of contesting, but obviously there are all the informal ways, usual in the government of the Church, for achieving this. From this point of view of juridical realism, these initiatives cannot be retained meta-juridical because they are not formally determined by the legal system. Indeed, episcopal collegiality includes the juridical responsibility, in these cases, of making one's own voice heard by the Pope in order to help him evaluate the opportuness of his decision.

the Roman Pontiff when he carries out singularly his role of guarantor of the unity of faith and morals in a definitive way (something which rarely ever happens). However, the reasons that led to this definition must be understood. I believe that the infallibility is required as a guarantee *sine qua non* for carrying out the Petrine ministry. This decision by the Council did not come about through an unnecessary or domineering whim.

Let me explain further. Using the terminology of Afanasieff, we can put the following question: if the Priority Church can make a mistake, then who can give the criteria for a valid and definitive testimony on God's will concerning a seriously disputed question? Can it be the Ecumenical Council alone? The orthodox have not had an Ecumenical Council since Nicea II (A.D. 787).[71] I think that they could never celebrate one without reference to a universal and binding Primacy.[72] Indeed, what is the ultimate criterion for definitively 'receiving' a council as ecumenical? This brings us back to the great question of 'receptio', which, when concerning contents of faith or morals, cannot be resolved otherwise than through the ultimate guarantee of Primacy[73].

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[71] «As the Orthodox experience from 787 teaches, and still more from 1453, it is not easy to call pan-Orthodox Councils. All the more today, when there is not a Bizantine Emperor who takes the initiative of the calling a Council.» Kallistos di Diokleia, *Un primato diverso e necessario*, o.c., p. 247. This author has recently asserted that the Great and Holy Pan-Orthodox Synod which will be celebrated in Crete in June 2016 cannot be considered an Ecumenical Council (cfr. Interview: *Metropolitan Kallistos Ware on the Great Council*, 7 March 2016, in www.ancientfaith.com/podcasts/ features/ware_holy_and_great_council).

[72] «En conséquence, on voit que le collège ne pourrait pas garantir sa propre unité et n'aurait même pas de fondement pour son pouvoir dans l'Eglise s'il manquait un critère objectif susceptible d'assurer sa dépendance envers l'Eglise, sa permanence objective en elle.» A. Carrasco Rouco, *Le Primat de l'évêque de Rome. Etude sur la cohérence ecclesiologique et canonique du Primat de jurisdiction*, Éditions Universitaires Fribourg Suisse 1990, p. 227.

[73] A. Antón underlines that true reception is one that, in the *consensus fidelium*, includes the magisterium of the bishops and also the infallible

This is not a question of personal prerogatives that place the Pope above the Church itself, or are based on human capability, but is a question of a gift from God *for* and *in* his Church: one of the concretisations of the promise of his perennial assistance. «No man – not even the apostles – has been called by Christ so that he might place himself above the Word and the Church, and determine what the true faith should be (…). The objective meaning of the Petrine ministry in its relation to the Universal Church is made possible by a special assistance of the Holy Spirit (the charism of infallibility), thanks to which the successor of Peter, in exercising his essential ministry, will not separate himself from the Universal Church. Thanks to the gift of this permanence in the truth of Tradition, the Petrine ministry can be, for each member of the faithful, the visible sign of the presence in history of the *Communio plena*.»[74]

«Peter's task is to search constantly for ways that will help preserve unity. Therefore he must not create obstacles but must open up paths. Nor is this in any way at odds with the duty entrusted to him by Christ: "strengthen your brothers in faith" (cfr. Lk 22:32).»[75]

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interventions of the Primate (cfr. A. Antón, *La "recepción" en la Iglesia y eclesiología (II)*, in «Gregorianum» 77 [1996], pp. 450-453 with footnotes 48 and 55).

[74] A. Carrasco Rouco, "Jurisdicción plena y suprema en el Vaticano I y Recepción. Respuesta a H.J. Pottmeyer", in A. García García, J. Manzanares, H. Legrand (eds.), *La recepción y la comunión entre las Iglesias,* III Coloquio Internacional de Salamanca, 8-14 April 1996, Universidad Pontificia de Salamanca, Salamanca 1997, pp. 303-304. (My translation).

[75] John Paul II, *Crossing the Threshold of Hope*, Knopf, 1995, p. 154.

Chapter 5

Ecclesiological Foundations of the Jurisdiction of the Orthodox Churches on Mixed Marriages with Catholics*

1. Introduction
2. CIC 1917 can. 1016 and CIC 1983 can. 1059
3. The power of jurisdiction of the non-Catholic Oriental Churches
4. Vatican II and the jurisdiction of the Orthodox Churches
5. Justification of this recognition

1. Introduction

All of us are aware that the actual canonical situation promises – or, better, already offers – a great richness of doctrinal development and of juridical technique, due, among the other reasons, to the existence of two codifications – Oriental and Latin – within the same Catholic canonical system.

We present now some reflections on the theological foundation and the ecumenical and juridical bearing of the new canon 780 § 2, 1º of CCEO[1], and of later parallel article 2 § 2, 1º of the

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* Updated version of the article of P. Gefaell, "Basi ecclesiologiche della giurisdizione delle Chiese ortodosse sui matrimoni misti", in J. Carreras (ed.), *La giurisdizione della Chiesa sul matrimonio e sulla famiglia*, Roma 1998, pp. 127-148.

[1] «Can. 780 - §1. Even if only one party is Catholic, the marriage of Catholics is regulated not only by divine law but also by canon law, with due regard for the competence of civil authority concerning the merely civil effects of such a marriage.

instruction *Dignitas connubii*, that applies this norm also for the Latin Church.

The question can be reassumed like this: does paragraph 2 of the Oriental canon and of the article in *Dignitas connubii*, indicate a "canonisation" of orthodox matrimonial law? I believe it certainly does not. In my opinion, the question goes much deeper. This second paragraph does not *grant* canonical effect but rather *recognises* the truly 'canonical' nature of the juridical norms that the Orthodox Churches possess (apart from those which according to Catholic doctrine are contrary to divine law).

The question does not concern a simple and gratuitous academic elucubration. Indeed if it only concerned the canonisation of these norms, then the accepting or refusing them would be reduced to a mere question of convenience. If, on the contrary, the question concerned the recognition due to an original reality, then admitting an orthodox law not contrary to divine law will be required in justice.

Given the subject of this study, it will not be possible for us to consider at length the case of the Ecclesial communities (protestants), which do not have a specific matrimonial law (CCEO, can. 780 § 2, 2°). I will say only that, in this circumstance, the most plausible thing is that this is a real 'canonisation' of the civil norms to which the canon here refers. As we will see, it is not, therefore, the same ecclesiological reason that is at the basis of recognition of the law of the Orthodox Churches. At the very most, it could be accepted that those ecclesial communities that have no valid episcopacy can create

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§2. In addition to divine law, marriage between a Catholic and a baptized non-Catholic is also regulated by: (1) the law proper to the Church or ecclesial community to which the non-Catholic belongs, if that community has its own matrimonial law; (2) the law that binds the non-Catholic, if it is an ecclesial community, if proper matrimonial law is lacking.»

ecclesiastical law only to the extent that the lay faithful can create law in the Church.

Moreover, even if it is very interesting and in close relationship with our theme, now it will not be possible for us to consider canon 781 CCEO, which indicates the criteria to follow in judging the validity of matrimony of non-Catholic Christians. Of this we will speak in the following chapter.

Few of the things I will say are new. Many canonists have already treated this theme.[2] I am concerned only to induce scholars and all those who have to make and apply law in the Church to reflect on this theme in order to make adequate decisions.

We can proceed, therefore, to the detailed exposition of our specific question. For this, I will use extensively the work done by Joseph Kaniamparambil,[3] which I retain of being of great interest for the present analysis.

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The new ecclesiological doctrine of Vatican II has certainly constituted a turning point in the attitude of the Catholic Church towards ecumenism. And this new vision has demanded a profound renewal of most of canon law. The great attempt to translate this new ecclesiology into canon law terms was carried out through the promulgation of the CIC, and more recently the CCEO.

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[2] Cfr., for example, the excellent article by U. NAVARRETE, *La giurisdizione delle Chiese Orientali non-Cattoliche sul matrimonio (c.780 C.C.E.O.)*, in AA.VV. *Il matrimonio nel codice dei Canoni delle Chiese Orientali*, Città del Vaticano 1994, p. 119. Even if on some points I do not agree with his positions.

[3] J. KANIAMPARAMBIL, *Competence of the Catholic Church in mixed marriages. The new vision of the oriental code*, thesis ad doctoratum in Iure Canonico partim edita, Pontificium Athenaeum Sanctae Crucis, Romae 1997. (I have also used the original typed thesis).

One of the more significant changes can be found in the new norm on merely ecclesiastical laws, contained in can. 11 CIC and in can. 1490 CCEO.

Given that the Catholic Church exempts non-Catholics from its jurisdiction, it is necessary to indicate the laws to be applied in cases where a non-Catholic party is in relation with a Catholic part. This acquires special relevance for mixed marriages. In the present analysis we are interested above all in mixed marriages with the orthodox. The two codes have resolved the question in different ways. The Latin code has established in canon 1059 the *exclusivity* of the Catholic jurisdiction on such marriages.[4] Indeed, they will be regulated uniquely by (Catholic) canon law. The Oriental code, on the contrary, has admitted that, in addition to canon law, these marriages are regulated by the specific law of the Church to which the non-Catholic party belongs (cfr. CCEO, can. 780 § 2, 1°).

I believe that the Latin canon, even if it leaves no legal lacuna (despite the affirmations of some authors[5]), does not faithfully translate the ecumenical ecclesiology of Vatican II. This failure in the Latin Code has been remedied with the above cited article 2 § 2 of the instruction *Dignitas connubii*.

This does not mean denying the competency of the Church of Christ (of which the Catholic Church is the full realisation on earth) for the marriages of all the baptized, but rather it means affirming the true ecclesiality of the Orthodox Churches and, consequently their faculty to organizes themselves with their own disciplinary norms (UR 16) which, therefore, are to be

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[4] «CIC 1983 c. 1059 - The marriage of Catholics, even if only one party is Catholic, is governed not only by divine law but also by canon law, without prejudice to the competence of the civil authority in respect of the merely civil effects of the marriage.»

[5] Cfr. J. Prader, *Il diritto matrimoniale latino e orientale: studio comparativo*, in S. Gherro (ed.), *Studi sul Codex Canonum Ecclesiarum Orientalium*, Padova 1994, p. 69.

considered as true and proper "canon law" unless contrary to natural divine natural law or divine positive law.

2. CIC 1917 can. 1016 and CIC 1983 can. 1059

Some commentators have said that the can. 1059 of CIC is the reproduction "*iisdem fere verbis*", with some changes, of the principle established in the can. 1016 of CIC 1917.[6] We could think that this is not the case, given that CIC 1983 intends to reflect the new ecclesiology of Vatican II and, consequently, can. 1059, drawing on the spirit of the new can. 11, seeks to limit its scope to Catholics alone when it modifies the word "*baptizatorum*" to "*catholicorum*".[7] Paradoxically, however, this canon has consolidated the exclusive jurisdiction of the Catholic Church over non-Catholics when they enter matrimonial relationships with Catholics.

Indeed, with the clause "*etsi una tantum pars sit catholica*" the non-Catholic party remains exclusively subject to Catholic canon law regarding the impediments, requirements for consent and the form of matrimony.

This question has provoked much debate among canonists.

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[6] F. Aznar, *Titulo VII: del Matrimonio (cc. 1055-1165)*, in L. Echeverria, *Código de Derecho Canónico*, Madrid 1985, p. 506; L. Chiappetta, *Sommario di Diritto Canonico e concordatario*, Roma 1995, p. 769.

[7] During the preparatory works of the new Latin codification, in the first proposal for the actual can. 1059 CIC the clause was: «*etsi una tantum pars sit baptizata*» (cfr. «Communicationes» [1971], p. 71), and it did not undergo modification until, during the 1980 revision of the Schema, some Fathers (Ratzinger, Hume, Freeman, O'Connor) asked to change the term "baptizatorum" with "catholicorum" for harmony with can. 11 (cfr. «Communicationes» [1977], p. 223; PCCICR, *Relatio* 1981, p. 246). The word "baptizata" of the second part of the canon was subtituted by the word "catholica" in the *errata corrige* officially published after the coming into force of CIC 1983 (cfr. AAS 75 [1983], p. 324; see also J.E.L. Serrano, *L'ispirazione conciliare nei principi generali del matrimonio canonico*, in AA.VV., *Il codice del Vaticano II - matrimonio canonico*, Bologna 1991, pp. 81-82).

Some authors, like Joseph Prader, consider that can. 11 *must* be applied to can. 1059. Therefore, if also in mixed marriages non-Catholics were exempt from merely ecclesiastical Catholic laws, then can. 1059 would have left a grave lacuna, not indicating with precision the matrimonial norms by which the non-Catholic party is ruled.[8] It would seem that, for the Catholic Church, non-Catholics were only bound by natural law, something that the Orthodox Churches would not admit.

On the contrary, many other authors – with whom I agree – consider that can. 1059 establishes an exception to can. 11. In fact, can. 1059 indicates unequivocally the *exclusive* competence of the Catholic Church regarding the marriages in which at least one party is a Catholic. Therefore, these authors do not see a *lacuna legis* in can. 1059: in this case, prior to *Dignitas connubii*, the non-Catholics were only subject to Catholic law[9] because, even if in principle, in virtue of can. 11, they were exempted, they were subject to Catholic ecclesiastical laws through the matrimonial pact.

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[8] J. Prader, *Il diritto matrimoniale latino e orientale*, in S. Gherro (ed.), *Studi sul Codex Canonum Ecclesiarum Orientalium*, Padova 1994, pp. 69-71.

[9] L. Örsy, *Marriage in Canon Law,* New York 1988*,* pp. 4-65; L. Bodgan, *Simple Convalidation of Marriage in the 1983 Code of Canon Law*, in «The Jurist» 46 (1986), p. 516; U. Navarrete, *La giurisdizione…*, p. 117; L. Chiappetta, *Il matrimonio nella nuova legislazione canonica e concordataria – Manuale giuridico-pastorale*, Roma 1990, p. 51; H. Heimerl & H. Pree, *Kirchenrecht, Allgemeine Normen und Eherecht*, Vienna 1983, p.175; M. Kaser, *Grundfragen des Kirchlichen Eherechts*, Regensburg 1983, p.746; H. Zapp, *Kanonisches Eherecht,* 7 Auflage, Rombach 1988, p. 50; H.J.F. Reinhardt, *Hat can. 11 CIC/1983 im Bereich des Eherechts Konsequenzen für die Verwaltungskanonistiik?*, in W. Schulz, *Recht als Heilsdienst, Festshrift für Prof. Dr. Mathäus Kaiser,* Paderborn 1989, pp. 218-220; A. Abate, *Il matrimonio nella nuova legislatione canonica*, Roma 1985, pp.27-28; F. Bersini, *Il nuovo diritto canonico matrimoniale, commento guiridico - teologico pastorale*, Torino 1983, p. 20; T. Doyle, *Title VII: Marriage*, in J. Coriden et al. (eds.), *The Code of Canon Law: A Text and Commentary*, New York 1985, p. 824.

However, if on the one hand we have sustained that can. 1059 affirmed the exclusive jurisdiction of the Catholic Church on the marriages of all the baptized, on the other hand this does not mean that this canon was the best juridical expression of this reality. Indeed, in my opinion, the norm of can. 1059 did not seem fully coherent either with the spirit of can. 11 or with the ecclesiological developments of Vatican Council II.

Knowing these different opinions makes it easier to understand the development of the debates during the Latin codification.

Indeed, two bishops' conferences, considering that can. 11 had to be applied also in the matrimonial field,[10] asked for a norm that would indicate by which laws the marriages of non-Catholics could be regulated. At this point a proposal was brought forward that, in substance, is equivalent to the current can. 781 CCEO.[11] The content of this canon does not refer to mixed marriages but to marriages between non-Catholics. Nonetheless, it is interesting for us because it supposes a certain recognition of the legislative capacity of the Orthodox Churches. The proposal did not proceed in the Latin commission because for some consultors it seemed dangerous

[10] It is interesting to note that Cardinal Gasparri, already during the works of codification of CIC 1917, had proposed a canon that might be considered a sort of application of the modern can. 11 in the matrimonial field. This was the proposal: «Therefore, it would seem perhaps opportune to place among the preliminary canons on matrimony a concept more or less like this: *Legibus ecclesiasticis, quae matrimonium respiciunt, tenentur soli baptizati in Ecclesia Catholica*» (Vatican Secret Archive, *Fondo CIC*, scatola 55, *Verbali della Consulta Parziale del 6 luglio 1905*, f. 90. Cited in J. Cárdenas, *La Noción de Matrimonio en la Codificación de 1917 (Iter del Canon 1012)*, Thesis ad Doctoratum in Iure Canonico totaliter edita, Pontificia Universitas Santae Crucis – Facultas Iuris Canonici, Romae 2004, p. 109). My translation.

[11] «Matrimonium eorum qui extra Ecclesiam catholicam baptizati sunt, nec in eam recepti, regitur iure divino et iure religioso vel civili, quo regitur (matrimonium) in coetu christiano ad quem quisque pertinet», in «Communicationes» 9 (1977), p. 127, cfr. also p. 126.

to recognise the jurisdictional competence of the non-Catholics ecclesial Communities.[12] In the debate of the 1980 schema, Card. Parecattil returned to the question,[13] but the Secretariat again responded negatively because, having affirmed the competence of the Catholic Church in the marriage of all the baptized,[14] for

[12] «Aliquibus norma videtur necessaria, secus illa matrimonia regerentur tantum iure divino; aliis non videtur necessaria imo periculosa sive quod secus recognosceretur competentia aliarum communitatum ecclesialium, sive quod obstant rationes oecumenicae sive quod ratio lacunae implendae non videtur tam cogens, cum illa matrimonia regantur iure divino et consuetudinario», in «Communicationes» 9 (1977), p. 127.

[13] «Suppressa obligatorietate iuris canonici pro acatholicis (cfr. can.11 § 2) magna legis lacuna crearetur nisi legislator aliquo modo communitatibus non catholicis occidentalibus (pro orientalibus iam fecit Conc. Vat.II: *UR* 16) facultatem agnoscat se secundum propriam disciplinam regendi.

Opportet proinde ut a legislatore positive statuatur quaenam leges attendendae sint in decisionibus de validitate prioris matrimonii eorum qui, obtento divortio, novum matrimonium inire desiderant cum parte catholica, secus praesumendum est, solummondo ius naturale attendendum esse, omnino neglectis legibus humanis quibus ipsi de facto subiciuntur (Cardinal Parecattil)». PCCICR, *Relatio 1981*, p. 246. See also «Communicationes» 15 (1983), p. 223.

It is interesting to note that the request by Cardinal Parecattil concerned only the Protestants; indeed, he considered that for Oriental non-Catholics the question was already resolved by *UR* 16. However, from the Latin side nothing was done to technify in the Code this affirmation of the Conciliar Decree. The Apostolic Signatura had declared many times that Catholic tribunals (also Latin ones) can judge Orthodox marriages in some circumstances, and some authors sought to resolve the problem of the absence of a Latin parallel to can. 781 CCEO by invoking *UR* 16 (Cfr. M.A. Ortiz, *Note circa la giurisdizione della Chiesa sul matrimonio degli acattolici*, in «Ius Ecclesiae» 6 [1994], p. 376). Given that the Council is the inspiring criterion for the Code, this reasoning is logical. Despite this, in the Latin context there was no juridical certainty about which law should be applied, due to the absence of a technical formulation of this conciliar principle; today this has been rectified through *Dignitas Conubii* art. 4 § 2.

[14] «Ad.1. Admitti debet. Dicatur proinde 'catholicorum'. Notetur tamen quod canon tantummodo dat praescriptionem positivam cohaerenter

ecumenical reasons it did not consider it opportune to indicate by which laws they would be regulated, given that (repeating what was said by the consultors) «the general canonization of civil law and of the laws of non-Catholics communities would be very dangerous in this field.»[15] We should note that the Secretariat spoke of "canonization", while the consultors had used the concept of "recognising jurisdictional competence". As we have mentioned, the technical framing of "*canonization*" certainly holds for civil law that the Church welcomes, or refuses to welcome, for reasons of opportunity. We consider, however, that at least in the case of the Orthodox Churches, we cannot speak strictly of the "*canonization*" of their law, but of a due "recognition" of the canonicity of their norms.

If it is established that for the Orthodox we cannot speak of "*canonization*" but of "recognition", the logical consequence is not only the establishment of a normative criterion with which the Catholic judge might judge the validity of their marriages (as can. 781 CCEO has done), but also acceptation that the Orthodox faithful can be ruled on the basis of their own laws even when they enter in contact with the Catholic Church through a mixed marriage (can. 780 § 2 CCEO). Today, the instruction *Dignitas Connubii,* with arts. 2 § 2 and 4 § 2, has applied the same rules in the Latin law.

3. The power of jurisdiction of the non-Catholic Oriental Churches

In the period prior to Vatican Council II there was a current of thought that denied the existence of a true power of jurisdiction

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cum can.11,§2, nullo modo intendit negare competentiam Ecclesiae circa matrimonia baptizatorum non catholicorum». PCCICR, *Relatio* 1981, p. 246. See also «Communicationes» 15 (1983), p. 223.

[15] «Ad 2: Non videtur opportunum, praesertim ob rationes oecumenicas, quod Ecclesia statuat quibus legibus regantur illa matrimonia. Generalis canonizatio legum civilium vel legum communitatum acatholicarum in hac materia valde esset periculosa. Melius praeterea est ut nihil in Codice dicatur». *Ibid*.

in the Churches separated from Rome. The principle reasons adopted were four:

Non-Catholic Christians were considered *excommunicated* because of the delict of schism or heresy (without taking account of personal responsibility), and therefore their bishops were considered incapable of posing juridically valid acts and incapable of being the subject of any ecclesiastical office.[16]

The concept of hierarchical communion was taken in the absolute sense, without the possibility of grades of communion. Non-Catholics were considered to be out of the body of the Church, and therefore lacked the minimum requirement of unity to justify the jurisdiction activity of the non-Catholic bishops.[17]

It was taught that outside the Church there was no salvation, and the Church was only the Catholic Church. Consequently, it was considered that the norms upon which non-Catholic confessions were based could not be objectively ordered to the *salus animarum,* understood as the ultimate common good in the Church, and therefore they lacked an essential element of the law: being "ordinatio rationis ad bonum comune promulgata". Therefore, these communities could not have a true canon law.[18]

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[16] I. Žužek, *La giurisdizione dei vescovi ortodossi dopo il Concilio Vaticano II*, in «La Civiltà Cattolica» 122 (1971/2), pp. 550-562 [here, p. 551].

[17] U. Navarrete, *La giurisdizione*…, o.c., p. 106. Cardinal Billot, for example, wrote: «Quisquis extra corpus Ecclesiae versatur, ipso facto omnis ordinarie iurisdictionis, puta episcopalis, incapax efficitur. Ratio est quia qui iurisdictionem habet ordinariam seu vere episcopalem, capitis obtinet dignitatem, et nemo esse potest caput particularis etiam ecclesiae, si Ecclesiae membrum non sit». L. Billot, *Tractatus de Ecclesia Christi*, vol. 1, Romae 1921, p. 297. Similar words were used already by Leo XIII in the Encyclical *Satis cognitum*, in ASS 28 (1895), p. 734.

[18] The words of Hervada that we will cite later, can only be explained within the ecclesiological context before the Council. Hervada said in 1962: «En efecto, los grupos sociales heréticos o cismáticos se han separado de la Iglesia Católica por la ruptura del vínculo simbólico (herejía) o del vínculo jerárquico (cisma). Ahora bien, si *extra Ecclesiam*

Theologians recognised without difficulty that non-Catholic bishops – validly ordained – enjoyed the power of Orders: but denied their power of jurisdiction. Indeed, it was considered that jurisdiction had to be *granted* by the Roman Pontiff to the bishops through the legitimate *missio canonica*.[19]

Despite this, already before the Council, there were authors who, in one way or another, attributed a certain jurisdiction to the Orthodox hierarchy. They could not ignore that Orthodox priests received offices from their patriarchs and bishops, and administered the sacraments and justice according to their own fields of competence. Be it among canonists[20] or among theologians,[21] many things were written on this subject.

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nulla salus – y por *Ecclesia* hay que entender a tenor de la Encíclica *Mystici Corporis* la Iglesia Católica, que se identifica con el Cuerpo Místico de Cristo – quiere esto decir que ni en la herejía ni en el cisma, en cuanto tal herejía o cisma, hay una tendencia real y objetiva al fin sobrenatural. No se da en estos grupos sociales, en lo que tienen de heréticos y cismáticos, una tendencia objetivamente ordenada a la *salus animarum* ni al bien común eclesiástico; al contrario, la herejía y el cisma constituyen un desorden respecto al fin supremo y al bien común de la Sociedad eclesiástica. En consecuencia, las normas que rigen estos grupos sociales – en cuanto grupos heréticos y cismáticos – no están objetivamente ordenadas a la *salus animarum* ni al bien común eclesiástico; por ello no pueden ser, no son, Derecho (*iustum*). Más bien son normas desordenadoras e injustas (*iniustum*).» J. Hervada, *Fin y características del ordenamiento canónico*, Pamplona 1962, p. 91.

[19] Cfr. W.W. Bassett, *The Impediment of Mixed Religion of the Synod in Trullo (A.D. 691)*, in «The Jurist» 29 (1969), p. 401.

[20] Cfr., among others, P. Arcadius, *De concordia Ecclesiae Orientalis et Occidentalis in septem Sacramentorum administratione*, lib. IV, c. 5, Parisiis 1672, pp. 435-437; G. D'Annibale, *Summula theologiae moralis*, t. 3, n. 62, Romae 1908, p. 387; V. Maroto, *Institutiones iuris canonici*, t. I, Matriti 1921, p. 670; E. Herman, *Quibus legibus subiciuntur dissidentes rituum orientalium?,* in «Il Diritto Ecclesiastico» 41 (1951), pp. 1043-1058.

[21] Y. Congar, *Schisme*, in *Dictionnaire de Théologie Catholique*, vol. 14, Paris 1939, pp. 1308-1310; T.H. Metz, *Le clerge orthodoxe ont-ils la jurisdiction?*, in «Irenikon» 5 (1928), pp. 142-146; F. Delandes, *Les prêtres Orthodoxes ont-ils la jurisdiction?*, in «Echos d'Orient» 16 (1927), pp. 385-395; V. Dalpiaz, *An Orientales schismatici legibus matrimonialibus Ecclesiae*

It is interesting to observe that Cardinal Gasparri, before the CIC 1917, also wrote on this point:

> «parochus autem schismaticus orientalis, vulgo pope, *probabilius* est *verus* parochus, cum Episcopus schismaticus ipsum instituens verius iurisdictione non careat.»[22]

However, it was not possible to go to the root of the problem: the more 'advanced' justified this jurisdiction by affirming that it was a substitute jurisdiction, by *concession* of the Roman Church, because the Roman Church did not want the Orthodox faithful to be deprived of such help.

4. Vatican II and the jurisdiction of the Orthodox Churches

The first schema of UR 16 read:

> «Sacra Synodus sollemniter, ad omne dubium tollendum, declarat Ecclesias Orientis, memores necessariae unitatis totius Ecclesiae, *ius et officium* habere se secundum proprias disciplinas regendi.»[23]

This text was the fruit of a request by many Council Fathers who wanted the Council to declare the right of the non-Catholic Oriental Churches to run themselves according to their own discipline, and that this Council declaration «*non est intelligenda ut mera concessio*, sed ut agnitio principii fundamentalis.»[24] The final text of UR 16, on the contrary, has changed the expression «ius et officium» with «*facultatem*»;[25] and there are no other intermediate texts or explanations for

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Latinae teneantur?, in «Appollinaris» 10 (1937), pp. 457-459.

[22] P. Gasparri, *Tractatus canonicus de matrimonio*, t. II, Parisiis 1891, no. 921. However in the third edition of this book (t. II, Parisiis 1904), instead of "*probabilius*" and "*verus*" Gasparri wrote simply "*probabiliter*".

[23] LXXXVI General Congregation, 23 September 1964, in *Acta Synodalia Sacrosanti Concilii Oecumenici Vaticani Secundi*, Romae 1971-1978, vol. 3, pars II, p. 312.

[24] LXXXVI General Congregation, 23 September 1964, *Relatio circa rationem qua schema elaboratum est*, in *Acta Synodalia*, o.c., vol. 3, pars II, p. 343.

[25] Vth Public Session, 21 novembre 1964, in *Acta Synodalia*, o.c., vol. 3, pars VIII, p. 856.

this change. In this change of words one might see a sign of uncertainty in declaring the original right of the Orthodox Church to be regulated according to its own discipline, but some authors have minimized the importance of this change.[26] The fact remains that the expression "ius et officium" did remain in the parallel text of OE 3, applied, however, only to the Catholic Oriental Churches.

Some Council Fathers, indeed, had doubts about the opportunity of a declaration in such clear terms. In no. 2 of the "prior explanatory note to *Lumen Gentium*" the necessity of the missio canonica is clearly indicated, so that those upon whom Holy Orders would be conferred might have power "ad actum espedita". The same paragraph adds a very significant *Nota Bene*:

> «N.B. – Sine communione hierarchica, munus sacramentale-ontologicum, quod distinguendum est ab aspectu canonico-iuridico, exerceri non potest. Commissio autem censuit non intrandum esse in quaestiones de liceitate et validitate, quae reliquuntur disputationi theologorum, in specie quod attinet ad potestatem quae de facto apud orientales seiunctos exercetur, et de cuius explicatione variae exstant sententiae.»[27]

However, official recognition of the exercise of jurisdiction in the Orthodox Churches was being progressively realized. For example, Decree OE no. 8, and Decree *Crescens matrimoniorum*[28] (bases of the actual can. 1127 § 1 CIC and can. 834 § 2 CCEO),

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[26] Cfr. J. FEINER, *Churches and Ecclesial Communities Separated from the Roman Apostolic See*, in H. VORGRIMLER (ed.), *Commentary on the documents of Vatican II,* vol. 2, New York 1967-1970, p. 137; M. NICOLAU, *L'ecumenismo nel concilio Vaticano II*, Roma 1966, p. 150; G. CAPRILE, *Aspetti positivi della terza sessione del Concilio*, in «La Civiltà Cattolica» 116/I (1965), p. 332.

[27] AAS 57 (1965), p. 75.

[28] SACRA CONGREGATIO PRO ECCLESIAE ORIENTALI, decr. *Crescens matrimoniorum*, 22 febr. 1967, in AAS 59 (1967), p. 165-166.

recognised the jurisdiction of the Orthodox Churches for validly blessing mixed marriages with Catholics without any intervention of the Catholic authority. Several important Rotal and Signatura sentences in the nineteen-sixties and nineteen-seventies repeated the recognition of the Orthodox hierarchy's legislative capacity.[29]

If some doubts on the justification of the exercise of jurisdiction in the Orthodox Churches could remain from the text of UR 16 (if it was a concession from the Roman Church or their own original right), John Paul II unequivocally clarified it in his Apostolic Letter «*Euntes in mundum*» when, after citing UR 16, he affirmed:

> «Ex hoc Decreto eruitur dilucide autonomiam, qua quoad disciplinam Ecclesiae Orientales fruuntur, *non manare e privilegis ab Ecclesia Romana concessis, sed a lege ipsa,* quam huiusmodi Ecclesiae a temporibus apostolicis tenent.»[30]

5. Justification of this recognition

We must now theologically justify the fact of recognising the existence of the jurisdiction in the Orthodox Churches not by concession, but by original right.

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[29] *SRR Decisiones seu Sententiae*, *coram* De Jorio, 17 October 1968, vol. 60, pp. 669-688; *coram* Bejan, 17 Decembrer 1969, vol. 61, pp. 1158-1171; *coram* Lefebvre, 25 April 1970, vol. 62, pp. 384-391; *coram* Canals, 21 October 1970, vol. 62, pp. 917-921 and *coram* Abbo, 4 June 1969, vol. 61, pp. 599-613 and 5 February 1970, vol. 62, pp. 133-141. Apostolic Signature: Sentence of 1 July 1972, in D. Staffa, *De validitate matrimonii inter partem ortodoxam et partem protestantem baptizatam* in «Periodica» 62 (1973), p. 38; Sentence of 28 November 1970, in X. Ochoa, *Leges Ecclesiae post codicem iuris canonici editae*, vol. 5, Romae 1980, col. 6394-6399.
Some articles of the nineteen-seventies affirmed with more insistence the existence of the jurisdiction of the Orthodox Churches: Cfr. I. Žužek, *La giurisdizione dei vescovi ortodossi*, o.c.; G.E. Schultze, *L'unità di governo dell'episcopato cattolico ed ortodosso*, in «Unitas» 25 (1970), pp. 8-29.

[30] John Paul II, Ap. Lett. *Euntes in mundum universum*, 25 January 1988, in AAS 80 (1988), p. 950, no. 10.

The four reasons that were adopted prior to Vatican Council II for denying the existence of this original jurisdiction (see above), after the Council's deepening of ecumenical ecclesiology, are no longer sustainable.

Indeed, Christians born in non-Catholic confessions are no longer considered subject to excommunication because they are not personally responsible for the separation that came about in history.[31] Besides, it is admitted that – although they lack of the fullness of ecclesiality – the Holy Spirit also acts through the Non-Catholic Christian confessions and that, therefore, these confessions tend towards the salvation of souls.[32] Finally, different grades of communion with the Church are recognised[33] as is the true *ecclesiality* of the Orthodox Churches.[34]

However, on one hand it is recognized that the Orthodox Churches are true Churches, and on the other one must maintain the juridical dimension as an *essential* dimension of the Church, analogous to the essentiality of the humanity of Christ, the Incarnate Word.[35] As logical consequence, one

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[31] UR 3.

[32] UR 3.

[33] Cfr. UR 3, 22; OE 4; JOHN PAUL II, Enc. Lett. *Ut Unum Sint*, 25 May 1995, no. 56, in AAS 87 (1995), pp. 921-982.
Among the forerunners of this doctrine cfr. J. GRIBOMONT, *Du sacrement de l'Eglise et ses réalisations imparfaites*, in «Irenikon» 22 (1949), pp. 345-367. After the Council, cfr. the well-known article by W. BERTRAMS, *De gradibus 'communionis' in doctrina concilii Vaticani II*, in «Gregorianum» 47 (1966), pp. 286-305.

[34] Commenting on the different texts of the Council that recognise the ecclesiality of the Orthodox Churches (e.g. UR 3 and 14) and the centrality of the Eucharist in being the Church (cfr. SC 41; LG 3, 11 and 26; CD 30; UR 2), I have already written that «Where there is a Christian community that constitutionally (individual cases are not enough) celebrates the Eucharist validly, there the Church of Christ is to be found, with a greater or lesser fullness.» P. GEFAELL, *Principi dottrinali per la normativa sulla 'communicatio in sacris'*, in «Ius Ecclesiae» 8 (1996), p. 515.

[35] «But, the society structured with hierarchical organs and the Mystical

should therefore affirm the existence of law in the Orthodox Churches, in the measure in which they are true Churches. And this Orthodox law has to be considered as belonging to the unique "primary juridical order" of the Church of Christ, composed of many and autonomous[36] secondary systems (as, for example, are the Latin and Orientals systems within the Catholic Church).[37]

Clearly, it might be said that the existence of canon law in the Orthodox Churches is not a concession from the Roman Church but, rather, an internal constituent of their ecclesiality. It would be nevertheless wrong to confuse *canon law* with

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Body of Christ, are not to be considered as two realities, nor are the visible assembly and the spiritual community, nor the earthly Church and the Church enriched with heavenly things; rather they form one complex reality which coalesces from a divine and a human element. For this reason, by no weak analogy, it is compared to the mystery of the incarnate Word» (LG 8).

[36] The autonomy of these secondary systems does not mean their indipendence or sovereignty, because all the secondary systems are united in the unique primary system (divine constitution of the Church), and therefore the supreme authority of the Church (College and Primacy) has the task of watching over all these secondary systems, as well as the Orthodox one. For these reasons, I do not consider very precise the affirmation according to which «the ecumenical dimension allows the recognition of the other Churches and Ecclesial communities as *societas iuridicae* which, even through they do not present the perfection of the canonical system, do have the characteristics specific to juridically perfect societies, that is, of systems distinct from that of the Catholic Church.» L. Gerosa, *L'incidenza della comunione gerarchica nell'esercizio della potestà di giurisdizione dei vescovi ortodossi*, in R. Coppola (ed.), *Incontro fra canoni d'Oriente e d'Occidente,* vol. 2, Bari 1994, pp. 183-191 [here, p. 184]. Indeeed, the Orthodox system cannot be considered as that of a juridically perfect society, that is to say one that is 'sovereign', because it is not independent from the primary canonical system of the One Church of Christ.

[37] P. Gefaell, *Rapporti tra i due 'Codici' dell'unico 'Corpus Iuris Canonici'*, in J.I. Arrieta – G.P. Milano (eds.), *Metodo, Fonti e Soggetti del Diritto canonico,* Pontificia Università della Santa Croce – Università di Roma Tor Vergata, Libreria Editrice Vaticana 1999, pp. 654-669.

jurisdiction. If we reflect carefully, canon law should also exist in the Protestant communities, in so far as they also belong to the mystery of the Church. Indeed it does exist, on the level of relationships of justice between the faithful (among the members of the Protestant communities there are strictly juridical-canonical pacts, for example marriage, whether they are conscious of this or not). But the essential difference between the Orthodox Churches and the Protestant communities is that, according to the Catholic doctrine, these communities born from the Reformation do not possess the episcopate, which is where one finds the sacramental origin of the *sacra potestas*: basis of the legislative, executive and judicial authority in the Church. Consequently, the Protestant communities can neither have ecclesiastical jurisdiction nor therefore, produce *canonical laws*, in the strictest sense of the term. The Orthodox Churches, instead, possess apostolic succession and are therefore able to possess *canonical jurisdiction* in the strict sense.

The words of the Pope cited above affirm that the Orthodox Churches have a *disciplinary autonomy* not originating in privileges granted by the Roman Church, but in the *lege ipsa* that these Churches possess since apostolic times. This disciplinary autonomy cannot be understood without the exercise of jurisdiction, so the Pope's affirmation means that, in the Orthodox Churches, the bishops exercise ecclesiastical jurisdiction handed down by the Apostles.

However, the stumbling block of the *missio canonica* remains. This is so because within the Church of Christ the sacred power of bishops cannot be *ad actum spedita* without canonical determination from the Supreme authority of the Church (Pope or College) as a guarantee of the hierarchical communion that is indispensable for exercising of power in the Church.[38]

[38] To belong to the College of Bishops, Episcopal ordination alone is not enough. This also requires communion with the head and with the other members of the College of Bishops in communion with him: cfr. LG 22; can. 336 CIC. For this reason can. 187 § 1 CCEO – following

This could put in doubt the validity of the exercise of the jurisdiction by Orthodox bishops. Regarding this, L. Spinelli notes that can. 899 CCEO requires the assent of the Roman Pontiff in order for Orthodox bishops who come into full communion with the Catholic Church to validly exercise their jurisdiction.[39] This author concludes that «given the sensitivity of the problem, we cannot take sides with extreme conviction for either doctrinal direction. The problem remains open for the future, and as the Magisterium of the Council indicates, it will be the theologians who with the time will be able to indicate the surest solutions.»[40] First of all, we should say that can. 899 CCEO only concerns those bishops who wish to exercise fully their jurisdiction in the service of the Catholic faithful within the Catholic Church, without the canon making any affirmation on the validity of the jurisdictional acts of other Orthodox bishops who, remaining outside full communion, carry out their episcopal ministry in favour of their Orthodox faithful. Can. 1 CCEO is clear in this regard. Moreover, theologians faithful in doctrine and of high scientific reputation continue to study the problem. On this, I was given pause for thought by this affirmation from Carrasco-Rouco:

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the prior explicative note to LG, at no. 2 – affirms that «To anyone who should be promoted to the episcopacy, is necessary the canonical provision with which one is constituted as eparchial bishop in a given eparchy or to whom another determined charge within the Church is given.»

[39] Can. 899 CCEO: «The cleric of an Eastern non-Catholic Church entering into full communion with the Catholic Church can exercise his own sacred order according to the norms established by the competent authority; a bishop cannot validly exercise the power of governance except with the consent of the Roman Pontiff, head of the College of Bishops.»

[40] L. Spinelli, *L'incidenza della comunione gerarchica nell'esercizio della potestà di giurisdizione dei vescovi ortodossi*, in R. Coppola (ed.), *Incontro fra canoni d'Oriente e d'Occidente*, vol. 2, Bari 1994, pp. 183-191 [here, pp. 190-191]. My translation.

> «The fundamental affirmation that the exercise of the episcopal power is not possible if not in union with the Pope, placed in doubt by the evidence of this exercise by ministers who have not preserved communion with him, can be sustained, but only if one understands the possibility of different degrees, a possibility opened because papal ministry requires unity with him only as sign of unity with the Church itself, and this allows for different degrees of realisation.»[41]

In fact the Orthodox bishops are in communion, although not fully, with the Church of Christ. And, even if not being in full communion is not of small importance, their true communion *fere in omnibus*, can be recognised by the Pope as sufficient for the exercise of their jurisdiction. Moreover, it is true that the *Lumen Gentium* no. 24 affirms that if the successor of Peter «refuses or denies apostolic communion, ... bishops cannot assume any office», but this number of LG also indicates that if it is there is not an explicit refusal from the Pope, «the canonical mission of bishops can come about by legitimate customs that have not been revoked by the supreme and universal authority of the Church, or by laws made or recognized by the same authority». In the text of the historical cancellation of the reciprocal excommunications on 7 December 1965 by Pope Paul VI and by the ecumenical Patriarch Athenagoras I,[42] it is affirmed, among other things,

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[41] «L'affirmation fondamentale que l'exercice du pouvoir épiscopal n'est possible que dans l'unité avec le pape, mise en doute par l'évidence de cet exercice par des ministres qui n'ont pas gardé la communion avec lui, peut donc être gardée, mais en comprenant la possibilité de l'existence de degrés différents, possibilité ouverte par le fait que le ministère papal n'exige l'unité avec lui que comme signe de l'unité avec l'Église elle-même, et celle-ci admet des degrés de réalisation différents». A. Carrasco Rouco, *Le Primat de l'évêque de Rome. Etude sur la cohérence ecclesiologique et canonique du Primat de jurisdiction*, Éditions Universitaires, Fribourg Suisse 1990, p. 226.

[42] Paul VI and Athenagora I, *Declaratio communis Pauli Papae VI et Athenagorae patriarchae constantinopolitani in ultima pubblica Sessione*

that the censures inflicted in 1054 were directed against persons and not against the Churches, and that these censures did not intend to break ecclesiastical communion (no. 3). Since this gesture – even if it is not concealed that this is not sufficient for restoring full communion (cfr. no. 5) – there does not seem to be any remaining explicit refusal on the part of the Roman Pontiff towards the exercise of power by Orthodox bishops. Indeed, there are many phrases in the discourses of recent Roman Pontiffs where one can observe the recognition of the pastoral function (and therefore of governance) of the Orthodox bishops towards their flocks. Pope Paul VI affirmed that the Orthodox bishops «doivent être reconnus et respectés comme pasteurs de la partie du troupeau du Christ qui leur est confiée.»[43] Also, John Paul II affirmed: «...a dialogue of brotherly love which must characterize relationships between the Churches of which we are the Pastors.»[44] Further, Pope Benedict XVI has signed a common declaration with the Patriarch of Constantinople, Bartholomew I, in which the two affirm that the commitment towards unity «comes from the Lord's will and from our *responsibility as Pastors in the Church of Christ*.»[45] Finally, in 2014 in Jerusalem, Pope Francis and Patriarch Bartholomew I confirmed that their meeting was «another encounter *of the Bishops of the Churches of Rome and*

Oecumenici Concilii Vaticani II a Secretario Consilii ad unitatem christianorum fovendam lecta, 7 decembris 1965, in AAS 58 (1965), pp. 20-21. Different comments regarding this can be found in «Eastern Churches Review» 1 (1966), pp. 49-52.

[43] Paul VI, *Address during the visit to Constantinople*, in AAS 59 (1967), p. 841.

[44] John Paul II, *Address to Ilia II, Catholicos Patriarch of the Ancient Apostolic Church of Georgia,* 6 June 1980, in «Information Service» 44 [1980/III-IV], p. 97. Cfr., also, Idem, *Address to H.H. Gagerin I Sarkissian, 14 December 1996*, in «Ecclesia» 2824 (18.1.1997), p. 21 (73). Cfr., also, «Irenikon» 53 (1980), p. 370.

[45] Benedict XVI and Bartholomew I, *Common Declaration*, Istanbul, 30 November 2006, no. 1, in www.vatican.va.

of Constantinople»,[46] and then in Istanbul they also affirmed: «we offer the assurance of our fervent prayer *as Pastors of the Church*, asking our faithful to join us in praying...»[47] On the same line, on 13 May 2003 the Pontifical Council for Legislative Texts published a *Note* in which one reads:

> «...given the principle declared by the Vatican Council in the decree on ecumenism (*UR* 16) in which it is recognised that these sister Oriental Churches have and have always had the exercise of true power of jurisdiction – that is native in the Church and not derived from human authority – in virtue of which these Churches also regulate the institution of matrimony with their own laws that determine the juridical ability of the parties and the form of manifesting juridically effective consent, without prejudice to divine law.»[48]

For all these reasons, I consider that in the non-Catholic Oriental Churches the *missio canonica* is conferred according to the ancient sacred canons, which have never been revoked by the supreme authority.[49]

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At the light of all we have said, we do not purport to affirm that the doctrine on the exclusive competence of the Church for the marriage of the baptized has been abolished. It is only a question of recognising the 'canonicity' of the Law of the Orthodox Churches, due to the recognition of their true

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[46] Francis and Bartholomew I, *Common Declaration*, Jerusalem, 25 May 2014, no. 1, in w2.vatican.va.

[47] Francis and Bartholomew I, *Ecumenical Blessing and Signing of the Common Declaration*, Istambul, 30 November 2014, in w2.vatican.va.

[48] PCLT, *Adnotatio circa validitatem matrimoniorum civilium quae in Cazastania sub communistarum regimine celebrata sunt*, 13 May 2003, in «Communicationes» 35 (2003), pp. 197-210 [here, p. 209]. My translation.

[49] Cfr. I. Žužek, *La giurisdizione dei vescovi ortodossi dopo il Concilio Vaticano II*, in «La Civiltà Cattolica» 122 (1971/2), p. 555; U. Navarrete, *La giurisdizione*, o.c., p. 107.

"ecclesiality". They are parts of the unique "Church", even if not to perfect degree, possessing therefore the juridical dimension as an essential part of their ecclesial being; and, as they possess a valid Episcopate, they can give laws that the Catholic Church *recognises*.

However, it could be objected that the particular legislation of a *sui iuris* Church, as a super-episcopal structure, is not the sum of the legislative power of the single bishops of that Church; rather, it is based on the exercise of a power that is the participation in the supreme authority of the Church.[50] This is undeniable, but does not necessarily suppose that this power has been *granted* by the Roman Pontiff. Indeed, the organisational structure of the *sui iuris* Churches responds rather to the collegial nature of the episcopate and, furthermore, is not born through a papal act of primacy but through an ecclesial phenomenon recognised officially by the Ecumenical Council of Nicea I (a.D. 325).[51]

It is true that the supreme authority of the Church (the Pope and the College of Bishops in communion with him) has the

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[50] «...de iis Ecclesiarum Orientalium fidelibus, qui extra territorium degunt, in quo Patriarchae, Archiepiscopi maiores, Metropolitae et ceteri Rectores Ecclesiarum «*sui iuris*» potestatem sibi collatam ad normam iuris statuti a *suprema Ecclesiae auctoritate* posssunt et valide et *tamquam ipsius participationem exercere*.» John Paul II, *Address to the Synod of Bishops during the Presentation of the "Code of Canons of the Oriental Churches"*, 25 October 1990, in «L'Osservatore Romano», 27 October 1990, pp. 4-5, no. 9. Italics are mine.
This nature of participation in the supreme power explains why the decisions taken at the super-episcopal level can bind the single diocesan-eparchial bishop.

[51] «Let the ancient custom which is in use in Egypt in Libya and in Pentapolis be maintained, that the bishop of Alessandria conserves jurisdiction on all these provinces, because the same custom is valid also for the bishop of Rome. Also in Anthioch and in the other provinces are to be safeguarded the prerogatives of the Churches (in vigour).» Nicea I, can. 6, in Aa.Vv, *Conciliorum Oecumenicorum Decreta,* EDB, Bologna 1991. My translation.

fundamental role of watching over ecclesiastical discipline in the entire Church of Christ, and therefore, can intervene in the specific cases. However, the interventions of the Roman Pontiff are made in reference to his role as the guarantor of unity in the Church.

Chapter 6

Can Orthodox Sentences of "Annulment" of Marriage be Recognized by the Catholic Church?*

1. The PCLT *Note* of 2012
2. Further study of the reasons for the PCLT *Note* of 2012

1. The PCLT *Note* of 2012

In the previous point we explored the ecclesiological foundations of can. 780 § 2 CCEO, that concerns mixed marriages. However, we must also bear in mind that – as we have already seen – the can. 781 CCEO and *Dignitas Connubii* art. 4 § 1 affirm that if a Catholic ecclesiastical judge has to judge the validity of a marriage celebrated *between two Orthodox*, the Catholic judge will have to adopt the interested parties' own orthodox laws, if they are not contrary to divine law. That is possible because the Catholic Church recognises such Orthodox norms.

Now we can take one further step and ask: how can we regulate in the case where an Orthodox comes to a Catholic parish priest wanting to marry a Catholic party and – to demonstrate his freedom to marry – shows a sentence of annulment of his previous marriage, given by the authorities of his Church?

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* Updated and modified version of the article of P. Gefaell, La *giurisdizione delle Chiese ortodosse per giudicare sulla validità del matrimonio dei loro fedeli*, in «Ius Ecclesiae» 19 (2007), pp. 773-791, on the basis of the last developments on this argument.

The Supreme Tribunal of the Apostolic Signatura made a *Declaration* on 20 October 2006[1] concerning the value in the Catholic Church of the declarations of free state given by the Orthodox Church in Romania in favour of Orthodox faithful who have previously contracted a marriage according to the norms of the Orthodox Church.

With this declaration the Dicastery wants to address a practice followed by some Catholic tribunals in Romania that held these Orthodox declarations of free state sufficient for celebrating a new marriage in the Catholic Church. The Signatura, instead, contradicts this practice, affirming that such declarations of free state given by the Orthodox Church in Romania cannot be considered sufficient to admit the Orthodox faithful to new Catholic marriages, and establishes that the Orthodox party is not to be considered free until a Catholic ecclesiastical tribunal has declared the nullity of his marriage through an executive decision or, if it is the case, that the marriage be dissolved by the Roman Pontiff for non-consummation.

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[1] The core of this declaration asserts: «(...) 1. Matrimonium duorum christifidelium ortodoxorum, celebratum iuxta normas Ecclesiae orthodoxae, validum habendum est (cfr. can. 779 CCEO; can. 1060 CIC). 2. Ad admissionem ad novum matrimonium in Ecclesia catholica celebrandum, praefatae declarationes status liberi, ab Ecclesia orthodoxa in Romania datae, non possunt considerari sufficientes; 3. Quapropter pars orthodoxa, quae eiusmodi documento munita novum matrimonium inire intendit in Ecclesia catholica, non consideratur libera, quousque nullitas praecedentis eius matrimonii declarata non fuerit a Tribunali ecclesiastico catholico per decisionem exsecutivam (cfr. cann. 781, 802 § 2 CCEO; cann. 1085 § 2, 1671 CIC; artt. 4 § 1; 5 § 1 Instr. *Dignitas connubii*) vel idem matrimonium, si adsint necessariae condiciones, a Romano Pontifice solutum fuerit ob inconsummationem. (...)».
SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, *Declaratio*, 20 October 2006 (P.N. 37577/05 VAR), in «Communicationes» 39 (2007), pp. 66-67. Cfr., also, P. BIANCHI, *Dichiarazione di stato libero rilasciate da autorità ecclesiali ortodosse. Una recente dichiarazione del Supremo Tribunale della Segnatura Apostolica*, in «Quaderni di Diritto Ecclesiale» 21 (2008), pp. 256-265.

As we can see, the Signatura does not explain why such declarations of free status in Romania are not considered sufficient. Therefore, let us try to look into the question.

We can start by citing a phrase from the common declaration of Pope Benedict XVI and the Patriarch Bartholomew I, during Roman Pontiff's visit to Turkey. It affirms, among other things:

> «As far as relations between the Church of Rome and the Church of Constantinople are concerned, we cannot fail to recall the solemn ecclesial act effacing the memory of the ancient anathemas, which for centuries have had a negative effect on relations between our Churches. *We have not yet drawn from this act all the positive consequences which can flow from it in our progress towards full unity* (...). We exhort our faithful to take an active part in this process, through prayer and through significant gestures.»[2]

Among the things for which positive consequences of ecumenical progresses could still be drawn is Christian marriage. Now, in particular let us pause to consider cases of matrimonial nullity.

The recognition of the Orthodox sentences of marriage nullity is not directly foreseen by can. 781 CCEO or art. 4 of *Dignitas Connubii*.

However, on 20 December 2012 the PCLT published a *Nota explicativa quoad pondus canonicum divortii orthodoxi*[3] which corroborates the non-admissibility of Orthodox divorce sentences, but at the same time opens the possibility of

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[2] Benedict XVI and Bartholomew I, *Common Declaration*, 30 November 2006, no. 1. In www.vatican.va. My italics. Similar things are found in the Common declaration of 14 December 2006, signed between the Holy Father Benedict XVI and His Beatitude Christodoulos, Archbishop of Athens and of all Greece.

[3] PCLT, *Nota explicativa quoad pondus canonicum divortii orthodoxi*, in «Communicationes» 44 (2012), pp. 357-359. The English translation used here is from «The Jurist» 75/1 (2015), pp. 253-256 [with a correction in the title of the *Note* (Divorced Orthodox//Orthodox Divorce) and two corrections of canons not corresponding to the original text].

accepting a sentence of nullity given by the Orthodox authority, as if it was a first instance sentence. In such a case, the Catholic appeal tribunal, after having considered the case for verification that divine law is not being harmed, can decide that it is sufficient to confirm by decree the Orthodox sentence or, if necessary, send the case back for ordinary examination in the second instance of judgement (cfr. no. 6). Here is the complete text of the Note:

Nota Explicativa

about the Canonical Significance of Orthodox Divorce

On several occasions this Dicastery has received the question whether in the case of an Orthodox faitfhul to whom the proper ecclesiastical authority has granted a divorce and who now wishes to remarry a Catholic faithful and the nullity of the previous marriage is also evident, a matrimonial process to declare the nullity of such a marriage is necessary or, for example, if a declaration of the Bishop by administrative decree, attesting to said nullity, is sufficient.

Since similar situations must be addressed by the whole Catholic Church and taking into account the indications given in this regard by other Dicasteries, in particular the *Declaratio* of October 20, 2006 of the Supreme Tribunal of the Apostolic Signatura, it seemed useful to present comprehensively some guidelines for the correct application of what is stipulated concerning the above-mentioned matter in both the CIC and the CCEO.

1. First, it should ne noted that very few non-Catholic Eastern Churches have norms providing for the nullity of marriage. The majority of these Churches have instead a discipline that cannot be reconciled with the doctrine of the Catholic Church on the indissolubility of marriage.[1] In fact, in these

[1] Cfr. Pastoral Constitution *Gaudium et Spes*, no. 48; Pius XI, Encyclical *Casti connubii*, 31 December 1930, nos. 546-556; Paul VI, Encyclical *Humanae vitae*, 25 July 1968, no. 25; *Catechism of the Catholic Church*,

Churches the matrimonial bond is dissolved through *oikonomia*, by a sentence or an administrative act.

2. According to the Catholic doctrine, mixed marriages are governed by divine law and canon law. Therefore the causes related to these marriages are governed by the proper law of the Church or lie within the competence of the ecclesiastical judge (cfr. cann. 1059, 1671 CIC and 780 § 1, 1357 CCEO; Instruction *Dignitas connubii*, artt. 2, 3 §§ 1 and 2, 4 § 1).
3. Should a divorced Orthodox want to marry a Catholic, in order for them to be able to contract a valid marriage the Orthodox party must obtain from a Catholic ecclesiastical tribunal the declaration of nulity of the previous marriage[2], even if the nullity of this previous marriage seems to be certain. In this sense, the two Codes provide one of two possible procedures for individual cases:
   a) as a general norm, the ordinary contentious trial is required for the declaration of the nullity of the marriage (cfr. cann. 1501-1655, 1690, 1691 CIC and 1185-1342, 1375, 1376 CCEO);
   b) if a written document would prove with certainty the existence of a diriment impediment or a defect of canonical form, the documentary process may be used (cfr. cann. 1686-1688 CIC and 1372-1374 CCEO). It should be noted, however, that canons 1686 CIC and 1372 § 1 CCEO do not foresee the possibility for a defect of consent to be proven by a document; therefore, it will be necessary in such cases to follow the ordinary contentious trial to declare the nullity of marriage.

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nos. 1610, 1611, 1615, 1640, 1641, 1644, 1647, 1649, 2364, 2382; cann. 1056, 1085 § 1 CIC and 776 § 3, 802 § 1 CCEO.

[2] Cfr. Supreme Tribunal of the Apostolic Signatura, *Declaration*, 20 October 2006, in «Communicationes» 39 (2007), pp. 66-67; cann. 1085 § 2, 1684 CIC and 780, 802 § 2, 1370 CCEO, Instruction *Dignitas connubii*, artt. 2 and 4 § 1.

4. If it emerges that when they entered into marriage the two Orthodox had not observed the canonical form prescribed by their proper law, it is sufficient to establish their free state during the prematrimonial investigation (cfr. cann. 784, 1372 § 2 CCEO and Instruction *Dignitas connubii*, art. 5 § 3). If, however, there is some doubt about the impossibility of their ability to approach the priest without grave inconvenience,[3] then one must proceeded as indicated in no. 3.
5. If it appears thar their marriage was never consummated, the norms on the process for the marriage *ratum et non consummatum* must be followed,[4] for which the Tribunal of the Roman Rota is competent[5] and the respective dispensation is granted by the Roman Pontiff.
6. The case of an Orthodox who has received from the authority of his own Church a real and proper declaration of nullity of marriage and who wants to marry a Catholic requires a different approach. In order for such declarations to be recognized by the Catholic Church, they must be verified through a canonical judicial procedure to ensure that divine law was not violated (cfr. can. 781, 1º CCEO and Instruction *Dignitas connubii*, art. 4 § 1, 1º). In this sense, according to the norms of the two Codes, there are two possible ways to proceed:
   a) the Catholic appelate tribunal, after having considered the matter from the perspective mentioned above, must decide whether it is sufficient to confirm the sentence

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[3] Cfr. Supreme Tribunal of the Apostolic Signatura, *Reply*, 3 January 2007, in «Periodica» 97 (2008), pp. 45-46.

[4] Cfr. cann. 1681, 1697-1706 CIC, 1384 CCEO; Congregation for Divine Worship and the Discipline of the Sacraments, Letter *De procesu super matrimonio rato et non consumato*, 20 December 1986, in «Communicationes» 20 (1988), pp. 78-84.

[5] Cfr. Benedict XVI, Motu proprio *Quaerit semper*, 30 August 2011, in AAS 103 (2011), pp. 569-571.

issued by the Orthodox authority by decree or, if neccessary, admit the case to an ordinary examination in the second instance (cfr. cann. 1682 § 2 CIC and 1368 § 2 CCEO);

b) the judge of second instance, in the documentary process, must decide whether to confirm the sentence or remand the case to the ordinary procedure; that is, to the tribunal of first instance (cfr. cann. 1688 CIC and 1374 CCEO).

However, if, instead of a declaration of nullity, it was a mere act of divorce issued by the Orthodox authority, one must proceed as indicated in no. 3.

Vatican City, 20 December 2012
+ Francesco Card. Coccopalmerio
President
+ Juan Ignacio Arrieta
Secretary

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Indeed, the Pontifical Council for Legislative Texts, already in no. 8 of the *Note* of 13 May 2003[4] affirmed that the sentence of the nullity of marriage given by the Orthodox authority can be recognised by the Catholic Church in the case of a lack of prescribed form, safeguarding always divine law. The text is the following:

«It may happen that an Oriental non-Catholic Christian presents himself to the Catholic authority with the document of declaration of nullity of marriage from his Orthodox Church. This sentence of nullity certainly cannot be recognised by the Catholic Church, because the different theological and juridical questions regarding the validity of sacramental marriage of non-Catholic Orientals have not been clarified. *Only in cases of the absence of the form prescribed by the authority of the person's own Church can the*

[4] PCLT, *Note of 13 May 2003*, in «Communicationes» 35 (2003), pp. 197-210.

> *sentence of the competent Orthodox authority be recognized, without prejudice to divine law.*»[5]

As can be seen, the text of no. 8 of the *Note* of 2003 excludes Orthodox sentences based on the other causes of nullity, even if – in theory – sentences could be given that are not contrary to divine law.

Another step forward came with the decree of the Apostolic Signatura of 3 January 2007 regarding the assuring of the free state of the Orthodox faithful who, having behind them a marriage celebrated without the due sacred rite established by the Orthodox Church, thereafter wish to marry a Catholic. The Signatura has established that – if there are no other doubts – these cases will be solved by the Local Ordinary or the parish priest with the permission of the Ordinary, without any judicial process, but with the simple prematrimonial investigation, in an analogous way to what happens for Catholics.[6]

As we can see, regarding Orthodox marriages the Catholic Church had already admitted Orthodox declarations of nullity for defect of form (PCLT *Note* of 2003), and the presumption of the non-existence of a marriage that lacks the Orthodox form (Signatura, *Decree* of 2007). However, until the PCLT *Note* of

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[5] PCLT, *Note of 13 May 2003*, o.c., no. 8 § 2. My translation.

[6] Apostolic Signatura, *Decree of 3 January 2007*, P.N. 38964/06 VT, pubblished with a commentary by G. P. Montini, *La procedura di investigazione prematrimoniale è idonea alla comprovazione dello stato libero di fedeli ortodossi che hanno tentato il matrimonio civile,* in «Periodica» 97 (2008) pp. 47-98. In this Decree, the Signatura gives the premise that a juridical act is presumed valid only if it is performed adequately according to its external elements (cfr. can. 124 § 2 CIC and can. 931 § 2 CCEO) and, therefore, applies can. 781 CCEO and art. 4 § 1 no. 2 of *Dignitas Connubii*, having in mind, by analogy, the authentic interpretation of 26 June 1984 on can. 1686 CIC that concerned the same case for Catholic marriages celebrated without canonical form. This authentic interpretation was included in can. 1372 § 2 CCEO, but this paragraph has now been cancelled by the new correlative can. 1374 of m.p. *Mitis et misericors Iesus* of 15 August 2015 (in 2w.vatican.va). I will comment on this later.

2012 Orthodox sentences based on the other causes of nullity were excluded, even if – in principle – the Orthodox authorities could hand down sentences not contrary to divine law. Therefore, if the Catholic Church has recognised the capacity of the Orthodox authority to make laws for its faithful, the same has to be affirmed for its judicial power: the sentences that the Orthodox authority hands down for its faithful have the force of law for the parties involved and, therefore, they cannot be considered as non-existent by the Catholic Church, but rather, it is reasonable that they be recognised, if there is no obstacle to the contrary. This is what no. 6 of the PCLT *Note* of 2012 has done.

It is true that, in practice, almost none of the Orthodox Churches grants declarations of nullity of marriage, because of the practice of simply allowing the passage to a new marriage through *oikonomia* (objectively contradicting the doctrine on indissolubility). However, if the authority of an Orthodox Church did grant a true declaration of nullity that was not contrary to divine law (and, in fact, this is foreseen in the personal Statutes of the Greek-Orthodox Church and of the Armenian-Orthodox Church in Lebanon as well as of those of the Siro-Orthodox Church in Syria),[7] then the Catholic

[7] The Personal Statutes of the Greek-Orthodox Church in Lebanon distinguish between the "annulation du mariage" (art. 67), the "resiliation du mariage" (art. 68) and the "divorce" (artt. 69-77): cfr. Mahmassi – Messarra, *Statut Personnel. Textes en vigeur au Liban*, (Documents Huvelin, Facultè de droit et des sciences œcomiques), Beyrouth 1970, pp. 640-646. As we can see from the text of art. 67, "l'annulation" is a true declaration of nullity: «le mariage est nul dans les cas suivants: 1. S'il est conclu alors qu'un mariage encore en vigueur lie l'une des parties; 2. S'il est conclu en violation des lois fondamentales de l'Église (tel que le mariage entre parents jusqu'au troisieme degré); 3. S'il est célebré par le prêtre d'une communauté autre que celle de l'un des deux époux» (art. 67). Cfr., also, *Personal Statutes of Armenian Orthodox Church in Lebanon:* artt. 28-32 (nullity of marriage) and arts. 50-59 (dissolution, divorce), in Mahmassani Messarra, *Statut Personnel. Textes en vigueur au Liban*, o.c., pp. 726-

Church would recognise such a decision, on the base of the above-mentioned can. 781 CCEO and of *Dignitas Connubii* (DC) art. 4 § 1, that have their origins in the Council decree *Unitatis Redintegratio* (UR) no. 16. According to the PCLT *Note* of 2012, an Orthodox sentence such as this is not sent to the Catholic tribunal of first instance but to the tribunal of appeal. This tribunal will preliminarily review the Orthodox sentence in order to ascertain that it does not harm divine law. If it confirms that divine law is respected, the Orthodox sentence is treated like a first instance sentence, and therefore the Catholic appeal tribunal can confirm it by decree – if everything is clear – or admit it to the ordinary examination in the second degree of judgment. In my opinion, the necessity that the Orthodox sentence be confirmed by the Catholic judge (cfr. PCLT *Note* of 2012, no. 6) continues in force despite the two *motu proprio* reforming the matrimonial process having cancelled the necessity of the "double confirmation".[8] This is so because the acceptability of the non-Catholic sentence must always be verified.

3.2. Further study of the reasons for the PCLT *Note* of 2012

As we can see, art. 4 § 1 of *Dignitas Connubii*, valid for the Latin Church, is parallel to the can. 781 CCEO. Although this article does not exist in the CIC,[9] it does not constitute an innovation in the Latin discipline, because it is nothing other than the explicit

760. See also the *Personal Statutes of the Siro Orthodox Church in Syria*, Chapters VI and VII (nullity of marriage) and Chapter XII (dissolution, divorce), in www.syrian-orthodox.com/article.php?id=4 (in arabic).

[8] Cfr. can. 1365 MMI and its Latin parallel can. 1679 of m.p. *Mitis Iudex Dominus Iesus* (MIDI), that abrogate can. 1368 CCEO and can. 1682 CIC respectively.

[9] During the work of codification its possible introdution in the 1983 CIC was even voted against, cfr. «Communicationes» 9 (1977), p. 127, can. 245. However, many authors have shown the necessity of introducing it: cfr. U. Navarrete, *Ius matrimoniale latinum et orientale*, in «Periodica» 80 (1991), p. 618; J. Abbass, *Two Codes in Comparison*, (Kanonika 7), PIO, Roma 1997, p. 106.

reception of the common and constant jurisprudence of the Apostolic Tribunals (cfr. can. 19 CIC), based on the indication given in the Vatican Council II decree on ecumenism, *Unitatis Redintegratio* no. 16, which says: «Sacra Synodus, ad omne dubium tollendum, declarat Ecclesias Orientis, memores necessariae unitatis totius Ecclesiae, facultatem habere se secundum proprias disciplinas regendi.»

Recognition of the validity of the Orthodox laws on marriage has already been treated in the previous section of this book. If this affirmation is valid for the capacity of an Orthodox authority to give laws for his faithful, the same has to be affirmed for his judicial power. All the principal authors who had written so far on the canons 780 and 781 limited themselves to affirming that the Catholic tribunal should use the laws of the non-Catholic party, but did not pose the problem of the recognition of Orthodox sentences.[10] After the PCLT *Note* of 2012 these can no longer be considered by the Catholic Church as non-existent. However, on this point there are many other things to bear in mind. Indeed, some clarifications are required:

a) As has been said, the Catholic Church recognises that marriage among the Orthodox is regulated by Orthodox law, *without prejudice to divine law*.[11] Therefore, in principle, if the competent authority of the Orthodox Church had declared null a marriage of their faithful and the substance of this sentence was not contrary to divine law, the Catholic Church should

[10] Cfr., e.g. U. Navarrete, *La giurisdizione delle Chiese orientali non cattoliche sul matrimonio (can. 780 CCEO)*, in AA.VV. *Il matrimonio nel Codice dei Canoni delle Chiese Orientali*, (Studi Giuridici XXXII), LEV, Città del Vaticano 1994, pp. 105-125; J. Prader, *Il matrimonio in Oriente e in Occidente*, (Kanonika 1), PIO, 2nd ed., Roma 2003, p. 55; D. Salachas, *Il sacramento del matrimonio nel Nuovo Diritto Canonico delle Chiese orientali*, ED-EDB, Roma-Bologna 1994, pp. 58-60.

[11] Cfr. can. 780 § 2 CCEO to which can. 781 no. 1 refers. Even if *Dignitas connubii* art. 2 § 2 does not explicitly include the clause «*salvo iure divino*», such a clause, other than being obvious, is already included in art. 2 § 1 («*non solum divino...*»).

be able to recognize this decision, and consequently consider the parties free to marry. However, this is not so simple, as we will see.

b) It is precisely the clause "*without prejudice to divine law*" that wishes to prevent (among other hypotheses[12]) possible Orthodox decisions which do not respect the doctrine of the indissolubility of marriage. Because, as we have said above, while affirming theoretically the indissolubility of marriage, in practice the Orthodox Churches permit for reasons of *oikonomia*[13] the passage to a new marriage in cases of the failure of the marriage.[14] For example, the Romanian Orthodox Church has 25 causes of "divorce"[15] and, all things considered, any grave cause justifies the concession of passage to a new marriage.[16] This is done through a specific permission given

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[12] For example, negation of the right of defence, etc.

[13] Cfr. P. Gefaell, *Fondamenti e limiti dell'Oikonomia nella tradizione orientale*, in «Ius Ecclesiae» 12 (2000), pp. 419-436.

[14] Cfr. J. Meyendorff, *La teologia bizantina: sviluppi storici e temi dottrinali*, Casale Monferrato 1984, pp. 109-111 [here, p. 111]. For other details, cfr. P. L'Huillier, *L'indissolubilité du mariage dans le droit et la pratique orthodoxes*, in «Studia Canonica» 21 (1987), pp. 239-260; A. Kaptijn, *Divorce et remariage dans L'Eglise orthodoxe*, in «Folia Canonica» 2 (1999) pp. 105-128; ; Cl. Pujol, *El divorcio en las Iglesias ortodoxas orientales*, in AA.VV., *El vínculo matrimonial*, BAC, Madrid 1978, pp. 371-434; J. Getcha, *L'idéal du mariage unique exclut-il la possibilité d'un remariage? La position de l'Église orthodoxe face au divorce*, in «Revue d'éthique et de théologie morale "Le Supplément" - Religions et Nations», 228 (2004), pp. 275-306.

[15] D. Lucanou, *De divortio in Ecclesia romena dissidenti*, excerpt. diss. ad Doct., Pont. Fac. Theol. O.F.M. Conv., Romae 1939, p. 80.

[16] *Ibid*. p. 71. Instead, I have found nothing on possible *nullity declarations* in the Romanian Orthodox Church: cfr. e.g. S. Cosma, *Indissolubilitatea căsătoriei şi Divorţul,* in «Biserica Ortodoxă Română – Buletinul Oficial al Patriarhiei Române» 121 (2003/1-6), pp. 454-464. Indeed, despite the fact that the Romanian civil law on the family of 29 December 1953, later modified on 30 July 1974, provided for divorce (art. 37), nullity (arts. 19 and 20) and annullment (art. 21) (cfr. J. Prader, *Il matrimonio nel mondo*, 2nd ed., Padova 1986, pp. 485-487), the Romanian Orthodox Church does not use declarations of nullity but does use sentences of divorce.

For more information, it is useful to read the official declaration of the Russian Orthodox Church on divorce:

«X.3. *The Church insists that spouses should remain faithful for life and that Orthodox marriage is indissoluble* on the basis of the words of the Lord Jesus Christ: "What God hath joined together, let not man put asunder… Whosoever shall put away his wife, except it for fornication, and shall marry another, commitieth adultery" (Mt. 19:6, 9). Divorce is denounced by the Church as sin, for it brings great spiritual suffering to spouses (at least to one of them), especially to children. Today's situation in which a considerable number of marriages are dissolved, especially among young people, causes an extreme concern. This situation has become a real tragedy both for the individual and the people.

The Lord pointed to adultery as the only permissible ground for divorce, for it defiles the sanctity of marriage and breaks the bond of matrimonial faithfulness. In cases where spouses suffer from all kinds of conflict, the Church sees it as her pastoral task to use all the means appropriate for her, (such as exhortation, prayer, participation in the Sacraments) to safeguard the integrity of a marriage and to prevent divorce. The clergy are also called to talk to those who wish to marry, explaining to them the importance of the intended step.

Unfortunately, sometimes spouses prove unable to preserve the gift of grace they received in the Sacrament of Matrimony and to keep the unity of the family because of their sinful imperfection. In her desire to save the sinners, the Church gives them an opportunity to reform and is ready to re-admit them to the Sacraments after they make repentance.

The Byzantine laws, which were established by Christian emperors and met with no objection of the Church, admitted of various grounds for divorce. In the Russian Empire, the dissolution of lawful marriages was effected in the ecclesiastical court.

In 1918, in its Decision on the Grounds for the Dissolution of the Marriage Sanctified by the Church, the Local Council of the Russian Orthodox Church, recognised as valid, besides adultery and a new marriage of one of the party, such grounds as a spouse's falling away from Orthodoxy, perversion, impotence which had set in before marriage or was self-inflicted, contraction of leper or syphilis, prolonged disappearance, conviction with disfranchisement, encroachment on the life or health of the spouse, love affair with a daughter in law, profiting from marriage, profiting by the spouse's indecencies, incurable mental disease and malevolent abandonment of the spouse. At present, added to this list of the grounds for divorce are chronic alcoholism or drug-addiction and abortion without the husband's consent.

by the Diocesan Bishop: this permission of passing to a new marriage is in practice equivalent to divorce, incoherently so with regards to the above-mentioned affirmations on the indissolubility of marriage.[17] It is very clear that the Catholic

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For the spiritual education of those contracting a marriage and consolidation of marital bonds, the clergy are urged before celebrating a Marriage to explain in detail to the bridegroom and bride that a marital union concluded in church is indissoluble. They should emphasise that divorce as the last resort can be sought only if spouses committed actions defined by the Church as causes for divorce. Consent to the dissolution of a marriage cannot be given to satisfy a whim or to "confirm" a common-law divorce. However, if a divorce is an accomplished fact, especially when spouses live separately, the restoration of the family is considered impossible and a church divorce may be given if the pastor deigns to concede the request. *The Church does not at all approve of a second marriage. Nevertheless, according to the canon law, after a legitimate church divorce, a second marriage is allowed to the innocent spouse. Those whose first marriage was dissolved through their own fault a second marriage is allowed only after repentance and penance imposed in accordance with the canons.* According to the rules of St. Basil the Great, in exceptional cases where a third marriage is allowed, the duration of the penance shall be prolonged.

In its Decision of December 28, 1998, the Holy Synod of the Russian Orthodox Church denounced the actions of those spiritual fathers who "prohibit their spiritual children from contracting a second marriage on the grounds that second marriage is allegedly denounced by the Church and who prohibit married couples from divorce if their family life becomes impossible for this or that reason". At the same time, the Holy Synod resolved that "pastors should be reminded that in her attitude to the second marriage the Orthodox Church is guided by the words of St. Paul: 'Art thou bound unto a wife? Seek not to be loosed. Art thou loosed from a wife? Seek not a wife. But and if thou marry, thou hast not sinned; and if a virgin marry, she hath not sinned… the wife is bound by the law as long as her husband liveth; but if her husband be dead, she is at liberty to be married to whom she will; only in the Lord' (1 Cor. 7:27-28, 39)". Bishops' Council of the Russian Orthodox Church, *The Basis of the Social concept*, n. X.3, in www.mospat.ru.

[17] See, for example, what Getcha affirms: «D'autre part, nous ne rencontrons nulle part dans la tradition canonique de l'Église orthodoxe la notion de 'divorce'. Les canons ne font que traiter des

Church cannot accept the recourse to *oikonomia* in this matter because it would be contradicting doctrine with practice. The Orthodox apply *oikonomia* in the single cases where – according to them – a dogmatic truth is not at stake and, given that the doctrine of matrimonial indissolubility, although affirmed by their tradition, has not been formally defined as dogma of faith by any Ecumenical Council, they apply *oikonomia* to allow new marriages. From the Catholic point of view, is well known that the doctrine of the indissolubility of a ratified and consummated marriage, although it has not been declared solemnly through an act of definition, is in any case taught by the Magisterium of the Catholic Church as a doctrine to be held definitively[18] (even if it seems a digression, I believe that the problem being examined here can be considered one of the most weighty reasons for proceeding to make a dogmatic declaration of this type).

c) The discussion on the practice of divorce in the Romanian Orthodox Church and its negative influence on the Romanian Greek Catholic Church is not recent: for example, specifically for these problems, in 1858, the Congregation of the Propagation of the Faith had sent to the Romanian Greek Catholic bishops an instruction on the indissolubility of marriage,[19] and in

problèmes de deuxième ou troisieme mariage que se posent lorsque pour cause de faiblesse humaine le premier mariage s'est dissous et qu'une seconde union s'est conclue ou est envisagée.» J. Getcha, *L'idéal du mariage unique exclut-il la possibilité d'un remariage? La position de l'Église orthodoxe face au divorce*, in «Revue d'éthique et de théologie morale "Le Supplément" - Religions et Nations», 228 (2004), p. 278.

[18] John Paul II, *Discourse to the Officials and Advocates of the Tribunal of the Roman Rota,* Friday 21 January 2000, nos. 6-7, in AAS 92 (2000), pp. 350-355 [here, pp. 353-354].

[19] S. C. de Propaganda Fide, *Instructio ad Archiep. Et Epp. Graeco-Rumenos provinciae Fogarasien. et Albae Iuliae*, 1858 ["Difficile dictu", de indissolubilitate matrimonii], in S. C. de Propaganda Fide, *Collectanea S. Congregationis de Propaganda Fide, seu decreta, instructiones, rescripta pro apostolicis missionibus ex tabulario eiusdem Sacrae Congregationis deprompta,* ex Typographia Polyglotta S. C. de Propaganda Fide,

Vatican Council I the opportuneness of declaring dogma the indissolubility of marriage was discussed.[20]

d) Habitually, the procedure adopted by the Orthodox Church for the Bishop to grant permission for a new marriage is not absolutely comparable to a Catholic process for declaring the nullity of a marriage, because in almost all the Orthodox Churches this procedure simply involves informing the bishop of the circumstances of how the marriage was broken, in order to see if there are motives for granting a divorce. The procedure is described in this way by one Orthodox author:

> «Ainsi, le remariage dans l'Église orthodoxe n'est pas une question de droit mais d'économie, qui implique exclusivement le discernement pastoral de l'évêque diocésain. Dans la pratique, les couples voulant se remarier à l'Église doivent présenter une demande écrite à l'évêque diocésain et peuvent être amenés a remplir un questionnaire permettant à l'évêque d'élucider la raison de la rupture du premier mariage, de connaître la durée de la séparation, de savoir s'il y a eut des enfants de la première union, de connaître leur âge, de savoir si l'autre partie s'est engagée dans une nouvelle union, si l'autre partie est consentante à ce project de seconde union en renonçant a la première, si le nouveau conjoint ou la nouvelle conjointe n'était pas aussi déjà marié, s'il y a des enfants de cette nouvelle union, s'il y a une perspective chrétienne à cette seconde union, etc. Ce n'est qu'après une analyse méticuleuse du cas et en usant du discernement pastoral que l'évêque diocésain

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Romae 1893, no. 1295, pp. 436-441. On the disputes between the Holy See and the united Romanians in the years 1856-1872 regarding the indissolubility of marriage, cfr. L. Bressan, *Il divorzio nelle Chiese orientali, ricerca storica sull'atteggiamento cattolico*, EDB, Bologna 1976, pp. 197-218.

[20] Cfr. P. Gefaell, *Il Primo Concilio Vaticano e gli orientali: Voti dei consultori della Commissione preparatoria per le Missioni e le Chiese orientali*, Pontificium Institutum Orientale – Facultas Iuris Canonici Orientalis, Excerpta ex Dissertatione ad Doctoratum, Romae 2005, pp. 28, 41, 96.

> peut se prononcer à accorder ou non un second mariage ecclésiastique.»[21]

So, because of the practice of having recourse to *oikonomia*, in the great majority of Orthodox Churches true sentences of marriage nullity are not given.

However,, in some countries the Orthodox authorities give the sentences of "annulment" of marriage which have civil effect.[22] For example, as has been said, in Lebanon, the Personal Statute of the Greek-Orthodox Church provides three different ways of "dissolving" a marriage: *annulation* (art. 67), the *resiliation* (dissolution: art. 68) and *divorce* (arts. 69-77). In substance, the second and the third methods are equivalent to the above mentioned "permissions" of accede to a new marriage, because *usually* they do not judge the original nullity of the marriage but they "annul" it, without entering in the merits of its validity or invalidity. However, in the first case (*annulment*) this is a true and proper declaration of the nullity of marriage (for the impediment of a previous bond, for the impediment of consanguinity, for defect of form).[23] Therefore, on 26 October

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[21] J. Getcha, *L'idéal du mariage unique exclut-il la possibilité d'un remariage? La position de l'Église orthodoxe face au divorce*, in «Revue d'éthique et de théologie morale "Le Supplément" - Religions et Nations», 228 (2004), p. 239. Cfr., also, N. Chatzimichalis, *Pratique pastorale de Grece à l'endroit du mariage et du divorce*, in «Revue de droit canonique», 17 (1967), pp. 318-343.

[22] Cfr. J. S. Saad, *La dissolution matrimoniale dans le communautés orthodoxes au Liban*, thesis extract, PIO, Roma 2002.

[23] The "*annulation*" is in reality a true declaration of nullity: «*le mariage est nul dans le cas suivants: 1. S'il est conclu alors qu'un mariage encore en vigueur lie l'une des parties; 2. S'il est conclu en violation des lois fondamentales de l'Église (tel que le mariage entre parents jusqu'au troisieme degré); 3. S'il est célebré par le prêtre d'une communauté autre que celle de l'un des deux époux*» (art. 67). Cfr. M. Mahmassi & I. Messarra, *Statut Personnel. Textes en vigeur au Liban*, Documents Huvelin, Facultè de droit et des sciences œcomiques, Beyrouth 1970, pp. 640-646.
Something similar happens in Greece (but with a different procedure, because it is the civil tribunal who judges and then transmits the decision to the bishop who makes it his own with a specific

document). Indeed, even in Greece divorce is distinguished from the declaration of the invalidity of a marriage: «La dissolution du mariage survient par la mort, par la déclaration de l'invalidité du mariage existant ou par le divorce. Un mariage est nul (gamos akyros) s'il est célébré contrairement aux articles 1350-1364 du Code Civil et il est annulable (gamos akyrossimos) s'il était annulé par une decision de la cour selon les articles 1374 et 1375 du Code Civil. (...) Le jugement prononçant le divorce est envoyé par le Procureur à l'èvêque qui déclare le mariage dissous au spirituel et donne le "diazeuktirion".» N. Chatzimichalis, *Pratique pastorale de Grece à l'endroit du mariage et du divorce*, in «Revue de droit canonique», 17 (1967), pp. 318-343 [here, pp. 337 and 339]. However, in this case we should study further the causes of the "annulment", because some could present difficulties in being accepted by the Catholic Church. Concretely, the web site of the European Commission indicates as follows the causes of "annulment" in the Greek matrimonial system: «A marriage may be annulled on the ground that one of the positive requirements for marriage was not met, or that there was some absolute impediment, or that the marriage is voidable by reason of a mistake or duress. A positive requirement is said to be lacking if the couple's declarations are not made in person, or are conditional or subject to a time-limit; if the spouses are minors, and the marriage has not been authorised by the courts; if either of them has a court-appointed guardian who does not consent to the marriage, and no authorisation has been obtained from the court; or if either of them at the time of the celebration of the marriage is not aware of what he or she is doing or is deprived of the use of reason owing to mental illness. There is an absolute impediment if the spouses are blood relations in the direct ascending or descending line, without limitation of degree, or collaterally, within the fourth degree; if they are relations by marriage in the direct ascending or descending line, without limitation of degree, or collaterally, within the third degree; or in case of bigamy or adoption. (...). There is no marriage if no declaration of marriage has been made before the mayor and witnesses, in the case of a civil wedding, or in the case of a religious wedding if the marriage has not been solemnised before a priest of the Eastern Orthodox Church or before a minister of another denomination or faith known in Greece. In that event the marriage has no legal effect, and an action seeking a declaration of its non-existence may be brought by anyone with a legal interest in the matter.» (https://e-justice.europa.eu/content_divorce-45-el-en.do#toc_8). Among these causes, the only one lacking in clarity is the annulment for 'mistake or duress' because if the error was not substantial it would not render

2008 in Lebanon the interested ecclesiastical authorities signed a pastoral agreement on the method to be followed by the Catholic Church for recognising the sentences of non-Catholic tribunals which declare the nullity of marriage.[24] After the PCLT *Note* of 2012, for these cases, from the Catholic side it is possible to make – for lack of a better expression – a process of "enforcement" of such sentences, so that they might have effect also in the Catholic context.[25] We have explained this above.

However, such Orthodox sentences are not recognised automatically, and neither can the interested parties be directly admitted to a new marriage by the Catholic parish priest. On the contrary, the intervention of the Catholic ecclesiastical judge is always required. Indeed, can. 781 CCEO starts like this: «Si quando Ecclesia *iudicare* debet de validitate matrimonii acatholicorum baptizatorum…». And the PCLT Note of 13 May 2003, no. 8, affirms that «each case that is presented must be examined and defined following the prescribed *judicial* procedure». Finally, art. 4 of *Dignitas Connubii* confirms: «Quoties *iudex ecclesiasticus* cognoscere debeat de nullitate matrimonii acatholicorum baptizatorum…». Therefore, the judge always has to intervene,[26] as the PCLT *Note* of 2012

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the marriage null according to Catholic canon law, and the "duress" of itself is not a cause of nullity, unless they meant a marriage celebrated because of fear of a menace.

[24] Cfr. Ch. Antoun, *La giurisdizione della Chiesa sul matrimonio degli acattolici e il riconoscimento della giurisdizione delle Chiese ortodosse nel contesto del Libano*, Doctoral thesis, Faculty of Canon Law, Pontificia Università della Santa Croce, Roma 2016 (pro manuscripto).

[25] Cfr. J. Llobell, *La giurisdizione della Chiesa sul matrimonio degli accattolici*, in J. Carreras (ed.), *La giurisdizione della Chiesa sul matrimonio e sulla famiglia*, Giuffré, Milano 1998, pp. 87-88.

[26] Cfr. M.A. Ortiz, *La validità del matrimonio civile celebrato da battezzati nella Chiesa ortodossa* [Commentary on the PCLT Note of 13 May 2003], in «Ius Ecclesiae» 27 (2005), pp. 315-333 [here, p. 332]. Cfr. as well the second part of the monography of U. Nowicka, *Stwierdzneie stanu wolnego wiernych prawoslawnych na forum Kościoła katolickiego* [Declaration of free state of Orthodox faithful in the forum of the

reiterated (cfr. nos. 3 and 6), except for the case of a marriage celebrated between two Orthodox without the canonical form prescribed by their law, for which the PCLT *Note* of 2012 confirms that it is enough to verify the fact through the prematrimonial investigation done by the Local Ordinary or by the parish priest with the permission of the Ordinary (cfr. no. 4).[27]

Catholic Church], Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego w Warszawie, Warszawa 2012 (see the review in Italian by W. Góralski, *La dichiarazione di stato libero dei fedeli ortodossi nel foro della Chiesa cattolica, un problema ecumenico?*, in «Ius Ecclesiae» 25 (2013), pp. 433-448, and on this second part in concrete, cfr. pp. 436-439). Even though it was published in the same year, the monography of Nowicka does not contain the PCLT *Note* of 2012 which we are considering.

[27] Still, the new can. 1374 of the motu proprio *Mitis et misericors Iesus* makes no mention of the content of the old can. 1372 § 2 CCEO that established this sufficiency of the prematrimonial investigation. Therefore, a Particular Response by the PCTL of 25 November 2015 affirms that, consequently, from now on in the Oriental discipline even in these cases a judicial sentence will be required and the prematrimonial investigation will no longer be sufficient (PCLT, *Particular Response Prot. N. 15170/2015*, 25 November 2015, in www.delegumtextibus.va. See my commentary: P. Gefaell, *PCLT's Particular Answers to m.p. Mitis et Misericors Iesus*, in «Eastern Legal Thought» 12 [2016], pp. 29-33). We should ask, therefore, if this change is also applicable to Orthodox married only civilly who then desire to marry an Oriental Catholic party. In fact, the doubt remains whether can. 1374 MMI has also abrogated the Signatura's Decree of 2007 and the no. 3b of PCLT *Note* of 2012. In the Latin discipline, on the contrary, the simple prematrimonial investigation is still sufficient, because – as another PCLT Particular Response of 18 November 2015 asserts – the new can. 1688 of the motu proprio *Mitis Iudex Dominus Iesus* «does not bring particular modifications to what is established in the former can. 1686 CIC» and therefore «the elements on the basis of which the authentic interpretation of can. 1686 made by the Pontificial Council for the Legislative Texts and the subsequent Response from the Apostolic Signatura using this interpretation as its source do not seem to have been modified.» (PCLT, *Particular Response of 18 November 2015, Prot. N. 15182/2015*, in wwww.delegumtextibus.va. My translation). As we can see, a disparity has been introduced between the two disciplines – Latin and Oriental – that in my opinion, should be harmonized.

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