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KANON XXIII

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Inhalt

DER XXI. KONGRESS DER GESELLSCHAFT FÜR DAS RECHT DER OSTKIRCHEN

Eva Maria S y n e k, Wien

Als Bischof Elie Haddad 2011 in Athen vorschlug, den nächsten Kongress im Libanon zu veranstalten, freuten wir uns sehr. Als es hieß, konkret zu planen, war die politische Lage im Nahen Osten so angespannt, dass es ratsam schien, einen alternativen Tagungsort ins Auge zu fassen. Zugleich hatte der plötzliche Tod des in Athen neu gewählten Präsidenten der Gesellschaft für das Recht der Ostkirchen, Konstantinos Pitsakis, eine völlig neue Situation geschaffen: im Vorbereitungsteam herrschte ob der entstandenen Lücke große Betroffenheit, zugleich war allen Vorstandsmitgliedern klar, dass Vorkehrungen für die am nächsten Kongress abzuhaltenden außerplanmäßigen Wahlen eines neuen Präsidiums getroffen werden müssen. Die von Varghese Koluthara bereits in Athen dankenswerter Weise vorgeschlagene Alternativoption, den Kongress nötigenfalls nach Indien zu transferieren, schien in Hinblick auf die notwendig gewordene Generalversammlung keine optimale Lösung, war doch zu befürchten, dass nicht nur die weite Anreise für manch älteres Mitglied unserer Gesellschaft ein Problem darstellen würde, sondern sich vor allem auch die hohen Flugkosten negativ auf die Teilnehmerzahl auswirken würden. Umso größer war die Erleichterung, als Raffaele Coppola dem Vizepräsidenten unserer Gesellschaft, Giorgio Gallaro, spontan zusagte, die Tagung mit dem in Athen beschlossenen Thema „Partikularrecht und aktuelle kirchliche Rechtsfragen" („Particular Laws and Current Issues in the Church") nach Italien zu „übersiedeln". So konnte vom 10.-13. September 2013 in Bari, das bereits 1991 für den großen, gemeinsam mit der Consociatio veranstalteten Kongress die Gastgeberrolle übernommen hatte[1], ein zweites Mal eine Tagung unserer Gesellschaft stattfinden.

Dieser Kanonband enthält die Kongressakten mit Ausnahme des Einführungsvortrags von Peter Szabo, dem die rechtzeitige Fertigstellung des Manuskripts nicht möglich war. Becket Soule and John Faris sei herzlich für ihr engagiertes Lektorat der nicht von „Muttersprachlern" verfassten englischen Manuskripte gedankt. Die Drucklegung von Kanon XXIII erfolgt wie schon zuletzt mit der finanziellen Unterstützung durch die Stiftung „Living together", wofür an dieser Stelle ebenfalls herzlich zu danken ist.

Stellvertretend für alle, die in vielfältiger Weise zum guten Gelingen unseres Kongresses beigetragen haben[2], sei hier Raffaele Coppola und seinem engagierten Team vor Ort, Giorgio Gallaro, unserer Generalsekretärin Eirini Christinakis und der dominikanischen Gemeinschaft von Bari gedankt, die die Kongressteilnehmer zum Abschied in ihren schönen Räumen nächst der Nikolausbasilika mit einem

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[1] R. COPPOLA (Hg.), Atti de Congresso Internazionale *Incontro fra canoni d'Oriente e d'Occidente*. Proceedings of the International Congress *The Meeting of Eastern and Western Canons*, Bari 1994.

[2] Vgl. auch das Schlusswort von R. COPPOLA, S. 335-344 in diesem Band.

köstlichen Abendessen verwöhnte. Insgesamt konnte unsere Tagung in Kooperation mit der Università degli Studi di Bari, dem Dipartimento di Giurisprudenza, dem Centro di Ricerca „Renato Baccari", der Facoltà Telogica Pugliese und dem dominikanischen Istituto di Teologia Ecumenico-Patristica San Nicola an verschiedenen Orten in Bari abgehalten werden. Besonders eindrucksvoll gestalteten sich eine nächtliche Führung durch die Kathedrale und der Besuch in der Nikolausbasilika. Der Großteil der Vorträge wurde im Konferenzsaal der Legione Allievi della Guardia di Finanza gehalten, die uns dankenswerter Weise auch weitere Infrastruktur wie Mensa, Bar und einige Gästezimmer zur Verfügung stellte.

In der Legione Allievi della Guardia di Finanza durften wir auch am letzten Konferenztag die Generalversammlung unserer Gesellschaft abhalten, auf der Bischof Kyrillos Katerelos zum neuen Präsidenten gewählt wurde. Um das Überlappen von Amtszeiten zu vermeiden, ist der restliche, in Athen gewählte Vorstand zurückgetreten und wurde auf weitere 4 Jahre wiederbestätigt. Außerdem hat Eirini Christinakis mit einem orthodoxen Kollegen aus Schweden, David Heith-Stade, der in Eigenregie die inzwischen mit unserer Gesellschaft „verlinkte" Website Zonaras (http://zonaras.wordpress.com/) aufgebaut hat, einen engagierten jungen Vizesekretär zur Seite gestellt bekommen.

Wie sehr zwischen Bari I und Bari II nicht nur im Vorstand ein Generationenwechsel stattgefunden hat, mussten wir zugleich mit einem lachenden und einem weinenden Auge feststellen. Nicht nur im Auditorium, sondern auch auf der Referentenliste stachen erfreulich viele jüngere, z. T. auch ganz neue Gesichter wie jenes von Emanuel Tavala oder Ioan Pop ins Auge. Zugleich wurde den älteren Teilnehmern schmerzlich bewusst, dass bei den Tagungen immer mehr prominente Mitglieder unserer Gesellschaft wie unser Ehrenpräsident Metropolit Panteleimon Rodopoulos dauerhaft fehlen, weil es ihnen gesundheitlich nicht mehr möglich ist, eine längere Reise zu unternehmen. Viele der Referenten von Bari I – u. a. Jean Beyer, Bischof Eugenio Correcco, Bischof Emil Eid, Jean Gaudemet, René Metz, Hubert Müller, Metropolit Damaskinos Papandreou, Erzbischof Johannes Rinne und Ivan Žužek – sind auch schon länger verstorben.

Dieser Kanon-Band soll in besonderer Weise dem Gedenken unserer beiden Präsidenten Konstantinos Pitsakis und Carl Gerold Fürst gewidmet sein. Mit Bischof Kyrillos Katerelos wurde ein Lieblingsschüler von Carl Gerold Fürst gebeten, zusammen mit dem Präsidentenamt auch dessen Nachfolge im Herausgeberteam unseres Jahrbuchs anzutreten. Im Namen der Gesellschaft sei ihm herzlich gedankt, dass er auch diese Herausforderung angenommen hat. Εἰς πολλά ἔτη!

LE DROIT PARTICULIER DANS L'ÉGLISE GRECQUE MELKITE CATHOLIQUE

✠Elie Bechara H a d d a d, Saida

Introduction

Parler d'un droit particulier d'une Église *sui iuris*, c'est remonter aux origines. Car, selon l'esprit des *Sacri canones*[1], la *mens legislatoris*, entend a travers ce droit particulier sauver le patrimoine. Mais faut-il préciser de quel patrimoine parle-t-on, et si vraiment le *ius particularae* de ces Églises a pu participer à sauver les particularités des Églises orientales.

Notre étude sur le droit particulier des melkites, nous le divisons en deux points: dans le premier nous donnons un aperçu historique des sources juridiques des Melkites qui correspondent au patrimoine melkite à sauver. Dans le deuxième nous aborderons l'état actuel du droit particulier de l'Église melkite.

I. Les sources juridiques de l'Église grecque melkite catholique

Les sources juridiques de l'Église grecque melkite catholique remontent au delà de son appartenance à l'Église catholique, a savoir au premier millénaire. Cependant, nous nous limitons dans cette étude aux sources juridiques depuis 1724, date du retour des melkites au catholicisme, arrivant à notre temps. On y distingue les Actes du Saint-Siège, les coutumes locales, le droit des religieux, le droit civil et les synodes patriarcaux.

Dans les Actes du Saint-Siège[2], on y voit les décrets des Pontifes romains, les documents de la Congrégation de la *Propaganda Fide*, de la Congrégation pour les Églises Orientales, de la Congrégation des indulgences, du tribunal de la Pénitencerie apostolique et enfin des délégués apostoliques[3].

Par rapport aux coutumes locales développées durant les siècles, sont aussi une partie des sources juridiques des Melkites. Ces derniers ont des coutumes de toutes sortes: universelles, particulières, *iuxta legem, contra legem,* rationnelles et irrationnelles etc.[4]. De sa part le Saint-Siège en fait dans ses documents certains emprunts pour des références juridiques. Ainsi font les conciles nationaux, la collection intitulée *Résumé des vérités* etc.[5].

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[1] Constitution Apostolique «Les canons sacrés» in Code des canons des Églises orientales, Cité du Vatican 1997, 9.

[2] Cf. A. COUSSA, Indication des sources juridiques du droit canon chez les Melchites, in: Fonti VIII, Vatican 1932, 433.

[3] Cf. ibidem, cf. aussi A. ABELA, Melchiti, in: DHGE VIII, Paris 1935, col. 22.

[4] Cf. C. KOROLEVSKY (= C. CHARON), Histoire des Patriarcats Melkites I, Rome 1911, 379-381.

[5] Cf. ibidem, 382.

Disant ceci, une réserve doit se faire sur les coutumes erronées et illégitimes. Dans ce cas, et dans l'absence de toutes normes juridiques, les Melkites ont suivi les lois de l'Église universelle[6].

Une autre source est le droit des religieux. Ces ordres sont l'Ordre Basilien Salvatorien, la Congrégation des Sœurs Basiliennes Salvatoriennes, l'Ordre Basilien Chouéirite, l'Ordre des Sœurs Basiliennes Chouéirites, l'Ordre Basilien Aléppins, l'Ordre des Sœurs Basiliennes Alépines, la Société des Missionnaires de Saint Paul, l'Ordre des Sœurs du perpétuel secoure, l'Ordre des Sœurs du bon Service. Tous ces Ordres forment dans leurs constitutions une source juridique du droit particulier des Melkites[7].

Reste à dire que le droit civil a eu aussi son influence sur le droit des Melkites. N'importe où se trouvent, les Melkites ont eu cette influence; on les voit au Liban, en Syrie, en Égypte, en Palestine, en Orient ou dans le monde occidental. Les différentes législations de ces pays ont collaboré à créer une multitude de traditions chez les Melkites correspondants surtout au statut personnel. La loi Islamique en Orient et la loi du mariage civil en Occident ont marqué en plusieurs points et ont eu leurs conséquences sur la vie et le patrimoine juridique des Melkites. On voit par exemple dans la période des Ottomans les communautés chrétiennes subir les répercussions de toutes les prescriptions des Kalifes[8].

Il nous reste de parler du mouvement conciliaire melkite entre 1724 et nos jours. Ces synodes ne sont pas tous à prendre pour de vrais révélateurs de la perspective melkite. On se limite dans la période 1724-1909 dans laquelle les synodes étaient une véritable tentative, malheureusement échouée, en vue de créer un *Corpus Iuris* complet à l'instar d'autres orientaux catholiques[9]. On se limite à éclaircir la problématique qui correspond à leur nombre et à leur valeur juridique, assujettie dès le début à des controverses ardentes.

Quant à leur nombre, plusieurs auteurs ont traité cette question. On exposera ici l'opinion de certains parmi eux qui résume l'idée générale des autres. Le premier de ces auteurs fut C. Korolevsky. Dans son étude sur ce sujet, il compte 13 synodes (conciles), entre 1731 et l'an 1900 mais qui ne sont pas tous de la même valeur. A son avis les synodes les plus importants sont huit: Le deuxième de Saint-Sauveur (1751); le troisième de Saint-Sauveur (1756); Saint-Isaïe (1761); le quatrième de Saint-Sauveur (1790); Carcafé (1806); Ain-Traz (1835); Jérusalem (1849); Ain-Traz (1909). Les autres sont pour une raison ou pour une autre loin d'être pris pour de vrais conciles[10].

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[6] Cf. ABELA, Melchiti, 302; COUSSA, Indication des sources, 495. La loi de l'Église latine est considérée comme étant source supplémentaire pour les Melkites (cf. ibidem, 427).

[7] Cf. J. RIACHI, Les Ordres Religieux Melkites, in: Le Lien 1 (1986) 23-24.

[8] Cf. C. BACHA, Histoire de l'Église grecque-melkite et la Congrégation salvatorienne (en arabe) II, Saint-Sauveur, Liban 1938, 33-80; ABELA, Melchiti, 26-28.

[9] Les maronites avaient pour législation reconnue par Rome, celle du Mont-Liban (1736); les ruthènes avaient le synode de Zamosk 1721.

[10] KOROLEVSKY, Histoire des Patriarcats Melkites III, 366-372.

De sa part le Cardinal Coussa compte dans la même période 17 conciles. Il en affirme l'importance de sept, omettant celui de Ain-Traz (1909) de la liste de Korolevsky[11]. Ces deux auteurs ne vont pas au-delà de l'an 1909, mais commencent dès 1731 laissant tomber le concile d'Alep (1724)[12] et le concile de Ain-Traz convoqué 1902[13]. Cependant ces lacunes ont été suffisamment remplies par l'étude de Mansi[14] et celle de Leclercq[15], modifiant deux autres conciles, celui d'Alep (1724) et de Ain-Traz (1902).

Hajjar de son côté, analyse toute l'œuvre synodale des Églises orientales catholiques déroulée jusqu'au temps moderne. Il la divise en trois phases: la première s'étend de 1730 à 1855, la deuxième de 1847 à 1929, la troisième de 1929 jusqu'au Vatican II. Son étude est analytique avec le but de démontrer comment chaque Église orientale catholique a essayé de se créer un «corpus iuris» complet et a cheminé ainsi vers une autonomie législative[16].

Malgré que Hajjar ne traite pas directement la question numérique des conciles, il met toutefois l'accent sur certains parmi eux supérieurs à d'autres. Au sujet des Melkites par exemple, il rejoint les auteurs ci-dessus cités dans leur délimitation qualitative. Il met en relief le concile de Saint-Sauveur (1790) comme première tentative de se créer une législation autonome, complétée ensuite par le concile de Carcafé (1806) et celui de Ain-Traz (1835) aussi que par le concile de Jérusalem (1849). Dans la deuxième période il met l'accent sur les deux conciles de Ain-Traz (1902 et 1909)[17].

Après avoir exposé les différentes opinions de ces auteurs, il nous semble inopportun de diviser les conciles selon le critère de l'importance des matières traitées, ou bien celui de la nature législative, but de chaque concile. Rien n'empêche qu'il y ait des conciles plus importants que d'autres, cela est bien clair, mais selon le critère de l'appellation des conciles[18], toute assemblée de patriarche et d'évêques qui a traité même la minime question regardant le bien spirituel de leur église, mériterait le nom de concile. Ensuite, il n'est pas dit qu'un concile doit

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[11] A. COUSSA, Discipline byzantine. Melkites (Fonti XV), Vatican 1934, 324.

[12] Ce concile fut convoqué par le patriarche Athanase Dabbas (1685-1694; 1720-1724), signé par lui et par neuf autres évêques. Les actes du concile se restreignèrent à traiter la question des dispenses autour du Jeûne et de l'abstinence pour les fidèles melkites. On le voit se répéter dans le décret de 1731 avec Cyrille VI Tanas, cela nous encourage à le considérer comme de vrai patrimoine de l'Église melkite. Sachant bien aussi que le patriarche Dabbas avait fait en ce temps de l'histoire, quoique n'est pas officiellement, sa profession de foi catholique. Cf. J. D. MANSI, Sacrorum Conciliorum XLVI, Paris 1911, col. 153-155 (le texte est traduit de l'arabe en italien).

[13] Cf. H. LECLERCQ, Histoire des conciles XI, Paris 1949, 788. Les membres du synode rédigèrent 16 résolutions regardant le droit du patriarche sur les évêques et les prêtres et réciproquement le devoir d'obéissance de ces derniers envers le patriarche.

[14] Cf. MANSI, Sacrorum Conciliorum XLVI, col. 153ss. On y trouve tous les synodes melkites jusqu'au l'an 1909.

[15] LECLERCQ, Histoire des conciles XI, 1. 136ss.

[16] J. HAJJAR, Les synodes des Églises Orientales Catholiques et l'évêque de Rome, in: Nicolaus 65 (1970) 371.

[17] Ibidem, 374.

[18] Cf. P. BLANC, Synode, in: DDC VII, Paris 1934, col. 1134.

par force légiférer et émaner des lois. Par contre il est indispensable de préciser que chaque concile porte en soi le pouvoir législatif même en cas d'absence concrète de canons; le simple fait de discuter des affaires concernant l'intérêt d'une église, dans le cadre d'une assemblée patriarcale et épiscopale légitimement convoquée, cela manifeste suffisamment l'intention de ces prélats à exercer ce pouvoir.

Arrivant à ce point, et selon les critères ci-dessus exposés, le concile de Zahlé (1859) – déjà appelé «pseudo concile» par les mêmes auteurs – est à éliminer de la liste conciliaire melkite, car, il a été convoqué en l'absence du patriarche et sans son consentement préalable, ainsi que le concile de Joun (1731) qui ne dépasse pas les limites d'un décret signé par le patriarche Cyrille Tanas et par deux autres évêques[19].

Après ce qui est dit, une nouvelle liste devrait contenir 20 conciles dont voici les noms et les dates:

1. Le concile d'Alep 1724
2. Le premier concile de Saint-Sauveur 1736
3. Le deuxième concile de Saint-Sauveur 1751
4. Le troisième concile de Saint-Sauveur 1756
5. Le concile de Saint-Isaïe 1761
6. Le concile de Deir-El-Kamar 1763
7. Le concile de Zouk 1765
8. Le quatrième concile de Saint-Sauveur 1790
9. Le concile de Zouk 1797
10. Le concile de Carcafé 1806
11. Le concile de Ain-Traz 1811
12. Le cinquième concile de Saint-Sauveur 1813
13. Le sixième concile de Saint-Sauveur 1813
14. Le concile de Zouk 1813

[19] LECLERCQ, Histoire des conciles XI, 1, 135.

15. Le concile de Ain-Traz 1835

16. Le concile de Jérusalem 1849

17. Le septième concile de Saint-Sauveur 1856

18. Le concile de St. Jean de Choueir 1864

19. Le concile de Ain-Traz 1902

20. Le concile de Ain-Traz 1909

Les conciles jugés par ces mêmes auteurs de moins importants sont: Le concile d'Alep (1724); le premier concile de Saint-Sauveur (1736); le concile de Deir-El-Kamar (1763); le concile de Zouk (1765); le concile de Zouk (1797); le concile de Ain-Traz (1811); le sixième concile de Saint-Sauveur (1813); le septième concile de Saint-Sauveur (1856); le concile de Ain-Traz (1902).

Deux de ces conciles pourraient susciter plus de difficultés que d'autres à être considérés de vrais synodes. Il s'agit de Deir-El-Kamar (1763) et de Zouk (1765). Le concile de Deir-El-Kamar (1763)[20], fut convoqué par le vicaire Apostolique Arnold Bossu, en vue de mettre fin aux divisions causées par l'abdication de Cyrille III et l'élection de deux Patriarches: Ignace Jauhar et Théodose Dahan. Bossu, avec l'approbation de la Propagande confirma Dahan et le Pape Clément XIII lui envoya plus tard le Pallium. Vu le droit inaliénable du Pape d'intervenir, lui ou moyennant ses délégués, pour convoquer ou assister aux conciles des Églises orientales catholiques, ce concile, légitimement convoqué, traitant d'un sujet extrêmement sérieux bien que conflictuel, serait inopportun à notre avis de ne pas lui accorder le nom de vrai concile. Quant au concile de Zouk (1765)[21], celui-ci a été convoqué par le Patriarche Dahan pour continuer à résoudre le conflit du concile précédent de 1763. Il est à notre avis un vrai synode. Disant cela, il se peut que la nature conflictuelle des œuvres conciliaires, ait tellement marqué les auteurs cités dans cette étude, au point qu'ils se méfièrent des deux dernières assemblées. Mais à vrai dire ils sont des conciles à l'instar des autres. Les autres conciles qui suscitent moins de difficultés, font sans doute partie du patrimoine conciliaire melkite.

Après avoir délimité le nombre des conciles, abordons en second lieu la question de leur valeur juridique. Avant tout nous devons dire, que pris dans les critères de Rome et selon la constitution «Immensa» de Sixte Quint[22], le

[20] Cf. MANSI, Sacrorum Conciliorum XLVI, col. 545ss.

[21] Cf. ibidem, col. 561ss.

[22] La constitution *Immensa* de Sixte Quint date du 22 juin 1587. Elle prescrit qu'aucun synode ne peut obtenir la sanction canonique sans l'approbation Pontificale romaine. Cf. MANSI, Sacrorum Conciliorum XXIX, col. 500.

mouvement conciliaire des melkites ne dépasserait pas les limites de 25 canons du synode de Ain-Traz (1835) approuvés par Rome. Faut-il voir d'autres critères, celui par exemple mis en pratique par les melkites? A ce propos le Cardinal Coussa dit:

> «En effet, dans la pensée de leurs auteurs, les conciles ne prétendent pas tous, ni toujours, rénover. Mais souvent leur but est de donner l'ensemble de la législation d'un rite – aujourd'hui Église patriarcale – une sorte de "corpus iuris". Aussi bien que plus d'un des canons, consignés dans ces sept conciles, – les sept conciles qu'il reconnaît lui même comme de vrais conciles – soit complètement tombés en désuétude, ou même n'ait jamais été mis en pratique, il reste que, au moins quelques fois, ils accusent des coutumes légitimes et même des lois proprement dites. C'est la raison pour laquelle, même le synode de Carcafé, quoique condamné par le Saint-Siège, est souvent consulté par le clergé melkite»[23].

Disant cela, le Cardinal Coussa donne plus de poids aux canons des conciles. On se demande si ce n'est pas un signe d'espoir qui nous permet de sauver la partie légitime des conciles et de la considérer comme un véritable patrimoine législatif pour les melkites. Coussa paraît pessimiste à ce niveau-là, il dit: «Quant à faire le départ entre les décisions légitimes et celles qui ne le sont pas, cela est moralement impossible»[24]. Mais à notre avis, le fait de ne pas accomplir un travail pareil menace la partie légitime elle-même de tomber dans l'oubli ou tout au moins de perdre sa valeur. Cela dit, la valeur juridique des conciles reste entre les mains des chercheurs et dans leurs tentatives de dégager tout ce qui n'est pas entaché d'aucune théorie suspecte.

Quant aux synodes de la période successive celle de 1909-1990, ceux-ci ne sont pas une véritable source de droit. Leurs œuvres se limitaient à des résolutions particulières administratives à base de la législation commune à toutes les Églises orientales catholiques. L'unique synode qui a promulgué des lois particulières pour l'Église melkite fut celui de Caire (1958)[25].

II. Premier essai d'un droit particulier des melkites (1991-1994)

Conformément à ce que le législateur catholique universel demanda lors de la législation antécédente des 4 motu proprio des années 1949-1953, à toutes les Églises orientales catholiques de préciser chacune son droit particulier, ce fut le même avec la parution du CCEO. Les mêmes Églises orientales sont de nouveau invitées à préciser leur droit particulier. De leur part les Melkites confiaient la

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[23] COUSSA, Indications des sources, 433.

[24] Ibidem, 433.

[25] Cf. W. KABKAB, «L'index des Décisions Synodales», qui est un recueil contenant des décisions synodales des melkites depuis 1946 jusqu'à nos jours. Il est fait en langue arabe et n'est pas encore publié.

charge à une commission préparatoire composée par Mgr Néophytos Edelby, Mgr Elias Néjmé, Mgr Jean Mansour, le père Dimitri Salachas et le père Elie Haddad B.S. Cette commission, prenant en considération les sources juridiques melkites ci-dessus citées, s'est réunit à Rabwé (Liban) le mois de Mai 1991, et exécuta un schéma préparatoire pour les 178 articles prévus au droit particulier par le CCEO.

De sa part le synode melkite convoqué par le patriarche Maximos V Hakim le 7/10/1991, étudia une partie du dit schéma et le confirma. Dans les deux années consécutives 1992 et 1993, les Melkites ont réussi à légiférer dans leur synode des évêques de l'Église patriarcale, le nouveau droit particulier. Ainsi, une fois terminé de sa tache, le synode a présenté le fruit de son travail au Saint-Siège et ce dernier a fini par l'approuver. Ensuite le texte fut publié dans la revue Al Macarrat en 1994, dans un numéro spécial publié en langue arabe. Malheureusement la traduction de ce texte en langues estrangères n'a pas eu lieu en forme intégrale mais que fragmentée.

Les titres du droit particulier melkite sont: L'appartenance a l'Église; L'élection du patriarche; Les droits et les devoirs du patriarche; Le synode des Evêques de l'Église patriarcale; La curie patriarcale; La vacance du siège patriarcale; Les Evêques; Le synode éparchial; La curie éparchiale; Les protopresbytres; Les paroisses et les cures; Les exarchats; Le clergé; Les laïcs; Les religieux; Les Instituts séculiers; Les sociétés des fidèles; L'évangélisation et le kérygme biblique; Les moyens de communication sociale; Les sacrements et les sacramentaux; Les baptisés non catholiques qui sont en communion avec l'Église catholique; L'œuvre œcuménique; Les personnes et les actes juridiques; Les offices; L'élection; Les plaintes contre les décrets administratifs; Les biens temporels de l'Église; Les tribunaux et les peines.

Le déroulement du travail autour des canons concernant le droit particulier semble être le même dès le début jusqu'à la fin. On cite brièvement quelques exemples de législations synodales. Le premier de ces canons était le numéro 70 du CCEO, regardant la direction du synode lors de l'élection du patriarche. Le droit particulier propose de suivre la norme du droit commun qui donne la priorité à l'administrateur patriarcal jusqu'une prochaine élection d'un président pour la séance en question.

Dans le canon 72, concernant toujours l'élection du patriarche, le droit particulier propose qu'après cinq scrutins, si l'un des candidats n'aura pas les deux tiers des voix, on se limite à voter pour les deux premiers d'entre eux qui ont eu les plus de voix. Après trois scrutins, si personne des deux n'a pas eu les deux tiers, il sera élu celui qui aura la majorité absolue.

A propos du canon 182 § 1, concernant la proposition des candidats à l'épiscopat, le droit particulier confirme celui commun[26].

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[26] Cf. CCEO can. 182 § 1: «Candidatos ad episcoporum idoneos sola Synodi Episcoporum Ecclesiae patriarchalis membra proponere possunt, quorum est etiam ad normam iuris particularis informationes et documenta, quae necesseria sunt, ut candidatorum idoneitas comprobetur, colligere auditis, si opprtunum ducunt, secreto et singillatim aliquibus presbyteris vel etiam aliis christifidelibus prudential et vita Christiana praestantibus».

Le canon 1036 § 1, donne au synode des évêques le droit de fixer la somme majeure et mineure dans l'aliénation des biens de l'Église. A cet égard, le droit particulier fixe comme somme mineure //30.000// $ et comme somme majeure //60.000// $. Cependant les nouvelles directives romaines ont suspendu les canons du CCEO.

Le synode de 1991 prescrit aussi des mesures concernant les canons: 198 concernant le devoir des évêques à célébrer la liturgie divine pour le peuple; can. 263 § 1 parlant du devoir de l'évêque de construire le conseil pour les affaires économiques dans son éparchie; can. 284 § 3 n°4 à propos du mandat des curés de paroisses s'il est stable ou pour un temps déterminé; cans. 294, 297 § 2, 377, 390 § 2, concernant certains droits et devoirs du clergé; can. 709 § 1 à propos de la distribution de la sainte communion par les prêtres aussi que par les diacres; can. 715 § 2 sur l'offerte de la Messe des présanctifiés; can. 880 § 2 traitant la possibilité de construire, transférer ou supprimer des journées de fête et de pénitence.

Bref, la plupart de ces articles adoptent les propositions du droit commun du CCEO. Ce dernier propose souvent une alternative et laisse le choix au droit particulier. Ainsi les revendications des prélats des différentes Églises orientales catholiques critiquant le nombre restreint des articles du droit particulier n'est pas soutenable. Ceci dit, aucune de ces Églises n'a atteint dans leur droit particulier le nombre total prévu par le CCEO a savoir 178 cas. A titre d'exemple, l'Église maronite a légiféré 150 cas, l'Église arménienne 140 cas, l'Église syriaque 142.

L'absence des matières ecclésiologiques du droit particulier a suscité certaines critiques de la part de quelques instances ecclésiastiques en orient catholique. Nous nous référons à la lettre des patriarches catholiques adressée au Pape Jean Paul II en l'an 2000, dans laquelle les revendications pour un élargissement de leurs droits en dehors du territoire patriarcal furent marquantes.

Suite à l'analyse de ces quelques canons du droit particulier, on se permet par contre d'analyser certaines lettres envoyées à Rome par ces différents synodes melkites convoqués dans ces dernières années. Ces lettres concernant certains points du nouveau Code et en conséquence des lacunes prévues par le droit particulier nous révèlent l'intention générale des Melkites.

La première de ces lettres fut celle de l'ouverture du synode du 24 août 1992. Le patriarche Maximos V Hakim s'adressa aux évêques en disant:

> «Bien des événements se sont déroulés l'an dernier, laissant leur influence dans notre vie. Parmi les plus importants, il faut citer la parution de la nouvelle 'collection des canons des Églises orientales', entrée en vigueur en octobre 1991. Nous aurons à les étudier et à prendre des décisions concernant le droit propre de notre Église, et même à avoir le courage de réclamer les droits qui n'ont pas été reconnus. C'est pour cette raison que nous avons

centré ce St Synode sur l'étude de ces canons, pour faire ample connaissance avec leur contenu et leurs conséquences»[27].

Dans le même numéro de la même revue, sa Béatitude le patriarche Maximos V, s'est adressé à son Éminence le Cardinal A. Silvestrini préfet de la CÉO montrant certaines réserves à l'égard des canons 813, 814 et 815 du CCEO, qui nécessitent des mesures de droit particulier. Ces canons concernent l'autorisation de dispense des mariages «de deux baptisés, dont l'un est catholique et l'autre non-catholique» (can. 813) et les conditions nécessaires à cette dispense (cans. 814-815). Il dit:

> «Durant l'étude du nouveau Code des Canons des Églises Orientales, notre Saint Synode s'est arrêté d'une manière spéciale sur les canons 813, 814 et 815 [...] Les Pères ont trouvé irrecevable la législation sur les mariages mixtes, relativement aux conditions posées tant à la partie catholique qu'à la partie non-catholique, du moins quand cette dernière appartient à l'une des Églises Apostoliques orthodoxes. Cela pour les raisons suivantes:
>
> 1. La nouvelle législation est contraire à la théologie des "Églises-Sœurs", qui est à la base de l'œcuménisme de Vatican.
> 2. Elle est contraire à nos traditions socio-religieuses orientales, qui obligent les enfants mineurs à suivre leurs pères dans leur allégeance communautaire.
> 3. Le fait de la convivialité et de la compénétration communautaire, souvent au sein de la même famille, fait que les mariages mixtes sont des faits courants.
> 4. Dans la vie courante, il est impossible de mettre en pratique les conditions exigées au canon 814. Que faire?»[28]

Dans un autre paragraphe de la même lettre le synode melkite poursuit en disant:

> «D'autre part, les pères ont trouvé que la nouvelle législation concernant les mariages mixtes ne nous apporte aucune solution à un problème qui se pose tous les jours dans nos chancelleries épiscopales, et qui est l'état libre d'un ex-conjoint catholique ou orthodoxe ou protestant, marié dans une Église orthodoxe ou une Communauté protestante, et dont le mariage a été dissous dans cette Église ou cette communauté. Là également, que faire?»[29]

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[27] Cf. M. HAKIM, Le St. Synode de l'Église grecque-melkite-catholique. Discours d'ouverture, in: Le Lien n. 5-6 (1992) 9.

[28] Cf. ibidem, p. 10-11.

[29] Cf. ibidem, p. 11.

Ces revendications mettent en relief le souci œcuménique des Melkites qui est d'ailleurs l'une des caractéristiques de l'ecclésiologie et de la mission de l'Église melkite. Dans une autre allocution, le patriarche Hakim évoque le problème des prêtres mariés. Il procède dans son discours en se rappelant des deux affirmations suivantes:

> «Les Églises d'Orient, conscientes de la nécessaire unité de toute l'Église, ont la faculté de se régir selon leurs propres disciplines, parce que plus conformes au caractère de leurs fidèles et plus aptes à promouvoir le bien des âmes» (*Unitatis Redintegratio 16*).

L'autre affirmation:

> «Les Églises d'Orient [...] ont le droit de se gouverner selon leurs propres disciplines particulières [...] Que tous les Orientaux sachent en toute certitude qu'ils peuvent et doivent toujours garder leurs rites liturgiques légitimes et leur discipline [...]» (*Orientalium Ecclesiarum § § 5 et 6*).[30]

Après avoir cité ces deux textes, le synode revendique le droit d'ordonner des prêtres mariés dans les pays d'Outre-Mer. Les membres du synode s'exprimèrent ainsi:

> «[...] Nous ne savons pas en effet comment justifier devant nos consciences et devant notre peuple, devant l'Orthodoxie qui a les yeux sur nous, cet abîme qui sépare les déclarations, des faits».[31]

La même revue insère à la fin de cette série d'articles, une note sur «la juridiction patriarcale en dehors des limites du Patriarcat». Cette note est prise de l'auteur Serge Decy dans son ouvrage *introduction et à l'ecclésiologie de l'Église melkite,* p. 94. La revue s'exprime ainsi:

> «Ce problème, dit l'auteur, concerne l'ensemble des Églises catholiques et se pose, en fait, de manière suivante: si l'Église latine, une Église particulière, exerce sa juridiction sur ses sujets où qu'ils soient, il est difficile d'accepter que le même droit ne soit pas reconnu aux autres Églises particulières, en l'occurrence les Églises orientales, en vertu de l'égalité des droits entre les Églises particulières, proclamée solennellement par le Concile Vatican II.

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[30] Cf. ibidem, p. 11.
[31] Cf. ibidem, p. 11-12.

Dès lors, l'enjeu du débat est œcuménique, comme l'a très bien souligné J. Tawil, l'ex-Éparque des États-Unis d'Amérique (*Le Lien n°85*). Il faut d'ailleurs se féliciter en cette matière de la position défendue avec vigueur par l'Église Melkite et son patriarche, Maximos V Hakim»[32].

Après l'exposition de ces articles et de ces différentes notes, on remarque facilement la méfiance des Melkites à l'égard de beaucoup de points fixés déjà par le CCEO. On se demande néanmoins si ces revendications ne sont pas arrivées bien en retard, tandis qu'il a fallu intervenir avant la parution du dit Code, pour éviter ses éventuelles lacunes.

III. L'état actuel du droit particulier melkite (2004-2010)

En 2003 le synode melkite a confié a une nouvelle commission juridique de réviser le droit particulier. Cette commission fut composée des pères Elie Haddad, Elias Rahal et Grégoire Sasine Chalawit, qui ont présenté au synode un schéma modifiant certains articles du texte de Al Macarrat 1994. Le synode de 2004 a approuvé le dit schéma après l'avoir longuement étudié. Le texte émané fut publié dans un extrait a part sorti en 2004.

Les modifications effectuées dans ce synode sur l'ancien droit particulier sont légères. Mais il y a eu par contre des ajouts sur le texte de 1994 à savoir, les règlements internes des conseils éparchiaux et paroissiaux.

Une nouveauté fut présentée par le synode de 2003 c'était de proposer que les évêques émérites ne participent plus aux synodes avec voie délibérative de leurs Églises lorsqu'ils atteignent l'âge de 80 ans conformément au canon 102, 2 du CCEO. La réponse de Rome était de vouloir concerter en ce sujet les autres Églises orientales[33]. En effet, notre synode a reçu cette année 2013 une lettre de la Congrégation pour les Églises orientales demandant notre avis sur ce sujet évoqué par les Melkites depuis 10 ans. La réponse n'était pas en faveur des évêques émérites. La majorité des membres de synode ont voté contre leur voix délibérative mais acceptaient leur simple présence durant les séances synodales[34].

Un autre point autour de la fête de Pâques issu du canon 880, 2 du CCEO fut aussi proposé par ce synode de 2003 en vue d'unifier la fête de la Résurrection avec nos frères orthodoxes. La réponse de Rome fut aussi pareille: il faut que toutes les Églises orientales catholiques s'entendent sur ce fait[35]. Cependant, cette réponse a été reformulée lors de la visite du Pape Benoit XVI au Liban en 2012, notamment dans l'exhortation apostolique «Communion et témoignage» ou le

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[32] Cf. ibidem, p. 12.

[33] Cf. Les actes du synode des Evêques de l'Église patriarcale grecque melkite catholique, 2004, in: Archives du patriarcat melkite, Rabwe, Liban.

[34] Cf. Les actes du synode des Evêques de l'Église patriarcale grecque [...], 2013, in: Archives du patriarcat melkite, Rabwe, Liban.

[35] Ibidem, 2003.

Pape exhorte les Églises orientales à fêter Pâques ensemble avec nos frères orthodoxes[36].

En 2010 une nouvelle commission synodale composée par Mgr Elie Haddad, Mgr Georges Haddad et Mgr Jean Haddad a présenté un schéma complétant ce qui reste des matières à modifier dans le droit particulier. Le synode melkite a ainsi refais les règlements internes du synode des Evêques de l'Église patriarcale, du synode permanent, du tribunal synodal avec le rôle de l'administrateur de la justice et le règlement du tribunal ordinaire patriarcal.

D'autres fragments de ce droit particulier ont été approuvé *ad experimentum* pour trois ans à savoir: le règlement des conseils éparchiaux et paroissiaux.

Un nouvel extrait à part est sorti en 2010 joint a celui de 2004, constituent ensemble le nouveau droit particulier des Melkites. Ce texte est en train d'être traduit en langue anglaise pour être plus à la portée des chercheurs.

IV. Conclusion

Pour conclure on peut affirmer que le droit particulier pris dans le sens strict, ne dépasse pas les 178 cas prévus dans le CCEO. Mais pris dans le sens large, il englobe une grande marge de la vie disciplinaire de l'Église et qui dépasse le texte du droit commun sans pourtant contredire la *mens legislatoris.*

Ce n'est pas un *corpus iuris* complet. C'est plutôt un ensemble de normes disciplinaires. Ainsi le concept de droit particulier a évolué de façon a être le subsidiaire du droit commun, chose inexistante avant la parution du code commun.

Cependant, et en répondant à la question si le droit particulier a-t-il sauvé le patrimoine des Églises *sui iuris*? A vrai dire, une comparaison faite entre la plupart des règles du droit particulier de ces Églises orientales catholiques, nous a permis de découvrir une ressemblance, voire une conformité quasi complète dans les matières légiférées.

Cette vérité ne soutient pas trop le concept de droit particulier, car il s'est avéré que quasiment rien n'est particulier à une Église par rapport aux autres Églises. Mais presque toutes les mesures prises sont communes. On est soit devant une extension du droit commun, soit devant la réalité que tous les patrimoines des Églises jaillissent d'une même source orientale. Dans ce sens il faut rechercher davantage quelles seraient ces sources communes.

Le peu de différence qui existe entre certaines mesures des Églises, n'a pas une argumentation qui remonte à une tradition ancienne d'une Église mais ceci est du a l'opinion récente des Evêques en synode. En effet, ces opinions pourraient être changées après une nouvelle discussion différemment orientée, ou bien, avec un nouveau groupe de participants au synode les opinions se répartissent différemment, car le critère du patrimoine est quasi absent des canons qui constituent le droit particulier.

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[36] PAPE BENOIT XVI, Exhortation apostolique pour les Eglises orientales «Communion et témoignage», 2013, 25.

THE PARTICULAR LAW OF THE UKRAINIAN GREEK CATHOLIC CHURCH: A CRITICAL ASSESSMENT

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I. Introduction

What has already taken place in the Ukrainian diaspora and especially in Ukraine itself after the process of perestroika in the former Soviet Union released this ecclesial body from its formerly underground status. I will not go on with retelling the history of the attempts to create a particular law for this church. This has already been admirably accomplished by several of my canonist colleagues. Instead, I would like to outline some particular problems rooted in this still foggy perception of particular law, which our Ukrainian Greek Catholic clergy face, myself included, working in not so ideal circumstances among the Ukrainian diaspora in the United States.

II. For Better or Worse: the Evolution of a System of Particular Law in the Ukrainian Greek Catholic Church

It is well known that our Ukrainian Greek Catholic Church has a confused history which has led to its having a somewhat hybrid identity – a basically eastern Christian organism but filled with many attitudes and especially legislative structures cleaved from the more legalistic and self-assured Latin West. It was founded by the Union of Brest at the end of the sixteenth century when several Orthodox bishops living in the Polish Lithuanian Commonwealth submitted to the Pope of Rome and became a Uniat or Eastern Catholic Church. But the historical circumstances surrounding this ecclesial body continued to change and although most of the bishops at the time were very much against introducing liturgical and canonical forms from the West into their own Church, this attitude soon changed. Social, cultural and sometimes even theological reasons motivated the hierarchs during the seventeenth and especially eighteenth centuries to adopt many latinisations in both liturgy and canon law. A high point of this latinisation programme occurred at the Synod of Zamosc in the eighteenth century. These changes turned the Ukrainian Greek Catholic Church into something almost unrecognizable from its past existence when it was still an Orthodox Church under the primacy of Constantinople. Only after Vatican II, did church leaders begin a process of rediscovering their own traditions which had been lost or mutated though borrowings from the West[1].

The Code of Eastern Catholic Canon Law is also plagued by a convoluted evolution since it combines elements of the western tradition with vocabulary and

[1] Cf. E. POPOWICZ, Prawo partykularne Ukraińskiego Kościoła Greckokatolickiego. Wprowadzenie w problematykę, in: Spotkanie Cyrylometodiańskie (Sandomierz 2010) 127-159.

mostly outer forms taken from the Orthodox East. For this reason, the new code endured quite a bit of criticism from various canonical quarters. It was often criticized as the work of really only one individual who was an avid advocate of the papal primacy and privileges to a veritable ultramontane degree. After the code's promulgation, voices were heard which urged a full "return to the pristine, self-governing tradition"[2] "of the Eastern Churches, a code truly suitable for the Eastern Churches"[3], and not "a mirror picture of the code of the Latin Church"[4]. One canonist was particularly critical of the fact that the code was conceived of as a common code for all the Eastern Catholic Churches and did not allow for much particular variation for the particular churches and hence the need for a particular Church law[5]:

> "It has been decided that there will; be only one, common code for all the Eastern Catholic Churches, although the various Churches should be presumed to be different from each other in many of their significant features as the Ukrainians are different from the Malabar's of India or from the Ethiopians of Africa. An Eastern Catholic Church is called sui iuris in the area of the law and as such must have its own code. Each church has its own identity and self-image which demands a separated code, promulgated not by the Pope but by the patriarch together with the patriarchal synod"[6].

Many canonists hoped that the particular law later promulgated by each individual Church *sui iuris* would in some way ameliorate this unsatisfactory situation. But in our Ukrainian Greek Catholic Church such an outcome was not forthcoming. Within the Eastern Catholic Code of Canon Law, 146 canons pertain to *particular law*.

Most of the Eastern Catholic Churches are no longer confined to their particular territory of origin, but instead have become global ecclesial organisms. They possess their own bishops, eparchies and faithful outside of their territory of origin and hence throughout the world.

The Eastern Catholic Churches have been granted the right to establish their own particular law in accordance with CCEO: c. 1493 § 1 and § 2. In accord with this established precept, leaders of the Ukrainian Greek Catholic Church became aware that it was their duty to develop their own particular law within the framework of the canon law of the entire Roman Catholic Church.

I might well be accused of speaking about the obvious but we should bear in mind at this point that the CCEO has 200 canons fewer than the CIC. We might ask ourselves why? Perhaps because it was those who compiled the Code of

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[2] V. J. POSPISHIL, Final Tally. A Report on the Unremarkable Life of a Catholic Priest in the Twentieth Century, Matawan 2001, 280.

[3] Ibidem.

[4] Ibidem.

[5] IDEM, The Ukrainians in the United States and Ecclesiastical Structures, in: The Jurist 39 (1979) 399-403.

[6] Ibidem, 400 (4th point of contention).

Canon Law of the Eastern Churches thought that the individual particular Eastern Churches would each supplement the missing canons by implementing their own particular laws. Hence, each particular Eastern Church would in a sense be free to formulate their own particular laws according to their own historical, cultural and religious circumstances which necessarily differ among such a diverse body stemming, as they do, from very different places and even theological traditions.

Several mistaken conceptions exist regarding the codification of particular law. Canonists sometimes argue that the CCEO must specifically permit all legislation which enters the particular law of a Church. But if the Ukrainian Greek Catholic Church really exists as a Church *sui iuris*, its competent leaders, the hierarchy, should be allowed to formulate all the necessary particular laws needed within the framework of the CCEO.

The process of the codification of a particular juridical system for the Ukrainian Greek Catholic Church has encompassed already some three decades[7]. A synod of bishops established a commission which set out to begin compiling a system of particular law already in 1980, but real activity began only in 1985[8]. A draft of this proposed system of particular law was accepted at another session of the synod in 1999. Canons of particular law were accepted by the synod in 2000 *ad experimentum*. The draft was accepted in 2001 after a review of the canons. But there was a catch. Even though the draft was accepted *ad experimentum*, it had no force of law since its canons were never officially promulgated. This occurred because the current head of the Church, Major Archbishop Myroslav Lubachivsky died. When a new Major Archbishop was chosen in the person of Lubomyr Husar, the synod together with him voted to accept the draft but not to release it for publication. Instead, they directed that it be handed over to a commission which was to elaborate on the particular law in a time period of two years. But the work of the commission continued and did not respect the limit of a two year period[9].

Finally, in December 2007 the canons pertaining to particular law were promulgated by the major archbishop by a decree[10]. They came into force on 14th January 2008, assuring their existence *de iure* and *de facto*.

All of these facts would lead one to believe that the Ukrainian Greek Catholic Church has already its own particular law. On closer examination, however, one discovers that the legislative process has indeed been accomplished but that it retains a certain aspect of secrecy and many details are still in shadow.

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[7] T. M. NÉMETH, Canons of The Particular Law of the Ukrainian Greek Catholic Church: a Critical Report, in: Sväté Tajomstvá na kresťanskom východe (Orientalia et occidentalia 3), Košice 2008, 352.

[8] T. T. MARTYNIUK, Problemi e prospettive della codificazione del diritto particolare della chiesa greco-cattolica ucraina. Il codice delle chiese orientali, in: PONTIFICIO CONSIGLIO PER I TESTI LEGISLATIVI (ed.), Il codice delle chiese orientali. La storia. Le legislazioni particolari. Le prospettive ecumeniche. Atti del convegno di studio tenutosi nel XX anniversario della promulgazione del codice dei canoni delle chiese orientali, Rome 2011, 252.

[9] O. CHORTYK, Problematyka ta problematyčnist' partykularnoho prava UGCC, Manuscript Copy, 35.

[10] L. HUSAR, Dekret P-07/529, in: Visnyk Kijevo-Halyckoho Archyepyscopa (2007) 52.

Why do I define their existence as secretive and shadowy? For the simple fact, that it is almost impossible to find an actual copy of the canons. One might hazard a guess and reason that that such information would be available on the web page of the Ukrainian Greek Catholic Church on the internet. It is not. An incomplete version was published in the Blahovisnyk[11] of the Ukrainian Greek Catholic Church in 2001. But access to this publication is quite limited. The web page of the Ukrainian Greek Catholic Eparchy of Winnipeg in Canada does include a list of the canons[12].

Another significant detail regards the deliberations of the synod of bishops in 2002. During this meeting, it was decided to add six new canons to the 146 canons which already existed *ad experimentum*. The history of these six canons is especially murky. They cannot be found in any publication and may be considered *secret* canons. Thus they have no legal binding and the whole matter causes additional problems. As to the canons already promulgated, one might question their utility. Have they really resolved any problems? A closer look at these canons of particular law leads one to opine whether a few of the canons need further development or completion. Or is more research necessary before certain issues may be resolved? Particular law was said to have been established in order to aid canonists in the resolution of complex canonical matters. But a look at the already promulgated canons shows that many decisions are reserved for the bishop or are referred to the CCEO. The particular canons themselves are almost mirror images of their prototypes contained in the CCEO.

III. Difficulties in Applying Particular Law in Various Particular Pastoral Situations

I would now like to begin the second part of my presentation with a look at some of the individual canons contained in our particular law and the problems which canonists working in the United States may encounter when dealing with them.

1. The Secretary and the Tellers at an Election

C. 5 of the Particular Law of the Ukrainian Greek Catholic Church which corresponds to c. 71 § 2 of the common law (CCEO)[13] states:

> "The secretary of the synod of bishops of the patriarchal/major archiepiscopal Church is to function as the secretary of the synod called for the election of a patriarch/major archbishop. The position of tellers is filled by the youngest

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[11] T. NÉMETH, Kanony partykularnoho prava ukrainskoji hreko-katolytskoyi cerkvy, in: Blahovysnyk (2002) 104-130.

[12] Translated by Andrei Kachur in Canada.

[13] This system of distinguishing the two canonical collections, that of particular law and that of common law (CCEO) is used in all the following examples.

of those according to episcopal ordination. If the secretary of the synod is temporarily unable to be present at the synod, the presider of the synod, with the consent of the permanent synod is to appoint, in the interim, a secretary from among the bishops of the synod".

The position of tellers and a secretary may also be selected from among the priests and deacons[14]. This information might have been inserted into the above cited canon of particular law[15].

2. Canonical Visitations of the Major Archbishop

C. 7 (CCEO c. 83 § 1) states the following:

"It is the right and obligation of the eparchial bishop to make canonical visitations within his own eparchy. The patriarch/major archbishop, after agreeing with the eparchial bishop or exarch as to the time and schedule, has the right and obligation to conduct a pastoral visitation of the same eparchy or exarchate at least once in a five year period".

The above cited canon seems not to correspond with the content of CCEO c. 78 § 2 which bears the title "The Rights and Obligations of Patriarchs", and which in paragraph § 2 reads as follows:

"The power of the patriarch is exercised validly only within the territorial Boundaries of the patriarchal Church unless the nature of the matter Common or particular law approved by the Roman Pontiff establishes otherwise".

Obviously the bone of contention revolves around the idea of "territorial boundaries". It is clearly stated that the patriarch's or rather major archbishop's jurisdiction is confined to his own territory. A question might arise in the event of the major archbishop's visit to the United States, Canada or Great Britain. The patriarch/major archbishop is indeed able to conduct a canonical visitation of the various eparchies in his own territory. This is defined by c. 7 of the particular law. But the same canon does not mention the fact that such a visitation must be approved by the Pope. Did Rome give permission for this omission in the canon of particular law? To my knowledge, no evidence supports such an audacious presupposition. Hence, I would question the validity of this particular law canon and I would view it as null and void since there is no mention in the particular canon of the canonical requirements required by the CCEO.

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[14] O. KASKIV, Lo sviluppo storico-giuridico del diritto particolare della chiesa ucraina cattolica di rito bizantino-ucraino alla luce del CCEO (Excerpta ex dissertatione ad doctoratum PIO), Roma 2000, 41.

[15] Ibidem, 41.

3. Celebrating the Divine Liturgy: Holy Days

C. 10 (CCEO c. 94) states the following:

> "The patriarch/major archbishop must celebrate the Divine Liturgy for the people of the entire Church over which he presides, every Sunday and on feast days established by the synod of bishops".

This canon corresponds to c. 21 of the same particular law which also stipulates the liturgical times when the eparchial bishop is to celebrate the Divine Liturgy for the faithful. Both stipulate that the bishop should celebrate the Divine Liturgy every Sunday. But particular law is not at all clear about the other days. On the other hand, a glance at c. 114 of the particular law reveals a list of six days on which the bishop is to celebrate. They are 1) Christmas Day; 2) Theophany; 3) The Annunciation of the Mother of God; 4) The Ascension of Our Lord; 5)The Feast of the Holy Apostles Sts Peter and Paul; 6) The Dormition of the Mother of God. A detail worthy of note is that, in particular law, these feast days are not listed in the order in which I have just given them according to their place in the liturgical year. To wit, they are placed in the following order: 1) The Nativity of Christ; 2) The Theophany of Our Lord; 3) The Ascension of our Lord; 4) The Annunciation of the Holy Mother of God; 5)The Dormition of the Holy Mother of God; 6)The Feast of the Apostles Saints Peter and Paul. Particular law groups the feast days as to content: 1) Despotic feasts of the Lord; 2) Feasts of the Theotokos; 3) Hagiological feasts of the saints. Both ways of listing are in fact appropriate.
It would have been seemed more apt to have specified the days in particular law in both c. 10 and c. 21, without deferring to c. 114.

4. Appointing Responsible Officials

C. 16 states the following:

> "The patriarchal finance officer is appointed for a term of five years; during the tenure he cannot be removed by the patriarch/major archbishop without the consent of the synod of bishops of the patriarchal/major archiepiscopal Church or, if there is danger in delay, that of the permanent synod".

If one studies CCEO c. 122 § 2 one may note that it allows the appointment of any person regardless of sex but *determined by particular law* to the position of financial officer. When the canon further describes the removal from office of such a person, the American translators of the CCEO explicitly refer to this individual using the twin personal pronouns *he* or *she*, a distinction, which,

however, is not made in the official Latin text[16]. C. 16 of particular law on the other hand uses only the masculine pronoun. The use of only the masculine pronoun must leave a bitter taste in the mouth not only of today's feminists but also in the mouth of all those who would seek to improve the lot of women in today's hierarchically organized Church – especially in the Eastern rites where a woman is technically even forbidden entrance into the sanctuary because of Old Testament Judaic ritual purity precepts. Such an attitude might appear to many to be rather disturbing. In my opinion, the canon should be reworded to include the notion of any individual, male or female, competent enough to be appointed to such a position.

5. Danger of Delay

Another significant detail regards the phrase *danger in delay*[17] which is employed by the above cited canons. What is the exact meaning of this so called *danger in delay*? If indeed such a situation were to involve financial improprieties, one wonders whether a system of check and balance comparable to that used in today's business environment should have been in common use. It also seems preferable to include in Canon 16 after the words *danger in delay*, the additional phrase *for the good of the Church.*

6. Celibate or Married

C. 29 states the following:

> "The protosyncellus and syncellus can be celibate or married priests. Insofar as it is possible, they should be from the clergy enrolled in the eparchy, not less than thirty years of age, have a doctorate or licentiate or at least be expert in some sacred science, of sound doctrine, uprightness, prudence and experience in handling matters".

A glance at the equivalent canon in the CCEO: c. 247 § 2 reveals a slight difference in intention. The CCEO requires the priest in question to be celibate, while particular law specifically allows the priest to be married.

7. Ascribed and Enrolled

Another problem which I happened to come upon during my own work in the bishop's chancery regards the exact definition of being "ascribed" and

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[16] "Oeconomus patriarchalis nominator ad tempus iure particulari determinatum; munere durante a Patriarcha amoveri non potest nisi de consensus Synodi Episcoporum Ecclesiae patriarchalis aut, si periculum in mora est, Synodi permanentis".

[17] CHORTYK (= note 9), 38.

"enrolled" in an eparchy. What is really meant by the terms ascribed and enrolled? CCEO c. 358 states that

> "through diaconal ordination, one is ascribed as a cleric to the eparchy for whose service he is ordained, unless in accord with particular law of his own Church sui iuris, he has already been ascribed to the same eparchy".

Today's world sees an unequal distribution of priests of my Church in the various countries in which my church is represented. Some areas have a surplus of priests while others experience a dearth of clergy. This provides a major impetus for clergy to leave their homes and seek work in other parts of the world. After the collapse of the Soviet Union and the socialist regimes in the satellite countries priests living there gained the advantage of mobility and many emigrated to the West, for a variety of reasons. Eparchies of my Church in the United States are heavily staffed by priests who have arrived from Eastern Europe. I am myself an example of a migrant priest although not from the East. Born in Great Britain, I began my clerical career among the Ukrainians in England and Scotland. To this day, I remain incardinated into the Ukrainian Greek Catholic *Eparchy of the Holy Family in Exile* in Great Britain. But at the present time and for many years, I am working in the Eparchy of Stamford (Connecticut) in the United States. Frankly, I am often made to feel unsure or rather uneasy about my own status in the eparchy in which I am presently working. Common law would dictate that I am *enrolled* in the Eparchy of Stamford and enjoy all the rights accorded to any priest of my eparchy.

8. Practical Experience

CCEO c. 247 § 2 concludes with the words that the presbyter must have *practical experience*". C. 29, on the other hand, ends by stating that the cleric in question must be experienced in handling *matters*. One may in fact be competent in handling matters, whatever this may mean, but does the cleric in question have real *practical experience*? This canon begs for further extrapolation. It should be expanded to more succinctly stipulate that the cleric in question who is appointed to such a position should have had some experience in a parish and should have spent some time in the bishop's chancery dealing with canonical matters.

9. Who Can Be Appointed Chancellor?

C. 30 (CCEO c. 252 § 1) states the following:

> "In the eparchial curia a chancellor is to be appointed who is to be a presbyter or a deacon and whose principle obligation is to see that the acts of the curia are gathered and arranged as well as preserved in the archives of the eparchial curia, as well as other duties determined by the eparchial bishop".

Both canons stress the fact that the chancellor should be either a priest or a deacon, that is a man in holy orders. On the other hand, for many years, and this is well known, a religious sister served as chancellor in the Ukrainian Greek Catholic Archeparchy of Philadelphia. Today, in many Roman Catholic dioceses of the Latin rite, women are appointed to the position of chancellor. Since this is merely an ecclesiastical law and not contrary to divine law, the bishop may dispense from it and appoint a competent woman as chancellor.

10. Can a Single Cleric Occupy Several Eparchial Positions?

In some eparchies today, a single cleric occupies many positions. CCEO c. 1086 § 1 stipulates that the office of judicial vicar is "distinct from the protosyncellus unless the smallness of the eparchy or the small number of cases suggest otherwise". This is explained by the fact that, as our eparchies are declining in numbers, the same cleric may be appointed to two or three positions: judicial vicar, protosyncellus and chancellor. In the Archeparchy of Philadelphia one priest occupies all three positions.

11. Installation of a Priest as Pastor

C. 39 (CCEO c. 288) states the following:

§ 1: "The pastor acquires the care of souls by canonical provision; however, he is not allowed to exercise his office unless he has taken canonical possession of the parish". § 2: "The introduction of the pastor into the parish takes place in the manner determined by the eparchial bishop".

The canonical possession of a parish is actually an administrative process. It is conducted by means of a letter from the bishop which releases a pastor from his parish and appoints his successor to the same parish. Sometimes the bishop himself travels to the parish in question and personally installs a pastor into his new parish. One example occurred when the Archbishop Metropolitan of Philadelphia installed a new pastor to a parish. After declaring his intention by letter, he personally installed him through the ritualized act of handing him a chalice.

C. 36 § 1° states the following:

"Besides the obligations mentioned in common law, the protopresbyter has the following rights and obligations: 1° To install a new pastor into a parish in his protopresbyterate, according to the norms of the liturgical books, unless the eparchial bishop determines otherwise".

The above should be added to c. 39[18]. But which are the liturgical books mentioned by this canon? This point needs further elaboration.

12. Celebrating the Eucharist and the Question of Stipends

C. 40 (CCEO c. 294) states the following:

> "The pastor is obliged to celebrate the Divine Liturgy for the faithful of the parish entrusted to him, every Sunday and on all Holy Days of obligation. If more than one parish is entrusted to a pastor Church, he is obliged to celebrate only one Divine Liturgy for the intentions of the people entrusted to Him. If the pastor, with a just cause, is unable to fulfill this obligation, then he can delegate it to the associate or to another priest".

This canon mentions only Sundays and Holy Days of Obligation. The canon should really specify which Holy Days are meant as c. 114 did in the case of the hierarchy. Neither is there any mention in this canon of requests for Divine Liturgies for the intentions of the faithful which are normally celebrated during the week. C. 40 needs to be amended with the following addition *"apart from the requested Divine Liturgies"*.

CCEO c. 294 begins with the following precept: "The pastor is frequently to celebrate the Divine Liturgy for the people entrusted to him".

But this canon might be interpreted in various ways. A priest may celebrate only one liturgy daily. Normally a stipend or monetary offering is given. Although this is assuredly a borrowing from the Latin tradition, the clergy as well as the faithful remain for various reasons, not all of them spiritual, very attached to the custom and it would be difficult if not impossible to dispense with it. The word *"frequent"* might be interpreted to allow a priest to celebrate more than one daily liturgy. This, of course is also an abuse introduced from the Latin rite (the Byzantine Slavonic liturgical tradition allows a priest to celebrate only one liturgy daily and a liturgy may be celebrated only on the same altar only once daily) but it would seem a necessary one since often a priest must celebrate in several parishes on Sunday due to the dearth of clergy. But what should the priest do with the stipend offering if he is celebrating more than one Sunday liturgy? The practice in the Stamford eparchy with which I am most familiar allows the priest to celebrate one Liturgy daily as well as with the permission of the bishop to binate and trinate. But the priest is obligated to keep only one stipend for himself. In the case of trination, the monetary offering for the stipend must be sent to the bishop's chancery. The other third or really the first of the liturgies is always celebrated *pro populo* on Sundays and Holy Days of Obligation.

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[18] Ibidem, 38.

13. Keeping the Parish Registers

C. 42 (CCEO 296 § 1) states the following:

"The parish baptismal and chrismation register is to be kept in two copies: one to be kept in the parish church, and in the archives of the eparchial curia. Besides the books named in common law, the pastor is to see to it that the following books are properly filled out and preserved namely of registers of: prenuptial investigations and marriages, funeral, parish financial statements in two copies, requests for Divine Liturgies, the sick, obligations to foundations, and also the minutes of parish meetings and list of parishioners".

Perusing this canon, I am immediately struck by the idea that it needs further elaboration. It is not advisable to conserve parish registers in the church itself since the church is more prone to fire. All parish registers should be preserved in a fire proof safe, under lock and key, in the rectory. Personal computers have long been in common use and this allows copies of parish records to be also kept on a flash drive as well as on the hard drive of the parish computer.

14. Recording Parish Sick Calls

Having familiarized myself with the relevant literature, I stumbled upon a proposal regarding the sick call register. The author in question reasoned, in my opinion most mistakenly, that keeping a sick call register was unnecessary and superfluous in today's world[19]. On the contrary, the public with whom the cleric is in constant contact have today become exigent and very aware of their sometimes supposed rights and privileges. They may well question the activity and behavior of a parish priest. If a priest makes a pastoral visit to an ill individual, it is very necessary that he record the visit. The public often accuses a priest of failing to respond to the special needs of an ill relative or friend. The parish register should include the burden of proof in the form of a written note detailing the time and place of such a sick call. Another record should be found at the hospital itself. After administering the sacrament of the anointing of the infirm in a hospital setting, the priest should be sure to make a note in the patient's medical records using the abbreviation SOS[20]. This record also serves as an official document which formally attests the sick call.

15. Filing Financial Reports

Regarding c. 42, I would suggest eliminating the stipulation requiring the recording of two financial statements. Financial reports are prepared by the parish

[19] Ibidem, 39.
[20] SOS = Sacrament of the Sick

council responsible for financial matters and are overseen by the pastor. He, following the bishop's instructions, submits them to the eparchial financial officer who reports everything to the bishop. A digital and written copy is always kept in the parish archives. All other documentation, including dispensations, rescripts, and permissions are kept in the parish archives by the parish priest. But today many parishes have secretaries who take care of conserving all pertinent documentation in the parish archives.

16. Fostering Vocations: Including Laymen in the Process?

C. 47 (CCEO c. 329 § 2) states the following:

> "In every eparchy there is to be a commission founded for the purpose of promoting vocations; these projects ought to be open to the needs of the universal church, especially missionary needs. The members of the commission are to be from among the clergy, religious and laity; the number of members is to be established by the statutes".

Examining this canon, the role of the laity in fostering vocations immediately springs to mind. The canon mentions the fact that laymen are included in the commission for vocations. On the other hand, the word *laity* is not explicitly employed in the common law. Instead "parents, teachers and other educators of Christian life" are specifically mentioned. I would stress the role of professional laymen in the development of vocations. They are often able to observe certain qualities that clerics may not. The role of professional psychology is today accepted in most ecclesiastical quarters as being somewhat helpful, but not determinative, in the evaluation of a candidate to the priesthood. After a candidate has been accepted, his bishop as well as the diocesan vocations commission is obliged to continue to survey his progress throughout his time at seminary. This point must be included in particular law.

17. Vocations: Necessary or Superfluous?

Many of us are aware of the surplus of vocations in western Ukraine, Romania and Poland. Several seminarists have already finished their required studies, but have subsequently been informed that there is no work and, naturally, no salary for them. They are then directed to find for themselves benevolent bishops who would in some way employ them! I am myself a witness to this tragic state of affairs. Former seminarists have found work on construction sites or are squandering their time at home simply because the parishes of their home dioceses are filled to capacity and their bishop can find no pastoral work for them. Eparchies have vocational commissions and vocational directors but they do little or nothing to guarantee a candidate for the priesthood a place in the eparchy, on a practical level and with an adequate salary, after he finishes his studies. What went wrong? It is vitally necessary to amend this canon so that it will provide a

guarantee that once a seminarist has completed his formation, he will be granted a position in his own diocese or that an arrangement will be made with another bishop of his own Church in need of vocations.

18. Ecumenism and Us: Dialogue with All or Only with Some Christians?

C. 118 (CCEO c. 910 § 2) states the following:

> "The undertakings of the ecumenical movement are to be carefully encouraged and cultivated, according to the norms of Apostolic Roman See and the statutes of the synod of bishops of the patriarchal/major archiepiscopal Church".

The ecumenical movement is territory fraught with danger – some would call it a mine field – and those who would, might locate the center of the mine field on the bridge occupied by my own and by other Eastern Catholic churches! My church was long viewed as an obstacle to fostering ecumenical relations with the Orthodox Churches by both these Churches as well as by some Roman authorities. The fact that the Ukrainian Greek Catholic Church was forced into the underground in the Soviet Union did not attune many hierarchs of the diaspora to fostering good relations with the Orthodox whom they viewed as usurpers. After the Church emerged from the underground, many Ukrainian Greek Catholic clerics in the now free western Ukraine viewed the Orthodox as enemies and wished to stress their own catholicity by emphasizing latinizations or borrowings from the West, most of which, ironically, are no longer frequently observed in the post-Vatican II Church of the Latin rite. Many had never heard of ecumenism and were shocked to hear that leaders of the Roman Catholic Church were engaged in dialogue with those whom they considered heretics and schismatics. Some completely opposed ecumenical endeavors and remained locked in a pre-Vatican II mentality. Others were prepared to foster good relations exclusively with the non-canonical so called Ukrainian Orthodox jurisdictions because they too supported Ukrainian nationalist ideology.

The relevant canon might include a clause directing the Ukrainian Greek Catholic Church clergy and faithful to support ecumenical relations with all Churches and not simply with the various so called Ukrainian Orthodox jurisdictions. The Ecumenical Directory states that

> "each Synod of the Eastern Catholic Churches and each Episcopal Conference in accordance with its own procedures, should establish an episcopal commission for ecumenism, assisted by experts, both men and women, chosen from among the clergy religious and laity"[21].

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[21] PONTIFICAL COUNCIL FOR PROMOTING CHRISTIAN UNITY, Directory for the Application of the Principles and Norms of Ecumenism, Boston (no date), 33.

IV. In Conclusion

The canons of the particular law of our Church beg for more study and elaboration. Many of the canons which have been promulgated are already outdated. Particular law must learn to adapt its legislative force to the today's especially convoluted times in Ukraine and in Ukrainian diaspora.

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THE NORMS OF PARTICULAR LAW OF THE BYZANTINE METROPOLITAN CHURCH *SUI IURIS* OF PITTSBURGH, U.S.A.

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Dedicated to the Memory of Prof. Dr. Carl Gerold Fürst

I. Introduction

Can. 1493 § 2 of the Code of Canons of the Eastern Churches states the following:

> "[...], under the name 'particular law' come all laws, legitimate customs, statutes and other norms of law, which are neither common to the entire Church nor to all the Eastern Churches"[1].

The previous canon, can. 1492, states the following:

> "Laws issued by the supreme authority of the Church, which do not expressly indicate the passive subject, affect the Christian faithful of the Eastern Churches only insofar as they concern matters of faith or morals or declarations of divine law, explicitly decide questions regarding these Christian faithful or concern favors which contain nothing contrary to the Eastern rite".

Additionally, it is necessary to call to mind can. 1513 § 1 which states:

> "No administrative act is revoked by a contrary law, unless it is provided otherwise in the law itself or the law was enacted by an authority higher than the one who issued the administrative act".

The juxtaposition of these canons illustrates, perhaps rather cryptically, one of the currently most difficult canonical and pastoral challenges facing the Byzantine Catholic Church *sui iuris* of the Byzantine Metropolia of Pittsburgh, Pennsylvania, U.S.A. It is a problem which arose in a very complex historical

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[1] This is in contrast to "common law" as described in can. 1493 § 1. Under the name "common law" in this Code come, besides the laws and legitimate customs of the entire Church, also the laws and legitimate customs common to all the Eastern Churches. Cf. Guidelines for the Revision of the Code of Canon Law, in: Nuntia 3 (1976) 18-24. Also cf. M. BROGI, Particular Law in the Future Oriental Code of Canon Law, in: Ch. PAYNGOT (ed.), Homage to Mar Cariattil, Pioneer Malabar Ecumenist, Rome 1987, 89-99. Naturally, this is always in the context of cann. 43 (the Roman Pontiff), 49 (the College of Bishops) and 1513 § 1 in the general principle of can. 985 § 2 "... An inferior legislator cannot validly issue a law contrary to a higher law", keeping in mind can. 167 § 1 concerning the power of the council of hierarchs to enact laws and norms.

setting when the particular legitimate disciplinary Eastern tradition of a married clergy came in contact with the opposite particular legitimate disciplinary Western tradition of a celibate clergy in the United States of America. Rather than allowing the two legitimate different traditions to coexist in the one Church of Christ, there was a partially successful attempt to homogenize the different disciplinary traditions into a single tradition by raising the question to a matter of faith, morals and divine law[2]. This partially successful sincere attempt by some to homogenize two legitimate different disciplinary traditions into one single tradition is the basis for difficult challenging canonical and pastoral questions today. In light of these challenges the question which must be calmly and intelligently confronted, within the context of sacred scripture, tradition and magisterium in the Catholic Church, is how it is possible, in the same Eastern tradition in the Catholic Church in different parts of the world, that there exists two different legitimate disciplinary practices regarding clerical celibacy.

II. "Mission Statement" of the Metropolitan Church sui iuris of Pittsburgh

The Byzantine Metropolitan Church *sui iuris* of Pittsburgh traces its origins to the Union of Užhorod which took place on 24 April 1646 when sixty-three Carpatho-Ruthenian priests made a profession of the Catholic faith in the church castle of Užhorod (Ungvár) and united with Rome[3]. The current norms of particular law of this Church promulgated on 29 June 1999 and which entered into force on 1 October 1999 take the Union of Užhorod as their starting point. The mission statement at the very beginning of the norms states:

> "The Byzantine Metropolitan Church *Sui Iuris* of Pittsburgh is desirous of remaining faithful to the principles of the Union of Užhorod and feels a particular link with the Churches derived from that event"[4].

The mission statement also affirms a faithful adherence to the teachings of the Second Vatican Council, the *Codex Canonum Ecclesiarum Orientalium* and "other texts of the Holy See concerning this Church" *(magisterium)*. Desirous of

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[2] This was accomplished outside of Europe in Cum data fuerit (1929), seemingly with intentions of imposing clerical celibacy throughout the world in Oriental Catholic Churches. Cf. M. J. KUCHERA, A Balance between Concession and Discipline "Cum data fuerit", Article XII and Codex Canonum Ecclesiarum Orientalium, Canon 758 § 3 in the Metropolia "sui iuris" of Pittsburgh, U.S.A., A Question of Celibacy or Jurisdiction, Rome 2005.

[3] There were three conditions of the union: to be allowed to retain the Slavonic Liturgy, as was the general principle from the Council of Florence (1438-1445) and the Union of Brest Litovsk (6 October 1596), the synod of the clergy would elect their bishop and submit their choice to the Holy See for confirmation, and the clergy would have the free enjoyment of ecclesiastical immunities in the social order. Cf. M. LACKO, The Union of Užhorod, Cleveland – Rome 1976.

[4] Cf. M. J. KUCHERA, Rutena [Iglesia], in: Diccionario General del Derecho Canónico VII, Universidad de Navarra 2012, 83-85 [for the original English text see the appendix of this article].) Today the Byzantine eparchy of Passaic awaits a new bishop since Bishop Skurla was enthroned as the fifth Metropolitan Archbishop of Pittsburgh on 18 April 2012.

the renewal of the spiritual, liturgical and canonical life of the Metropolia, the Council identifies in its mission statement the four areas of consideration as: education, worship, evangelization and ecumenism. These four goals are to be renewed "according to the authentic traditions of the Eastern Churches". Furthermore the mission statement concludes with the following.

> "The hierarchs of the Metropolia of Pittsburgh, joined in full equality with all of the bishops of the United States, should collaborate to decide matters for the common good of the Churches, unity of action, common endeavours, the good of religion and ecclesiastical discipline § In carrying out its mission, the Council of Hierarchs shall be ever mindful of its full communion with the Apostolic See of Rome"[5].

The manner of proceeding in dealing with disciplinary matters in the territory of local Churches is succinctly presented in these two sentences of the mission statement. It adheres well to the spirit and letter of the documents of Vatican II which are also codified in CCEO can. 322. Indeed *Christus Dominus* very clearly states the necessity and the manner of proceeding in number 37, on episcopal conferences and their necessity, especially when it says that:

> "The object of these meetings is that, by sharing ideas based on prudence and experience and by exchanging opinions, there may result a holy consortium of resources for the common good of the Churches".

To this end *Christus Dominus* in number 38, 6) states the following:

> "It is earnestly recommended that, in promoting the discipline of their own Church in their synods, the prelates of the Eastern Churches should, for the more efficacious encouragement of works for the good of religion, also take into account the common good of the whole territory where many Churches of different rites exist, by exchanging views in inter-ritual meetings, according to the norms to be determined by competent authority".

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[5] Cf. CCEO, Title IX, "Assemblies of Hierarchs of Several Churches sui iuris", can. 322 and its sources: Vat. II decr. Christus Dominus, 37, 38, 6); decr. Orientalium Ecclesiarum, 4. All sources quoted from Vatican II are from N. P. TANNER (ed.), Decrees of the Ecumenical Councils vol. 2, Washington, DC 1990. To this end of collaboration among all Catholic bishops there exists "The Eastern Catholic Associates" formed over 40 years ago and recently constituted as Region XV of the U.S. Conference of Catholic bishops. "The Eastern Catholic Associates" are essentially a national organization of all Eastern Catholic Archbishops and Bishops in the United States to promote the interests of the Eastern Catholic Churches and their institutions. Diocesan bishops together with their equivalent in law and auxiliary bishops are members. The Association represents the Armenian, Chaldean, Maronite, Melkite, Romanian, Ruthenian, Syro-Malabar and Ukrainian Churches. There is also representation for the Syriac and Russian Churches, but without a bishop member since they presently have no established hierarchy in the United States.

This is also presented in *Orientalium Ecclesiarum* 4.

> "[...] odinaries of the various individual Churches who exercise jurisdiction in the same territory should take care to further unity of action, after taking counsel among themselves in periodic meetings".

This is the context for the present consideration of one of the norms of particular law of the Byzantine Metropolitan Church *sui iuris* of Pittsburgh[6]. The norm considered in this presentation is in reference to CCEO can. 758 § 3 which states:

> "The particular law of each Church *sui iuris* or special norms established by the Apostolic See are to be followed in admitting married men to sacred orders".

The particular law norm of the Byzantine Metropolitan Church *sui iuris* of Pittsburgh regarding this canon is:

> "§ 2. Concerning the admission of married men to the order of the presbyterate, the special norms issued by the Apostolic See are to be

[6] The Norms of Particular Law of the Byzantine Metropolitan Church "sui iuris" of Pittsburgh contain the norm considered in this presentation. These norms were promulgated on 29 June 1999 and were in effect from 1 October 1999. However, earlier there were statutes, not norms, for the Byzantine Eparchy of Parma (Ruthenian). The Statutes of the Byzantine Catholic Eparchy of Parma, which were promulgated by Bishop Andrew Pataki of Parma (1984-1996), at the second eparchial assembly on 2 September 1993, were amended twice by Bishop Basil M. Schott, Bishop of Parma (1996-2002), on 17 April 1997 and 1 May 2000. Bishop Pataki was Bishop of Passaic (1996-2007) and Bishop Schott was Metropolitan Archbishop of Pittsburgh from 2002 until his death in 2010. These Statutes were amended after the 29 June 1999 promulgation of The Norms of Particular Law of the Byzantine Metropolitan Church "sui iuris" of Pittsburgh, U.S.A. Currently, neither the Archeparchy of Pittsburgh nor the Eparchy of Passaic have comprehensive published Statutes. The Archeparchy of Pittsburgh did have Statutes which were in effect from 4 January 1999 and ended when the Norms were promulgated on 29 June 1999. The Eparchy of Van Nuys currently has a Pastoral Handbook which serves as their eparchial statutes. Elsewhere I have written in a more comprehensive way about the Statutes of the Byzantine Catholic Eparchy of Parma (Ruthenian) which were promulgated on 2 September 1993 and provide a basis for the Norms of Particular law of the Byzantine Metropolitan Church "sui iuris" of Pittsburgh, U.S.A. (promulgated 29 June 1999). Cf. M. J. KUCHERA, The New Approach of the Theology of the Holy Mysteries and its Effect in the Liturgical and Canonical Practices in the Byzantine Metropolia of Pittsburgh, U.S.A. (Orientalia et Occidentalia 3), Košice 2008, 23-36. For a critical brief analysis of the Pittsburgh Norms cf. P. SZABÓ, Altre Chiese di tradizione bizantina: L'attività legislative sui iuris delle Chiese 'minore' di tradizione bizantina, in: Il Codice delle Chiese Orientali, La storia, le legislazioni particolari, le prospettive ecumeniche (Atti del convegno di studio tenutosi nel XX anniversario della promulgazione del codice dei canono delle chiese orientali), Rome 2010, 305-344 (pp. 312-318: "Brevi osservazioni sullo ius particolare Ecclesiæ sui iuris della Metropolia rutena di Pittsburgh [USA]"); for a shorter summary of this in English cf. IDEM, Elaboration of the ius particolare sui iuris in the Byzantine Catholic Churches, in: M. AOUN – J. M. TUFFERY-ANDRIEU (ed.), Le 'ius particulare' dans le droit canonique actuel. Définitions, domaines d'application, enjeux: Actes du Colloque tenu à Strasbourg le 6 mai 2011, l'Institut de droit canonique et le Centre PRISME-Sdrc de l'Université de Strasbourg, Perpignan 2013, 157-171 (especially pp. 166-169). Also cf. KUCHERA, Balance, passim.

observed, unless dispensations are granted by the same See in individual cases".

Neither the canon in the Oriental Code nor the particular law norm are ambiguous, they are clear and precise.

III. Cann. 1493 § 2 and 1492, a question of discipline or of faith and morals?

This is not the place to treat in a systematic way and in greater detail the *iter* of CCEO can. 1492 and can. 1493. May it suffice here to highlight the essential points in relation to CCEO can. 758 § 3 and the Pittsburgh norm which is simply referred to as § 2. (under the heading of CCEO can. 758 § 3).

First, can. 1493 § 2 deals with the topic of particular law. However, it is what is stated in can. 1492 which is the heart of the matter in relationship to can. 758 § 3. The matter in can. 1513 is also essential in addressing procedural considerations which in turn safeguard truth and justice.

As always for a legitimate understanding of any canon in the Oriental code the first and most important point of reference is what is recorded in *Nuntia*. In this case the matter regarding can. 1493 § 2 is found principally in *Nuntia* 18 (1984), pp. 76-77 (can. 129). Many commentaries exist on this canon, but the essentials are in the original which is the following[7]:

"Quattro Organi di consultazione fanno riserve a questo canone, rilevandone la novità e tremendo che esso, a causa della terminologia, dissimile da quella del *CIC*, possa creare delle difficoltà. Uno di questi Organi di consultazione ritiene che il § 1 del canone possa essere omesso perché conterrebbe una

[7] The best work on CCEO cann. 1492 and 1493 from a Latin and Oriental perspective is by V. DE PAOLIS. Cf. P. V. PINTO (ed.), Commento al Codice dei Canoni delle Chiese Orientali, Vatican City 2001, 1167-1169 in Italian and with some different editing and in a more comprehensive form in English in: G. NEDUNGATT (ed.), A Guide to the Eastern Code (Kanonika 10), Rome, 2002, 814-818. DE PAOLIS, in addition to the essential Nuntia 3 (1976) 6 and 18 (1984) 74-77, elsewhere suggests: G. NEDUNGATT, A Companion to the Eastern Code (Kanonika 5), Rome 1994, 342-344 (Annotations, can. 1493); G. MONTINI, Ecclesia universalis an Ecclesia universa? Investigatio Terminologica in Textum LG, in: Periodica 74 (1985) 43-62; M. BROGI, Le chiese sui iuris nel Codex Canonum Ecclesiarum Orientalium, in: K. BHARANIKULANGARA (ed.), Il diritto canonico orientale nell'ordinamento ecclesiale (Studi Giuridici XXXIV), Vatican City, 1995, 49-75 (especially pp. 70-74, pp. 71-72) on the principle of sussidiarietà in CICO: "2. Il nuovo codice si limiti alla codificazione della disciplina commune a tutte le chiese orientali, lasciando ai loro vari organismi, la facoltà di regolare con un diritto particolare le altre materie, non reservate alla Santa Sede" (Nuntia 3 [1976] 6); I. ŽUŽEK, Indice alla voce "ius particulare" in CCEO, in: ibidem, 45-48; K. BHARANIKULANGARA, Qualche nota circa lo ius particulare nel Codex Canonum Ecclesiarum Orientalium, ibidem, 34-48, also I. ŽUŽEK in: Index Analyticus (Kanonika 2), Rome 1992, 170-174 and IDEM, Incidenza del Codex Canonum Ecclesiarum Orientalium nella storia moderna della Chiesa universale, in: Ius in vita et in missione Ecclesiæ. Acta symposii internationalis iuris canoni occurrente X anniversario promulgationis codicis iuris canonici, Vatican City 1994, 675-735 (cf. pp. 721-734, Un Codice per una 'varietas Ecclesiarum'); D. SALACHAS, Autocéphalie où autonomie des églises orthodoxes et status sui iuris des églises orientales catholiques, in: R. COPPOLA (ed.), Atti del Congresso internazionale. Incontro fra canoni d'oriente e d'occidente I, Bari 1994, 369-392.

definizione 'mere negativa'. Un altro invece lo ritiene inadeguato per le Chiese *sui iuris*, p.e. quelle patriarcali, che, con il canone, non sarebbero 'entitled to regard the body of law respecting the entire patriarchate as their common law and the law that concerns some parts of that Church, as, for instance, a diocese, as particular law'[8].

Nel gruppo di studio si prende in considerazione innanzitutto il fatto che nel progetto del *CIC* le parole *leges universales* si applicano alle leggi che riguardano 'unice Ecclesiam Latinam' pressa però nella sua totalità. In altre parole il termine *universalis* si riferisce nel *CIC* non più alla *Ecclesia Catholica Universa*, bensì alla sola universalità della Chiesa Latina. In questa prospettiva si potrebbe chiamare *lex universalis* anche ciò che in Oriente si chiama *lex particularis totius alicuius Ecclesiae sui iuris*. Questo però non poteva essere accettato perché mancherebbe del tutto il termine appropriato per le leggi comuni a tutte le Chiese Orientali (che *a fortiori* sarebbero *universalis*) contenute nel *CICO*, e per le leggi concernenti la *Ecclesia Catholica Universa*, le quali, per la comprensione degli Orientali sono le sole veramente *universales*.

Tutto considerato, il gruppo di studio ritiene il canone di significato indubbio e indispensabile per la intelligenza di molti canoni in cui si dovranno usare i termini descritti nel canone in questione, all'occorrenza ulteriormente specificati, soprattutto per quanto riguarda la espressione 'ius particolare'. Questo infatti, può avere varie specifiche come p.e.: 'lex particularis a Sede Apostolica statuta'; 'lex a Synodo Episcoporum vel Consilio Hierarcharum statuta'; 'lex eparchialis'; 'lex alicuius Instituti vitae consecratae' come sono gli *statuta*, *typica*, etc. Altre differenziazioni, proprie della dottrina canonistica occidentale ('ius commune – ius singulare'; 'ius generale – ius speciale'; 'ius universale – ius particolare') il gruppo di studio non le ritiene necessarie né utili, anzi piuttosto controproducenti, per la comprensione delle norme del *CICO* da parte degli orientali. D'altra parte niente impedisce le Chiese che lo vogliono, di usare nelle traduzioni del *CICO*, salvo il senso giuridico esatto dei singoli canoni, le espressioni che più convengono al loro patrimonio disciplinare"[9].

The final phrase in this citation is perhaps obvious, but it is what must be emphasised, namely that particular law deals with discipline, *patrimonio disciplinare*. It does not deal with matters of faith or morals or declarations of

[8] Some resolve this difficulty by using the vocabulary "common law" for the law binding all Churches sui iuris, "particular law (norms)" for the next hierarchical division, then "statutes" (usually for a single eparchy) and also "eparchical handbooks".

[9] Nuntia 18 (1984) 76-77. It should also be noted that: "[...], per migliorare la redazione del canone, il gruppo di studio inverte l'ordine dei §§, di modo che la definizione dello ius commune passi al primo posto e sostituisce le parole 'et similia' con l'espressione 'Aliaeque iuris norme'".

divine law. This is clearly stated in can. 1492 which has no corresponding canon in CICO nor in CIC/83[10].

Can. 1492 is usually commented on in the context of the source *Etsi pastoralis* § 9, 5 of Benedict XIV on 29 May 1792[11]. G. Nedungatt explains the matter in the following manner. If the legislator specifies for whom the laws are for, there is no difficulty (as with *Cum data fuerit*). However, on occasion when laws are issued by the supreme authority of the Church "the passive subjects of the law" are not specified. The norm stated in *Etsi pastoralis*, upheld until today by the Roman Apostolic See, is that laws issued by this See are usually promulgated with the Latin Church in mind. These laws also apply to the faithful of Eastern Churches in the following four cases. First, if the law concerns matters of faith and morals. Second, if it declares divine law. Third, if it specifically deals with Eastern Catholics. Fourth, if it is a matter of granting favours that are not contrary to the Eastern rites. This last point is especially in the spirit of OE 2 and its codification in CCEO cann. 39-41 on the observation of rites[12].

Yet the first source, in chronological order, cited for can. 1492 is the Fourth Lateran Council of 1215, number 4. The spirit of this citation is in rather sharp contrast to *Orientale Ecclesiarum* and the *Codex Canonum Ecclesiarum Orientalium*, but nevertheless it remained the dominant propensity until after Vatican II[13]. Lateran IV speaking about the pride of the Greeks towards the Latins said the following (Lat. IV, 4).

> "Although we would wish to cherish and honour the Greeks who in our days are returning to the obedience of the apostolic see, by preserving their customs and rites as much as we can in the Lord, nevertheless we neither want nor ought to defer to them in matters which bring danger to souls and detract from the church's honour. For, after the Greek church together with certain associates and supporters withdrew from the obedience of the apostolic see, the Greeks began to detest the Latins so much that, among

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[10] Neither cann. 1492 nor 1493 §§ 1 and 2 have a corresponding canon in CIC/83. Only can. 1493 § 2 has a corresponding canon in PA can. 317: "Nomine iuris particularis, nisi aliud ex legis textu contextuque aut ex natura rei constet, veniunt etiam statuta peculiaria seu peculiares constitutiones legitime approbatae quibus persona moralis regitur." Cf. BROGI, Particular Law (= note 1).

[11] Cf. DE PAOLIS, in: A Guide to the Eastern Code, 814. The material presented in the Kanonika 10 analysis originates with the De Paolis contribution on can. 1492 in the 2001 Pinto commentary, p. 1167 (noted above), but it is heavily augmented and more thoroughly explained by Nedungatt in his 2002 commentary. This matter, leges universales, was one of the areas of fastidious scholarly investigation and expertise of Father Nedungatt during the production of the Oriental code.

[12] Nedungatt, Guide, 814, offers a further explanation of the matter in a footnote which is worth citing. "[...] Can. 1492 had a tortured iter. The original text of TI (Nuntia 2 [1976] 66, c. 6) was revised and then omitted after a long and inconclusive debate (Nuntia 10 [1980] 96-98; 13 [1981] 45) and then reintroduced in a revised form after the feedback to the 1981 schema (Nuntia 18 [1984] 75-76). Two different concerns were operative: - 1) equality: not to treat the Eastern Christian faithful in law as if they were marginalized minorities untouched by 'universal laws'; - 2) legal clarity: when the passive subject of a law issued by the Roman Apostolic See is not stated (the faithful of the Latin Church only being in view, while not expressly excluding others). In such situations, which are not rare, the persent canon supplies a clear answer, which is not a presumption. [...]".

[13] See the reference to Don Cirillo KOROLEVSKIJ on this matter below.

> other wicked things which they committed out of contempt for them, when the Latin priests celebrated on their altars they would not offer sacrifice on them until they had washed them, as if the altars had been defiled thereby. The Greeks even had the temerity to rebaptize those baptized by the Latins; and some, as we are told, still do not fear to do this. Wishing therefore to remove such a great scandal from God's church, we strictly order, on the advice of this sacred council, that henceforth they do not presume to do such things but rather conforming themselves like obedient sons to the holy Roman church, their mother, so that there may be *one flock and one shepherd* (Jn 10:16). If anyone however does dare to do such a thing, let him be struck with the sword of excommunication and be deprived of every ecclesiastical office and benefice"[14].

This reference highlights many problems inherent in Church history in 1215 and from its very beginning. By contrast one can only think of the accusations and protests of the Latins to what they clearly saw as the byzantination being forced upon them in the Council in Trullo (692) or what the Synod of Diamper (20-26 June 1599) remains for the Thomas Christians of Kerala[15]. Likewise, the Ruthenians in the United States of America in 1929 were subjected to well intentioned, but unfortunately often and at crucial times, ill-informed disciplinary measures. These in turn for a myriad of extremely complex reasons led to schism. The vestige of a very well intentioned 1929 papal document still gives rise to canonical and pastoral questions facing Eastern Catholics abroad today. The question which time and again, especially in the globalized world in which we now live, is how is it possible that three *sui iuris* Eastern Catholic Churches which historically come from the very same union with Rome in the Union of Užhorod (24 April 1646) have two opposite disciplinary practices regarding clerical celibacy. The material presented above treats of some of the canonical questions of ecclesial law in the context of cann. 1492 and 1493, in relation to can. 758 § 3 and the § 2 on this canon in the particular law of the Byzantine Metropolitan Church *sui iuris* of Pittsburgh, U.S.A. The status of the question until the 1999 promulgation of the particular law of this Church follows, focusing on historical matter within the context of canonical ramifications.

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[14] N. P. TANNER, Decrees of the Ecumenical Councils vol. 2, Washington, DC 1990, 235-236.

[15] Cf. G. NEDUNGATT – M. FEATHERSTONE (ed.), The Council in Trullo Revisited (Kanonika 6), Rome 1995 and G. NEDUNGATT (ed.), The Synod of Diamper Revisited (Kanonika 9), Rome 2001.

IV. The complex historical setting of the Pittsburgh Particular Law on can. 758 § 3

One of the results of the papal curial decree *Cum data fuerit* (1 March 1929)[16], which remains in force and is the reason for "§ 2" in the particular Law of Pittsburgh in reference to Can. 758 § 3, is the creation of the "Carpatho-Russian Greek Catholic Orthodox Church of the Eastern Rite of North and South America". In this exodus from the Catholic Church, it is estimated that 20,000 to 100,000 faithful actually joined the Orthodox Church[17]. The new ecclesiastical jurisdiction which was created in the United States of America was in fact the second time this occurred. A short time earlier in the history of the Catholic Church in the United States (1891), it is estimated that as many as 225,000 Carpatho-Russins and Galician Catholics united with Russian Orthodoxy. This is due in large part to the American bishops, through Rome, challenging these newcomers in the United States on the issue of clerical celibacy[18]. At first glance, the topic of the argument among the people and the clergy was clerical celibacy, but ultimately it became a question of obedience and jurisdiction.

In 1891 Archbishop John Ireland of Minneapolis crudely received the widowed archpriest Alexis Toth and a group of Carpatho-Russins. This reception in turn led them to seek union with Russian Orthodoxy. Archbishop Ireland and American Catholic bishops refused to allow married Eastern rite priests to exercise their ministry in the United States. In 1893 the American archbishop stated:

> "[...] that the presence of married priests of the Greek rite in our midst is a constant menace to the chastity of our unmarried clergy, a source of scandal to the laity and therefore the sooner this point of discipline is abolished before the evils obtain large proportions, the better for religion [...]"

Although this passage speaks of the "constant menace to the chastity of our unmarried clergy", a pastoral question, it also notes it is a "point of discipline". The manner in which this problem for the American bishops would be dealt with was through jurisdiction and obedience.

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[16] Also after Cum data fuerit (1 March 1929), Rome issued Qua sollerti (23 December 1929), explicitly ordering clerical celibacy for all of the Americas and Australia.

[17] W. C. WARZESKI, Byzantine Rite Rusins in Carpatho-Ruthenia and America, Pittsburgh 1971, 206. The Catholic Directory of 1946 lists 278,171 members within the Pittsburgh Exarchate or a loss of 10,219 since 1925. For a general brief overview of the history and statistics in 1964, cf. M. LACKO, The Churches of the Eastern Rite in America, in: Unitas XVI, No. 2 (1964; reprint).

[18] J. HENNESEY, American Catholics, A History of the Roman Catholic Community in the United States, New York 1981, 193.

For those who would not be obedient the archbishops were also of the mind to say:

> "The possible loss of a few souls of the Greek rite bears no proportion to the blessings resulting from the uniformity of discipline"[19].

Not only did Archbishop Ireland forbid all Roman and Ruthenian Catholics within his jurisdiction to have any association with Alexis Toth, but also in every national forum he argued his vendetta against all Uniate activity. He even carried his case directly to Propaganda and Propaganda surrendered to the demands of the American bishops. Ireland was concerned with "uniformity of discipline", with conformity. He and the American hierarchy resisted all intrusion into their authority, and for the moment, Propaganda supported them. Ireland's alarm in the matter was when Toth presented him with his credentials from his bishop in "Slovakia", here it was clearly stated that Toth and those like him were to be subject to the local Latin ordinary[20], but this was only until the time when a Uniate jurisdiction would be established in the United States[21].

In 1929 this "uniformity of discipline" was once again being imposed upon Ruthenian Greek rite[22] Catholic priests in the United States. But the situation

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[19] Ibidem. For a comprehensive treatment of the history of this first break of the Greek rite Catholics in the United States and their move to the Orthodox Church cf. C. SIMON, In Europe and America: the Ruthenians between Catholicism and Orthodoxy on the Eve of Emigration, in: Orientalia Christiana Periodica [OCP], Extracta 59 (1993) 169-210 and IDEM, The First Years of Ruthenian Church Life in America, in: ibidem vol. 60 (1994) 187-232.

[20] Before coming to the United States, Father Toth had served as a professor of Canon Law at the seminary in Prešov. Also it should be noted that during the period of the late 19th and early 20th centuries there was an extremely strong Latin influence on the canonical level in the Greek Catholic Church in "Slovakia". Bishop Pankovič of Mukačevo (1867-1874) even proposed no longer to use the traditional name "Greek Catholic" for his church, but rather "The Roman Catholic Church of the Greek-Oriental Rite". Cf. C. VASIL', Fonti Canoniche della Chiesa Cattolica Bizantino-Slava nelle Eparchie di Mukačevo e Prešov a Confronto con il Codex Canonum Ecclesiarum Orientalium (CCEO), Rome 1996, 168.

[21] M. R. O'CONNELL, John Ireland and the American Catholic Church, St. Paul 1988, 269-271. For a review of this book cf. R. TAFT, OCP 56 (1990) 220-221 and again, but slightly altered, Worship 62, no. 2 (March 1991) 177-180. In the OCP review TAFT says: "... and O'Connell found not a word about him [Toth] in the archdiocesan archives in St. Paul." (p. 221) and he repeats this again in the review in Worship (p. 179). One would think a copy of this letter would be in the archives in St. Paul. If it were not there, one should ask why.

[22] There is a variety of terminology for the people identified throughout this presentation as Ruthenian Greek rite Catholics and the equivalent Carpatho-Russians used above in the citations from Warzeski and Hennesey. The terminology varies in both geographical locations and historical time periods. For the fullest treatment in English of the variety of this nomenclature cf. P. R. MAGOCSI, The Shaping of a National Identity, Subcarpathian Rus', 1848-1948, Cambridge 1978, especially pp. 119 and 277-281. Also cf. C. SIMON, I Rutheni: Passato e Presente, in: La Civilta' Cattolica 141, Vol. III, Quaderno 3365 (1 settembre 1990) 400-412 and his reference to B. O. UNBEGAUN, L'origine du nom des Ruténes, in: Selected Papers on Russian and Slavonic Philology, Oxford 1969, 128-129. For a survey of the complexity of the ecclesiastical dimensions of this question cf. M. LACKO, A Brief Survey of the History of the Slovak Catholics of the Byzantine Slavonic Rite, in: Slovak Studies III: Cyrillo-Methodiana, Rome – Cleveland 1963, 199-224. However, various authors and scholars have and continue to use a variety of terms. For a pertinent discussion of this cf. the Proceedings of the

changed between 1891 and 1929, since in 1907 Monsignor Soter Ortynsky, O.S.B.M. became the first Greek Catholic Bishop in the United States and in 1913 an Ordinary with ecclesiastical jurisdiction. In 1924 Bishop Basil Takach took possession of the newly created Subcarpathian Ruthenian Pittsburgh Exarchate. The origins, but to a lesser extent the mentality, of the Latin rite hierarchy in the United States also changed during this time. This may be due to the fact that in 1897, 66% of the bishops in the United States were foreign born, but by 1927, only 23% were foreign born[23]. The significance of this being that as the American Church and hierarchy became more indigenously American, the original concerns of Americanism[24] from the times of Bishop Ireland decreased. This was due in large part to the pope exercising his jurisdiction over the American bishops in condemning Americanism and they obeyed his suggestions and no longer publically spoke of this theme. However, as history shows they continued to pursue the ideals of their mentality which were not converted to the spirit of Leo XIII (1878-1903).

The historical context in which this drama unfolded was one of increasing immigration to the United States. As the Ruthenian immigrants arrived on American soil, the Greek Catholic Church began to develop and take root in this new land. By 1882, there were approximately seventy Ruthenian families living in Shenandoah, Pennsylvania. The majority of the families were from the Subcarpathian Ruthenian area of Hungary and not from Galicia. However, when they decided to request a priest, they asked the Metropolitan Archbishop Sylvester Sembratovich, Metropolitan of Lemberg (L'vov), Galicia. The reason the Galician metropolitan was asked to provide a priest probably was due to the fact that he was a metropolitan and therefore more likely to have a priest to send to the new world[25]. However, it is likely that Charles Reis, a German immigrant from Russia then in Shenandoah, who actually wrote the letter, had a suggestion about to whom the letter should be sent[26]. The immigrants surely had little or no concept of ecclesiastical jurisdiction, but just as surely they would have wanted a priest who was "one of theirs"; "ours" as the vocabulary is still used today more than one hundred years later. The complex motives behind this mentality cannot be analyzed here, but it is a fact. For the moment, Metropolitan Sembratovich responded in a letter of 24 October 1884, saying that a priest was available, but

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Conference on Carpatho-Ruthenian Immigration, 8 June 1974. Transcribed, Edited and Annotated by R. RENOFF – St. REYNOLDS, Cambridge, MA 1975, 59-81.

[23] For a good statistical account of this topic cf. J. J. DONOVAN, The American Catholic Hierarchy: A Social Profile, in: American Catholic Sociological Review 19 (1958) 98-112.

[24] Americanism was a movement in the American Roman Catholic Church in the 1890's to adapt the external life of the Church to modern culture. It was condemned by Leo XIII in Testem Benevolentiae (22 January 1899) addressed to Cardinal Gibbons, Archbishop of Baltimore (3 October 1877 – 24 March 1921). For the text, cf. V. PIAZZESI (ed.), Acta Sanctae Sedis 31 (1898-99) 470-479. Bishop John Ireland of St. Paul (31 July 1884, Archbishop from 15 May 1888 – 25 September 1918) was an original supporter of the movement.

[25] J. SLIVKA, Historical Mirror Sources of the Rusin and Hungarian Greek Rite Catholics in the United States of America, 1884-1963, New York 1978, 1.

[26] WARZESKI, Byzantine Rite Rusins, 102.

more than the enclosed $50.00 must be sent to cover the cost of transportation for the priest and his family[27].

Having received the necessary money, Father Ivan Volansky and his family came to the United States. In December of 1884 he presented himself to the Roman Catholic authorities in Philadelphia. Patrick John Ryan was the newly installed Archbishop of Philadelphia (8 June 1884 – 11 February 1911) and Father Horstman was the chancellor. Father Volansky presented his credentials to Father Horstman, and as a married priest who was considered schismatic, he was not allowed to see the archbishop. From Philadelphia he traveled to Shenandoah where he found that the Ruthenian Catholics were not allowed to use the facilities of the Latin rite Church, but rather had to rent a social hall for their services. He began building a church and in 1885 the church of Saint Michael the Archangel in Shenandoah, Pennsylvania became the first Ruthenian Catholic church in the United States of America[28].

Father Volansky organized at least six other parishes between 1887-1889, founded a bi-weekly newspaper named *America*, publishing between 1886 and 1898, and he also began a co-operative store which lasted a short time. Due to his difficulties with the Latin rite, Father Volansky was recalled in 1892.

It is not certain which Subcarpathian Ruthenian priest from Hungary was the first to arrive in the United States. Some maintain that Father Nicholas Zubricky was the first to arrive in 1887 and began functioning in Kingston, Pennsylvania. Others hold that the first were really two: Fathers Alexander Dzubay and Cyril Gulovich in 1889 in the Wilkes-Barre and Freeland areas of Pennsylvania. In any event, by 1894 there were thirty Eastern rite Catholic churches in the United States and twenty-six were organized by Subcarpathian Ruthenians[29]. The first Subcarpathian Ruthenian Catholic church with a Subcarpathian Ruthenian Catholic pastor was Saint Mary's Holy Dormition parish in Freeland, Pennsylvania. Buliding was begun in June 1887 and Father Volansky consecrated the church the following August. Naturally, all of this was accomplished in what

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[27] Cf. ibidem, 102; I. SOCHOCKY, The Ukrainian Catholic Church of the Byzantine-Slavonic Rite in the U.S.A., Philadelphia 1958, 250-251.

[28] The Ruthenian population in Shenandoah was not Galician, nor are the current (c. 2013) majority of parishoners of Galician descent. However, the parish today belongs to the Ukranian Archdiocese of Philadelphia (Galician) and not to the Byzantine Cathiolic Diocese of Passaic (Subcarpathian Ruthenian). This historical anomaly is due to the fact that when the dioceses were split in 1916, the factor in deciding which church was to belong to which diocese was determined by origin of the current pastor of the parish. (As noted above, this is part of the complex mentality of "ours".) In 1916 the parish in Shenandosh had a Galician pastor, hence it is under the Ukranian jurisdiction. It should also be noted that the hierarchy in Lemberg (L'vov) who knew this division would be occurring along these guidelines, ordained a number of cantors with no theological training and sent them to parishes in the United States. Thus when the division of the diocese was done, there were a number of Galician priests in parishes which had a majority of Subcarpathian Ruthenian parishoners. Still these parishes, as Shenandoah, were under Ukranian jurisdiction. Also cf. N. DEMITROV (ed.), Pershii rusko-amerikanskii kalendar, Pennsylvania 1897 and T. F. SABLE, Lay Initiative in Greek Catholic Parishes in Connecticut, New York, New Jersey, and Pennsylvania (1884-1909), Ann Arbor 1985, 131-159.

[29] E. E. LEDBETTER, The Greek Catholic Church in America, in: Amerikansky Russky Viestnik (3 September – 1 October 1925).

in reality was a very ambiguous situation of ecclesiastical jurisdiction in America, even if there were clarity in Rome.

This very brief description of the state of affairs on the eve of the first schism within the Greek Catholic Church in the United States highlights not only the ambiguity of the state of affairs, but also demonstrates the lack of knowledge on the part of the American Catholic hierarchy. The difficulty Father Volansky had when he arrived in the Archdiiocese of Philadelphia was repeated by other married Catholic priests arriving in the United States. Among the Irish-dominated Roman Catholic hierarchy and the Poles, neither fully accepted the Ruthenians. In their search for identity they were confronted by both these hostile fellow Catholics as well as civil groups calling for assimilation in American life. The National Americanization Committee called for all new arrivals to

> "give up the languages, customs, and methods of life which they have brought with them across the ocean, and to adopt instead the language, habits, and customs of this country, and the general standards and ways of American living"[30].

With a lack of understanding and no support from the Latin rite community, the Byzantine rite arrivals took matters into their own hands and went about building their Church in the United States. Just as Father Volansky left Philadelphia and with the seventy families built a church in Shenandoah, so too did other Ruthenian parishes arise. One of the long lasting consequences of this, which would play a significant part in the *Cum data fuerit* debate, was registration of church property and buildings in the names of the lay trustees of a parish. This became the main juridical problem of the era for the Ruthenians in both civil and ecclesiastical spheres.

Gradually Rome became aware of the plight of the Ruthenian Catholics in the United States and in this early period she issued at least five letters and one important decree. Both the letters and the decree were from the Sacred Congregation for the Propagation of the Faith[31]. The first letter was on 12 May

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[30] M. M. GORDON, Assimilation in American Life, New York 1964, 101; also cited by P. R. MAGOCSI, in: Our People, Carpatho-Rusyns and Their Descendents in North America, Ontario 1984, 24. For a review of this book cf. R. TAFT, OCP 52 (1986) 485-487. In the context of Americanism it is also helpful to consider the life and times of Isaac Thomas Hecker (1819-1888), a native New Yorker, Methodist, Catholic convert, Belgian Redemptorist, friend of American immigrants and founder of the Paulists.

[31] The origin of the Congregation of Propaganda begins with St. Pius V (1566-1572) and Gregory XIII (1572-1585) for the east and west Indian missions, for the Italo-Greeks and for ecclesiastical affairs in European Protestant territories. Clement VIII in 1599 instituterd a Congregation "of Propaganda Fide", "Congregation for the Matters of the Holy Faith and Catholic Religion", but its activity was short-lived. Thus, Propaganda was created by Gregory XV on 22 June 1622 in the bull "Inscrutabili Divinae". Originally, the Congregation was concerned with missions to heathen countries and the administration of territories where there is no properly established hierarchy. As a mission territory the United States came under this Congregation. On 4 January 1893 the establishment of an apostolic delegation in Washington, D.C. was announced. Pius X removed the United States from the jurisdiction of Propaganda in 1908 in Sapienti consilio, I, 6°, nn. 1-8. The ordinary ecclesiastical affairs

1890. The second and a third, 1 October 1890, the fourth on 10 May 1892 and the fifth on 12 April 1894. The decree was on 1 May 1897 quoting the theme of the letter of 1 October 1890. These are sources for both *Cum data fuerit* and CCEO can. 758 § 3.

It is not possible here to offer the lengthy presentation of the full canonical sources in all their intricate complexity and analysis. However, allow a quote of Don Cirillo Korolevskij to provide a general summary of the complexity of the canonical sources which at a minimum must be studied juridically, literally and historically. He offers the following:

> "'But', they say, 'you are going against formal papal acts'. And they cite *Etsi pastoralis*, *Ea semper* and the Brief of Pius IX which appears to canonize all the hybridisms of the Ukrainians and declare them useful for the Catholic cause. Here again, both the romanizers who appeal to these documents and the Orthodox who object to them misunderstand history. They see such documents only juridically and literally; either they have completely forgotten the history of the documents or they never knew it. One must return to the sources, and one will find today either nothing at all remains of these documents, or whatever is left is in agony".

V. Insights

Three insights may serve as a partial summary of this complex history and subsequent developments after *Cum data fuerit*.

1. The first insight is in the context of a meeting which took place on 30 August 1933 between the Subcarpathian Ruthenian bishop in the United States and 113 members of his clergy. At this meeting the priests united solidly in favor of their bishop and for priestly celibacy and against a fraternal organization which threatened schism over priestly celibacy[32].

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concerning the United States are transacted through the regular Congregations which regulate the discipline of non-mission countries. However, Ruthenian questions in the United States, were of an exceptional character, and were regulated by Propaganda. Pius IX in the const. Romani Pontifices (6 January 1862) created the Congregation for the Oriental Church within Propaganda, but with the m.p. of Benedict XV, Dei providentis (1 May 1917) it received its autonomy. Its competence was notably increased in 1938 by Pius XI with the m.p. Sancta Dei Ecclesia (25 March 1938). Paul VI in the const. Regimini Ecclesiae universae (15 August 1967) changed its name from "Sacra Congregatio pro Ecclesia Orientali" to "Sacra Congregatio pro Ecclesiis Orientalibus". Currently its competence is stated in the ap. const. of John Paul II, Pastor Bonus (28 June 1988), arts. 56-61. In reference to "The Sacred Congregation for the Evangelization of the Nations or of the Propagation of the Faith" as named in Regimini Ecclesiae universae (15 August 1967) which in Pastor Bonus (28 June 1988) is "Congregatio pro Gentium Evangelizatione" and aware of its other names, such as "Propaganda Fide", at different times in history.

[32] WARZESKI, Byzantine Rite Rusins, 229-232.

After this meeting there was a very serious consideration in Rome which was

> "a study considering a less rigid interpretation of the papal disposition and the negative opinion of *some* of the ordinaries in the United States".

The text here clearly says *some* of the ordinaries. An earlier report about the responses of the twenty-seven ordinaries in the United States who responded to the inquiry of the Apostolic Delegate from his letter of 17 November 1931, strongly declares the opposite.

> "Come vedono l'EE. [sic] VV. RR., l'unanimità dei giudizi a favore del celibato ecclesiastico fra i ruteni degli Stati Uniti è inequivocabile"[33].

If some of the opinions of the ordinaries did change during this relatively short time of less than two years, then there are many other questions which must be raised. Today, to say the least, this matter requires further study and explanation in light of other archival evidence[34]. The matter is indeed one of truth and justice.

2. The second insight involves the most often repeated phrases and two words in the argument for priestly celibacy developed and sustained from 1890 to 1929. The phrases are: "ripetendogli non trattarsi di una disposizione nuova"[35] and "no sia una cosa nuova"[36]. The two words are: "tollerato" and "privilegio". R. Taft has noted that often it is a problem of particularism versus universalism, of diversity versus uniformity. Just as with the first Christians: "In my Father's house there are many mansions" (John 14:2), so too the ever-recurring temptation of Christians is to fail to see the paradox that only through a multitude of particulars

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[33] S. Congregazione per la Chiesa Orientale, Prot. N. 572 / 30, especially p. 38, paragraph 20, no. 56, the quote in the second paragraph. (*Although sometimes confusing, this is the correct reference, there are paragraphs within paragraphs.) For an Orthodox point of view about the differences between Bishop Takach and Fr. Chornock, cf. L. BARRINGER, Glory to Jesus Christ. A History of the American Carpatho-Russian Orthodox Diocese, Brookline 2000, especially pp. 74-75. Note, "l'EE. [sic] ... = le EE. ...".

[34] Cf. G. FOGARTY, The American Hierarchy and Oriental Rite Catholics, 1890-1907, in: Records. A Publication of the Catholic Historical Society of Philadelphia 85, nos. 1-2 (1974) 17-28, especially pp. 26-27. He also says that Rome: "... was itself somewhat ambivalent about permitting the oriental rites to retain a married clergy" (p. 26). This position seems increasingly difficult to maintain in light of the question of celibacy in the oriental colleges in Rome, especially as discussed in the 6 November 1928 Plenaria and its aftermath. For further investigation of the matter there seems to be well preserved and documented materials in the Archives of Marians of the Immaculate Conception in Chicago. Cf. L. TRETJAKEWITSCH, Bishop Michel d'Herbigny, S. J. and Russia. A Pre-Ecumenical Approach to Christian Unity, Würzburg 1990. The sources are given in the section "VII. Power and Disgrace: d'Herbigny's Last Years in Rome 1928-1933" (pp. 218-282, pp. 255-260, footnotes: 86-94).

[35] S. Congregazione per la Chiesa Orientale, Ponenze 1934, Prot. N. 572 / 30, Relazione, § 12, no. 30, p. 20.

[36] Sacra Congregazione Particolare Mista De Propaganda Fide per gli affair di Rito Orientale e degli affair Ecclastici Straordinari, Prot. N. 33346, Allegato (239), 30 March 1908.

and their resulting diversity can the Church realize her universality in the fullest way[37].

My word of caution on this is that a mongrel monster born out of a patchwork of particularisms could so dilute the universal that the universal merely becomes another particular. A vibrant tension between particulars and the universal steeped in positive organic development, must be maintained in order to guarantee the essence of the universal. For a fluently organic development to be realized the organicism of the development must never lose site of the whole. In all, it must not be particulars or the universal, but particulars and the universal. One must cultivate a universalism of diversity which is deliberately cumulative rather than naively eclectic. In an attempt to cultivate a universalism of diversity which is deliberately cumulative rather than naively eclectic, not only in relations with those outside the Catholic Church, but also among the various rites within the Catholic Church, it is necessary to remember that

> "At a time when it is increasingly recognized that the right of every people to express themselves according to their own heritage of culture and thought is fundamental, the experience of the individual Churches of the East is offered to us as an authoritative example of successful enculturation. From this model we learn that if we wish to avoid the recurrence of particularism as well as of exaggerated nationalism, we must realize that the proclamation of the Gospel should be deeply rooted in what is distinctive to each culture and open to convergence in a universality, which involves an exchange for the sake of mutual enrichment" (*Orientale lumen*, no. 7, 2 May 1995). "Only a religious assimilation, in the obedience of faith, of what the Church calls 'Tradition' will enable Tradition to be embodied in different cultural and historical situations and conditions. Tradition is never pure nostalgia for things or forms past, nor regret for lost privileges, but the living memory of the Bride, kept eternally youthful by the Love that dwells within her" (*Orientale lumen*, no. 8).

The Bride can never labor to neutralize, to absorb or to expel diversity, she cannot destroy her own vitality, but in wisdom she includes it.

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[37] Some of these reflections are formulated in various ways by Robert Taft in many of his writings. To be sure, these venerable ideas form the solid philosophical and theological basis of such documents as Orientalium ecclesiarum (21 November 1964) and are developed as well by many other authors. Francis Sullivan is only one example of another author who developes similar ideas with respect to the magisterium, specifically in his elaboration of the idea of "subsists". Cf. F. A. SULLIVAN, Magisterium, Teaching Authority in the Catholic Church, New York 1983, example p. 77. For examples of these thoughts in the writings of Taft compare the early R. F. TAFT, Easter-Rite Catholicism. Its Heritage and Vocation, Glen Rock, New Jersey 1963 (especially pp. 3-4) and the mature TAFT, Beyond East and West. Problems in Liturgical Understanding, Washington, D.C. 1984 (especially pp. 114-115). The same is found in IDEM, De Geest Van De Oosterse Liturgie, in: Het Christelijk Oostem 28 (1976) 229-245, the same in English: "The Spirit of Eastern Christian Worship", in: Diakonia 12 (1977) 103-120 and similarly in IDEM, Russian Liturgy. A Mirror of the Russian Soul, in: Studi albanologici, balcanici, bizantini e orientali in Honor of G. Valentini, S.J. (Studi albanesi, Studi e testi V), Florence 1986, 413-435.

3. The third and final insight has its origin in a reflection by Cardinal Ratzinger about the distinction between consensus and truth. There were numerous meetings about priestly celibacy during the years from at least the 1890's until the plenary of 16 June 1934. There were many meetings among the cardinals, correspondences between the American Latin and Eastern bishops, the Ruthenian bishops in Europe, the apostolic delegate in Washington, D.C., the various Congregations and even the faithful. However, it becomes ever more obvious that in the search for Truth in the matter, the main overall conclusion is that:

> "Truth does not create consensus, and consensus does not create truth as much as it does a common ordering. The majority determines what must be regarded as true and just. In other words, law is exposed to the whim of the majority and depends on the awareness of the values of the society at any given moment, which in turn is determined by a multiplicity of factors"[38].

In summary the problem is one

> "of *recta ratio*, of right reason. Beyond opinions and currents of thought, this right reason must try to discern what is just – the essence of law, and is in keeping with the internal need of the human being everywhere, distinguishing from that which is destructive of man"[39].

These are very profound thoughts, clearly stated and in a real sense a summary of a possible starting point for an accurately enlightened and frank discussion of the complex canonical and pastoral questions regarding can. 758 § 3 and particular law on this canon. Naturally, it first must be accepted that the question of clerical celibacy as a canonical and pastoral issue is one of Church discipline, not of faith, morals or divine law. Secondly, the historical reality must be acknowledged that both a married and celibate clergy always did and do exist in the Ruthenian Catholic Church in Europe, as well as in other Oriental Catholic Churches.

Crucial passages from *Orientalium Ecclesiarum*, nos. 5 and 6[40] and *Sacri Canones* which refers to *Orientalium Ecclesiarum* 6, as well as the quoted

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[38] J. RATZINGER, "Crises of Law", from his address delivered on the occasion of his reception of the degree of Doctor Honoris Causa from the Libera Università Maria S.S. Assunta, the Faculty of Jurisprudence, 10 November 1999. His presentation is in the context of the "end of metaphysics" which he says "in broad sectors of modern philosophy is superimposed as an irreversible fact, [the end of metaphysics] has led to juridical positivism which today, especially, has taken on the form of the theory of consensus: if reason is no longer able to find the way to metaphysics as the source of law, the State can only refer to the common convictions of its citizens' values, convictions that are reflected in the democratic consensus". The material is very rich in thought and invites much reflection in the context of the present historical-juridical investigation.

[39] Ibidem.

[40] OE 5: "[...] Hence it [this synod] solemnly declares that the churches of both east and west enjoy the right, and are bound by duty, to govern themselves in accordance with their own particular

passages at the beginning of this presentation from *Oinetalium Ecclesiarum* 4, *Christus Dominus* 38, 6) and cann. 1493 § 2, 1492 and 1513 imply a *recta ratio*. This understanding is an essential element and context for the current particular law in the Byzantine Catholic Metropolia *sui iuris* of Pittsburgh and can. 758 § 3. In addition to the claim that this current particular law is a balance between concession and discipline, both the historical and juridical evidence seem to point to the significance and primacy of the question of jurisdiction in the matter of priestly celibacy. Just as the historical starting point is a 12 May 1890 letter from the Sacred Congregation of the Propagation of the Faith to the Archbishop of Paris about the authority of the patriarch outside his particular diocese[41], so too, it is possible to conclude on this same theme as presented in *Orientalium Ecclesiarum*, no. 7. Ultimately, and rightly so, whether it is the jurisdiction of a patriarch or of a metropolitan, it remains a question of jurisdiction.

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rules, seeing that they are recommended by venerable antiquity, are more suited to the customs of their faithful and seem more suitable for assuring the good of souls". OE 6: "All eastern Christians should know and be certain that they may and should always preserve their own lawful liturgical rites and way of life, and that changes should be made only by reason of their proper and organic development. All these things are to be observed with the greatest fidelity by the eastern Christians themselves. They should indeed, from day to day, acquire greater knowledge of these matters and more perfect practice of them and if for reasons of circumstances, times or persons they have fallen unduly short of this they should have recourse to their age-old traditions. [...]"

[41] Much has been written on this topic since Vatican II and Orientalium Ecclesiarum (21 November 1964), especially nos. 7-11. Cf. J. RĚZÁČ, Sull'estensione della potestà dei Patriarchi ed in genere delle Chiese orientali sui fedeli del proprio rito, in: Concilium 8 (1969) 140-154. For a succinct history of this topic in canon law cf. I. ŽUŽEK, Canons Concerning the Authority of Patriarchs Over the Faithful of Their Own Rite Who Live Outside the Limits of Patriarchal Territory in: IDEM, Understanding the Eastern Code (Kanonika 8), Rome 1997, 29-69 (especially pp. 29-40) and Nuntia 6 (1978) 3-33. For an opposing view cf. V. POSPISHIL, Ex Occident Lex, Carteret 1979, 110-140. For an understanding of the situation in 1912, cf. E. PACELLI, La Personalità e la Territorialità, Specialmente nel Diritto Canonico, Rome 1912, 21-24 and 32-33. He argues that expanded personal jurisdiction, rather than strict territorital jurisdiction, is necessary because of the new global situation. Foraneus in "Some Thoughts on the Ruthenian Question in the United States and Canada", in: The Ecclesiastical Review 52, no. 1 (January 1915) 47, simply says that the title Archbishop of Lemberg of the Ruthenians clearly shows that their jurisdiction is personal, based on privilege, in opposition to the old Church practice of territorial jurisdiction, e.g. Bishop of Agram (Zagreb). The law today in CCEO is: "Can. 78 - § 2. Potestas Patriarchae exerceri valide potest intra fines territorii Ecclesiae patriarchalis tantum, nisi aliter ex natura rei aut iure communi vel particulari a Romano Pontifice approbato constat". The earliest sources for this canon are from the Apostolic Canons, can. 34; the Ecumenical Council of Nicaea I (325), can. 6; the Ecumenical Council of Constantinople I (381), can. 2; the Ecumenical Council of Ephesus (431), can. 8; the Ecumenical Council of Chalcedon (451), can. 28 and the Ecumenical Council of Constantinople IV (869-870), can. 23. With respect to CCEO can. 177, today it would be argued that jurisdiction is in the first place always personal, not territorial, but both are criteria for an eparchy. For jurisdiction in the context of the philosophy of law, cf. G. DEL VECCHIO – T. O. MARTIN (trans. from the eighth ed., 1952), Philosophy of Law, Washington, D.C. 1953, 308-309. Also cf. P. ERDŐ – P. SZABÓ (ed.), Territory and Personality in Canon Law and Ecclesiastical Law, Budapest 2002 (= The Proceedings of the 11th International Congress of Canon Law and the 15th International Congress of the Society for the Law of the Eastern Churches, Budapest 2-7 September 2001).

In line with the *Sacri Canones* and *Cleri sanctitati* Can. 216 § 2, 1° and 2° as sources, among others, *Orientalium ecclesiarum*, no. 7 states:

> "[...] By the term 'eastern patriarch' is meant a bishop who possesses jurisdiction over all the bishops (including metropolitans), clergy and faithful of his own territory or rite in accordance with the norm of law and without prejudice to the primacy of the Roman pontiff".

VI. Conclusion

If it is the responsibility of the present to address injustices of the past, naturally once it is agreed that there were injustices in the past, there are some basic specific helpful principles set out in spirit as well as in letter in § 26 of *Orientale lumen* (2 May 1995) of John Paul II. This is in no way an illigitimate anachronism since the basic objective principles presented are timeless and are the basis for subjective interpretation in any particular given time. Among several principles in § 26 there are two which seem to be helpful in summarizing apparent injustices in the past and having an effect on the current situation of the topic of this presentation. First, more with respect to the past, in the diaspora where Eastern Catholics lacked their own hierarchy, Latin ordinaries are to study attentively, grasp thoroughly and apply faithfully principles of the Holy See in the pastoral care of these faithful. Indeed, similarly expressed so well in CCEO can. 193 - § 1., with an emphasis on "gravi obligatione"[42]. Secondly, within the situation today, Eastern Catholic bishops and clergy are called to collaborate among themselves and closely with Latin ordinaries for an effective unified apostolate (CCEO can. 322). The first principle is left to the judgment from the history briefly presented above. The second principle leaves itself to the judgment of the recent past and the present with the understanding that the pope, among his myriad of offices and duties, also is the chief Latin ordinary. The heart of the matter is succinctly stated in CCEO can. 43:

> "The bishop of the Roman Church, in whom continues the office (*munus*) given by the Lord uniquely to Peter, the first of the Apostles, and to be transmitted to his successors, is the head of the college of bishops, the Vicar of Christ and pastor of the entire Church on earth. By virtue of his office

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[42] Can. 193 § 1. The eparchial bishop to whose care the Christian faithful of another Church sui iuris have been committed is bound by the serious obligation of providing everything so that Christian faithful retain the rite of their respective Church, cherish and observe it as far as possible. He is to ensure that they foster relations with the superior authority of their Church. It should also be noted that until 13-19 March 2013 S.E.R. Jorge Mario Bergoglio, S.J., was the Ordinary for Oriental rite faithful living in Argentina. On this CCEO can. 193 § 1. cf. L. LORUSSO, Lo stato giuridico e la cura pastorale dei "Christifideles orientales" nel CCEO e CIC: collaborazione e problematiche intercclesiali nel due codici, Bari 1999. Also this is elaborated on in IDEM, Gli orientali cattolici e I pastori latini: problematiche e norme canoniche, Roma 2003 and the same in English: Eastern Catholics and Latin Pastors: Issues and Canonical Norms, 2013.

(*munus*) he possesses supreme, full, immediate and universal ordinary power in the Church which he is always able to exercise freely".

This is the context of this presentation which firmly holds that presently there is a balance between concession and discipline with respect to the norms of particular law of the Byzantine Metropolitan Church *sui iuris* of Pittsburgh.

Canon law is the law of the Catholic Church and always history must be given its due, but perhaps the final word of caution about history is best left to Metropolitan Archbishop Stephen J. Kosisko (1915-1995), who was fourteen years old when *Cum data fuerit* was issued, lived at the Ruthenian College of St. Josaphat on the Janiculum, studied at the Urbanianum, was ordained a celibate priest in 1941 and was part of the episcopal hierarchy of the Byzantine Greek Catholic Eparchy of Pittsburgh and Passaic from 1956 until his retirement as Byzantine Metropolitan Archbishop of Pittsburgh in 1991. He was also present at the second, third and fourth sessions of Vatican II[43]. When requested to give his opinion for the "Norme per la Ricognizione del Diritto Canonico Orientale", he offered the following.

> "The Guiding Principles manifest an idealism and seem to be attempting the construction of a Church built upon facts gleaned from history books. It is important that history be taken into consideration, but at the same time kept in its proper perspective. Properly used, history will enable us to avoid the mistakes of the past and can give guidance for building upon a solid foundation. We cannot, however, smother what more recent history has taught us. In addition to the principles of Vatican II and Oriental traditions, equal consideration should be given to the practical knowledge and experience obtained through contemporary diocesan and parochial life"[44].

Appendix: The Ruthenian Catholic Church[45]

[...] After the Union of Užhorod there were ten Eastern Rite Bishops of Mukačevo between 1664 and 1767, but in actuality it was the Latin rite Bishop of Eger who prevailed in ecclesiastical matters. This situation changed only after the intervention of Empress Maria Theresa of Austria. She persuaded Clement XIV (1769-1774) to canonically recognize the Eparchy of Mukačevo. This was done with the Apostolic Bull *Eximia Regalium Principum* on 19 September 1771. The eparchical territory in northeastern Hungary in the 18th century had over 800 parishes in three vicariates: Maramures (1723), Satu Mare (1776) and Košice (1787). On 22 September 1818, Pius VII (1800-1823) with *Relata Semper*, established the Eparchy of Prešov. However, the same Bull placed the Bishop of Prešov under the metropolitan jurisdiction of the Archbishop of Esztergom, primate of Hungary. [Also from the 1750's some Ruthenians emigrated from the territory known today as Slovakia and they would eventually become part of the Diocese of Križevci (17 June 1777). In a later

[43] The third session of Vatican II (14 September – 21 November 1964) produced Orientalium Ecclesiarum (21 November 1964) and the fourth session (14 September 1965 – 8 December 1965) produced Christus Dominus (28 October 1965).

[44] Pontificia Commissione per la Revisione del Codice di Diritto Canonico Orientale, Prot. 3/1.

[45] Original English text of M. J. KUCHERA, Rutena [Iglesia], in: Diccionario General del Derecho Canónico VII, Universidad de Navarra 2012, 83-85.

period (below), 4 July 1924, 21 Ruthenian parishes, from the diocese of Prešov in Hungary after the creation of Czechoslovakia, became part of an Apostolic Exarchate at Miskolc with Bishop Anthony Papp (1912-1945) of Mukačevo in residence.]

With the end of World War I, the major territory of the Ruthenian Catholic Church in Europe became part of Czechoslovakia. In 1939 it was proclaimed an independent republic, briefly returned to Hungary (1939-1944) and then became part of the Ukrainian territory of the Soviet Union. This was a bleak period of misguided nationalism between those who still favored Hungary and those who sought their place in the new order. At the end of World War II, difficulties intensified when some of the territory of the Ruthenian Catholic Church was definitively incorporated into the Soviet Union and some into Czechoslovakia. Earlier there was a movement to "Slovakize" the people known then as Greek Catholics of Eastern Slovakia (1939-1944), and after the war this movement received new impetus. The Ruthenian Catholic seminary in Užhorod, which was founded in 1778, was closed in 1946. In 1949 the Ruthenian Catholic Church on the official governmental level became part of the Russian Orthodox Church. In general, the period of Soviet domination provided the Ruthenian Catholic Church in Europe with numerous testimonies of martyrdom for the sake of faith in Christ. Two of these martyrs were Bishop Theodore G. Romzha (1911-1947), Apostolic Administrator of the Eparchy of Mukačevo and Bishop Paul P. Gojdich, O.S.B.M. (1888-1960), Apostolic Administrator of the Eparchy of Prešov (1926-1940) and from 19 July 1940, Bishop of Prešov, later with an Auxiliary, Bishop Basil Hopko (1947-1967). Not until after the fall of communism was another bishop granted for the Eparchy of Prešov (21 December 1989) and subsequently consecrated (17 February 1990). Also in 1990 the seminary in Prešov reopened. The eparchy remained immediately subject to the Holy See. The Holy See confirmed an Ordinary and two Auxilaries for the Eparchy of Mukačevo (16 January 1991). Likewise, this eparchy remained immediately subject to the Holy See. A new seminary was constructed in Užhorod in 1995. The Most Reverend Milan Šašik, C.M., Apostolic Administrator of Mukačevo was elevated to become the bishop of Mukačevo (17 March 2010). On 27 January 1997, Košice, Slovakia, became an Apostolic Exarchate and is now an eparchy (30 January 2008). The Eparchy of Bratislava was created (30 January 2008) and its first bishop, Most Reverend Peter Rusnák was consecrated on 16 February 2008. Prešov became a Metropolitan See (30 January 2008) and the Most Reverend Ján Babjak, S.J. was elevated to become its first Metropolitan Archbishop (17 February 2008).

After large numbers of those generically known as Ruthenian immigrants arrived in the United States in 1907, Stephen Soter Ortynsky, O.S.B.M. (1907-1916) became the first "Greek Catholic Bishop for all Ruthenian Catholics in the United States". In 1913 he became an Ordinary with ecclesiastical jurisdiction. After his death on 24 March 1916 the Holy See established separate jurisdictions for "Greek Catholics" from Hungary and those from Galicia. The former included Rusyns, Magyars and Croats and the latter Ukrainians and Lemkos. However, in local parishes of both jurisdictions the ethnic distinctions were never absolute. In 1924 Bishop Basil Takach (1924-1948) took possession of the newly created "Diocese of Pittsburgh ('Greek Rite')" which embraced all "Greek Rite Catholics" from Hungary in the entire United States of America. Presently, this Ruthenian Byzantine Catholic Church (Metropolitan *sui iuris*) in the United States has one archeparchy and three eparchies: the Metropolitan Archeparchy of Pittsburgh (Apostolic Exarchate, 8 May 1924; Eparchy, 6 July 1963; Metropolitan Archdiocese (Munhall), 21 February 1969; Archeparchy, 11 March 1977) and the Eparchy of Passaic (6 July 1963), the Eparchy of Parma (21 February 1969) and the originally named Eparchy of Van Nuys (3 December 1981).

During the very turbulent years of the episcopate of Bishop Takach, with the enforcement of priestly celibacy from the decree *Cum data fuerit* (1 March 1929) and the creation in 1938 of the "Carpatho-Russian Greek Catholic Orthodox Church of the Eastern Rite of North and South America", it is estimated that 20,000 to 100,000 faithful actually joined the Orthodox Church. With the creation of this Church and after the death of Bishop Takach in 1948, the Ruthenian Catholics in the United States entered a numerically diminished, but relatively tranquil period of ecclesiastical and "liturgical" Latinizations. This period also included cultural and social assimilation into American society. One of the most significant diocesan events of this period was the establishment of a seminary in Pittsburgh, Pennsylvania (16 October 1950). Also by 1964 the Sacred Oriental Congregation allowed the publication and use of the Divine Liturgy of St. John Chrysostom in English. Today the ecclesiastical structure of the Ruthenian Catholic Church in the United States is much larger, but the number of parishioners, not only due to the events of 1938, is significantly less. At the time of Bishop Takach and

the creation of the Subcarpathian Ruthenian Pittsburgh Exarchate on 25 February 1924 there were 129 priests, 155 churches and 288,390 parishioners. In 2006 the Metropolitan Archeparchy of Pittsburgh had 75 priests, 80 parishes and 59,946 parishioners. The Metropolitan Archbishop and president of the council of hierarchs of the Ruthenian Catholic Church in the United States of America was Basil Myron Schott, O.F.M. (installed 9 July 2002, died 10 June 2010). The Byzantine Catholic Eparchy of Passaic, with its bishop the Most Reverend William C. Skurla, in 2006 had 80 priests, 90 parishes and 23,914 parishioners. The Byzantine Catholic Eparchy of Parma, with its bishop the Most Reverend John M. Kudrick in 2006 had 39 priests, 31 parishes and 12,402 parishioners. The former Byzantine Catholic Eparchy of Van Nuys, now Phoenix (10 February 2010), with its bishop the Most Reverend Gerald N. Dino (27 March 2008) in 2006 had 26 priests, 19 parishes and 3,026 parishioners. The official total numerical difference from 1924 to 2006 is 91 more priests, 65 more parishes, but 189,102 fewer parishioners.

IL PATRIMONIO LEGISLATIVO DELLA CHIESA SUI IURIS ROMENA LA LEGISLAZIONE ECCLESIASTICA NEL SECONDO MILLENNIO

Ioan Alexandru P o p, Roma

Nell'anno 1054 quando è peggiorato il rapporto tra le due grandi Chiese, per le cause ben conosciute, arrivando alla fine alla grande scisma, la Chiesa romena, che si trovava sotto la giurisdizione della Sede costantinopolitana, è stata trascinata nella scissione. In questo periodo e fino al XIV secolo la Chiesa romena era organizzata sotto il governo dei Vescovi slavi, che avevano le loro sedi episcopali alla destra del Danubio. Dal XIV secolo la Chiesa romena è stata organizzata intorno alla propria gerarchia, in tre provincie, ognuna avendo a capo un metropolita.

Nel Țara Românească[1] (il sud di Romania) si è costituita nell'anno 1359 la sede metropolitana di Argeș, che è stata trasferita nell'anno 1517 nella città di Târgoviște. Nella Moldavia[2], nel XIV secolo si conosce una sede metropolitana nella città di Rădăuți, poi nell'anno 1401 il Patriarca di Costantinopoli approva una sede metropolitana nella città di Suceava, avendo come suffraganea la sede di Rădăuți, diventata sede eparchiale. Nell'Ardeal[3] è attestato storicamente un arcivescovo dal 1376, che aveva probabilmente la sua sede metropolitana nella città di Alba-Iulia.

In materia di diritto queste tre provincie adoperavano la legislazione della Chiesa bizantina, arrivata da noi per mezzo di alcune collezioni greche. Tra queste c'erano il *"Nomocanone"* di Matteo Blastare, *"Hexabiblos"* di Costantino Armenopulo e il *"Nomocanone"* di Manuele Malaxos[4].

Matteo Blastare[5] ha scritto il *"Nomocanone"* nell'anno 1335, nel monastero di Salonicco. La sua opera è conosciuta anche come "Sintagma alfabetica", perché la sua struttura segue il numero delle lettere dell'alfabeto greco. Contiene i sacri canoni e le leggi imperiali sistemate in 24 capitoli e 303 titoli. Questa collezione è conosciuta da noi dalla metta del XIV secolo ed è stata utilizzata come fonte per l'elaborazione della "Pravila cea Mare".

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[1] Cf. M. PĂCURARIU, Istoria Bisericii ortodoxe române, Sibiu 2007, 101-103; S. A. PRUNDUȘ – C. PLAIANU, Catolicism și ortodoxie românească, Cluj-Napoca 1994, 35.

[2] Cf. PĂCURARIU, ibidem, 105-109.

[3] Ibidem, 118.

[4] Cf. W. HARTMANN – K. PENNINGTON (ed.), The History of Byzantine and Eastern Canon Law to 1500, Washington, DC 2012; S. N. TROIANOS, Oi peges tou byzantinou dikaiou, Athens ^{3}2011.

[5] Cf. I. DAN, Pravila Magna eiusque auctoritas in Ecclesia romena, Rom 1943, 137; I. N. FLOCA, Drept canonic orthodox, Legislație și administrație bisericească Vol. I, București 1990, 99; 115; 121; Îndreptarea leggi 1652. Ediție întocmită de Colectivul de drept vechi romînesc, București 1962, 17; J. PAPP-SZILÁGYI, Enchiridion juris Ecclesiae Orientalis Catholicae, Magno-Varadini ^{2}1880, § 45 (p. 36); P. TOCĂNEL, Jus Greco-Romanum sive Byzantinum (ed. O. BUCCI), in: M. PAI. (ed.), Plenitudo legis, amor veritatis. In memoriam Petri Tocănel, Roma 2003, 175.

Un decennio più tardi, Costantino Armenopulo[6] ha scritto la sua opera *"Hexabiblos"* nell'anno 1344/1345, nella città di Salonicco, che è stata pubblicata per la prima volta a Parigi nell'anno 1540. L'opera è una compilazione in sei volumi, che contiene una varietà di fonti della legislazione bizantina. In Romania è conosciuta dal XVII secolo ed è stata utilizzata dal canonista greco-cattolico romeno, Samuil Micu, insieme all'opera di Blastare, come fonte per il suo trattato sul matrimonio pubblicato a Vienna nell'anno 1781.

Manuele Malaxos[7] ha scritto il suo *"Nomocanone"* nell'anno 1561, nella metropolia di Teba di Boezia. Quest'opera è molto complessa, contiene i sacri canoni e le leggi imperiali disposte in 541 capitoli. Questa compilazione è conosciuta nella Chiesa romena dal XVII secolo ed è stata impiegata come fonte per la redazione della "Pravila cea Mare" e della "Pravila aleasă", mai pubblicata.

I. Prima dell'unione con Roma

Dal XVII secolo la Chiesa romena, dopo aver adottato per alcuni secoli nella sua disciplina le collezioni greche, tradotte anche in slavo, ha iniziato il lavoro di redazione delle proprie collezioni, in lingua romena. Queste collezioni sono denominate con il termine di "Pravila", che deriva dalla parola *pravilo* (slavo antico), è significa sia la legge in sé stessa, sia il codice di leggi ecclesiastiche e civili. Di seguito presenterò le collezioni che riguardano in modo diretto la Chiesa di Transilvania/Ardeal.

1. Pravila diaconului Coresi[8]

La prima collezione in lingua romena è stata pubblicata tra gli anni 1560-1563 o 1570-1580 a Braşov, da Coresi, un diacono ortodosso proveniente dalla provincia di Dâmbovița.

Quest'opera intitolata "Pravila sfinților părinți" (La pravila dei Santi Padri) e conosciuta anche con il nome di "Pravila de la Ieud", secondo la località dove è stato trovato l'unico esemplare.

La collezione è considerata come un frammento di una pravila più voluminosa. Nel periodo in quale è stata realizzata la pubblicazione della Pravila, i romeni della Transilvania erano sottoposti a un ostile proselitismo da parte dei calvinisti.

2. Pravila aleasă

L'opera rimasta in manoscritto, è una compilazione di canoni e leggi imperiali bizantine, scritta da Eustratie nell'anno 1632, in Moldavia. Il suo titolo è

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[6] Cf. DAN, Pravila Magna, 138; FLOCA, Drept canonic, 129.

[7] Cf. DAN, ibidem, 123-124; FLOCA, ibidem, 99; 129; Îndreptarea leggi 1652, 17; TOCĂNEL, Jus Greco-Romanum, 175.

[8] Cf. DAN, ibidem, 154-155; FLOCA, ibidem, 132.

"Pravila aleasă şi tocmită şi dentru multe sănte scripturi cercată şi găsită" (Pravila scelta ed elaborata, cercata e trovata in vari documenti). Per la sua elaborazione l'autore ha adoperato il Nomocanone di Manuele Malaxos. Il manoscritto si trova oggi nella Biblioteca Academiei Române Filiala Cluj-Napoca, prima era custodita a Blaj.

3. Pravila cea mică de la Govora[9]

L'opera conosciuta anche come "Pravila bisericească" (Pravila ecclesiastica) è stata pubblicata nell'anno 1641 nella tipografia del monastero di Govora, nel Ţara Românească. Il suo titolo è "Pravila aceasta iaste dreptătoriu de leage, tocmeale a Sfinţilor Apostoli, tocmite de şapte soboare, către aceasta şi a preacuvioşilor părinţi, învăşătorilor lumii" (Questa pravila è il direttorio della legge, le disposizioni dei Santi Apostoli, dei sette sinodi e dei padri maestri della gente). Il monaco Michele Moxa, l'autore dell'opera, ha usato come fonte le compilazioni slave e greche a noi sconosciute.

"Pravila cea mică" (La piccola pravila) è una collezione sistematica di canoni e leggi imperiali, strutturata in due parti, che divide in 149 capitoli (glave) i canoni e le costituzioni dei santi Apostoli, i canoni dei sinodi e dei Santi Padri, le leggi civili e penali, i canoni penitenziali, la disciplina matrimoniale e clericale, i sacramenti e le regole monacali. Questa pravila è stata pubblicata anche per la Chiesa romena di Ardeal, avendo la firma del metropolita Ghenadie.

4. Pravila cea Mare[10]

Questa pravila conosciuta anche come "Îndreptarea legii" (Il direttorio della legge) è stata pubblicata nell'anno 1652 a Târgovişte e rivolta alle due regioni: Ţara Românească e Ardeal. L'intero titolo è

> "Îndreptarea legii cu Dumnezeu carea are toată judecata arhierească şi împărătească de toate vinile preoţeşti şi mireneşti. Pravila sfinţilor apostoli, a ceale 7 săboare şi toate ceale namcastnice. Lângă aceastea, şi ale sfinţilor dascăli ai lumii Vasilie Velichi, Timothei, Nichita, Nicolae. Theologhia dumnezeeştilor bogoslovi. Scrise mai nainte şi tocmite cu porunca şi învăţătura blagocestivului împărat, chir Ioan Comninul, de cuvântătoriul diac a marii besearici lui Dumnezeu şi păzitor de pravili, chir Alexie Aristinu. Iar acum de întâiu prepuse toate de pre elineaşte pre limba rumânească, cu nevoinţa şi oserdia şi cu toată cheltuiala a pr. s. de Hs., chir Ştefan, cu mila lui Dumnezeu mitropolit Târgovişteі, exarh Plaiului a toată Ungrovlahia. În Târgovişte, în tipografia prealuminatului meu domn, Io Mathei voievod

[9] Cf. I. BALAN, Fontes iuris canonici Ecclesiae rumenae, Vatican 1932, 28; DAN, ibidem, 157-160; FLOCA, ibidem, 133.

[10] Cf. BALAN, ibidem, 29-31; DAN, ibidem, 188-189; 191; PAPP-SZILÁGYI, Enchiridion, §§ 48 e 49 (p. 38-63); Îndreptarea leggi 1652, 9-19.

Basarab, în sfânta mitropolie, în casa Nălțării domnului nostru Isus Hristos. Martie 20, văleat 7160 a lui Hristos 1652, v. post velichi".

L'autore dell'opera è il monaco Daniele Andrea Panoneanul e, come emerge dal titolo, ha scritto la Pravila con il sostegno del metropolita Stefano di Târgoviște. La Pravila è una collezione dei canoni e delle leggi imperiali, divisa in due parti. Prima, nominata "Îndreptarea legii" è sistemata in 417 capitoli (glave), che contiene un riassunto degli insegnamenti di Fozio, Balsamone, Armenopolo e le leggi imperiali riguardanti il giudizio, la gerarchia, il clero, l'organizzazione ecclesiastica, i sacramenti, i delitti e le pene, il digiuno ecc. La seconda, intitolata "Nomocanon cu Dumnezeu" è ordinata in titoli e capitoli (glave), accompagnati dai commenti, che racchiude i canoni dei Santi Apostoli, dei Concili ecumenici, dei sinodi locali e dei Padri della Chiesa.

L'autore ha impiegato come fonte principale la "Sintagma alfabetica" di Matteo Blastare, il "Nomocanone" di Manuele Malaxos, il "Nomocanone" di Alessio Aristen e le risposte di Anastasio di Antiochena.

La Chiesa greco-cattolica di Ardeal ha adoperato la collezione "Pravila cea Mare" come codice ufficiale fino all'anno 1872, quando ha iniziato il lavoro di codificazione del proprio diritto particolare.

5. Zaconicul lui Sava Brancovici[11]

Zaconicul è una collezione di consuetudini e di leggi dettate dal sinodo o dal concistoro metropolitano e dal principe di Transilvania. Il Zaconicul è stato redatto con l'intento di provvedere ad un'organizzazione solida della Chiesa romena di Ardeal, in un momento storico di grande crisi. L'opera è attribuita al metropolita Sava Brancovici e probabilmente è stata scritta nell'anno 1680, nella metropolia di Alba-Iulia. Un frammento in manoscritto del "Zaconicul" si trova oggi nella "Biblioteca Academici Române Filiala Cluj-Napoca", registrato nella sezione dei manoscritti romeni, con il numero 211.

Dal testo del manoscritto emerge che la collezione era strutturata in 11 capitoli. Il testo rimasto contiene l'inventario delle cose appartenenti alla metropolia di Alba-Iulia, la procedura di elezione del Metropolita, l'elenco dei libri liturgici, degli indumenti liturgici e dei vasi sacri. Il frammento è stato publicato nell'anno 1855 da Timotei Cipariu[12] nel suo libro sulla storia della Chiesa romena in Ardeal.

II. Dopo l'unione con Roma

L'unione con Roma è stata concretizzata nel sinodo del 7 ottobre 1698, riunito nella sede metropolitana di Alba-Iulia, dove hanno partecipato insieme al

[11] Cf. DAN, ibidem, 156-157; FLOCA, Drept canonic, 132.

[12] Cf. T. CIPARIU, Acte şi fragmente latine românesci. Pentru istori'a beserecei romane mai alesu unite, Blaj 1855, 257-263.

metropolita Atanasie Anghel, 38 protopresbiteri, i parroci dei rispettivi 38 distretti e due o tre laici da ogni parrocchia. In questo sinodo è stata elaborata la dichiarazione di unione, chiamata "Carte de mărturie"[13] (Carta di testimonianza), che contiene tre parti. Nella prima parte è accolta la decisione di unione, nella seconda sono stabilite alcune condizioni apposte all'unione (es.: di rimanere nella tradizione orientale), e nella terza parte è prescritta la clausola "di mantenere la propria Legge" per la validità dell'atto di unione.

Nel 4 settembre 1700 lo stesso metropolita ha convocato un altro sinodo nella sua sede, in quale è stato preparato il "Manifestul de unire"[14] (Manifesto d'unione) che conferma l'avvenuta unione nel sinodo precedente. A questo sinodo hanno partecipato 54 protopresbiteri insieme ai parroci dei rispettivi distretti.

Da questo momento in poi hanno cominciato a comparire nella legislazione della nostra Chiesa, accanto alla "Pravila cea mare", varie collezioni di diritto canonico orientale stese da canonisti greco-cattolici romeni. Tra queste ricordo qui il "Procanon" di Petru Maior, i "Canoanele săboarălor" di Samuil Micu e l'"Enchiridion" di Iosif Pop Silaghi.

1. Procanon[15] di Petru Maior

Petru Maior, sacerdote greco-cattolico romeno, era di formazione teologo, storico, canonista e filologo. Ha studiato nei Seminari di Târgu Mureş (1769-1772) e Blaj (1771-1774) e poi la filosofia e la teologia nel Collegio di *Propaganda Fide* a Roma (1774-1779), dove si è laureato. Tra gli anni 1779-1780 ha studiato il diritto all'Università di Vienna.

L'opera "Procanon" l'ha scritta nell'anno 1783 a Blaj ed è stata pubblicata per la prima volta a Bucarest negli anni 1894-1895, da Constantin Erbicianu nella rivista *Biserica ortodoxă română*, n. 6, 7, 8, dopo di che nell'anno 1948 è stata ripubblicata a cura di Grigore T. Marcu a Sibiu, Tipografia Arhidiecezană e a cura di Serafim Duicu nell'anno 1996 a Târgu-Mureş, Editura Tipomur. Non ho notizia dove si trovi oggi il manoscritto.

Il titolo dell'opera è "Procanon ce cuprinde în sine cele ce sânt de lipsă spre înţălesul cel deplin şi adevărat al canoanelor şi a toată tocmeala bisericească, spre folosul mai cu samă a românilor". L'opera è prima collezione greco-cattolica di diritto canonico orientale.

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[13] Cf. PRUNDUŞ – PLAIANU, Catolicism, 53.

[14] Ibidem, 54.

[15] Cf. C. CAPROS – F. POPAN, Biserica Unită între anii 1700-1918, in: AA. VV., Biserica Română Unită două sute cincizeci de ani de istorie, Cluj-Napoca 1998, 62; Petru Maior, Protopopadichia. Ed. L. STANCIU, Alba-Iulia 1998, 22-23; 43.

2. Canoanele săboarălor di Samuil Micu[16]

Samuil Micu, sacerdote greco-cattolico romeno e monaco nel monastero "Santa Trinità" di Blaj, è stato un grande storico, filologo, canonista, teologo e filosofo. Tra gli anni 1762 e 1772 ha studiato nel Seminario per i monaci a Blaj e al Collegio "Pazmanian" di Vienna. Ha scritto importanti opere di storia, di teologia, di linguistica e di diritto canonico orientale. Nell'ultima disciplina ha scritto due trattati in latino pubblicati a Vienna, Dissertatio canonica de matrimonio juxta disciplinam Graecae Orientalis Ecclesiae (1871), Dissertatio de jejuniis Graecae Orientalis Ecclesiae (1872) e una collezione di sacri canoni, in cirillico romeno, rimasta in manoscritto, Canoanele săboarălor a toată lumă, şi acelor namăsnice, şi ale Sfinţilor Părinţi, căle primite în Bisărica răsăritului (1798).

Quest'opera è la seconda collezione greco-cattolica romena di diritto canonico orientale ed è una traduzione incompleta del *Sinodicon* (1672) di William Beveridge. Per i canoni di San Gregorio di Nissa, Samuil ha usato il testo latino di Gentian Hervetus. La traduzione ha due parti, prima, comprende i canoni degli apostoli, dei Concili ecumenici e i canoni del Sinodo Trullano, e la seconda, contiene i canoni dei Sinodi locali e dei Padri della Chiesa.

3. *Enchiridion*[17] di Iosif Pop Silaghi

Quest'opera è una collezione di diritto delle Chiese orientali cattoliche, elaborata dal Vescovo Iosif dell'eparchia di Oradea Mare, per l'uso dei chierici greco-cattolici studiosi. L'opera ha avuto due edizioni, prima nell'anno 1862 e la seconda nel 1880, *post mortem*, a cura del canonista Augustin Lauran.

L'Enchiridion inizia con un *Prolegomena* lungo di 68 pagine, che contiene un trattato teologico-giuridico sulle materie come la religione cristiana, Gesù Cristo il Salvatore, la Chiesa, la potestà legislativa e giudiziaria, la gerarchia, i chierici, i laici e le fonti del diritto ecclesiastico. L'autore ha ordinato l'opera in due parti con sezioni, capitoli e canoni. Ha usato vari fonti di diritto latino e bizantino.

La prima parte chiamata *Jus publicum ecclesiasticum*, è divisa in due sezioni. Prima sezione, accoglie lo *Jus publicum ecclesiasticum internum* ed è suddivisa in nove capitoli che espongono i canoni sulla gerarchia ecclesiastica (es.: il ministero pietrino, il Romano Pontefice e la sua suprema autorità nella Chiesa, la curia del Romano Pontefice, il Patriarca, il Metropolita, il Vescovo), sui Concili ecumenici, sui Sinodi provinciali ed eparchiali, sull'eparchia, sulla parrocchia e sul monachesimo. La seconda sezione, contiene lo *Jus ecclesiasticum publicum externum* ed è distribuita in cinque capitoli che presentano i canoni sulla mutua

[16] Canoanele săboarălor a toată lume şi a celor namăsnice şi ale Sfinţilor Părinţi, Blaj 1798, p. 540+181 (manoscritto in vista di pubblicazione a cura di Ioan Alexandru Pop). Il manoscritto si trova nella Biblioteca Academici Române Filiala Cluj-Napoca fond Blaj, con il numero di registrazione 427.

[17] Cf. PAPP-SZILÁGYI, Enchiridion, 376.

relazione tra la Chiesa e la Società civile, sul rapporto tra l'imperatore e la Chiesa, sulla potestà ecclesiastica e civile sulle persone ecclesiastiche (giuridiche) e sui beni ecclesiastici e, il dialogo con le altre confessioni.

La seconda parte intitolata *Jus privatum ecclesiasticum*, è divisa in tre sezioni. Prima sezione, comprende *De Personis et Beneficiis ecclesiasticis*, ed è suddivisa in quattro capitoli che presentano i canoni sulle persone ecclesiastiche, sulla vita del clero, sul beneficio e il patronato, sul modo di ottenere i benefici e le dignità ecclesiastiche (es.: Romano Pontefice, Patriarca, Metropolita e Vescovo). La seconda sezione, include *De Jure rerum ecclesiasticum* ed è sistemata in tre capitoli che rilevano i canoni sul culto divino, sui sacramenti e sui sacramentali. La terza sezione, comprende *De Judiciis, delictis, et poenis ecclesiasticis* ed è strutturata in quattro capitoli che presentano i canoni sul giudizio e sul processo criminale e matrimoniale, sulla sentenza e sulle censure ecclesiastiche. L'Enchiridion finisce con un'ammonizione indirizzata ai chierici orientali cattolici, di credere nella dottrina sul ministero pietrino, sul *Filioque* e sul purgatorio.

III. La legislazione pontificia

Dopo l'unione con Roma avvenuta nel 1698 sono state aggiunte alla legislazione della nostra Chiesa, le leggi emanate dai Romano Pontefici. I vari papi hanno emanato norme che riguardavano l'organizzazione della provincia ecclesiastica di Ardeal, la dottrina cattolica sul sacramento del matrimonio e i patti concordatari.

1. L'istituzione della Chiesa grego-cattolica romena

Nel 1698 quando la Chiesa di Ardeal si è unita con la Chiesa di Roma, era organizzata in una provincia ecclesiastica, con la sede metropolitana nella città di Alba-Iulia. Dopo l'unione, questa provincia è stata trasformata in una eparchia con la sede nella città di Alba-Iulia. Nel 1721[18] la sede episcopale è stata trasferita nella città di Făgăraş e poi nel 1807[19] nella città di Blaj, nel cuore della Transilvania. Mi sembra opportuno notare, che già nell'anno 1737 il Vescovo Ioan Inocenţiu Micu ha trasferito la residenza episcopale nella nuova proprietà vescovile di Blaj, dove poi, hanno risieduto tutti i suoi successori.

Nel 6 dicembre 1853[20] è stata riattivata la provincia ecclesiastica di Ardeal con il titolo di Făgăraş e Alba-Iulia, con la sede metropolitana situata nella città di

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[18] Cf. INNOCENTIUS XIII PP., Litt. ap. *Rationi congruit*, 15 iun. 1721, in: R. DE MARTINIS (ed.), Iuris Pontifici De Propaganda Fide. Pars prima, Vol. II, Roma 1888, II (p. 345-348). Con questa lettera il papa Inocenzio XIII riconferma quanto è stato decretato dal suo predecessore papa Clemente XI.

[19] Cf. PIUS VII PP., Litt. ap. *Apostolatus officium*, 1 dic. 1807, in: ibidem, Pars prima, Vol. IV, Roma 1891, XXXIV (p. 507-509).

[20] Cf. PIUS IX PP., Litt. ap. *Ecclesiam Christi*, 6 dic. 1853, in: ibidem, Pars prima, Vol. VI, Roma 1894, CL (p. 203-209).

Blaj. Nello stesso momento sono state erette le due eparchie suffraganee, Lugoj[21] e Cluj-Gherla[22]. L'eparchia di Oradea Mare, eretta nell'anno 1777, che prima era sotto la giurisdizione dell'arcivescovo di Estergonz (Ungheria) e che adesso passa sotto la giurisdizione del metropolita di Făgăraş e Alba-Iulia.

Nell'anno 1930[23] è stata eretta e congiunta alla provincia la nuova eparchia di Maramureş, con la sede a Baia-Mare, così che la provincia comprendeva quattro eparchie e una archieparchia.

Con l'arrivo del regime comunista al governo del nostro paese, la Chiesa greco-cattolica romena, nel 1 dicembre del 1948, è stata privata dalla sua libertà e soppressa con la disposizione del Decreto 358 dello stesso anno. Nel dicembre del 1989, grazie alla rivoluzione contro il regime comunista, la nostra Chiesa ha riacquistato la sua libertà, ripristinando la sua organizzazione metropolitana e la sua giurisdizione su tutto il territorio romeno[24], con la sede a Blaj.

Con l'entrata in vigore nel 1991 del *Codex Canonum Ecclesiarum Orientalium*, la nostra Chiesa è diventata Chiesa metropolitana *sui iuris*. Poi, nel 14 dicembre del 2005, quattordici anni più tardi, il papa Benedetto XVI[25] ha elevato la nostra Chiesa alla dignità di Arcivescovile maggiore.

2. La rinuncia all'ufficio episcopale

Secondo i sacri canoni[26] nelle Chiese orientali era già prevista la rinuncia/dimissione dall'ufficio episcopale, di propria volontà. Nella storia della nostra Chiesa sono stati tre casi di dimissione dall'ufficio episcopale, per motivi politici, di cui era a conoscenza il Romano Pontefice.

Ricordo il caso del Vescovo Ioan Inocenţiu Micu, che nel 7 maggio 1751 ha dovuto dimissionare, mentre si trovava nell'esilio a Roma, perché aveva combattuto per i diritti del suo popolo romeno. Dopo di lui, nel 13 marzo 1782 il Vescovo Grigore Maior, costretto dalla corte imperiale, ha dato le dimissioni, perché militava apertamente per il riconoscimento dei diritti dei romeni. Nel 10 aprile dell'anno 1850 il Vescovo Ioan Lemeni è stato anche lui costretto di presentare le dimissioni per motivi politici. Le sue dimissioni sono state accettate da papa Pio IX[27], nel 13 maggio dello stesso anno.

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[21] Cf. IDEM, Litt. ap. *Apostolicum ministerium*, 6 dic. 1853, in: ibidem, CXLVIII (p. 194-198).

[22] Cf. IDEM, Litt. ap. *Ad Apostolicam Sedem*, 6 dic. 1853, in: ibidem, CXLIX (p. 198-203).

[23] Cf. PIUS XI PP., Const. ap. *Solemni Conventione*, 5 iun. 1930, in: AAS 21 (1930) 381-386.

[24] Ibidem.

[25] Cf. BENEDICTUS XVI PP., Cost. ap. *Ad totius dominici gregis*, 14 dec. 2005, in: AAS 98 (2006) 107.

[26] Cf. cann. 88 di Cartagena, 16 di Cost. I-II, 10 di Pietro di Alessandria – vedi supra alla nota S. MICU, Canoanele săboarălor [...]; can. 3 di Cirillo di Alessandria – vedi Fonti, Fasc. IX, II, 280-281.

[27] Cf. PIUS IX PP., Litt. ap. *Redite sunt nobis*, 13 mai. 1850, in: Iuris Pontifici De Propaganda Fide. Pars prima, Vol. VI, Roma 1894, LXXIV (p. 95-96).

3. Il sacramento del matrimonio

Nella lettera[28] indirizzata ai Presuli e ai parroci del regno dell'Ungheria, il papa Gregorio XVI disponeva alcune norme relative alla disciplina del matrimonio misto. Per il pericolo che comporta alla parte cattolica, questo matrimonio è illecito senza la dispensa dal proprio Ordinario. La dispensa era concessa solo dopo che la parte cattolica compieva alcune condizioni: di promettere che non abbandonerà la fede cattolica e che educherà la prole nella Chiesa cattolica. Riguardo alla sua celebrazione era vietato sia la seconda cerimonia del matrimonio davanti al sacerdote non cattolico sia la concelebrazione del parroco cattolico con quello non cattolico. Invece, è permessa la partecipazione non attiva.

In un'altra lettera[29] inviata al Metropolita e ai Vescovi della provincia ecclesiastica di Alba-Iulia e Făgăraş, papa Pio IX stabiliva alcune norme da osservare nel custodire, propagare e applicare la dottrina cattolica sul matrimonio. Queste norme fanno riferimento al diritto divino e naturale circa l'indissolubilità del vincolo matrimoniale, che non può essere sciolto per i capi d'adulterio, eresia, violenza coniugale e l'assenza del coniuge. Invece, se il matrimonio è rato e non consumato, può essere sciolto solo dal Romano Pontefice.

4. Le feste

Nell'anno 1775 il Vescovo di Făgăraş ha ricevuto dal papa Pio VI[30], la facoltà di ridurre le feste nella propria eparchia e di trasferire il digiuno. In questa occasione è stato comunicato l'elenco delle feste con l'obbligo di osservarle: La Risurrezione del Signore, la Pentecoste, il Natale, la Circoncisione, l'Epifania, L'Ascensione; la Purificazione della Vergine Maria, l'Annunciazione, l'Assunzione, la Natività e concepimento; i Santi Apostoli Pietro e Paolo e Tutti i Santi.

5. Il diritto concordatario

Sono due i concordati che sono stati stipulati dalla Sede Apostolica, e che riguardavano la Chiesa greco-cattolica romena. Il primo[31] è stato concluso tra il papa Pio IX e l'imperatore d'Austria, Francesco Giuseppe I, nel 18 agosto 1855. Questo concordato conteneva 36 articoli, in cui era stabilito per esempio: la libertà e l'autonomia della Chiesa cattolica nell'organizzarsi in tutto l'impero (cf. artt. I-

[28] Cf. GREGORIUS XVI PP., Litt. ap. *Quas vestro*, 30 apr. 1841, in: ibidem, Pars prima, Vol. V, Roma 1893, CXCV (p. 272-274).

[29] Cf. PIUS IX PP., Litt. ap. *Verbis exprimere*, 25 aug. 1859, in: ibidem, Pars prima, Vol. VI, Roma 1894, CCXVII (p. 289-291).

[30] Cf. PIUS VI PP., Litt. ap. *Assueto paternae*, 8 apr. 1775, in: ibidem, Pars prima, Vol. IV, Roma 1891, V (p. 206-208).

[31] Cf. Sollemnis Conventio, 18 aug. 1855, in: A. MERCATI (ed.), Raccolta di concordati su materie ecclesiastiche tra la Santa Sede e le Autorità civili, Vol. I, Vaticano 1954, 821-829.

IV); il diritto d'impartire l'insegnamento cattolico nelle scuole e gli istituti pubblici e privati sotto l'autorità del Vescovo diocesano (cf. artt. V-VIII); la competenza esclusiva della Chiesa per giudicare le cause ecclesiastiche riguardanti la fede, i sacramenti, le sacre funzioni, gli uffici ecclesiastici e i diritti annessi al ministero sacro (cf. artt. X-XIV); il diritto della Sede Apostolica di erigere nuove diocesi, in alcuni casi con il consenso del Governo Imperiale (art. XVIII); il diritto della Chiesa di possedere, acquistare, amministrare i beni temporali (artt. XXVII- XXIX-XXXI). Questo concordato è caduto in desuetudine nell'anno 1918 quando l'impero è stato diviso definitivamente in diverse repubbliche indipendenti.

Il secondo concordato[32] è stato stabilito tra il papa Pio XI e il re della Romania, Ferdinando I, nel 1 maggio 1927. Contiene 24 articoli e un articolo addizionale. Il concordato prevedeva:

- la libertà della Chiesa cattolica di ogni rito sul territorio del regno romeno (cf. art. I)

- la costituzione della provincia ecclesiastica di Alba-Iulia e Făgăraş (dei greco-cattolici) e di Bucarest (dei latini) e un capo spirituale per gli armeni, con la sede a Gherla (cf. art. II)

- la libera comunicazione tra i Vescovi, i chierici e il popolo con la Sede Apostolica (cf. art. III)

- l'obbligo per i Vescovi e il capo spirituale degli armeni di essere cittadini romeni. La Sede Apostolica prima di nominarli doveva informare il Governo del regno (cf. art. V, §§ 1 e 2)

- il riconoscimento della personalità giuridica della Chiesa cattolica da parte dello stato (cf. art. IX)

- la libertà degli Ordinari di esercitare le funzioni ecclesiastiche e di governare le diocesi (erigere nuove parrocchie, fondare chiese filiale), di impartire l'istruzione religiosa, morale ed ecclesiastica. Dipendono da loro tutti i chierici cattolici sia per la nomina sia per l'esercizio del ministero sacro. Dell'avvenuta nomina doveva essere informato il Ministero dei Culti (cf. artt. VIII, XII, XX, § 1)

- la competenza del Vescovo con il suo Consiglio di amministrare il patrimonio ecclesiastico, secondo gli Statuti da lui redatti e approvati dalla Sede Apostolica e dal Governo. Il patrimonio godeva di personalità giuridica (cf. art. XIII, §§ 3 e 5)

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[32] Cf. Sollemnis Conventio, 10 mai. 1927, in: AAS 21 (1929) 441-451.

- la personalità giuridica per gli Ordini e le Congregazioni religiose, i loro membri devono essere cittadini romeni. L'istituzione dei nuovi Ordini e Congregazioni o di case delle medesime, si può solo con l'approvazione della Sede Apostolica e del Governo (cf. art. XVII, 1°, 2° e 4°)

- il diritto della Chiesa cattolica di provvedere all'assistenza spirituale dei propri fedeli, nell'armata, negli ospedali civili e militari, negli orfanotrofi, nelle scuole di correzione e nei penitenziari (cf. art. XVIII)

- il diritto della Chiesa cattolica di erigere e mantenere le scuole primarie e secondarie, sotto la dipendenza dell'Ordinario e sotto la sorveglianza e il controllo del Ministero dell'Istruzione pubblica (cf. art. XIX,§ 1).

Questo concordato è caduto in desuetudine dopo la denuncia unilaterale del regime comunista nell'anno 1948.

IV. La prima codificazione del diritto particolare

Negli anni 1864-1866[33] i Vescovi della provincia metropolitana di Alba-Iulia e Făgăraş iniziavano i lavori di preparazione per l'organizzazione di un Concilio provinciale, provvedendo anche al raduno del materiale necessario al riguardo. Questo loro desiderio si è realizzato nell'anno 1872 quando si è tenuto il primo concilio, seguito poi da altri due a distanza di pochi anni. Questi concili compongono il nostro primo codice di diritto canonico particolare, suddiviso in tre parti, secondo i rispettivi concili. Le fonti principali dei tre concili sono i sacri canoni, la dottrina dei Padri della Chiesa e i sinodi arcieparchiali ed eparchiali tenuti nella nostra Chiesa.

1. Il Concilio Provinciale I

Questo è il primo concilio provinciale nella storia della nostra Chiesa. Si è tenuto dal 5 al 14 maggio dell'anno 1872, nella sede metropolitana di Blaj. Il Concilio è strutturato in titoli – dieci al numero – e capitoli, in quali si ordina il magistero della Chiesa cattolica (tit. I, 4 capitoli), l'istituzione ecclesiastica (tit. II, 9 capitoli; tit. III, 4 capitoli), i beni temporali della Chiesa (tit. IV, 4 capitoli), i sacramenti (tit. V, 9 capitoli), il culto divino (tit. VI, 10 capitoli), i chierici (tit. VII, 7 capitoli), i monaci (tit. VIII, 4 capitoli), l'educazione scolastica (tit. IX, 6 capitoli) e il foro ecclesiastico (tit. X, 3 capitoli).

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[33] Cf. I. VANCEA, Epistola indictionis Concilii provinciae Ecclesiasticae Graeco-Catholicae Alba-Iuliensis et Fagarasiensis, in: Conciliul Provincial I, Blaj 1872.

Questo Concilio introduce nella nostra Chiesa la disciplina sull'indissolubilità[34] del matrimonio, secondo il concetto della teologia latina. Prima c'era in vigore la disciplina che regolava lo scioglimento del vincolo a causa dell'adulterio per l'oikonomia[35].

Invece, il Concilio non ha introdotto l'impedimento dirimente dell'ordine sacro, mantenendo la disciplina orientale sul matrimonio valido ma illecito, celebrato dopo l'ordinazione sacra[36].

Un'altra questione da tener presente, riguarda la conferma della prassi della nostra Chiesa, sul foro delegato protopresbiterale di prima istanza[37], che era competente a giudicare le cause ecclesiastiche contenziose, penali e matrimoniali. Da questo foro si appellava al foro episcopale.

Gli atti e i decreti del Concilio sono stati inviati alla Sede Apostolica nel 10 agosto 1872. Nove anni più tardi, nel 19 marzo 1881, ha ricevuto la *recognitio* dalla Congregazione *de Propaganda Fide*.

2. Il Concilio Provinciale II

Il Concilio si è tenuto a Blaj, dal 30 maggio al 6 giugno dell'anno 1882. Nel discorso d'inaugurazione del Concilio, il Metropolita elogiava il lavoro legislativo svolto dal primo Concilio Provinciale, nominandolo un "proprio Codice ecclesiastico". Lui affermava che il Codice è stato elaborato secondo i canoni[38] che erano in vigore e in uso all'inizio della nostra Chiesa greco-cattolica. Il Concilio è diviso in titoli – sei al numero –, sezioni e capitoli e ordina le materie come il magistero della Chiesa (tit. I, 3 canoni), il capitolo metropolitano (tit. II, sez. I, 4 capitoli e 17 canoni; sez. II, 2 capitoli e 8 canoni; sez. III, 2 capitoli e 6 canoni; sez. IV, 2 capitoli e 10 canoni), i monaci (tit. III, 2 capitoli), il processo giudiziario matrimoniale, contenzioso e penale (tit. IV, sez. I, 4 capitoli e 46 canoni; sez. II, 6 capitoli e 40 canoni; tit. V, 4 capitoli e 96 canoni) e i beni ecclesiastici (tit. VI, 3 capitoli e 7 canoni).

Questo Concilio introduce l'impedimento dirimente dell'Ordine sacro[39]. Le cause matrimoniali dei chierici che hanno contratto il matrimonio dopo l'ordinazione erano inviate al giudizio della Sede Apostolica. La procedura informativa per il raduno della documentazione necessaria al processo era istituita dal Vescovo interessato o dall'Arcivescovo.

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[34] Cf. Conciliul Provincial I, Tit. V, cap. VIII.

[35] Vedi Alexandru ŞTERCA ŞULUŢIU, Adnotatiuni [...], 1858, Biblioteca Academiei Române Filiala Cluj-Napoca, fond Blaj, ms. rom., n. 61, XVI, p. 137-330 (manoscritto in fase di pubblicazione a cura di Ioan Alexandru Pop); PETRU MAIOR, op.cit., §§ 21-25 (p. 140-159); Samuil MICU, Dissertatio canonica de matrimonio juxta disciplinam graecae orientalis Ecclesiae (Typis Josephi Nob. de Kurzbeck), Vindobonae 1781, CVII-CVIII (p. 126-141).

[36] Cf. Conciliul Provincial I, Tit. V, cap. VIII; vedi anche ŞTERCA ŞULUTIU, op.cit., XV (p. 124-135); MICU, Dissertatio [...], XLIX (p. 63-64).

[37] Cf. Conciliul Provincial I, Tit. X, cap. III; PETRU MAIOR, op.cit., §§ 20-21 (p. 136-144).

[38] Come ho presentato di sopra, questi canoni radunati nelle varie collezioni, appartengono alla legislazione bizantina.

[39] Cf. Conciliul Provincial II, Blaj 1882, Tit. IV, Sez. I, cap. II, § 11.

Invece, il Concilio riconferma il foro delegato protopresbiterale di prima istanza[40], con competenza per le cause matrimoniali, contenziose e penali.

Gli atti e i decreti del concilio sono state inviate alla Sede Apostolica nel 1 ottobre 1882 e hanno ricevuto la *recognitio* dalla Congregazione *de Propaganda Fide* dopo due anni, nel 1 ottobre 1884.

3. Il Concilio Provinciale III

Il Concilio si è radunato a Blaj dal 4 al 13 settembre del 1900, all'anniversario dei duecento anni dall'unione della nostra Chiesa con la Chiesa di Roma. È stato annunciato nella conferenza dei Vescovi tenuta a Blaj nel 23 giugno 1897 e a Budapest nel 13 e 14 settembre dell'anno 1899, dove è stato anche determinato il suo programma e la sua data. Il Concilio è strutturato in titoli – quattro al numero-, capitoli e canoni e contiene le seguenti materie: l'unione con Roma (tit. I, 3 capitoli), l'istituzione ecclesiastica (tit. II, cap. 1, 5 canoni; cap. II, 4 canoni), il culto divino (tit. III, cap. I, 13 canoni; cap. II, 17 canoni; cap. III) e la nuova edizione della Sacra Scrittura (tit. IV). Gli atti e i decreti del Concilio hanno ricevuto la *recognitio* nel 21 dicembre 1905 dalla Congregazione *de Propaganda Fide*.

V. La codificazione del diritto particolare oggi

La nostra Chiesa oggi è una Chiesa Arcivescovile Maggiore, che nel *CCEO* è considerata la seconda nella tipologia delle Chiese *sui iuris* e gode di un'autonomia simile a quella della Chiesa patriarcale. Il Sinodo dei Vescovi è l'autorità legislativa competente nell'emanare leggi liturgiche e disciplinari particolari (cf. can. 110 § 1 CCEO). La promulgazione di queste leggi spetta solamente all'Arcivescovo maggiore (cf. can. 112 § 1 CCEO).

Dal 2005 fino ad'oggi il Sinodo ha emanato leggi liturgiche sulle feste, sul digiuno e sulle vesti liturgici e leggi canoniche attinenti ai beni temporali della Chiesa e ai protopresbiterati. L'Arcivescovo maggiore o il Sinodo dei Vescovi hanno approvato vari Statuti appartenenti ad alcuni enti ecclesiastici.

Attualmente, la Commissione per la redazione del diritto particolare svolge i lavori di elaborazione del codice particolare, seguendo la linea tracciata dai canoni del Codice orientale, che rimandano in alcune materie alla disposizione del diritto particolare o alla potestà legislativa del Sinodo dei Vescovi.

1. Le leggi liturgiche

Il Sinodo dei Vescovi ha emanato nell'anno 2009 alcune leggi liturgiche che regolano il calendario, il digiuno e l'astinenza e, le vesti liturgiche secondo la

[40] Idem, Tit. IV, Sez. II, cap. I, § 50, cap. III, § 65; Tit. V, cap. I, § 2; cap. II, § 16; cap. III, §§ 59, 60; cap. IV, § 92.

tradizione bizantina. Queste norme sono entrate in vigore nello stesso anno e vincolano i fedeli greco-cattolici, dovunque si trovino (cf. can. 150 § 2 CCEO).

2. L'alienazione dei beni ecclesiastici

Il Sinodo dei Vescovi ha stabilito nell'anno 2008 la somma minima e massima per l'alienazione dei beni temporali della Chiesa, secondo i cann. 1036 e 1037 del CCEO. Questa legge vincola, dentro i confini del territorio della Chiesa, l'Arcivescovo maggiore, i Vescovi e i parroci.

3. I protopresbiterati

Nell'anno 2008 il Sinodo dei Vescovi ha emanato una legge, con la quale si stabilisce la personalità giuridica per tutti i protopresbiterati costituiti entro il territorio della Chiesa.

4. Gli Statuti

Sono stati approvati dall'Arcivescovo maggiore gli Statuti del Sinodo dei Vescovi della Chiesa Arcivescovile maggiore (15 giugno 2010), del Consiglio Economico della medesima Chiesa (12 aprile 2007), della Curia Arcivescovile maggiore (17 maggio 2007) e del Tribunale ordinario (18 giugno 2010). Dal Sinodo dei Vescovi sono stati approvati gli Statuti dei Seminari Maggiori (2 giugno 2008) e del Tribunale superiore (8 novembre 2010).

Tali Statuti che racchiudono norme particolari che riguardano le istituzioni che appartengono alla struttura interna della nostra Chiesa, sono parte integrante del nostro diritto canonico particolare.

5. I decreti dell'Arcivescovo maggiore

Nell'anno 2007 è stato emanato un decreto con cui l'Arcivescovo maggiore obbliga all'osservanza delle leggi concernenti la pubblicazione dei libri teologici che toccano i temi di fede e morale (cf. cann. 659, 661, 662, 663 CCEO), la pubblicazione dei calendari (cf. il calendario ufficiale approvato dal Sinodo dei Vescovi) e la pubblicazione e ripubblicazione dei libri liturgici destinati al culto pubblico (cf. cann. 656 § 1 e 657 CCEO). Lo stesso decreto urge all'osservanza e all'applicazione delle leggi che riguardano l'uso degli strumenti della comunicazione sociale (cf. cann. 651, 652, 653 CCEO).

In un'altro decreto del 2009 si dispone, secondo i cann. 656 § 1 e 657 del CCEO, l'obbligo di adoperare i libri liturgici approvati dall'autorità ecclesiastica competente, nella celebrazione della Divina Liturgia (di San Giovanni Crisostomo, di San Basilio Grande e di Gregorio Dialogo – Presantificandi), dei Vespri (Vecernia) e delle Lodi mattutine (Utrenia).

Il decreto ricorda ai Vescovi eparchiali, che essendo moderatori, promotori e custodi della vita liturgica nelle proprie eparchie, hanno l'obbligo sia di curare e di organizzare la liturgia secondo le prescrizioni e le consuetudini legittime della propria Chiesa *sui iuris*, sia di vigilare affinché non ci siano degli abusi (cf. can. 199 § 1 CCEO). Ai protopresbiteri si fa presente il loro obbligo di vigilare affinché la liturgia sia celebrata secondo le prescrizioni dei libri liturgici (cf. can. 278 § 1, 3° CCEO). Ai presbiteri si menziona l'obbligo di celebrare i sacramenti secondo le prescrizioni liturgiche della propria Chiesa *sui iuris* (cf. cann. 667 e 674 CCEO).

VI. Conclusione

Nel presente articolo ho esposto uno studio cronologico sulla storia del diritto canonico particolare della nostra Chiesa ai nostri giorni. Però, non ho incluso nello studio la legislazione emanata, durante gli anni, dai Dicasteri della Curia Romana per la nostra Chiesa (es.: *S. C. de Propaganda Fide*, *S. C. Orientalis* e *S. C. S. Offici*) e dai Sinodi arcieparchiali ed eparchiali tenuti dopo l'unione con Roma (60 al numero).

Dopo lo scisma nella disciplina canonica della Chiesa romena compaiono diverse collezioni di leggi e canoni bizantini (es.: *"Nomocanone"* di Matteo Blastare, *"Hexabiblos"* di Costantino Armenopulo e *"Nomocanone"* di Manuele Malaxos) e dal XVII secolo appaiono le prime compilazioni di diritto bizantino in lingua romena (la più conosciuta era *"Pravila cea Mare"*). Dopo l'unione con Roma, la nostra Chiesa che adoperava la *"Pravila cea Mare"* come codice ufficiale, ha iniziato a realizzare una propria legislazione. In questo tempo compaiono le collezioni di Petru Maior ("Procanon"), Samuil Micu ("Canoanele săboarălor") e Iosif Pop Silaghi ("Enchiridion") e le leggi emanate dai Romano Pontefici.

Poi, alla fine del XIX secolo, con l'occasione dei tre Concili Provinciali di Alba-Iulia e Făgăraş tenuti a Blaj, si è compiuta la prima codificazione del diritto particolare. Attualmente, la nostra Chiesa possiede lo statuto giuridico di Chiesa Arcivescovile maggiore e gode di una maggiore autonomia e potestà nell'emanazione delle leggi per il proprio territorio. Per cui, il Sinodo dei Vescovi con l'aiuto della Commissione per la redazione del diritto particolare costituita nel 2006, svolge il lavoro di elaborazione del proprio codice.

IL DIRITTO PARTICOLARE DELLE CIRCOSCRIZIONI ECCLESIASTICHE BIZANTINE IN ITALIA

Lorenzo L o r u s s o O.P., Bari

I. Introduzione storica

Per Chiesa bizantina in Italia intendiamo le tre circoscrizioni ecclesiastiche di Lungro, Piana degli Albanesi e Grottaferrata. Si tratta di due eparchie immediatamente soggette alla Sede Apostolica e di un monastero esarchico di diritto pontificio.

Le tre circoscrizioni ecclesiastiche bizantine in Italia sono eredi di due tradizioni distinte nell'ambito della stessa tradizione bizantina. Il monastero esarchico di Grottaferrata, nei pressi di Roma, è l'erede del monachesimo italo-greco che nella Chiesa bizantina in Italia fiorì nel primo millennio. Le due eparchie di Lungro (Cosenza) e Piana degli Albanesi (Palermo) invece, sempre nell'ambito bizantino, sono eredi dell'emigrazione albanese avvenuta soprattutto nel secolo XV in seguito alle incursioni dei turchi ottomani nei territori albanesi. Pur appartenendo alla stessa tradizione bizantina, l'esarcato da una parte e le due eparchie dall'altra hanno una storia differente e un proprio modo di vivere la fede.

All'arrivo degli italo-albanesi, nell'Italia meridionale rimanevano ancora alcuni segni della presenza del rito bizantino, praticato dagli italo-greci, che pure nel primo millennio dell'era cristiana erano presenti in tutto il meridione d'Italia, e che nei secoli VIII, IX e X avevano raggiunto il loro massimo splendore, esprimendo una intensa vita religiosa nelle grandi figure di innumerevoli santi e negli oltre mille monasteri e cenobi che fiorirono in Calabria[1].

La presenza della tradizione della Chiesa orientale in Italia ha origini antiche: esse risalgono alla prima metà del VI secolo, quando Giustiniano, imperatore dell'Impero Romano d'Oriente, s'impossessò dell'Italia. Questo dominio si prolungò durante gli anni, anche se successivamente interessò solamente le regioni meridionali dell'Italia, che vanno dalla Puglia alla Calabria e fino alla Sicilia. In questo contesto un avvenimento di grande interesse per la Chiesa di tradizione orientale in Italia furono le migrazioni di moltitudini di monaci che, perseguitati dagli imperatori avversari del culto delle sacre immagini, i cosiddetti iconoclasti, lasciarono la loro terra e si stabilirono in Italia, soprattutto in Sicilia, dove, benché sempre soggetti al dominio di Costantinopoli, trovarono requie. La conquista della Sicilia da parte degli arabi spinse questi monaci ad emigrare verso la Calabria. In

[1] Cf. La Chiesa greca in Italia dall'VIII al XVI secolo. Atti del Convegno storico intereccclesiale (Bari 30 aprile – 4 maggio 1969), Padova 1973; A. VACCARO, Italo-Albanensia. Repertorio bibliografico sulla storia religiosa, sociale, economica e culturale degli Arbëreshë dal sec. XVI ai nostri giorni (Associazione culturale italo-greco-albanese 1), Cosenza 1994; E. F. FORTINO, La Chiesa bizantina albanese in Calabria. Tensioni e comunione (Associazione culturale italo-greco-albanese 2), Cosenza 1994; D. COMO, Una diocesi della Chiesa italo-albanese: L'eparchia di Piana degli Albanesi, Palermo 1981; I. CEFALIA, Lo status ecclesiale canonico delle Comunità bizantine cattoliche d'Italia. Questioni e prospettive di uno stato giuridico, Roma 2005.

questa regione si assiste perciò ad una grande fioritura del monachesimo basiliano, detto così perché i monaci si ispiravano alla regola di san Basilio. Poi anche per quest'Ordine iniziò lento ma inesorabile il declino. La vicenda di questi epigoni della Chiesa orientale in terra d'Italia stava per esaurirsi, quando, a rinvigorire quella tradizione, arrivarono gli albanesi. Tra l'arrivo dei monaci orientali e quello degli albanesi un grave evento aveva turbato la pacifica convivenza tra la Chiesa d'Oriente e la Chiesa d'Occidente: lo scisma del 1054. Ma quando gli albanesi arrivarono in Italia, l'unità era stata ristabilita dal concilio di Firenze del 1439 ed essi furono accolti di buon grado.

Con il concilio di Trento le cose cambiarono. I canoni tridentini non riguardavano specificatamente i fedeli orientali, tuttavia alcune decisioni incidevano profondamente sul rapporto di convivenza ormai instauratosi tra questi e la Chiesa d'Occidente. I canoni più marcatamente contrari al regime antecedente riguardavano le visite pastorali dei vescovi i quali ogni anno erano tenuti a visitare con autorità apostolica tutte le chiese. Oppure il canone che riguardava le ordinazioni il quale proibiva a chiunque di essere ordinato sacerdote da un vescovo diverso da quello ordinario del luogo di dimora. I decreti del concilio di Trento erano stati approvati da qualche mese, quando una serie di segnalazioni, provenienti dai primi vescovi riformatori trasferitisi in alcune diocesi dell'Italia meridionale, cominciarono a porre la Santa Sede di fronte alla sussistenza di una gerarchia episcopale e di un clero, che amministravano i sacramenti ed esercitavano giurisdizione nel territorio di quelle diocesi, ma lo facevano nella consapevolezza di dipendere ecclesiasticamente non dal papa bensì dal patriarca di Costantinopoli. A questo punto intervenne direttamente il papa Pio IV che con il Breve *Romanus Pontifex*, del 16 febbraio 1564, abrogò le esenzioni ed i privilegi concessi dai pontefici precedenti e sottomise le comunità orientali alla giurisdizione dei vescovi ordinari latini[2].

Il 20 agosto 1566 papa Pio V firmò la Bolla *Provvidentia Romani Pontificis*, con la quale vietò tassativamente ogni tipo di duttilità e promiscuità liturgica e revocò ai sacerdoti di entrambi i riti tutti i precedenti permessi di celebrare il culto divino secondo l'uso dell'una o dell'altra Chiesa, quando questo non fosse il proprio[3].

Nel 1573 sotto il pontificato di Gregorio XIII fu istituita la Congregazione dei Greci (la curia Romana mai differenziò gli italo-albanesi dagli italo-greci, chiamandoli sempre con quest'ultima formula). Grazie a questo organismo, e soprattutto grazie all'attività del suo presidente, l'arcivescovo di Santa Severina Giulio Antonio Santoro, la presenza di questa frangia orientale in Italia cessò di essere un problema da risolvere con l'annientamento[4].

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[2] Bullarium Pontificium Sacrae Congregationis de Propaganda Fide tom. I, Roma 1839, 8-10; cf. S. V. VARNALIDIS, Le implicazioni del Breve "Accepimus nuper" di Papa Leone X (18 maggio 1521) e del Breve "Romanus Pontifex" di Papa Pio IV (16 febbraio 1564) nella vita religiosa dei Greci e degli Albanesi dell'Italia Meridionale, in: Nicolaus 8 (1981) 259-382.

[3] Bullarium Pontificium Sacrae Congregationis de Propaganda Fide tom. I, Roma 1839, 11-12.

[4] Cf. V. PERI, Chiesa Romana e "Rito" Greco. G.A. Santoro e la Congregazione dei Greci (1566-1596), Brescia 1975.

La soluzione si trovò nell'individuazione di un vescovo di rito greco, però cattolico, abilitato ad ordinare in debita e legittima forma nuovi sacerdoti albanesi e greci. Questa istanza fu fatta propria dal papa Clemente VIII che la recepì nel documento pontificio noto come *Perbrevis Instructio* del 31 agosto 1595. Il primo vescovo orientale per origine ecclesiastica e per rito, soggetto direttamente all'autorità del Pontefice Romano fu il cipriota Germano Kouskonaris, il quale, fuggito da Famagosta e abiurata l'ortodossia, viveva stentatamente a Roma come Cappellano del Collegio Greco. L'evoluzione avuta nel campo ecclesiologico si può ormai sintetizzare. Dal punto di vista romano non esistevano più due Chiese, due comunità con propria tradizione liturgica, spirituale, disciplinare e teologica, in piena comunione; ma una sola Chiesa nel cui ambito si trovavano delle comunità cattoliche che potevano mantenere parte della loro tradizione, ma non una propria gerarchia. La presenza di un vescovo ordinante per i preti orientali rendeva gli stessi preti abili all'esercizio del loro ministero, ma nulla più.

Con la bolla *Superna Dispositione* del 10 giugno 1732 papa Clemente XII nominò il presidente del Collegio Corsini, Felice Samuele Rodotà, vescovo titolare, cui spettava espressamente la funzione di ordinare i sacerdoti di rito orientale per le comunità di Calabria. Altre prerogative di questi vescovi riguardavano la conduzione del seminario sottratto alla giurisdizione dell'ordinario del luogo, e la celebrazione delle cresime. Essi non avevano nessuna giurisdizione sul clero e sui fedeli di rito orientale, giurisdizione che rimaneva totalmente in mano ai vescovi latini.

Il papa Benedetto XIV emanò il 26 maggio 1742 la Bolla *Etsi pastoralis*[5]. Essa conteneva prescrizioni di ordine liturgico, come l'introduzione del *Filioque* nel simbolo niceno-costantinopolitano da recitarsi nella liturgia orientale; altre di ordine canonico come l'impossibilità del marito di abbracciare il rito orientale della moglie, la quale era tenuta ad uniformarsi al rito del coniuge latino; per contro, alla moglie latina era precluso analogo passaggio se il marito era di rito orientale; i figli dovevano seguire il rito del padre, salvo che la moglie latina non volesse educarli nel proprio rito. Infine stabiliva la supremazia del rito latino su quello greco. Ad una prima lettura, l'*Etsi pastoralis* appare come una legge nettamente contraria al rito greco, ma, come Benedetto XV due secoli più tardi ebbe modo di rilevare, quella normativa era dettata dallo spirito di preservare il rito greco, voluto dal disegno divino, e per evitare i contrasti che sorgevano tra gli ordinari latini ed i fedeli e i sacerdoti albanesi. In altri termini l'*Etsi pastoralis* con la sua regolamentazione, certamente restrittiva, garantì agli albanesi di tradizione orientale un ambito in cui poter sopravvivere.

Col passare del tempo, però, diventava sempre più manifesta per i fedeli italo-albanesi la necessità di una dimensione stabile e visibile di una Chiesa con un proprio territorio, stretta attorno ad un proprio vescovo. Nel 1888 gli italo-albanesi inviarono al papa Leone XIII una supplica, per reclamare l'autonomia ecclesiastica, corredata da migliaia di firme. A lui successe Benedetto XV, che

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[5] R. DE MARTINIS, Iuris Pontificis de Propaganda Fide. Pars prima complectens Bullas, Brevia, Acta S.S. III, Roma 1890; P. GASPARRI (ed.), CIC Fontes, Roma 1947, 734-755.

istituì l'eparchia di Lungro per gli albanesi di Calabria e dell'Italia continentale. Pio XI nel 1937 ha istituito l'eparchia di Piana degli Albanesi per gli albanesi di Sicilia, eretta con la costituzione apostolica *Apostolica Sedes* il 26 ottobre 1937[6], sotto la protezione di san Demetrio di Tessalonica. L'eparchia di Lungro è stata istituita il 13 febbraio 1919 con la costituzione apostolica *Catholici fideles*[7], sotto la protezione di san Nicola di Mira.

Il monastero esarchico di Grottaferrata ha una sua storia particolare. Dopo la fondazione nel 1004 da parte di San Nilo, San Bartolomeo e il Beato Proclo, Callisto II (1119-1124) dichiara l'Abbazia di Grottaferrata soggetta soltanto alla Chiesa Romana, ed esente perciò dalla giurisdizione del vescovo. Nel 1150 Eugenio III, in una lettera diretta all'abate Nicolò II, ribadisce l'indipendenza della badia dai Vescovi di Tuscolo. Alessandro IV, in due Bolle del 1259, conferma l'indipendenza.

Nel 1428 Martino V erige l'Abbazia di Grottaferrata in commenda dandola in concessione a Oddone de Variis; Eugenio IV, nel 1432 abolisce la commenda e nomina abate Pietro Vitali che resterà in carica trenta anni.

Nel 1462 Pio II, interrompendo la serie degli abati perpetui, conferisce l'Abbazia di Grottaferrata in commenda al Cardinale Giovanni Bessarione. Seguirà una lunga serie di commendatari (Colonna e Barberini) che durerà fino al 1816 e segnerà un tentativo di latinizzazione.

Finalmente, il 26 settembre 1937 il cenobio di Grottaferrata viene elevato a monastero esarchico con la costituzione apostolica *Pervetustum Cryptæferratæ Cœnobium*[8].

II. La situazione odierna delle tre circoscrizioni[9]

1. Lungro

Conta oggi 32.900 abitanti e la sua estensione su 493 Kmq non ha una continuità territoriale. L'eparchia si estende a tutto il Mezzogiorno dell'Italia continentale, con una parrocchia a Lecce, a Bari e a Villa Badessa (Pescara). In

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[6] AAS 30 (1938) 213-216.

[7] "[...] Cui quidem diœcesi, Lungrensi nuncupandæ, perpetuo attribuimus et adsignamus sequentes parœcias cum omnibus fidelibus tum græci ritus, tum latini, si qui sunt, eas incolentibus; idcirco easdem e diœcesibus latinis, ad quas modo pertinent, dividimus ac seiungimus": BENEDETTO XV, Const. Ap. *Catholici fideles*, 13 febbraio 1919, in: AAS 11 (1919) 222-226 (p. 224).

[8] AAS 30 (1938) 183-186; cf. G. CROCE, La Badia Greca di Grottaferrata e la rivista "Roma e l'Oriente", Cattolicesimo e Ortodossia, fra unionismo ed ecumenismo, vol. 1-2, Città del Vaticano 1990; E. FABBRICATORE (ed.), S. Nilo. Il Monastero italo-bizantino di Grottaferrata, 1004-2004. Mille anni di storia spiritualità e cultura, Roma 2005.

[9] In preparazione del II Sinodo Intereparchiale è stato effettuato uno studio previo sul "contesto teologico e pastorale" nel quale deve inserirsi il Sinodo. Le notizie che riportiamo sono tratte in gran parte dai contributi di Papàs Donato Oliverio, membro della Commissione Centrale di Coordinamento (Lungro), dell'Archimandrita Antonino Paratore, segretario della Commissione Centrale di Coordinamento (Piana degli Albanesi), dello jeromonaco criptense P. Antonio Costanza, membro della Commissione Centrale di Coordinamento (Grottaferrata).

Calabria il vescovo ha giurisdizione esclusiva. Sono al servizio dell'eparchia le religiose divise in 13 comunità di due Congregazioni: le Suore delle Piccole Operaie dei Sacri Cuori di Acri e le Suore Basiliane figlie di Santa Macrina.

La Chiesa eparchiale sotto la guida del suo pastore si è mossa verso un rinnovamento catechetico, liturgico e missionario. Segno di ciò è stata la celebrazione di un'Assemblea Eparchiale, regolata dal Codice dei Canoni delle Chiese Orientali, sottolineando la peculiarità della Chiesa italo-albanese di tradizione bizantina posta provvidenzialmente dal Signore nel cuore dell'occidente chiamata a vivere la vita cristiana nella propria tradizione liturgica, con una accresciuta fedeltà alla spiritualità bizantina e alla lingua albanese, senza dimenticare la speciale missione ecumenica di cui essa è stata investita.

2. Piana degli Albanesi

L'eparchia comprende quattro colonie albanesi di rito bizantino: Piana, Mezzojuso, Contessa Entellina, Palazzo Adriano; una latina, Santa Cristina Gela, e la parrocchia della Martorana a Palermo. L'8 luglio 1960 con decreto della Sacra Congregazione Orientale fu stabilita l'unità di giurisdizione dell'eparchia anche nelle terre di Mezzojuso, Palazzo Adriano e Contessa Entellina. Un altro elemento che riconfigurerà l'eparchia in modo nuovo è rappresentato dalla bolla *Orientalis Ecclesiae* di Giovanni XXIII, dell'8 luglio 1960, con la quale tutte le parrocchie con i rispettivi fedeli presenti nel territorio dell'eparchia, indipendentemente dal rito, passavano sotto la giurisdizione del "solo vescovo" di Piana degli Albanesi.

Il territorio, di 430 kmq, situato nella provincia di Palermo, è discontinuo con paesi che distano tra loro dai 40 agli 80 km. Parte dei fedeli si trova a Palermo. I suoi fedeli attualmente sono 28.900, la maggior parte di rito greco, con un totale di 15 parrocchie delle quali 11 di rito greco e 4 di rito latino. Circa la vita consacrata, vi è una presenza storica rappresentata dalle Suore Collegine o della Sacra Famiglia (1734) e, dal 1930, sono presenti le Suore Basiliane "Figlie di Santa Macrina", con la sede della Casa Madre a Mezzojuso. I monaci Basiliani sono una presenza attualmente molto limitata (due sacerdoti e un fratello). Generalmente la loro presenza è concentrata nella catechesi parrocchiale, nella formazione giovanile e nella carità. Il numero complessivo delle religiose (di ambedue i riti) è 42.

3. Grottaferrata

Il Monastero esarchico da mille anni testimonia ancor oggi, in pieno ambiente latino, la presenza viva della Chiesa cattolica bizantina, come *anamnesi* perenne della Chiesa indivisa[10].

I legami dell'abbazia con gli italo-albanesi sono dovuti alla vicinanza geografica e allo stesso ambiente culturale. L'abbazia rappresenta storicamente, a

[10] Cf. S. PARENTI, Il monastero esarchico di Grottaferrata e la Chiesa italo-albanese, in: Apollinaris 73 (2000) 629-662.

differenza delle due eparchie, l'ultimo esempio della fede e della tradizione "Italiota". Paolo VI la definì una "perla orientale incastonata nella tiara pontificia".

Dal punto di vista *canonico* il monastero è esarchico, cioè costituisce un entità ecclesiale a sé, dipendente direttamente dalla Sede Apostolica e non dalla diocesi latina di Frascati, nel cui territorio essa si trova. Ciò vuol dire che il monastero non svolge una attività pastorale costante rivolta ad un numero definibile di persone, quale è quella che può e deve svolgere una normale parrocchia. La basilica è, giuridicamente, anche una parrocchia, ma soltanto ai fini canonici della celebrazione di sacramenti quale il battesimo (solo per fedeli di rito bizantino), il matrimonio (entrambi i riti, bizantino e latino: nell'ultimo caso il celebrante è di norma un sacerdote estraneo al monastero).

All'interno della comunità monastica si prova un autentico desiderio di rinnovamento che investe il campo liturgico e spirituale, si profila altresì la possibilità di nuove vocazioni. Per quanto riguarda l'attività *ad extra*, il monastero è un punto di riferimento spirituale per molte persone che, da Grottaferrata e da più lontano, partecipano alla Divina Liturgia domenicale, chiedono il sacramento della confessione, spesso cercano consiglio e discernimento spirituale. Molto richiesta la direzione spirituale da varie comunità religiose.

Nel settembre 2001 è stato approvato dalla Sede Apostolica, il nuovo *Typikòn*, dopo un complesso lavoro di riscrittura che ha coinvolto tutta la comunità. Esso intende non solo essere in linea col CCEO, ma soprattutto porsi come uno strumento catechetico per la crescita spirituale della comunità stessa e per una corretta impostazione della vita monastica alla quale formare le nuove vocazioni. Uno strumento di rinnovamento è pure la *Lectio Divina* settimanale, tenuta da un membro della comunità per la comunità monastica, e aperta anche a chiunque voglia partecipare.

Il monastero si apre con strutture di *ospitalità* adeguate ai tempi, a quanti, singoli o gruppi, vogliano entrare in contatto con la sua tradizione liturgica e spirituale e/o cercare momenti di più intensa riflessione e preghiera. Si accolgono, pertanto, gruppi parrocchiali, movimenti ecc. che chiedono di potersi ritrovare nel monastero stesso, anche partecipando alle liturgie ed eventualmente, se uomini singoli, alla vita comunitaria.

Attraverso la creazione e il continuo aggiornamento di un sito internet (www.abbaziagreca.it) il monastero si fa conoscere nella sua storia e nel suo messaggio come pure nelle proposte formative che esso intende offrire.

Si è instaurata una cordiale collaborazione con le parrocchie di Grottaferrata: alcuni monaci si recano presso le parrocchie per confessare o per tenere corsi biblici e di spiritualità. Si collabora alla rivista bimestrale della diocesi di Frascati (*Comunità Tuscolana*) con due pagine per ogni numero. Si lavora per il sempre più fedele ripristino della tradizione liturgica specifica del monastero secondo il Typikòn liturgico di San Bartolomeo, in ottemperanza alle direttive dell'Istruzione della Congregazione per le Chiese Orientali (1996).

III. Lo status giuridico della Chiesa italo-albanese

Dal 1944 al 1971, secondo l'*Annuario Pontificio*, sotto "rito bizantino o costantinopolitano" troviamo anche tre circoscrizioni presenti in Italia[11]:

"Italiani – Italia: Monastero Esarchico di S. Maria di Grottaferrata
Italo-Albanesi – Italia: Eparchie di Lungro e Piana degli Albanesi".

Con l'edizione del 1972 abbiamo[12]:

"Italo-Albanesi: Eparch. Lungro, Piana degli Albanesi. Abb. S. Maria di Grottaferrata".

Probabilmente si tratta di un errore di curia. Dal 1993 il Monastero di Grottaferrata viene lasciato con le due eparchie, ma non più sotto la denominazione *Italo-Albanesi*, ma *Chiesa Italo-Albanese*[13]. Quest'anno abbiamo invece la denominazione[14]:

"Chiesa bizantina cattolica in Italia
Eparchie Italo-Albanesi: Lungro, Piana degli Albanesi
Abb.: Santa Maria di Grottaferrata".

Secondo il can. 27 CCEO, per Chiesa *sui iuris* si intende una comunità di fedeli cristiani congiunta dalla gerarchia a norma del diritto che la suprema autorità della Chiesa riconosce come tale espressamente o tacitamente. La Chiesa *sui iuris* che non è patriarcale, né arcivescovile maggiore, né metropolitana *sui iuris*, a norma del can. 174 CCEO, è affidata al Gerarca che la presiede a norma del diritto comune e del diritto particolare stabilito dal Romano Pontefice. Anche se ha potere legislativo, il Gerarca non può stabilire alcuna norma del diritto particolare della Chiesa *sui iuris*, perché questa normativa è riservata al Romano Pontefice. Gli atti che il diritto comune riserva al Metropolita vengono esercitati da un Gerarca delegato dalla Sede Apostolica.

Nel nostro caso, se vogliamo restare con l'*Annuario Pontificio* e considerare le tre circoscrizioni ecclesiastiche come un'unica Chiesa *sui iuris*, la Chiesa italo-albanese è sui generis, come affermava Brogi, perché vi manca qualsiasi forma di precedenza e di conseguente coordinamento[15], da annoverare tra le *ceterae*

[11] Annuario Pontificio 1944, 1026; Annuario Pontificio 1971, 1310.
[12] Annuario Pontificio 1972, 925.
[13] Annuario Pontificio 1993, 1136.
[14] Annuario Pontificio 2013, 1139.
[15] Cf. M. BROGI, Le Chiese sui iuris nel Codex Canonum Ecclesiarum Orientalium, in: K. BHARANIKULANGARA (ed.), Il Diritto Canonico Orientale nell'ordinamento ecclesiale, Città del Vaticano 1995, 49-75 (p. 70).

Ecclesiae sui iuris di diritto speciale, per certi versi previsto nella clausola finale del can. 176 CCEO, come affermava Žužek[16].

L'attuale status giuridico è insoddisfacente: le tre circoscrizioni sono indipendenti e immediatamente soggette alla Sede Apostolica con tre Gerarchi legittimi, posti a capo di ciascuna di esse[17]. Si potrebbe addirittura affermare che esse costituiscono tre Chiese *sui iuris* o almeno due: le due eparchie hanno storia e rito comune, mentre l'esarcato ha una storia millenaria di comunione con la Chiesa di Roma. Queste Chiese *sui iuris* sono autonome in quanto staccate dalla Chiesa latina e da ogni altra Chiesa *sui iuris*, ma che dipendono direttamente dal Romano Pontefice ed hanno in lui il custode e garante dello loro fedeltà al proprio patrimonio ecclesiastico. Le due eparchie sono espressione di una storia comune, appartengono al medesimo rito, ma attualmente sono indipendenti l'una dall'altra e immediatamente soggette alla Sede Apostolica. Ma può dirsi la stessa cosa per il monastero esarchico di Grottaferrata? Il monastero ha una doppia configurazione: il monastero *sui iuris* e l'esarcato. Non costituisce l'esarcato una distinta Chiesa *sui iuris* con una propria storia e un proprio rito, il rito italo-bizantino o italo-greco? Il patrimonio teologico, spirituale, disciplinare e liturgico dell'esarcato differisce da quello delle due eparchie italo-albanesi. La completa comprensione del concetto giuridico di una *Ecclesia sui iuris*, chiaramente descritto nel can. 27 CCEO, non può prescindere dal suo patrimonio, cioè dal concetto di *Ritus* contenuto nel can. 28 CCEO[18].

Nella costituzione apostolica *Pervetustum Cryptaeferratae Coenobium* del 26 settembre 1937, con la quale viene eretto l'Esarcato, Pio XI ricorda lo stretto legame che da sempre unisce la storia del Monastero a quella della Chiesa di Roma, considera le opere e le attività ivi sorte, decide di elevare il monastero *in Abbatiam nullius dioeceseos, seu Monasterium Exarchicum*, dichiarandola *nobis et Sanctae Sedi immediate subiectam* ed affidandola *Monachis Basilianis ritus byzantini*. L'Archimandrita *pro tempore* della Congregazione d'Italia dei Monaci Basiliani è l'Ordinario o Esarca. Nella Costituzione non si rileva alcun elemento che autorizzi a considerare l'Esarcato in qualche relazione esclusiva con l'etnia italo-albanese, ma si menziona tra le opere del monastero il seminario minore italo-albanese che Benedetto XV affidò alla Congregazione Basiliana d'Italia[19]. Così pure, nella costituzione apostolica di erezione dell'eparchia di Piana degli Albanesi del 26 ottobre 1937, Pio XI richiama espressamente l'erezione dell'eparchia di Lungro, ma non dell'esarcato di Grottaferrata[20]. Non esiste alcun documento pontificio che ascrive il monastero esarchico alla Chiesa italo-albanese.

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[16] I. ŽUŽEK, Understanding the Eastern Code (Kanonika 8), Roma 1997, 261; 264-265.

[17] Per V. PARLATO, La Chiesa italo-albanese, pur costituita da due eparchie e di un'abbazia esarchica, non è *sui iuris*: V. PARLATO, Le Chiese d'Oriente tra storia e diritto. Saggi, Torino 2003, 35.

[18] Cf. D. SALACHAS, in: P. V. PINTO (ed.), Corpus Iuris Canonici II: Commento al Codice dei Canoni delle Chiese Orientali, Città del Vaticano 2001, 38.

[19] Cf. AAS 30 (1938) 183-186.

[20] Cf. AAS 30 (1938) 213-216.

C'è chi giustifica la presunta appartenenza dell'esarcato alla Chiesa italo-albanese nel fatto che la maggioranza dei monaci appartiene alle due eparchie[21]. Ma c'è da chiedersi: questo ha una rilevanza giuridica? E se in un futuro l'elemento italo-albanese venisse ad esaurirsi senza possibilità di ricambio e nel contempo un altro gruppo etnico divenisse prevalente, sarebbe questo un motivo giuridicamente sufficiente per ascrivere l'Esarcato di Grottaferrata alla Chiesa del gruppo etnico, o ancora bisogna immaginare una forma di monachesimo bizantino plurirituale e dunque pluriecclessiale[22]? Il monastero ha sempre ammesso tra i suoi membri non solo i greco-bizantini, ma anche latini, ucraini, romeni, italo-albanesi, siro-malabaresi.

Il monastero di Grottaferrata, in quanto esarcato, si configura giuridicamente come Chiesa *sui iuris* distinta dalla Chiesa italo-albanese, come depositaria da un millennio di quel "patrimonio liturgico, teologico, spirituale e disciplinare, distinto per cultura e circostanze storiche di popoli", con il quale esprime in modo proprio la vita di fede (can. 28 §1 CCEO).

IV. Il II Sinodo Intereparchiale

Per la prima volta le tre Circoscrizioni ecclesiastiche bizantine in Italia, pur avendo dietro di sé una secolare vicenda, si incontravano in un Sinodo comune a Grottaferrata dal 13 al 16 ottobre 1940[23].

Il card. Lavitrano, arcivescovo di Palermo e ordinario di Piana dei Greci, nel discorso di apertura del Sinodo, ebbe a dire:

> "Accogliendo i voti manifestati in pubblico e in privato dal clero delle nostre eparchie, desiderose di raggiungere, nei limiti del possibile l'uniformità della disciplina e del rito nei nostri paesi separati territorialmente dal mare e moralmente da usi e costumanze secolari, i vostri Pastori, incoraggiati in questo anche dal defunto Pontefice Pio XI, di s.m., scartando la primitiva idea di sinodi diocesani, stimarono più opportuno raccogliersi in un sinodo intereparchiale e decisero di convocarlo in questo monastero esarchico che, conservando con le tradizioni i più autorevoli documenti della Liturgia,

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[21] E. F. FORTINO, Chiesa Italo-Albanese, in: Dizionario del Movimento Ecumenico, Bologna 1993, 168-171 (p. 168): "In realtà sono due le eparchie che propriamente costituiscono la Chiesa italo-albanese, avendo il monastero di Grottaferrata una storia propria, in quanto fondato nel secolo X da s. Nilo di Rossano, e quindi prima della venuta degli albanesi in Italia (secolo XV). Nell'attuale fase tuttavia in cui, tra l'altro, il monastero trae le sue vocazioni dalle comunità italo-albanesi e rende il suo servizio spirituale a queste comunità, anche il monastero di Grottaferrata viene incluso nella realtà storica e spirituale della Chiesa italo-albanese".

[22] Cf. PARENTI, Il monastero esarchico di Grottaferrata, 642-643.

[23] Cf. E. F. FORTINO, Il primo Sinodo Intereparchiale di Grottaferrata, in: CONGREGAZIONE PER LE CHIESE ORIENTALI (ed.), Ius Ecclesiarum vehiculum caritatis, Città del Vaticano 2004, 713-723.

offriva l'aiuto più efficace per ritrovare la purezza del rito conservata nel Typicon"[24].

Le deliberazioni del Sinodo furono pubblicate sotto forma di Costituzioni ed entrarono in vigore il 13 giugno 1943[25]. Con la promulgazione del CCEO le deliberazioni del Sinodo sono abrogate e occorre provvedere ad un nuovo diritto particolare.

Il Sinodo Intereparchiale, per quanto esca dalla cerchia di una eparchia, non può assumere l'importanza di un Concilio provinciale (assemblea dei Vescovi della provincia ecclesiastica), perché i Gerarchi che l'hanno convocato con l'autorizzazione del Romano Pontefice, non costituiscono una Provincia ecclesiastica o Metropolia. Uscendo però dai limiti di una eparchia ed essendo stato convocato con pari autorità dai Gerarchi che lo presiedono con uguale potere legislativo, è naturale che la sua importanza è maggiore di quella di una semplice Assemblea eparchiale.

L'Assemblea eparchiale ha carattere prevalentemente eparchiale e alle persone convocate non conferisce alcun potere legislativo che resta riservato al Vescovo; ma dà solo diritto di esporre voti e desiderata, manifestare il proprio parere sulle decisioni che saranno prese ed esprimere la propria accettazione delle Costituzioni Sinodali quando vengono pubblicate.

1. Commissione Intereparchiale Antepreparatoria

La convocazione del II Sinodo Intereparchiale è stata autorizzata dal Romano Pontefice Giovanni Paolo II nel 1996, ma il suo assenso risale al 27 giugno 1994 (protocollo n. 76/94). I tre Gerarchi delle circoscrizioni ecclesiastiche interessate hanno costituito nello stesso anno 1996 una Commissione Intereparchiale Antepreparatoria che ha individuato (1996-2000) le tematiche da studiare per il Sinodo, integrata con proposte dei Gerarchi. Alla conclusione dei suoi lavori, i Gerarchi hanno approvato le seguenti tematiche, affidate ad altrettante Commissioni di studio:

1. liturgia;
2. diritto canonico: è compito del II Sinodo Intereparchiale aggiornare la legislazione canonica del precedente Sinodo, tenendo presente la diversa fisionomia ecclesiale (eparchie e monastero) delle tre circoscrizioni interessate; si individuano le esigenze reali e quelle norme e tradizioni delle Chiese italo-albanese e italo-greche che vanno conservate, pur adattate alla *mens* del CCEO; i canoni "aperti" che richiedono una

[24] Bollettino della Badia Greca di Grottaferrata 12, nn. 1-2 (110) (1941) 6.

[25] Per qualche osservazione sulle costituzioni relative al culto divino, vedi E. F. FORTINO, Il Sinodo intereparchiale di Grottaferrata e la Chiesa bizantina in Italia (Studia Anselmiana 110), Roma 1993, 119-140.

precisazione nel diritto particolare (cann. 40, 329, 401-404, 617-620, 625, 783, 902-908);

3. catechesi;
4. ecumenismo e dialogo inter-religioso;
5. formazione del clero e alla vita consacrata;
6. rapporti inter-rituali: la presenza nell'eparchia di Piana degli Albanesi di parrocchie e fedeli di rito romano, affidata alla cura pastorale del Vescovo di rito bizantino, i gruppi familiari misti e la continuità territoriale con parrocchie e diocesi latine, sia in Calabria che a Grottaferrata, sono altrettante situazioni che richiedono l'intervento del Sinodo con orientamenti atti a favorire la convivenza e la comunione; l'antepreparatoria, dopo un esame della situazione, rileva che non sempre sono stati attuati quei mezzi che il diritto prevede in simili situazioni; temi da sviluppare: aspetti e criteri pastorali per giungere alla soluzione dei problemi ancora aperti, promozione dello spirito di comunione tra le Chiese di diversa tradizione;
7. rievangelizzazione e missione.

2. Decreto d'indizione

Con decreto congiunto datato 15 agosto 2001, i tre Gerarchi delle circoscrizioni interessate hanno indetto il II Sinodo Intereparchiale di Grottaferrata[26], dopo ormai più di sessant'anni dal primo celebrato nel 1940.

L'attuale Sinodo vuole essere una risposta alle sollecitudini del Concilio Vaticano II che vuole che "rimangano salve ed integre le tradizioni di ogni Chiesa" (OE 2) e che "qualora, per circostanze di tempo o di persone, fossero indebitamente venuti meno ad esse, procurino di ritornare alle avite tradizioni" (OE 6).

Inoltre, il *Codice dei Canoni delle Chiese Orientali*, nel presentare il diritto comune a tutte le Chiese orientali cattoliche, richiede anche che ognuna di esse stabilisca il proprio diritto particolare formulandolo in accordo sia con i principi del Codice stesso sia con le legittime tradizioni delle Chiese particolari: ciò rende necessario un aggiornamento della legislazione stabilita a suo tempo dal I Sinodo. A tutto ciò si aggiunge, da parte della Congregazione per le Chiese Orientali, la pubblicazione della *Istruzione per l'applicazione delle prescrizioni liturgiche del Codice dei Canoni delle Chiese Orientali* (1996) che intende, con forza giuridica e opportunità pastorale e spirituale, promuovere un ritorno, graduale ma deciso, all'autentica tradizione delle singole Chiese orientali cattoliche per quanto concerne le celebrazioni liturgiche nei loro vari aspetti.

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[26] Cf. Decreto d'indizione, in: Lajme Notizie 13 (2001/3) 1-3.

Nel decreto, i Gerarchi indicano i partecipanti al Sinodo: i Protosincelli e gli Economi eparchiali, i Rettori dei seminari, i Protopresbiteri, i Parroci e i Vicari parrocchiali, i membri dei Consigli presbiterali eparchiali, i membri della Sinassi monastica, i Diaconi e i Lettori, i Seminaristi dei seminari maggiori, una rappresentanza delle Religiose operanti nelle tre circoscrizioni, altri da essi invitati. Inoltre, i fedeli laici eletti dai Consigli pastorali eparchiali, in numero che non superi il terzo del totale dei convocati. Il decreto dice che saranno invitati anche altri membri partecipanti ritenuti idonei e utili per i lavori assembleari, e questo da altre Chiese orientali *sui iuris*, dalla Chiesa latina e dalle Chiese ortodosse.

Tutti i convocati e invitati hanno solo voto consultivo. Le conclusioni del Sinodo saranno presentate alla Sede Apostolica per l'approvazione e saranno promulgate dai Gerarchi delle tre circoscrizioni e da quel momento avranno vigore.

Il tema del Sinodo è "Comunione ed annuncio dell'Evangelo" e lo scopo è tradurre in orientamenti pastorali adeguati l'annuncio della Parola di Dio, recuperare una ecclesiologia, sulla linea dell'insegnamento del Concilio Vaticano II, per poter attuare la comunione, vivendo lo specifico della tradizione spirituale bizantina. Il tema viene sviluppato nei seguenti schemi:

1. prologo: contesto teologico e pastorale;
2. la Sacra Scrittura nella Chiesa locale;
3. catechesi e mistagogia;
4. liturgia;
5. formazione del clero e dei membri di Istituti di vita consacrata;
6. diritto canonico;
7. rapporti interrituali;
8. ecumenismo e dialogo inter-religioso;
9. rievangelizzazione;
10. missione;
11. epilogo: "Chiamati ad essere santi" (Rom 1,7).

3. Commissioni Intereparchiali di Studio

Il 29 ottobre 2001, i Gerarchi hanno costituito la Commissione Centrale di Coordinamento (CCC) e sette Commissioni Intereparchiali di Studio per i sette temi scelti per il II Sinodo Intereparchiale. La CCC ha preparato il *Regolamento delle Commissioni* che è stato approvato dai Gerarchi. Vediamo solo alcuni elementi.

Per gli atti collegiali delle Commissioni, compresa la CCC,

> "ha forza di diritto ciò che, presente la parte maggiore di coloro che devono essere convocati, è piaciuto alla parte assolutamente maggiore di coloro che sono presenti; se invece i voti sono stati uguali, il presidente dirima la parità col suo voto" (CCEO, can. 924, 1°).

Qualsiasi proposta deve essere fatta in consonanza con il Magistero della Chiesa, con la tradizione bizantina (teologica, spirituale, disciplinare, liturgica) e patristica, e, per quanto riguarda le parrocchie di rito latino, con la tradizione romana. Deve tenere presente i seguenti principi: mantenere integre le tradizioni della Chiesa bizantina (OE 2), ritornare alle avite tradizioni qualora indebitamente si fosse venuto meno ad esse (OE 6), eventuali innovazioni siano fatte secondo un organico progresso (OE 6), ogni proposta dovrà tenere conto delle esigenze attuali e delle prospettive future delle tre circoscrizioni bizantine in Italia.

Nel 2002 la CCC e le sette Commissioni hanno lavorato sui rispettivi temi; il 2 febbraio 2003 i Gerarchi hanno indetto le consultazioni delle Comunità locali; i vari enti hanno esaminato i testi e presentato le loro osservazioni entro il mese di settembre 2003. Nei primi sei mesi del 2004, con l'aiuto di esperti, la CCC ha dato agli schemi la forma necessaria per la loro presentazione alla discussione sinodale. Nel mese di luglio 2004 la CCC li ha presentati ai Gerarchi che li hanno esaminati perché fossero sottoposti alla discussione sinodale.

La CCC ha pubblicato un opuscolo per informare e coinvolgere le Comunità locali e i singoli fedeli delle tre circoscrizioni ecclesiastiche bizantine in Italia nella preparazione del II Sinodo Intereparchiale. Il dossier contiene: 1. Il Decreto d'indizione del Sinodo; 2. Le proposte della Commissione antepreparatoria; 3. La composizione della CCC e delle sette Commissioni di studio; 4. Il Regolamento per il lavoro delle Commissioni; 5. Il programma di lavoro per la preparazione del Sinodo; 6. Un appello alle Comunità e ai singoli fedeli. Circa quest'ultimo capitolo, riportiamo il questionario su "Diritto Canonico" e "Rapporti interrituali".

> "Il diritto canonico aiuta a vivere nell'ordine e nella comunione:
>
> a) Avverti dei casi in cui il diritto vigente non corrisponda ai bisogni?
>
> b) Ci sono degli aspetti che vorresti regolati da nuove norme di applicazione del diritto vigente?"

"Le nostre Circoscrizioni vivono a contatto con le diocesi latine; nell'eparchia di Piana convivono nella stessa giurisdizione parrocchie bizantine e latine. Avresti qualche problema particolare da suggerire al Sinodo:

a) sotto forma di problema?

b) sotto forma di soluzione da dare?"

Si sono avute tre sessioni sinodali tenutesi nella Basilica di Santa Maria di Grottaferrata: I Sessione dal 17 al 22 ottobre 2004; II Sessione dal 15 al 18 novembre 2004; III Sessione dal 10 al 14 gennaio 2005. La celebrazione del II Sinodo Intereparchiale ha avuto luogo in concomitanza con i festeggiamenti del millennio (1004-2004) di fondazione del monastero di Santa Maria di Grottaferrata per opera di San Nilo di Rossano.

L'11 gennaio 2005 i membri del Sinodo, presentati dal Prefetto della Congregazione per le Chiese Orientali, sono stati ricevuti in udienza dal Papa Giovanni Paolo II; mentre il 14 gennaio 2005 i tre Gerarchi interessati hanno dichiarato concluso il II Sinodo Intereparchiale.

La CCC in due sessioni nel mese di luglio 2005 ha riletto gli schemi, allo scopo di valutare l'esattezza del modo in cui gli emendamenti votati erano stati introdotti, per stabilire il testo da presentare ai Gerarchi come risultato della consultazione sinodale. La segreteria esecutiva sulla scorta delle proposte degli esperti e delle decisioni della CCC, ha messo a punto il testo finale.

Dopo la *recognitio* della Congregazione per le Chiese Orientali in data 10 maggio 2010, vi è stato il decreto di promulgazione da parte dei tre Gerarchi interessati in data 8 settembre 2010, che fissa l'entrata in vigore degli *Orientamenti Pastorali* e delle *Norme Canoniche del II Sinodo Intereparchiale* al 17 ottobre 2010.

4. Diritto Canonico Particolare

La Commissione "Diritto Canonico Particolare" ha elaborato un testo che si limita a formulare un diritto particolare per le tre circoscrizioni ecclesiastiche in riferimento a quei Titoli del CCEO che richiedono l'emanazione di un diritto particolare, indipendentemente dalla configurazione giuridica delle tre circoscrizioni ecclesiastiche. Per il resto si osserva il diritto comune per tutte le Chiese orientali cattoliche, cioè il CCEO. Mi soffermerò solo sulle norme che hanno, dal mio punto di vista, un interesse maggiore.

La prima osservazione è di natura tecnica. Infatti, lo *ius particulare Ecclesiæ sui iuris* anche nelle Chiese minori dovrebbe essere promulgato dall'unico Capo della Chiesa interessata (cfr. can. 176 CCEO). Finché nella Chiesa italo-albanese non sarà risolto il problema della riorganizzazione gerarchica delle tre circoscrizioni menzionate, non è chiaro quale dei tre Gerarchi sia il Capo. In mancanza di tale chiarezza sorge la seguente domanda: poiché la promulgazione è avvenuta in maniera congiunta da parte dei tre Gerarchi, in base a quale titolo tale normativa sarà veramente *superiore*, e perciò irrevocabile ed immodificabile?

Il testo è composto da 80 articoli. Si parte con il diritto di tutti i fedeli cristiani di esercitare il culto divino secondo le prescrizioni della propria Chiesa *sui iuris* (cfr. can. 17 CCEO) e a tale scopo, salvo restando il *Typikon* liturgico del monastero di Grottaferrata e le prescrizioni liturgiche della Chiesa latina, si deve comporre un Direttorio Liturgico comune alle tre circoscrizioni ecclesiastiche, approvato dalla Sede Apostolica, secondo le indicazioni dell'*Istruzione* (n. 6) della Congregazione per le Chiese Orientali.

Gli articoli 461-481 legiferano sui Vescovi e sulle eparchie (cfr. Titolo VII CCEO). Rispondendo al can. 199 § 2 CCEO che sollecita il Vescovo eparchiale a curare che nella propria chiesa cattedrale si celebri almeno una parte delle lodi divine anche ogni giorno, secondo le legittime consuetudini della propria Chiesa *sui iuris*, come pure che in ogni parrocchia si celebrino le lodi divine per quanto possibile nei giorni di domenica e nelle feste e inoltre nelle principali solennità e nelle loro vigilie, l'art. 463 stabilisce:

> "§ 1. Nella chiesa cattedrale delle eparchie si celebri il Vespro ogni sera; il Mattutino tutte le Domeniche e nelle feste principali. § 2. Nelle parrocchie si celebri il Vespro ogni sabato e nella vigilia delle feste e delle principali solennità, come pure il Mattutino la domenica, nelle feste e nelle principali solennità. § 3. Nelle parrocchie latine dell'eparchia di Piana degli Albanesi si osservino le disposizioni e le consuetudini liturgiche della Chiesa latina".

Il can. 230 CCEO parla di giusta remunerazione per l'Amministratore eparchiale e di emolumenti al futuro Vescovo eparchiale da stabilirsi con legge di diritto particolare o dalla legittima consuetudine. Il diritto particolare tace, probabilmente perché si provvede diversamente, tramite il diritto particolare eparchiale.

All'Assemblea eparchiale (cfr. can. 238 CCEO), l'art. 465 stabilisce che sono tenuti ad essere presenti: il Protosincello e l'Economo eparchiale; i Consultori eparchiali; il Rettore del Seminario maggiore; i Protopresbiteri, i Parroci e i Vicari parrocchiali; i membri del Consiglio presbiterale eparchiale; i Diaconi e i Lettori; i seminaristi maggiori dell'Eparchia; tutte le Religiose appartenenti alla Chiesa eparchiale; i fedeli laici che saranno eletti dal Consiglio pastorale eparchiale che non superino il terzo del totale dei convocati; altri invitati dal Vescovo eparchiale. Il can. 242 CCEO stabilisce:

> "Il Vescovo eparchiale comunichi all'autorità determinata dal diritto particolare della Chiesa sui iuris il testo di leggi, dichiarazioni e decreti che sono stati emanati nell'assemblea eparchiale".

Questa autorità, secondo l'art. 466 § 2, è la Sede Apostolica, ma aggiunge che occorre il consenso di essa. È da tenere presente che nell'Assemblea eparchiale, unico legislatore è il Vescovo eparchiale, senza consenso della Sede Apostolica.

Il Protosincello e i Sincelli delle eparchie possono essere sacerdoti celibi o coniugati (cfr. art. 467; can. 247 § 2 CCEO). L'economo eparchiale è nominato per cinque anni, rinnovabili solo per un altro mandato a giudizio del Vescovo eparchiale (cfr. art. 469; can. 262 § 2 CCEO). Per la composizione e il funzionamento del Consiglio presbiterale, l'art. 471 rinvia al diritto comune e agli statuti propri, mentre nel can. 266 CCEO vi è esplicito rinvio al diritto particolare della Chiesa *sui iuris*. L'ufficio di Protopresbitero può essere stabilmente congiunto con l'ufficio di parroco di una determinata parrocchia (cfr. art. 473 § 1;

can. 277 CCEO). Circa le sue potestà e facoltà, oltre a quelle stabilite dal CCEO, l'art. 473 § 2 stabilisce che ha anche la facoltà speciale di assolvere i casi riservati al Vescovo eparchiale nell'ambito del distretto affidatogli; inoltre, è membro del Consiglio pastorale eparchiale (cfr. art. 473 § 3).

Per la nomina del parroco a tempo determinato, si osservano le norme della CEI (cfr. Delibera n. 17 del 6 settembre 1984), secondo le quali la nomina del parroco può avere la durata di nove anni (cfr. art. 476; can. 284 § 3, 4° CCEO). Il diritto particolare permette l'affidamento della parrocchia *in solidum* (cfr. art. 477), ma nulla è detto sui diritti e doveri del moderatore, come richiesto dal can. 287 § 2 CCEO che rinvia al diritto particolare della Chiesa *sui iuris*. Spetta al Vescovo eparchiale curare la costituzione in ogni parrocchia del Consiglio pastorale; quanto alle modalità e funzioni si osservano gli statuti propri approvati dal Vescovo eparchiale. Il Consiglio per gli affari economici è costituito dal parroco e i membri restano in carica per tre anni, rinnovabili una sola volta consecutiva (cfr. art. 480 § 2; can. 295 CCEO). Nulla è detto sui diritti e doveri del vicario parrocchiale, probabilmente rinviando al diritto particolare eparchiale.

Gli articoli 482-499 trattano dei chierici. Prima di tutto, per mezzo dell'ordinazione diaconale si è ascritti come chierici ad una eparchia o al monastero esarchico di Grottaferrata. Mentre, per quanto riguarda i chierici minori, si rinvia alle disposizioni del Vescovo eparchiale e ai libri liturgici. Nulla è detto sulle opere per promuovere le vocazioni, come richiesto dal can. 329 § 2 CCEO, probabilmente rinviando al diritto particolare eparchiale.

L'art. 485 § 1 stabilisce che si mantenga l'istituzione del Seminario intereparchiale minore di Grottaferrata, mentre il seminario maggiore resta il Pontificio Collegio Greco di Roma (cfr. art. 485 § 2), ma è opportuno che, parallelamente ai corsi universitari, si seguano anche corsi integrativi interni di teologia orientale, di patristica e di liturgia e musica bizantina (cfr. art. 485 § 3). Spetta ai responsabili dei seminari minore e maggiore organizzare per i seminaristi esperienze pastorali specialmente nella cura degli italo-albanesi che vivono nella città di Roma (cfr. art. 485 § 4). Il can. 365 § 2 CCEO stabilisce:

> "Se lo comporta il diritto particolare di una Chiesa *sui iuris*, per il lecito passaggio all'eparchia di un'altra Chiesa *sui iuris* si richiede anche che il Vescovo eparchiale, che dimette il chierico, ottenga il consenso dell'autorità determinata dallo stesso diritto particolare".

L'art. 489 determina che per il lecito passaggio di un chierico all'eparchia di un'altra Chiesa *sui iuris*, inclusa la Chiesa latina, si richiede che il Vescovo eparchiale che dimette un chierico ottenga il consenso della Sede Apostolica.

Per quanto riguarda i diritti e i doveri dei chierici, ne ricordiamo solo alcuni. I chierici devono partecipare ai ritiri spirituali secondo le prescrizioni del diritto proprio (cfr. can. 369 § 2 CCEO) e l'art. 490 rinvia alle disposizioni del Vescovo eparchiale. La stessa cosa per stabilire i mezzi opportuni da usare per il decoro

della castità (cfr. can. 374 CCEO), anche se l'art. 491 stabilisce che il Vescovo eparchiale anche con l'ausilio di esperti deve porre particolare attenzione alla formazione affettiva e integrale dei suoi chierici, celibi e coniugati.

Il can. 377 CCEO obbliga tutti i chierici alla celebrazione delle lodi divine secondo il diritto particolare della propria Chiesa *sui iuris*. L'art. 492 § 1 stabilisce che tutti i chierici sono tenuti in coscienza a celebrare l'Ufficio divino secondo le proprie possibilità. Nel §2 si tratta dei chierici latini e si riporta la loro normativa.

I chierici per allontanarsi dall'eparchia per più di tre settimane consecutive devono avere la licenza del Vescovo eparchiale (cfr. art. 496). Per quanto riguarda la foggia dell'abito dei chierici, si deve osservare la norma della CEI (Delibera n. 12, 23 dicembre 1983), secondo la quale, salve le prescrizioni per le celebrazioni liturgiche, il clero deve indossare l'abito talare o il clergyman. Si raccomanda ai sacerdoti orientali di indossare l'abito talare proprio (cfr. art. 497). Quanto al diritto dei chierici e della loro famiglia, se sono sposati, a una conveniente previdenza e sicurezza sociale ed assistenza sanitaria, e il loro obbligo di contribuire in quota parte, vanno osservate le norme della CEI (cfr. art. 498). I chierici hanno diritto a trenta giorni di ferie annuali (cfr. art. 499).

Per i laici, l'art. 500 stabilisce che dove, per circostanze locali durevoli, è difficile assicurare un continuo ed efficace servizio pastorale da parte dei sacerdoti, il Vescovo eparchiale può affidare a laici opportunamente preparati e di vita esemplare alcuni incarichi o funzioni che non richiedono l'ordine sacro, come la conduzione della recita di alcune parti delle lodi divine. In circostanze straordinarie, soprattutto per supplire alla scarsità di ministri sacri, il mandato di predicare, anche in chiesa, può essere dato dal Vescovo eparchiale anche agli altri fedeli, chierici minori e laici, esclusa l'omelia.

Per gli istituti secolari, le altre forme di vita consacrata e le società di vita apostolica, non vi sono norme di diritto particolare, ad eccezione dell'art. 501 che riserva l'approvazione degli statuti delle società di vita apostolica al Vescovo eparchiale.

Il can. 587 § 3 CCEO stabilisce che spetta al diritto particolare emanare le norme con cui viene ordinato il catecumenato; l'art. 504, invece, rinvia al Vescovo eparchiale, ma l'art. 208 dice che la durata e la modalità, "per gli adulti e i bambini, saranno determinate dagli Ordinari mediante un'apposita istruzione". Inoltre, l'art. 209 aggiunge:

> "Gli adulti che chiedono i sacramenti dell'Iniziazione cristiana vi siano ammessi solo dopo aver espletato il periodo di catecumenato"; mentre l'art. 210: "I bambini saranno ammessi alla celebrazione dei sacramenti dell'Iniziazione cristiana dopo la preparazione dei genitori e dei padrini".

L'art. 507 risponde alle richieste dei cann. 621-622 CCEO. Compete ai tre Gerarchi, entro i confini del territorio delle tre circoscrizioni ecclesiastiche, emanare delle norme sull'istruzione catechistica da riunire ordinatamente in un direttorio catechistico, osservando quanto è stato stabilito dalla suprema autorità della Chiesa. In questo direttorio si deve tenere conto dell'indole speciale delle Chiese orientali, in modo che nell'insegnamento della catechesi risplendano l'importanza della Bibbia e della liturgia e le proprie tradizioni nella patrologia, nell'agiografia e nella stessa iconografia. Per i fedeli cristiani delle parrocchie latine dell'eparchia di Piana degli Albanesi si adoperano i catechismi della CEI. È compito dei tre Gerarchi, curare che i catechismi siano adattati ai vari gruppi di fedeli cristiani e siano provvisti anche di sussidi e strumenti, e che inoltre siano promosse varie iniziative catechistiche in accordo tra loro. Vi deve essere una commissione catechistica comune. La commissione catechistica deve avere a sua disposizione anche un centro catechistico, che ha il compito di essere di aiuto alle circoscrizioni ecclesiastiche per organizzare iniziative catechistiche in modo coordinato e più efficace e inoltre per servire alla formazione, anche permanente, dei catechisti (cfr. art. 126).

Il diritto particolare tace sull'uso della radio, del cinema, della televisione e di strumenti simili (cfr. can. 653 CCEO), nonché sui diritti d'autore (cfr. can. 666 § 3 CCEO).

La parte più corposa riguarda il culto divino e i sacramenti: 28 articoli, dal 508 al 535. Il diritto particolare ribadisce le prescrizioni contenute nel CCEO, così come opportunamente spiegate dall'*Istruzione* per l'applicazione delle prescrizioni liturgiche dello stesso CCEO. Norma fondamentale è che i sacramenti dell'iniziazione cristiana devono essere amministrati congiuntamente, perché l'iniziazione è celebrazione unitaria e invisibile dell'ingresso alla vita in Cristo, nella comunità che vive in lui. Quando la crismazione col santo myron, per gravi e legittimi motivi, si celebra separatamente dal battesimo, l'art. 216 afferma che "lo si faccia durante la Divina Liturgia, dopo il canto del *Kontakion* e prima del *Trisaghion*". Colui che è stato battezzato e cresimato è ammesso all'Eucaristia, "nella Divina Liturgia che immediatamente segue la celebrazione del Battesimo, o nella prima liturgia che segue il giorno del Battesimo, oppure alla Comunione con i Doni presantificati" (art. 218). Il neofita può ricevere la comunione ogni volta che partecipa alla Divina Liturgia o alla comunione con i Doni presantificati (cfr. art. 219).

Il battesimo per i fedeli orientali deve essere celebrato per immersione, forma che indica in maniera espressiva l'essere sepolti e il risorgere con Cristo, e la fede trinitaria. Per i fedeli latini dell'eparchia di Piana degli Albanesi ci si attiene alle disposizioni della CEI (Delibera n. 29, Roma, 18 aprile 1985: di preferenza per infusione; è consentito il rito per immersione solo con l'autorizzazione del Vescovo diocesano). Se il battesimo è stato celebrato da un ministro di un'altra Chiesa *sui iuris*, inclusa la Chiesa latina, il battezzato è ascritto alla Chiesa *sui iuris* a norma dei cann. 29-30 CCEO (cfr. art. 511).

Nell'art. 211 si auspica che nella chiesa cattedrale, i sacramenti dell'iniziazione cristiana vengano amministrati nella vigilia di Pasqua, mentre, secondo l'art. 212, non è permessa la celebrazione durante la Grande e Santa Quaresima, salvo il caso di vera necessità. Inoltre, l'art. 213 stabilisce:

> "L'acqua per il Battesimo e l'olio per le unzioni pre-battesimali vengono benedetti durante la celebrazione del sacramento. Al termine del rito l'olio inutilizzato viene versato nella lampada perenne dell'altare".

Infine, l'art. 214 riprende quanto detto sulla immersione. I presbiteri orientali che per un legittimo titolo amministrano la crismazione del santo myron ai fedeli latini useranno la loro facoltà con grande discrezione e con la licenza dell'Ordinario dei fedeli (cfr. *Istruzione*, n. 50); i fedeli latini avranno possibilmente come padrino lo stesso del battesimo. Il figlio che non ha ancora compiuto il quattordicesimo anno di età, di genitori orientali o di solo padre orientale o di sola madre orientale, con volontà concorde dei genitori ascritto alla Chiesa della madre, pur avendo ricevuto il battesimo secondo le prescrizioni liturgiche della Chiesa latina, appartiene alla Chiesa orientale e deve ricevere quanto prima la crismazione del santo myron prima di essere ammesso alla Divina Eucaristia (cfr. art. 513 § 5).

Per significare la stretta unità dei tre sacramenti dell'iniziazione cristiana, la Divina Eucaristia, secondo la Tradizione delle Chiese orientali, è amministrata ai bambini, con le opportune pratiche cautele, nella stessa celebrazione congiuntamente al battesimo e alla crismazione del santo myron; al più tardi, nella Divina Liturgia della domenica successiva al Battesimo. Per i fedeli latini dell'eparchia di Piana degli Albanesi si osserva quanto stabilito dal CIC (can. 913) e dalla CEI (cfr. art. 514).

La Divina Eucaristia può essere distribuita anche dal diacono, con la previa licenza del Vescovo eparchiale, come pure portare i Santi Doni eucaristici agli infermi (cfr. art. 520; art. 240).

Non è ammessa la binazione, salvo nei giorni festivi per vera necessità pastorale, per colui che è unico responsabile di una parrocchia o che ha la cura di una seconda. In altri casi, solo con l'autorizzazione del Vescovo (cfr. art. 244).

Gli uomini coniugati possono essere ammessi a ricevere gli ordini sacri dopo qualche tempo dalla celebrazione del matrimonio, secondo il giudizio del Vescovo eparchiale. Sono ordinati quegli uomini coniugati che offrono un luminoso esempio agli altri fedeli cristiani nel condurre la vita familiare e nell'educazione dei figli (cfr. art. 525). Nulla è detto sugli interstizi previi all'ordinazione (cfr. can. 758 § 1, 6° CCEO), probabilmente rinviando al diritto particolare eparchiale.

L'art. 528 recita:

"Circa la preparazione al Matrimonio, l'esame dei fidanzati, l'età richiesta per la lecita celebrazione del Matrimonio, i documenti richiesti e, nei matrimoni misti, il modo con cui sono da farsi le dichiarazioni e promesse della parte cattolica, si osservino le disposizioni della CEI" (Decreto generale sul matrimonio canonico, 5 nov. 1990).

Il matrimonio si celebra davanti al parroco di uno degli sposi scelto con concorde volontà dagli stessi; in mancanza di volontà concorde si seguono le consuetudini locali (cfr. art. 529). Il matrimonio non si può celebrare validamente per mezzo di un procuratore, a meno che in un caso particolare e per cause gravi il Vescovo eparchiale non autorizzi tale celebrazione. Per celebrare validamente il matrimonio tramite procuratore, l'art. 530 riporta esattamente quanto stabilito dal can. 1105 del CIC.

È proibita la celebrazione del matrimonio durante il periodo della Grande Quaresima, a meno che non ci sia una giusta causa e con la licenza del Gerarca del luogo (cfr. art. 531).

È lecita la separazione con permanenza del vincolo matrimoniale dei coniugi che di comune accordo scelgono entrambi la vita consacrata in un Istituto religioso (cfr. art. 532).

Costituire, trasferire o sopprimere giorni di festa e di penitenza, propri alle due eparchie e al monastero di Grottaferrata, compete anche ai rispettivi Gerarchi con il consenso della Sede Apostolica, tenendo debitamente conto però delle altre Chiese *sui iuris*, fermo restando il can. 40 §1 CCEO (cfr. art. 535 § 1). Nulla è detto sui sacramentali, probabilmente rinviando ai libri liturgici (cfr. can. 867 § 2 CCEO).

L'art. 536 è dedicato all'accoglienza nella Chiesa cattolica dei fedeli acattolici laici: spetta anche al parroco, previa licenza, almeno presunta, del Vescovo eparchiale.

Gli ultimi tre articoli, 537-539, sono dedicati ai beni temporali e si rinvia alle norme della CEI[27].

Circa il diritto processuale, non vi sono norme di diritto particolare. I cann. 1129 § 1; 1152 § 2, 3°; 1242; 1340 § 1 CCEO non sono precettivi. I cann. 1084 § 1, 4°; 1127; 1192 § 1; 1261 CCEO rinviano al diritto particolare del tribunale ecclesiastico.

La stessa cosa per il diritto penale: i cann. 1405 § 2; 1420 § 2; 1427 § 1 CCEO non sono precettivi.

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[27] Spesso vi è il rinvio alle norme promulgate dalla Conferenza Episcopale Italiana, perché i tre Gerarchi orientali partecipano a pieno diritto ad essa (cf. Enchiridion CEI 6/3072; 3150).

5. Rapporti interrituali

Dopo un'introduzione sulla interritualità (cfr. art. 540-543), si passa alle celebrazioni liturgiche. Prima di tutto si mette in evidenza che nell'eparchia di Piana degli Albanesi vi è un unico Vescovo eparchiale, a cui sono legittimamente affidati anche fedeli ascritti alla Chiesa latina; egli celebrerà le sacre funzioni secondo le prescrizioni liturgiche della propria Chiesa italo-albanese, a meno che non abbia ottenuto una speciale facoltà dalla Sede Apostolica (cfr. CCEO, can. 674 § 2). Mi chiedo: quando il Vescovo celebra per i suoi fedeli latini, non potrebbe farlo secondo le prescrizioni liturgiche della Chiesa latina, almeno nelle solennità o durante la visita pastorale? Questi fedeli, non hanno diritto a partecipare al culto divino secondo le prescrizioni liturgiche della loro Chiesa, in modo particolare quando celebra il proprio Vescovo?

> "Art. 545 § 2. Nell'eparchia di Piana degli Albanesi, l'unico vescovo eparchiale, a cui sono affidati anche i fedeli ascritti alla Chiesa latina, potrà ordinare i candidati suoi sudditi ascritti alla Chiesa latina, solo con la licenza della Sede Apostolica, a norma del can. 748 § 2 CCEO. In tal caso, salva diversa disposizione contenuta nella stessa licenza, il Vescovo eparchiale celebrerà l'ordinazione in rito bizantino".

Il Vescovo di Piana degli Albanesi per ordinare un suo suddito latino ha bisogno della licenza della Sede Apostolica (cfr. can. 748 § 2 CCEO); se vorrà inoltre ordinarlo secondo le prescrizioni liturgiche della Chiesa latina ha bisogno della speciale facoltà della Sede Apostolica (cfr. can. 674 § 2 CCEO). Non si potrebbe concedere una volta per sempre la speciale facoltà al Vescovo di Piana degli Albanesi?

A norma degli art. 552-553, il passaggio di un fedele ad un'altra Chiesa *sui iuris* avviene solo con il consenso della Sede Apostolica.

Nell'eparchia di Piana degli Albanesi, dove il Gerarca è unico, non potrebbe essere sufficiente solo il permesso dello stesso? La stessa cosa in caso di matrimonio per il passaggio di un coniuge alla Chiesa dell'altro coniuge (cfr. art. 560-561).

> "Art. 564. Il diacono latino, secondo il can. 1108 § 1 del CIC, può essere delegato ad assistere ad un Matrimonio, mentre il diacono orientale non può essere delegato a benedire un Matrimonio secondo il can. 828 del CCEO. Nel caso di un Matrimonio tra un/a fedele orientale con un/a fedele latina, se viene celebrato nella Chiesa latina, il parroco latino non potrà delegare un diacono latino né orientale a celebrare il Sacramento".

"Art. 566. Occorre tenere presente che, con l'eccezione del caso in cui il Gerarca o il parroco siano, a norma del can. 916 del CCEO, di altra Chiesa sui iuris, la celebrazione deve avvenire, ad liceitatem, secondo il rito degli sposi, o di uno di loro in caso di Matrimonio interrituale. Una celebrazione in altro rito è dunque illecita, ma può essere autorizzata caso per caso dalla Santa Sede Apostolica (Istruzione per l'applicazione delle prescrizioni liturgiche del CCEO, n. 83)".

L'art. 566 riporta il n. 83 della *Istruzione* che, secondo me, contiene un errore. Il can. 830 § 1 CCEO dichiara:

"Il Gerarca del luogo e il parroco del luogo finché svolgono legittimamente l'ufficio possono conferire ai sacerdoti di qualsiasi Chiesa sui iuris, anche della Chiesa latina, la facoltà di benedire un determinato matrimonio entro i confini del loro territorio".

Questo canone si riferisce alla sola validità:

"Ciò non appare dal testo, ma dal principio generale, enunciato nel can. 674 § 2, secondo il quale Minister sacramenta celebret secundum præscripta liturgica propriæ Ecclesiæ sui iuris[28]".

Dunque, se il sacerdote è di un'altra Chiesa *sui iuris*, si deve attenere al rito liturgico proprio e non a quello degli sposi, a meno che non abbia ricevuto dalla Sede Apostolica la speciale facoltà (biritualismo). Dello stesso tenore è il corrispondente can. 1111 § 1 CIC.

Secondo il can. 674 § 2 CCEO il ministro deve celebrare i sacramenti secondo le prescrizioni liturgiche della propria Chiesa *sui iuris*. Vi è contraddizione tra l'*Istruzione* n. 83 e il Codice: riteniamo che, stante tale contraddizione, bisogna stare alla norma codiciale[29].

Un ultimo articolo che mi è parso particolarmente interessante è il 681 che tratta della diaspora. Richiama le norme di entrambi i Codici e l'istruzione *Erga migrantes caritas Christi* (2004) del Pontificio Consiglio per la cura pastorale dei migranti. L'art. 681 lascia aperta la possibilità alle tre Circoscrizioni ecclesiastiche di costituire un delegato permanente per coordinare l'azione pastorale; inoltre, chiede che si formuli un *votum* alla Sede Apostolica affinché conceda agli Ordinari lo *ius vigilantiae* analogo a quello dei Patriarchi.

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[28] M. BROGI, Il nuovo Codice orientale e la Chiesa latina, in: Antonianum 66 (1991) 35-61 (p. 53).

[29] Cf. D. SALACHAS – L. SABBARESE, Chierici e ministero sacro nel Codice latino e orientale. Prospettive intercclesiali, Città del Vaticano 2004, 335.

V. Conclusione

Le tre circoscrizioni, se di fatto hanno le caratteristiche di una sola Chiesa *sui iuris*, giuridicamente non lo sono[30]. Comunque, per il fatto che il Romano Pontefice abbia accolto la richiesta, avanzata congiuntamente dai tre Gerarchi, di celebrare il II Sinodo Intereparchiale è segno di un possibile futuro riconoscimento che dovrà tenere presente le caratteristiche proprie delle due eparchie e dell'esarcato che, pur appartenendo alla tradizione bizantina come le due eparchie, è erede della tradizione italo-greca e non italo-albanese; inoltre, è sempre rimasto bizantino come rito e cattolico-romano come fedeltà al Papa, metropolita del Lazio[31].

Questo Sinodo è lo strumento adeguato per precisare i canoni del diritto particolare lasciati aperti dal Codice. Esso ha tracciato le prospettive future: conservare la tradizione ma allo stesso tempo rinnovare, alla luce di quell'*organico progresso* auspicato dal Concilio Vaticano II; promuovere una pastorale efficace per la rievangelizzazione, in sintonia con le strutture ecclesiali.

Questo lavoro, oltre che di fatto necessario, può costituire una condizione reale per il riconoscimento e l'organizzazione di una Chiesa *sui iuris*, ma senza dimenticare quanto ha affermato l'Esarca di Grottaferrata:

> "Il synodos è una strada che si percorre insieme, e noi di Grottaferrata, per quanto possiamo, ci facciamo compagni di strada e di viaggio, ma vogliamo anche vedere con chiarezza dove la strada ci porta. A tale proposito, in ideale continuità con la linea segnata dal mio Predecessore P. Marco [...] ci tengo a ribadire, qualora vi siano ancora dubbi o aspirazioni, che non è nostra intenzione aderire ad una Chiesa metropolitana sui iuris italo-albanese. Certamente è giusto che le Eparchie italo-albanesi di Lungro e di Piana vengano costituite in Chiesa metropolitana sui iuris, ma le origini, la storia e il ritus fanno di Grottaferrata una distinta Chiesa sui iuris. Vi assicuro che non si tratta di un nostro capriccio o desiderio di singolarità [...]. Nella nostra Comunità oltre agli italo-albanesi, vi sono ucraini, indiani, romeni, italiani. Ma anche l'adozione di altre denominazioni che qua e là si leggono e si inventano, come 'Chiesa cattolica bizantina in Italia' e simili, non modificano la realtà dei fatti"[32].

Si tratta di un vasto documento che, per quanto riguarda il genere letterario, come è stato notato, assomiglia ai *libri sinodali* emanati dai *sinodi diocesani*

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[30] Cf. PARLATO, Le Chiese d'Oriente; FORTINO, Chiesa Italo-Albanese, 168-171.

[31] Cf. I. CEFALIA, Lo status ecclesiale-canonico delle comunità bizantine cattoliche d'Italia. Questioni e prospettive di uno sviluppo giuridico, pro manuscripto, Roma 2005; L. LORUSSO, Le statut juridique de l'Eglise italo-albanaise et son projet de droit particulier, in: Kanon 19 (2006) 208-232.

[32] Commissione Antepreparatoria, Saluto di P. Emiliano Fabbricatore allegato al Verbale della seduta del 17 febbraio 2000.

contemporanei[33]. Degli undici capitoli del documento, la maggioranza di essi non presenta un carattere veramente giuridico. Sembra che lo *ius particulare sui iuris* si trovi solo nel sesto capitolo del libro, intitolato *Diritto canonico particolare*. In verità però vi sono norme sparse anche in altri capitoli. Anche se vi sono ripetizioni superflue del CCEO, non mancano norme particolari *præter ius commune*.

Con l'approvazione e la promulgazione degli *Orientamenti Pastorali e Norme Canoniche* le tre circoscrizioni ecclesiastiche bizantine in Italia hanno nel loro oggi storico una peculiare fisionomia normativa, il diritto particolare, dal quale non può prescindere ed a cui deve fare riferimento ogni comportamento pastorale, salvaguardando le tradizioni italo-albanese e italo-greca, senza contraddire la *mens* del CCEO.

[33] Cf. P. SZABÓ, L'attività legislativa sui iuris delle Chiese minori di tradizione bizantina, in: PONTIFICIO CONSIGLIO PER I TESTI LEGISLATIVI (ed.), Il Codice delle Chiese Orientali. La storia, le legislazioni particolari, le prospettive ecumeniche, Città del Vaticano 2011, 305-344 (p. 319).

THE PARTICULAR LAW OF THE MARONITE CHURCH WITH A SPECIAL FOCUS ON TERRITORIAL RESTRICTIONS

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I. Introduction

The Codex Canonum Ecclesiarum Orientalium[1] (hereafter Eastern Code or CCEO), the body of law promulgated by Pope John Paul II on 18 October 1990, is the first complete body of common law for the twenty-two Eastern Catholic Churches. The Eastern Code is significantly shorter (1546 canons) than its counterpart, the Codex Iuris Canonici[2] for the Latin Church (1752 canons), despite its extensive treatment of institutions (e.g., patriarchs, major archbishops and synods of bishops) found only in the Eastern Catholic Churches. The reason for the disparity is that the Eastern Code relegates many matters to particular law that is to be enacted by the competent authorities of the individual Eastern Catholic Churches[3].

> "Furthermore, in this area full attention should be given to all those things that this Code entrusts to the particular law of individual Churches *sui iuris*, which are not considered necessary to the common good of all the Eastern Churches. Our intention regarding these things is that those who enjoy legislative power in each of the Churches should take counsel as soon as possible for particular norms, keeping in mind the traditions of their own rite and the precepts of the Second Vatican Council"[4].

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[1] Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus, Vatican City 1990. English translation from Code of Canons of the Eastern Churches, Latin-English Edition: New English Translation, Washington, DC 2001 [hereafter CCEC]. All English translations of canons from the CCEO will be taken from this source unless indicated otherwise.

[2] Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus, Vatican City 1983.

[3] For more on the nature of *particular law* as articulated in the *CCEO* see K. BHARANIKULANGARA, Particular Law of the Eastern Catholic Churches (Maronite Rite Series IV), New York 1996 [hereafter BHARANIKULANGARA, Particular Law]; IDEM, Particular Law of the Oriental Catholic Churches: An Analysis Based on *Codex Canonum Ecclesiarum Orientalium (CCEO)*, in: Journal of St. Thomas Christians 23 (April-December 2012) 83-93; I. ŽUŽEK, Qualche nota circa lo *ius particulare* nel *Codex Canonum Ecclesiarum Orientalium*, in: IDEM, Understanding the Eastern Code (Kanonika 8), Rome 1997, 354-366.

[4] "Praeterea hac in provincia bene animadvertatur hunc quidem Codicem iuri particulari singularum Ecclesiarum sui iuris ea omnia committere, quae ad commune omnium ecclesiarum orientalium bonum non necessaria considerantur. Quibus de rebus mens Nostra est, ut qui legislativa potestate in singulis Ecclesiis sui iuris gaudent, peculiaribus normis, proprii ritus traditionibus prae oculis habitis necnon Concilii Vaticanii II praeceptis, quam celerrime consulant": JOHN PAUL II, Apostolic constitution *Sacri Canones*, 18 October 1990, in: AAS 82 (1990) 1037-1038; CCEC, xxiv.

The Vatican II decree on the Eastern Catholic Churches, Orientalium Ecclesiarum[5], makes the affirmation:

> "Hence, it solemnly declares that the churches of both east and west enjoy the right, and are bound by duty, to govern themselves in accordance with their own particular rules, seeing that they are recommended by venerable antiquity, are more suited to the customs of their faithful and seem more suitable for assuring the good of souls"[6].

In consideration of this self-governing authority, the Eastern Code designates them as Ecclesiae sui iuris, a term defined in *CCEO* can. 27:

> "A community of the Christian faithful, which is joined together by a hierarchy according to the norm of law and which is expressly or tacitly recognized as *sui iuris* by the supreme authority of the Church, is called in this Code a Church *sui iuris*"[7].

The Maronite Church is a Church sui iuris and has, throughout its history, enacted laws to govern its ecclesial life. The purpose of this study is to provide an exposition of the law enacted by the synod of bishops of the Maronite Church after the 1990 promulgation of the Eastern Code. We shall begin with a brief description of Maronite particular law before 1990. A description and analysis of the salient points of the particular law of the Maronite Church enacted in 1996 and currently in force will follow. Finally, we shall examine the territorial restrictions of particular law and the canonical provisions regarding the extra-territorial extension of the force of law to legislation enacted by the synod of bishops.

II. Particular Law prior to the Code of Canons of the Eastern Churches

It must be kept in mind that the 1964 conciliar affirmation of the right of the Eastern Catholic Churches to legislate for themselves and the 1990 promulgation of the Code of Canons of the Eastern *Churches* did not mark the beginning of the legislative programs of these Churches. In the case of the Maronite Church, one can identify three earlier phases[8]:

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[5] Vatican II, Decree *Orientalium Ecclesiarum*, 21 November 1964, in: AAS 57 (1965) [hereafter OE] 76-85, English translation in: N. P. TANNER (ed.), Decrees of the Ecumenical Councils 2, London and Washington 1990 [hereafter TANNER], 900-907.

[6] OE n. 5; TANNER, 902.

[7] For more information about the nature of the Churches *sui iuris*, see I.. OKULIK, Le Chiese sui iuris. Criteri di individuazione e delimitazione, Venice 2005; I. ŽUŽEK, Le *Ecclesiae sui iuris* nella revisione del diritto canonico, in: IDEM, Understanding the Eastern Code (Kanonika 8), Rome 1997, 94-109.

[8] See A. COUSSA, Epitome Praelectionum de Iure Ecclesiastico Orientali 1, Rome 1948, 185-187; Dictionnaire de Droit Canonique [hereafter DDC] 8, Paris 1957, cols. 811-829.

1. Ancient Law until 1578 (the year of the visit of Giambattista Eliano, S. J.)

Sources in this period are restricted to papal letters to the Maronite Church and two letters sent by Maronite Patriarch Simon el-Hassan to Pope Leo X in 1514 and 1515. In addition, there are two nomocanons: the Kitâb al-Huda ("Book of Direction")[9], a collection of canons, liturgical prescriptions and short theological treatises translated by Maronite Bishop David in 1059; and a thirteenth-century adaptation of the Coptic nomocanon of 'Abul Fada'il Ibn al-'Assal[10].

2. Law from 1578-1736

Many papal and patriarchal letters are preserved from this period. Of greater significance are five synods: Synod of Qannubin of 1580 issued ten dogmatic and disciplinary chapters proposed by Eliano, the Pontifical Delegate[11]; Synod of September 1596 approved the text proposed by the Pontifical Delegate, Girolamo Dandini, S. J; the Synods of November 1596 and of 1598, convoked by Maronite Patriarch Joseph Riši, adopted disciplines from the West that Pope Paul V obliged the successors of Riši to revoke; the Synod of 1644 marked a restoration of some of the ancient traditions.

3. Law from 1736-1990

Sources from this period include patriarchal letters and papal decisions. The most important source constituting a modern arrangement of particular law for the Maronite Church is the Synod of Mount Lebanon of 1736[12]. The approved canons were organized into four parts: (1) the faith, feasts and fasts; (2) the sacraments; (3) the hierarchy; and (4) churches, monasteries and schools. There were ten subsequent synods prior to the 1990 *Codex Canonum Ecclesiarum Orientalium*[13].

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[9] See A. JOUBEIR, Kitab al-Huda, Kaslik [2]1990.

[10] DDC 8, cols. 812-816.

[11] See J. FEGHALI, Histoire du Droit de L'Église Maronite, Paris 1962, 107-204.

[12] Acta et Decreta Sacrorum Conciliorum Recentiorum. Collectio Lacensis 2, Freiburg im Breisgau 1870-1890, cols. 75-478. See also E. ATALLAH, Le synode libanais de 1736, Paris 2001.

[13] Beqaata (1744); Machmouché (1747); Qannoubin (1755); Beqaata (1756); Synod of 1762; Ghosta (1768); Maifouq (1780), Ain-Chaqiq (1786); Bkerke (1790); Notre Dame de Louaize (1818); cf. Atallah, ibidem, 161-172. Patriarch Paul Masad convoked a synod in Bkerke on 11-13 April 1856, during which the decrees of the Synod of 1736 were abridged and amended. However, the acts were never approved by Pope Pius IX. It is not usually included in the lists of synods of the Maronite Church.

4. "Synod" of 2006[14]

A patriarchal assembly (cf. *CCEO* canons 140-145) was celebrated 2003-2005, the acts of which were approved by the Maronite patriarch and synod of bishops in 2006.

III. Particular Law Enacted by the Synod of Bishops of the Maronite Church after 1990[15]

1. Legislative History

Subsequent to the promulgation of the Eastern Code in 1990, Maronite Patriarch Cardinal Nasrallah Peter Sfeir committed the preparation of a draft of the particular law to the Episcopal Commission for Canon Law headed by Bishops Chucrallah Harb, Antoine Joubeir and Bechara Rai[16].

On 27 May 1991, the Commission presented its first draft to the patriarch and synod of bishops. A second draft (comprising 147 articles) was presented on 25 February 1992 to the bishops for their observations, which were received by the Commission before and after the June 1992 meeting of the synod of bishops. A third draft (reduced to 105 articles) was presented on 7 September 1992; Patriarch Sfeir asked that observations on this draft be submitted by December 1992. The third draft was reviewed in subsequent meetings of the synod of bishops until February 1993. A fourth draft (containing 109 articles) was prepared in May 1993[17].

The draft of the particular law was forwarded by Patriarch Sfeir and the synod of bishops to the Congregation for the Eastern Churches[18]. It should be

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[14] See Maronite Patriarchal Synod 2003-2006 (Bkerke, 2008). From a canonical perspective, it is imprecise to refer to the assembly conducted from 2003-2005 as a "synod". According to the CCEO, the term "synod" refers to an assembly of ordained bishops of a patriarchal or major archiepiscopal church (CCEO cc. 102-113). It is more accurate to refer to it as a "patriarchal assembly" (conventus patriarchalis), treated in CCEO cc. 140-145.

[15] For further information about the particular law of the Maronite Church, see Ch. BOUSAMRA, The Particular Law of the Maronite Church. Analysis and Perspective, Rome 2010) [hereafter BOUSAMRA]; J. ABBASS, Updating the Particular Law of the Maronite Church, in: PONTIFICIO CONSIGLIO PER I TESTI LEGISLATIVI (ed.), Il Codice delle Chiese Orientali: la storia, la legislazione e le prospettive ecumeniche. Atti del Convegno di Studio tenutosi nel XX Anniversario della Promulgazione del Codice dei Canoni delle Chiese Orientali (Rome: October 8-9, 2010), Vatican City 2011 [hereafter ABBASS, Updating], 173-193.

[16] See Le droit particulier de l'Église Maronite: La Revue Patriarcale. Porte-Parole du Patriarcat Maronite, Special Edition Number 15 (1996) [hereafter "Le droit particulier"] 9.

[17] This 1993 draft was published in BHARANIKULANGARA, Particular Law, 197-208. See also J. ABBASS, A *Codex Particularis* for the Maronite Church, in: Iura Orientalia 3 (2007) [hereafter ABBASS, Codex Particularis] 14-36.

[18] Le droit particulier, 9-11. It is not known whether the modified September 1992 draft (comprising 105 articles) or the May 1993 draft (comprising 109 articles – the same number as the promulgated text) was sent to the Congregation for the Eastern Churches.

noted that the synod of bishops was not required to forward the draft of the particular law to the Congregation for the Eastern Churches since CCEO can. 112 § 1 states:

> "The promulgation of laws and the publication of decisions of the synod of bishops of the patriarchal Church is the competence of the patriarch".

However, the promulgated particular law was to be forwarded to the Roman Pontiff as soon as possible according to CCEO can. 111 § 3:

> "Acts regarding laws and decisions are to be sent to the Roman Pontiff as soon as possible; certain acts, or even all of them, are to be communicated to the patriarchs of the other Eastern Churches according to the judgment of the synod".

The particular law (containing 105 articles)[19] was promulgated on 4 June 1996 and published in Arabic in July 1996 in *La Revue Patriarcale*[20]. The letter of promulgation, signed by Maronite Patriarch Sfeir, indicates that the particular law acquired the force of law on the date of promulgation[21].

The 4 June 1996 letter of promulgation also indicates that certain internal statutes of institutions of the Maronite Church form an integral part of the particular law of the Maronite Church: the synod of bishops, presbyteral councils, college of eparchial consultors, finance councils, parochial *waqf* committees, parish councils, eparchial pastoral councils[22].

2. Structure

The title of the promulgated text is *The Particular Law of the Maronite Church in accordance with the Code of Canons of the Eastern Churches*[23] (hereafter MPL). The document is minimalistic in structure, with only 26 section heads. Generally, each article contains the reference to the relevant CCEO canon. The structure is as follows: 1. The election of the patriarch (articles 1-5); 2. The rights and duties of the patriarch (articles 6-8); 3. The synod of bishops of the patriarchal church (articles 9-10); 4. The patriarchal curia (article 11); 5. The election of bishops (article 12); 6. The rights and duties of eparchial bishops (articles 13-16); 7. The eparchial synod (articles 17-18); 8. The eparchial curia (articles 19-25); 9. Parishes, pastors and parochial vicars (article 26-32); 10.

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[19] Abbass reconciles the difference between the 109 articles of the May 1993 draft with the 105 articles of the promulgated text: Articles 22 and 23 of the 1993 draft are combined in the 1996 text; article 68 of the 1993 draft is incorporated into article 65 of the 1996 text; articles 76 and 104 of the 1993 draft are omitted. See ABBASS, Updating, 175.

[20] See La Revue Patriarcale, Porte-Parole du Patriarcat Maronite 15 (1996) 41-52 (in Arabic).

[21] Le droit particulier, 7.

[22] Le droit particulier, 13.

[23] The author is indebted to the translation provided in BOUSAMRA, Particular Law, 339-354.

Exarchies and exarchs (article 33); 11. Clerics (articles 34-50); 12. Lay persons (article 51); 13. Monks and other consecrated persons (articles 52-57); 14. Associations of the lay faithful (article 58); 15. Evangelization of nations (articles 59-60); 16. Preaching of the word of God (article 61); 17. Instruments of social communication and books (article 62-63); 18. Divine worship and the sacraments (articles 64-85); 19. Sacramentals, sacred times and places and veneration of saints (articles 86-88); 20. Baptized non-Catholics coming into full communion with the Catholic Church (article 89); 21. Ecumenism (article 90); 22. Offices (article 91); 23. Recourse against administrative decrees (article 92); 24. Temporal goods of the Church (articles 93-100); 25. Trials (articles 101-104); 26. Penal sanctions (article 105).

3. General Observations

Perhaps the greatest weakness of the current particular law of the Maronite Church is that it restricts itself to the explicit references to particular law in the Eastern Code[24]. In commenting on the 1993 draft, Jobe Abbass observes:

> "However, a *Codex particularis* formulated solely on the basic references to 'particular law' in *CCEO* risks being incomplete. It is by now commonly understood that, in omitting certain laws previously in force, *CCEO* often implies by 'indirect' references, as it were, that those matters are left to particular law to regulate. For all intents and purposes, the 1993 text does not appear to have considered these indirect references and, therefore, seems to fall short in terms of proposing a comprehensive code of canon law"[25].

4. Salient Areas of Interest

The limitations of this study do not allow for a comprehensive commentary on each article of the particular law. We shall instead comment on certain salient areas of interest. In pointing out the weaknesses, one risks giving the impression that the entire body of particular law is deficient; this is not the case. The particular law is well done, but, like all human creations, allows for improvement. Let us therefore examine a few points of interest.

MPL article 12, in reference to CCEO can. 182 § 3[26], treats the election of bishops. The second paragraph of the article[27] reserves the right of presentation of

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[24] For an index of explicit references to *ius particulare* in the CCEO, see I. ŽUŽEK in: Index Analyticus Codicis Canonum Ecclesiarum Orientalium (Kanonika 2), Rome 1992; s. v. "ius particulare".

[25] ABBASS, Codex Particularis, 15. Abbass further points out certain canons of the CCEO which allow for particular law to legislate (CCEO cc. 864 § 2; 1084 § 1, 4°; and 1152 § 2), but observes that the particular law of the Maronite Church is silent on the matter, thereby leaving the matter to common law. See ABBASS, Codex Particularis, 16-17.

[26] "Unless particular law approved by the Roman Pontiff determines otherwise, the synod of bishops of the patriarchal Church is to examine the names of the candidates and draw up by secret

candidates to the patriarch. Reference is made to particular law approved by the Roman Pontiff, but no specific indication of the document is cited. The provision effectively allows for the patriarch to veto any candidacy, simply by not presenting the name. Such a reservation of presentation is perhaps based on the presupposition that the patriarch has information that might not be available to the members of the synod. However, one must also question whether the provision of CCEO can. 183 § 2[28] allows for a bishop to vote for someone who is not on the ballot.

In certain cases, the particular law seems to contain canonical imprecisions. MPL article 7[29], with reference to CCEO can. 86 § 1, 2°[30], provides that the patriarch is competent to ordain bishops personally or to appoint others to do so on his behalf. It seems that the CCEO is referring to the possibility that particular law can reserve the competence of episcopal ordinations to the patriarch. This interpretation is reinforced by CCEO can. 86 § 2[31], which declares that the patriarch is competent *ipso iure* to ordain metropolitans and bishops.

MPL article 48[32] provides parameters for the annual vacations of clerics. In combining CCEO can. 386 § 1 and 392, the article creates a certain imprecision in that it speaks of a month-long absence from the eparchy. One could conclude that the cleric could be absent from the parish while remaining in the eparchy – and thereby not be considered to be on vacation. It should also be noted that the article speaks of clerics, not simply pastors (*parochi*) or presbyters.

In certain cases, the particular law is superfluous in that it adds nothing to the common law. CCEO can. 113[33] requires that the synod of bishops draw up a set of

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ballot a list of the candidates. This list is to be transmitted through the patriarch to the Apostolic See to obtain the assent of the Roman Pontiff".

[27] "In accordance with the particular Law approved by the Roman Pontiff, only the patriarch has the right to propose the names of episcopal candidates to the fathers of the synod who examine the names of the candidates and then compile a list of the names by secret ballot which must be transmitted through the patriarch to the Apostolic See in order to obtain the assent of the Roman Pontiff".

[28] "The bishops are freely to elect the one whom before all others they consider before the Lord to be worthy and suitable".

[29] "The patriarch is competent to ordain bishops either personally or by appointing other bishops to do so on his behalf".

[30] "The patriarch is competent to ordain metropolitans either personally or, if impeded, through other bishops, and, if particular law so provides, also to ordain all bishops".

[31] "By virtue of the law itself, the faculty is given to the patriarch to ordain and enthrone metropolitans and other bishops of the Church over which he presides who have been appointed by the Roman Pontiff outside the territorial boundaries of that Church, unless in a special case it is expressly established otherwise".

[32] "Clerics have a right to be absent from the eparchy for a period of one month for an annual vacation while [a] period exceeding this requires the permission of the eparchial bishop. Nevertheless, the cleric must coordinate with his bishop to determine the timing of the vacation and to secure his replacement in the ministry during his absence. Aside from the annual vacation, a cleric needs the permission of his bishop to be absent, even when he takes his vacation at intervals".

[33] "The synod of bishops of the patriarchal Church is to draw up its statutes in which are provided a secretary of the synod, preparatory commissions, the order of procedure as well as other means that they consider effective for the attainment of its goals".

statutes to regulate its operations. MPL article 10 § 2[34] (without any reference to CCEO can. 113) indicates that the synod of bishops has its proper statutes. It should be noted that these statutes are a part of the particular law. However, it seems that MPL article 10 § 2 is unnecessary. MPL article 30[35], in delineating the councils to be constituted in a parish, adds little to the provisions of CCEO can. 295[36].

It is interesting that while CCEO can. 331 § 1[37] provides for the possibility of particular law to allow others not called to the clerical state to be educated in the minor seminary, MPL article 36[38] absolutely prohibits it, while making no provisions regarding the possibility of students attending classes during the day. There is no need for the particular law in its present form. This is also the case in MPL article 37[39], in reference to CCEO can. 335 § 2[40], which treats the representation of the juridic person of the seminary; the article simply defers to the statutes of the seminary.

CCEO can. 408 § 2[41] treats the possibility of entrusting ecclesiastical functions to lay persons except in those cases that require sacred orders or are prohibited by particular law of the Church *sui iuris*. MPL article 51[42] indicates no parameters for such an arrangement and simply relegates the matter to the competent ecclesiastical authority.

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[34] "The Synod of Bishops of the Maronite Church has its proper statutes which have been laid down by the fathers of the synod themselves".

[35] "In the parish, there are to be appropriate councils dealing with pastoral and economic matters according to the norms laid down by the Synod of Bishops of the Maronite Church. The councils are the religious endowment administrative committee (*waqf*) and the pastoral council".

[36] "In the parish there are to be appropriate councils dealing with pastoral and financial matters, in accord with the norms of the particular law of its own Church *sui iuris*".

[37] "In the minor seminary, those who seem to show signs of a vocation to the sacred ministry are especially to be educated, so that they can more easily and clearly discern it themselves and cultivate it with dedication; in accord with the norm of particular law, others also can be educated who, even though they do not seem to be called to the clerical state, can be educated to fulfill certain ministries or apostolic works. Other institutes which, according to their statutes, serve the same purposes, even if they differ in name, are equivalent to a minor seminary".

[38] "Those who are not called to the clerical state must not be admitted, for whatever cause, to board as internal students in the seminary".

[39] "The statutes of the seminary must determine the juridical causes in which the rector of the seminary must represent it".

[40] "In all juridical matters the rector of the seminary represents it, unless particular law or the statutes of the seminary establish otherwise".

[41] "Besides those ecclesiastical functions to which lay persons are by common law admitted, they may be admitted by a competent authority to other functions, except those that require sacred orders or that are expressly forbidden to lay persons by the particular law of their own Church *sui iuris*".

[42] "Besides those ecclesiastical functions entrusted to lay persons by common law, lay persons may also be entrusted by the competent ecclesiastical authority with other services and functions originating from the sacraments of baptism and chrismation with holy myron in conformity with the directives and teachings of the Church".

With regard to ecumenical initiatives, MPL article 90[43] essentially restates the provisions of CCEO can. 904 § 1[44]. The lack of elaboration on ecumenical matters results in an absence of a clear ecumenical vision in the particular law *in vigore* in the Maronite Church. This is not the only example of a *lacuna legis* arising from the lack of specific provision in the particular law[45]. CCEO can. 937 § 2[46] defers to the provisions of particular law regarding the implementation of decrees establishing offices. MPL article 91[47] in turn defers the matter to the "competent ecclesiastical authority", without providing any specific details. Hence, the Maronite Church lacks details regarding the creation of new offices.

There are certain cases in which the permission of the patriarch is required for certain acts. MPL article 40[48], citing CCEO can. 365 § 2[49], requires the permission of the patriarch for a cleric to be ascribed to an eparchy of another Church *sui iuris*. Insofar as: (1) the power of the patriarch is restricted to the territory of the patriarchal church; (2) this particular law is of a disciplinary nature; and (3) this particular law has not been approved by the Apostolic See, it would seem to lack the force of law outside the patriarchal territory. We shall examine below the possibility of the extra-territorial extension of the law.

Another example is similar. MPL article 13[50], in reference to CCEO canon 194[51], requires the eparchial bishop to "ask the patriarch to confer the order of Chorbishop or Periodeut". The matter is disciplinary and therefore *per se* lacks the force of law outside the patriarchal territory. Since CCEO can. 194 refers to *ius particulare Ecclesiae sui iuris*, the eparchial bishop – as we shall see below – is not competent to enact it in his own eparchy. (If it were simply a matter of *ius particulare*, it would still be unlikely that an eparchial bishop would enact a law that would oblige him to seek permission from a superior in order to confer the

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[43] "The diverse undertakings of the ecumenical movement must be encouraged in conformity with the principles decreed by the Second Vatican Council and the directives of the Apostolic See and particularly among them, the *Decree on Ecumenism*".

[44] "Ecumenical initiatives are to be promoted in every Church *sui iuris* through special norms of particular law, while the Roman Apostolic See functions as the moderator of the movement for the entire Church".

[45] This observation was made by BOUSAMRA, Particular Law, 201.

[46] "The particular law of each Church *sui iuris* is to determine in greater detail how these prescripts are to be put into effect, unless provision has already been made for certain matters by common law".

[47] "It belongs to the competent ecclesiastical authority to apply the decrees relating to a recently created office and in the way he sees fit".

[48] "For the licit transfer of a cleric from our Maronite Church to an eparchy of another Church *sui iuris*, the bishop who permits the transfer must obtain permission from the Maronite patriarch".

[49] "If the particular law of the Church *sui iuris* so prescribes, it is also required for the licit transfer to an eparchy of another Church *sui iuris* that the eparchial bishop releasing the cleric obtain the consent of the authority determined by the same particular law".

[50] "In accordance with canon 250, the eparchial bishop must ask the patriarch to confer the order of Chorbishop or Periodeutes [sic] (bardût) upon clerics subject to him who distinguished themselves in excellence and pastoral ministry, especially the vicar general during or after his charge. The patriarch must confer these orders by the imposition of hands or by delegating this to the eparchial bishop".

[51] "The eparchial bishop can confer dignities upon clerics subject to them, others excluded, in accord with the norm of the particular law of their own Churches *sui iuris*".

orders of chorbishop or periodeut.) The eparchial bishop is not obliged in this matter to seek the permission of the patriarch in order to confer such orders. Such a lack of canonical requirement would not prevent the eparchial bishop outside the patriarchal territory from seeking the blessing prior to the ordination.

In both of these articles, one notes that the territorial restrictions relating to particular law complicate matters.

5. Future Prospects for Particular Law of the Maronite Church

It was already mentioned above that the Maronite patriarchal church celebrated a patriarchal assembly in three sessions from 2003-2005. The acts of this assembly were confirmed by Maronite Patriarch Nasrallah Peter Cardinal Sfeir and the Synod of Bishops on 11 June 2006[52]. As would be expected, the Maronite Church wanted to avail itself of the fruits of the patriarchal assembly and re-elaborate 1996 particular law. It is beyond the scope of this study to analyze the particular law that is still in draft form, but for anyone interested, an English translation of the November 2009 draft has been published and analyzed[53].

IV. Territorial Restrictions on the Force of Particular Law

Let us now examine the territorial limitations of the law, possibilities for extraterritorial extension of the force of law, and possible ramifications of the territorial division of the particular law of a Church *sui iuris*.

A significant factor in the governance arrangements of the Eastern Catholic Churches is that territorial boundaries are applied to each Church *sui iuris*. In the cases of the patriarchal and major archiepiscopal churches, the territory of those churches is the region in which the rite of the respective church is observed and the patriarch or major archbishop has legitimately acquired the right to erect provinces, eparchies and exarchies[54]. The modification of territorial boundaries or the resolution of doubts regarding boundaries of the patriarchal or major archiepiscopal church is the exclusive competence of the Roman Pontiff, upon receipt of a petition presented to him by the synod of bishops[55]. In the case of the

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[52] Maronite Patriarchal Synod 2003-2006. Text and Recommendations, Bkerke 2008, 8-10.

[53] See BOUSAMRA, Particular Law, 360-446 (translation) and 202-316 (analysis).

[54] CCEO c. 146 § 1: "The territory of the Church over which the patriarch presides extends over those regions in which the rite proper to that Church is observed and the patriarch has a legitimately acquired right to erect provinces, eparchies, and exarchies". CCEO c. 152 provides that what is stated in common law for the patriarchal churches is applicable also to the major archiepiscopal churches unless indicated otherwise or it is evident from the nature of the matter.

[55] CCEO c. 146 § 2: "If any doubt concerning the territorial boundaries of the patriarchal Church arises or if it is a question of the modification of boundaries, it is for the synod of bishops of the patriarchal Church to investigate the matter. After hearing the superior administrative authority of each Church *sui iuris* concerned, and after discussing the matter in the synod, it is up to the same synod to present a properly documented petition for the resolution of the doubt or for the modification of the boundaries to the Roman Pontiff. It is for the Roman Pontiff alone to resolve the doubt authentically or to decree a modification of the boundaries".

metropolitan church, it is the exclusive competence of the supreme authority of the Church to define the boundaries of this category of Churches *sui iuris*[56].
The heads of the Eastern Catholic Churches exercise authority over the faithful in two ways according to the territorial boundaries of the Church *sui iuris*. CCEO can. 78 § 2 provides a general territorial restriction on the power of the patriarch:

> "The power of the patriarch is exercised validly only within the territorial boundaries of the patriarchal Church unless the nature of the matter or the common or particular law approved by the Roman Pontiff establishes otherwise"[57].

It is noteworthy that the term "validly" is included. Any acts of governance not covered by the exceptions indicated in can. 78 § 2 are invalid. This applies also to legislative activity of the synod; unless common law or particular law approved by the Roman Pontiff provides otherwise, the patriarch cannot *validly* promulgate laws for faithful outside the territory of the patriarchal church.

The precise canonical arrangements are articulated for the patriarchal and archiepiscopal churches in Title 4, Chapter 8, "The Territory of a Patriarchal Church and the Power of the Patriarch and Synods Outside this Territory" (CCEO can. 146-150). The Eastern Code does not explicitly provide for extra-territorial governance for the metropolitan churches *sui iuris* or other churches *sui iuris*.
With regard to legislative activity, the "divide" between territorial and extra-territorial power is articulated in CCEO can. 150 § 2:

> "Laws enacted by the synod of bishops of the patriarchal Church and promulgated by the patriarch, have the force of law everywhere in the world if they are liturgical laws. However, if they are disciplinary laws or in the case of other decisions of the synod, they have the force of law within the territorial boundaries of the patriarchal Church".

Therefore, the extent of the force of law of a synodal enactment that is promulgated by the patriarch is determined by the nature of the law itself: (1) if a law is a liturgical law, it has the force of law everywhere in the world; (2) in the case of disciplinary laws or other decisions of the synod, they have the force of law only within the territorial boundaries of the patriarchal church. The division between a liturgical law and a disciplinary law is not as self-evident as one might presume; for example, is the minimum age required for a sponsor on the occasion

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[56] CCEO c. 155 § 2: "It is solely for the supreme authority of the Church to erect, modify, and suppress metropolitan Churches *sui iuris* as well as to define their territorial boundaries".

[57] See also CCEO c. 147: "Within the territorial boundaries of the patriarchal Church, the power of the patriarch and the synods is exercised not only over all Christian faithful who are ascribed to that Church, but also over others who do not have a local hierarch of their own Church *sui iuris* constituted in the same territory and, even if they remain ascribed in their own Church, are committed to the care of local hierarchs of that patriarchal Church with due regard for can. 916 § 5".

of baptism58 a liturgical law or a disciplinary law? The response will determine the extent of the force of law of this particular law of the Maronite Church.

The following 13 articles are liturgical laws and, consequently, enjoy the force of law throughout the Maronite Church: 67 (right of consecrating sacred oils); 68[59] (age of First Communion); 69 (sacred species); 70 (obligation to receive Divine Eucharist); 71 (distribution of Divine Eucharist); 72 (place of sacrament of penance); 73 (ordination in another eparchy); 74 (interstices between ordinations); 84 (marriage by proxy); 85 (time of celebration of marriage); 86[60] (sacramentals); 87 (holy days of obligation); 88 (veneration of saints).

The other 92 articles of the Maronite Particular Law are of a disciplinary nature; consequently, their legal force is restricted to the territory of the patriarchal church.

1. Extraterritorial Extension of the Force of Law

While the force of disciplinary particular law is *per se* restricted to the territory of the patriarchal church, the Eastern Code provides means to extend the force of law extra-territorially:

> "Eparchial bishops constituted outside the territorial boundaries of the patriarchal Church, who desire to do so, can attribute the force of law to disciplinary laws and other decisions of the synod which do not exceed their competence in their own eparchies; if, however, these laws or decisions are approved by the Apostolic See, they have the force of law everywhere in the world"[61].

2. Approval of the Apostolic See

One way to extend the force of laws enacted by the synod of bishops is for the Apostolic See to approve[62] them. Approval by the Apostolic See attributes the

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[58] MPL art. 66 (cf. can. 685 § 2): "For a person to fulfill validly the role of a sponsor, besides those things required by can. 685 § 1, 3°, it is necessary that he or she be at least 18 years old and lead a life in harmony with the faith and the role to be undertaken".

[59] The provisions of MPL art. 68 regarding the reception of Holy Communion by children only after the age of seven years seems to be contrary to the "spirit" of *CCEO* c. 697, which indicates that "the Divine Eucharist is to be administered as soon as possible (*quam primum*) in accord with the norms of the particular law of each Church *sui iuris*". See also Congregation for the Eastern Churches, Instruction for Applying the Liturgical Prescriptions of the Code of Canons of the Eastern Churches, n. 42, Vatican City 1996.

[60] MPL art. 86, in reference to CCEO c. 867 § 2, states: "Concerning the sacramental, the norms to be applied are those prescribed by liturgical books, rituals, devotions and processions and which have received the recognition of the Supreme Authority of the Church". In requiring the recognition of the Supreme Authority, the Maronite Particular Law requires a higher level of ecclesiastical approval than CCEO c. 657.

[61] CCEO c. 150 § 3. The translation differs from that of the CCEC.

[62] *Approbatio* is defined as "the giving of one's approval, approbation" (cf. P. G. W. GLARE, Oxford Latin Dictionary, New York 1983 [hereafter OLD] s. v. "approbatio").

force of law to these laws everywhere in the world: "*si vero hae leges vel decisiones a Sede Apostolica approbatae sunt,* ubique *terrarum vim iuris habent.* Approval (*approbatio*)"[63] of synodal laws and the consequent extraterritorial extension of the authority is distinct from *recognitio*[64] or enactment[65] of particular law on the part of the Apostolic See.

How does one categorize synodal laws that are approved by the Roman Pontiff or Apostolic See? Are such laws patriarchal laws or papal laws? Because the laws were enacted by the synod of bishops and promulgated by the patriarch, it is accurate to categorize such laws as *patriarchal*. Nevertheless, the approval of the Roman Pontiff or Apostolic See radically changes the nature of the laws. One must first note that the canon describes such a law as having the force of law everywhere in the world (*ubique terrarum*). Although the law already was *in vigore* in the patriarchal territory, the approval attributes the force of law to it throughout the patriarchal church – inside and outside the territory of the

[63] There are cases in which the CCEO requires the approval of the supreme authority of the Church, the Roman Pontiff or the Apostolic See in order for the *ius particulare* to acquire the force of law: CCEO c. 56 requires approval by the *supreme authority* of the Church for norms regulating the power of patriarchs; CCEO c. 78 § 2 provides that particular law approved by the Roman Pontiff can modify the territorial restrictions on the exercise of patriarchal power; CCEO c. 138 treats special norms governing metropolitans established outside the patriarchal territory. Such norms enacted by the synod of bishops require the approval of the Apostolic See; CCEO c. 187 § 3 treats the election of bishops and allows for a possible modification of the procedure with the approval of the Roman Pontiff; CCEO c. 322 § 3 requires the approval of the Roman Pontiff for the decisions of an assembly of hierarchs to have the force of law; CCEO c. 322 § 4 requires the approval of the Apostolic See for the statutes of an assembly of hierarchs; CCEO c. 880 § 3 requires the approval by the Apostolic See for particular law enacted by the synod of bishops regarding the suppression or transfer of holy days; CCEO c. 1388 prescribes that changes to the procedure for the removal or transfer of pastors requires the approval of the Apostolic See.

[64] *Recognitio* is translated as "formal examination, inspection, review" (OLD, s. v. "recognitio"). The CCEO calls for the review of: certain liturgical texts by the Apostolic See in order for the texts to be considered as approved (CCEO c. 657 § 1); statutes of an association by the competent ecclesiastical authority in order for the association to be recognized in the Church (CCEO c. 573 § 2). One could also argue that the *receptio* of the Apostolic See of laws enacted by the council of hierarchs (CCEO c. 167 § 2) is also essentially a *recognitio*. – In comparing the process of *approbatio* with that of *recognitio* (while not drawing a too clear-cut distinction), one might characterize *approbatio* as a positive confirmation of the legislation, while *recognitio* can be construed as a preventative measure: "Recognitio, en cuanto concepto, significa el examen y fallo subsiguiente de que nada relative a la fe, las costumbres o la oportunidad es merecedor de censura" (cf. J. OTADUY – A. VIANA – J. SEDANA [ed.], Diccionario General de Derecho Canónico, Pamplona 2012; s. v. "recognitio").

[65] In addition to laws enacted by the supreme authority of the Church (CCEO c. 1492) and the common law of the Eastern Churches (CCEO c. 1493 § 1), the CCEO provides that certain particular laws are enacted by the Apostolic See: CCEO cc. 29 and 30 include possibilities for alternative norms regulating ascription; CCEO c. 138 provides that the Apostolic See can enact norms regulating metropolitan sees established outside the territory of the patriarchal church; CCEO c. 572 stipulates that either particular law of the Church *sui iuris* or particular law enacted by the Apostolic See governs societies of the Apostolic life; CCEO c. 758 § 3, in treating the admission of married men to sacred orders, indicates that the "particular law of each Church sui iuris or special norms established by the Apostolic See are to be followed in admitting married men to sacred orders"; CCEO c. 1036 § 4 provides that the Apostolic See can approve or establish the highest amount regarding the alienation of goods.

patriarchal church[66]. Once approval of the Roman Pontiff or Apostolic See is given, the synod of bishops is no longer competent to derogate from or abrogate the law without the approval of the Roman Pontiff or Apostolic See. This arrangement is not only of a theoretical, but also of a practical concern.

3. Enactment by the Eparchial Bishop

CCEO can. 150 § 3 also provides that eparchial bishops can, if they want, "attribute the force of law to disciplinary laws and other decisions of the synod in their own eparchies". How does the eparchial bishop attribute the force of law to synodal legislation? Since he is subordinate to the synod, he cannot – as is the case with the Apostolic See – *approve* the synodal legislation. The only way in which the eparchial bishop can attribute the force of law to a law enacted outside his territory is to promulgate it. This conforms to CCEO c. 1488: "Laws are established by promulgation". Unlike synodal law approved by the Apostolic See, the law promulgated by the eparchial bishop is *eparchial law* since the eparchial bishop is the author of the legislation. Eparchial law falls under the general category of *ius particulare* and is thereby susceptible to future derogation by himself or his successors.

The provision contains a restrictive clause that generally seems to be overlooked: the eparchial bishop can attribute the force of law to those matters that do not exceed his competence (*quae eorum competentiam non excedunt*)[67]. Inclusion of this phrase in the canon is premised on the fact that the synod of bishops enacts laws that are beyond the competence of the eparchial bishop to enact. Can. 150 § 3 does not give the eparchial bishop *carte blanche* to duplicate the laws of the synod in his own eparchy; *he can attribute the force of law only to those laws that are within in his competence to legislate.*

What are the limits of competence? The Eastern Code articulates certain distinctions. Taking a *via negativa* approach, the Eastern Code defines *ius particulare* ("particular law") as laws, legitimate customs, statutes and other norms of law, which are neither common to the entire Church nor to all the Eastern Catholic Churches[68]. The term *ius particulare* is a generic term that includes patriarchal, major archiepiscopal, metropolitan and eparchial laws,

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[66] Some argue that the approval of the Apostolic See extends the legal force of the synodal enactment only extraterritorially but if the intention of the legislator is to provide for a consistent canonical arrangement for the patriarchal church, it would seem that approval of a synodal enactment is for the *entire* patriarchal church, that is, inside and outside the territory. It is illogical that the synod of bishops would be competent to derogate from or abrogate a law approved by the Roman Pontiff or Apostolic See even inside the patriarchal territory. The provision of CCEO c. 985 § 2 ("An inferior legislator cannot validly issue a law contrary to higher law") should also be kept in mind.

[67] Some might presume that this phrase refers only to the fact that eparchial bishops cannot attribute force of law contrary to enactments of the Roman Pontiff or Apostolic See, implying the restrictions on married clergy. Such a presumption is unsupported.

[68] CCEO c. 1493 § 2. While the canon refers to "Church" and "Eastern Churches" without the qualification of "Catholic", one can presume that the scope of the definitions are restricted to the Catholic communion (cf. CCEO c. 1).

statutes of juridic persons and bodies, each of which is enacted according to the nature of the institution.

In addition to the generic term of *ius particulare*, the Eastern Code also employs the term *ius particulare Ecclesiae sui iuris* to designate laws enacted *at the level of the Church sui iuris*. The *ius particulare Ecclesiae sui iuris* is further specified according to the hierarchical rank of the Church *sui iuris* enacting it: (1) *ius particulare Ecclesiae patriarchalis*[69]; (2) *ius particulare Ecclesiae Metropolitanae sui iuris*; and (3) *ius particulare in "ceteris" Ecclesiis sui iuris*[70].

The Eastern Code stipulates what authority is competent to enact *ius particulare Ecclesiae sui iuris*[71]: the Roman Pontiff[72], the supreme authority of the Church[73], the Apostolic See[74], the synod of bishops of the patriarchal church / major archiepiscopal church[75], the council of hierarchs of the metropolitan church *sui iuris*[76] and the competent authority in an "Other" Church *sui iuris*[77]. One must conclude that no other authority is competent to enact *ius particulare Ecclesiae sui iuris*[78].

Legislation enacted by an eparchial bishop, while falling under the category of *ius particulare*, does not qualify as *ius particulare Ecclesiae sui iuris*; an eparchial bishop attempting to enact particular law falling under the category of *ius particulare Ecclesiae sui iuris* would be acting beyond his competence. This is the parameter of the phrase "which do not exceed their competence" (*quae eorum competentiam non excedunt*) as found in *CCEO* canon 150 § 3.

Certain articles of the 1996 Maronite Particular Law refer to canons that speak of *ius particulare* and are therefore within the competence of the eparchial bishop to legislate: 17 (participants in eparchial synod); 20 (term of office for eparchial finance officer); 24 (term of office of protopresbyter); 25 (role of

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[69] Note that the synodal enactments of the major archiepiscopal church fall under this category; see CCEO c. 152.

[70] These are the distinctions drawn by I. ŽUŽEK in Index Analyticus Codicis Canonum Ecclesiarum Orientalium (Kanonika 2), Rome 1992; s. vv. "ius particulare", "ius particulare Ecclesiae patriarchalis", "ius particulare Ecclesiae Metropolitanae sui iuris", "ius particulare Ecclesiae sui iuris", "ius particulare in "ceteris" Ecclesiis sui iuris". See also BHARANIKULANGARA, 28-31.

[71] There appears to be an imprecision in CCEO c. 880 § 2 ("The competence to constitute, transfer or suppress feast days and days of penance for individual Churches *sui iuris* belongs also to the authority in those churches that is competent to establish particular law. It may do so, however, only after taking into account the other Churches *sui iuris* and without prejudice to can. 40 § 1"). There are many authorities competent to establish particular law; it would seem that the canon intends to restrict the authority to those competent to enact particular law on behalf of the entire Church *sui iuris*.

[72] CCEO cc. 78 § 2; 159; 182 § 3.

[73] CCEO cc. 56; 58.

[74] CCEO cc. 29 § 1; 30; 554 § 2; 888 § 3; 1388.

[75] CCEO c. 110 § 1.

[76] CCEO c. 167 § 1.

[77] CCEO c. 176.

[78] It is worth noting that the particular law of a Church *sui iuris* has greater stability than particular law of an eparchy because of the legislative authority behind it. One should also take into account that the formalities required in the enactment and promulgation of particular law of a Church *sui iuris* are more demanding.

protopresbyter); 28 (acquisition of office of pastor); 31[79] (preservation of older parish records); 35 (director of vocations); 36 (lay students in minor seminaries); 37 (seminary statutes); 38 (seminary moderators); 41 (annual retreat for seminarians); 42 (conduct of clerics); 44 (daily celebration of Divine Liturgy); 45 (unbecoming clerical conduct); 48[80] (annual vacations of clerics); 49 (clerical garb); 50 (financial support of clerics and their families); 52 (conventual chapters of monasteries with less than six members); 56 (establishment of other forms of ascetical life); 58 (private associations); 59 (catechumenate program); 60 (catechetical committee); 61 (homilies); 62 (clerics and social communications); 65 (place and minister of baptism); 66 (qualifications for lawfulness of sponsors); 77 (announcement of candidates for sacred orders); 78 (spiritual retreats for ordinands); 83 (proper pastor of marriage); 89 (reception of lay persons into Maronite Church); 90 (ecumenical initiatives); 97 (annual budgets and financial reports); 98 (annual reports on donations); 99 (creation of non-autonomous pious foundations); 100[81] (constitution or acceptance of pious foundations); 102 (communication of judicial acts); 103 (expenses for judicial causes); 105 (penal sanctions).

Some articles of the Maronite Particular Law refer to canons of the Eastern Code in which the term *ius particulare* is used without any further qualification, but *ex natura rei* such matters are beyond the legislative competence of the eparchial bishop: 1 (election of patriarch); 2 (time for the convocation of synod of bishops for patriarchal election); 3 (synod presidency during patriarchal election); 4 (election of secretary and scrutineers); 5 (requirements for election); 6 (patriarchal visitation of eparchies); 7 (ordination of bishops); 8 (obligation of patriarch to offer Divine Sacrifice for the faithful); 9 (voting rights of bishops outside territory); 10 (convocation of synod of bishops); 11 (patriarchal finance officer); 12[82] (election of bishops); 15[83] (obligation of eparchial bishop to be present in eparchy); 16 (eparchial administrator); 33 (exarchs emeriti); 46 (clerics and political activities); 53 (dispensation from temporary vows); 54 (dismissal of monk in temporary vows); 92 (recourse against patriarchal administrative decree); 101 (establishment and operation of unified permanent tribunal).

There are also MPL articles that refer to canons calling for *ius particulare Ecclesiae sui iuris* (or a variation of this term). The articles are as follows: 13

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[79] MPL art. 31 refers to CCEO c. 296 §§ 1 and 5. The first paragraph calls for norms of particular law of the Church *sui iuris;* the fifth paragraph refers to particular law on the preservation of older parish registers.

[80] In combining CCEO cc. 386 § 1 and 392, MPL art. 48 creates an imprecision: it refers to month-long absences from the eparchy. If a cleric took his vacation within the territory of the eparchy, he would not be canonically absent. One notes that the article refers to all clerics, not just presbyters.

[81] MPL art. 100 treats the acceptance of pious foundations and makes reference to the *Law on the Personal Statutes of Catholic Rites*. The personal statutes are beyond the scope of an eparchial bishop outside the territory of the patriarchal church.

[82] MPL art. 12 § 2, in treating the presentation of candidates, refers to particular law approved by the Roman Pontiff, but does not cite the specific reference.

[83] MPL art. 15 refers to CCEO c. 204 § 3, which includes the phrase "established by the particular law of his own Church *sui iuris*".

(permission to confer orders of chorbishop and periodeut); 14[84] (obligation of eparchial bishop to celebrate Divine Eucharist for the intentions of the faithful); 18 (communication of acts of eparchial assembly); 19 (protosyncellus and syncellus should be celibate presbyters); 21 (eparchial finance council); 22 (presbyteral council); 23 (qualifications of protopresbyter); 24 (protopresbyter term of office); 26 (term of office of pastors); 27 (appointment of several presbyters to one parish); 29 (obligation of pastor to celebrate Divine Liturgy for intentions of faithful); 30 (parish councils); 32 (retirement of pastors); 34[85] (ministry of minor clerics); 39 (ascription through reception of minor orders); 40 (transfer of ascription of a cleric to another Church *sui iuris*); 43 (clerical obligation to celebrate divine office); 47[86] (prohibition of clerics to exercise business or trade); 51 (entrusting ecclesiastical functions to lay persons); 55 (erection of secular institutes); 57 (establishment of societies of apostolic life); 63 (intellectual property rights); 64 (permission for non-Catholic Christians to use ecclesiastical facilities); 79 (marriage preparation / betrothal); 80 (determination of freedom to marry); 81 (lawful age of marriage); 82 (promises in mixed marriage); 84 (marriage by proxy); 91 (provisions for the establishment of offices); 93 (eparchial taxes on physical persons); 94 (taxes for acts of governance); 95 (financial support of clerics); 96 (administration of ecclesiastical goods); 104 (execution of judicial sentence).

Finally, there is *ius particulare* that requires the approval of the Roman Pontiff (cf. CCEO can. 182 § 3 and 880 § 3) or the Apostolic See (cf. CCEO can. 1388) in order to acquire the force of law. In the case of the particular law of the Maronite Church, one can refer to MPL art. 12 § 2[87], which treats the election of bishops and requires approval of the Roman Pontiff; MPL art. 87[88], which treats holy days of obligation and requires the approval of the Apostolic See.

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[84] MPL art. 14 (cf. CCEO c. 198) does not have the force of law outside the territory of the patriarchal church, but the eparchial bishop is bound by the more general obligation imposed by the Eastern Code. Even if CCEO c. 198 referred only to *ius particulare*, it would be inappropriate for the eparchial bishop to legislate in this matter because effectively he would be binding only himself. Cf. MPL arts. 18, 21 and 22.

[85] CCEO c. 327 defers the organization of ministries of minor clerics to particular law of the Church *sui iuris*; MPL art. 34 in turn relegates the organization of the ministries of cantor, lector and subdeacon to the eparchial bishop in collaboration with the pastor.

[86] One should note that most of the deacons in my own eparchy are in violation of CCEO c. 385 § 2.

[87] "In accordance with the particular Law approved by the Roman Pontiff, only the patriarch has the right to propose the names of the episcopal candidates to the fathers of the synod, who examine the names of the candidates and then compile a list of the names by secret ballot which must be transmitted through the patriarch to the Apostolic See in order to obtain the assent of the Roman Pontiff".

[88] "§ 1. The holy days of obligation in our Church are the following: the Nativity, new years day [sic], the Epiphany, Saint Maron, Saint Joseph, Holy Week, Good Friday, Easter Monday, Saints Peter and Paul, the Assumption of the Virgin, the Triumph of the Cross, All Saints, Immaculate Conception and the feast of the patron of the parish, except if the eparchial bishop has transferred any of these feasts to Sunday, when it does not coincide with a civil holiday. § 2. Along with the Synod of Bishops of the Patriarchal Church, the patriarch has the right to establish, transfer or suppress them for all the Maronite Church taking into consideration, as much as possible, the situation of the other Churches and the circumstances of place and time. § 3. Along with the Synod of Bishops of the Patriarchal

In order to appreciate the distinctions regarding the competence of an eparchial bishop to attribute the force of law to enactments of the synod of bishops, let us examine some specific issues.

CCEO can. 284 § 3, 4°[89] provides that a pastor is permanent in his office and is not to be appointed for a fixed period of time unless the particular law of his Church *sui iuris* permits it. Based on this provision, MPL article 26[90] permits a pastor to be appointed for a determined period of time.

CCEO can. 284 § 3, 4° does not refer simply to any particular law, but to particular law *at the level of the Church sui iuris*. The eparchial bishop is not competent to enact particular law of the Church *sui iuris* and, therefore, is not competent to enact legislation that would allow for the appointment of a pastor for a determined period of time. This arrangement is appropriate; otherwise the eparchial bishop would be legislating for himself alone (cf. MPL articles 14, 18, 21 and 22).

Another example can be found in MPL article 27 § 1[91] regarding the arrangement of entrusting a parish to several presbyters. CCEO canon 287 § 2[92] provides that particular law of the Church *sui iuris* can allow for the derogation from the general provision that each parish is to have only one pastor. The eparchial bishop is not competent to enact this legislation for his own eparchy.

There are cases in which the Maronite Particular Law requires confirmation of an eparchial bishop's actions by a superior authority. For example, MPL article 56[93], in reference to CCEO canon 570[94], provides that an eparchial bishop, with the consent of the presbyteral council, can establish other forms of the eremitical life, the statutes of which are to be approved by the patriarch together with the synod

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Church, the patriarch also has the right to suppress or transfer to a Sunday the holy days of obligation common to the Oriental Churches with the approval of the Apostolic See. § 4. Taking into consideration the circumstances of place, fasting is obligatory in the season of Lent and Holy Week. Abstinence is obligatory on Fridays throughout the year except the period between the feast of the Nativity and the Epiphany, between the feast of Easter and Pentecost, the week preceding the season of Lent and the Fridays that fall on a holy day of obligation".

[89] "The pastor is permanent in his office, therefore he is not to be appointed for a determined period of time unless the particular law of his Church *sui iuris* permits it".

[90] "The pastor possesses stability in his office. However, he can be named for a fixed period of time determined by the eparchial bishop in accordance with can. 284 § 3".

[91] "In the same parish there must be only one pastor. However, when necessary, a parish may be entrusted to several presbyters on condition that the eparchial bishop determine in the decree of appointment the rights and obligations of the moderator and the other presbyters".

[92] "In the same parish there is to be only one pastor; however, if the particular law of the Church *sui iuris* allows it, a parish may be entrusted to several presbyters; the same particular law is to determine precisely the rights and obligations of the moderator, who directs the common action and reports on it to the eparchial bishop, and what are those of the other presbyters".

[93] "The eparchial bishop can, with the consent of the presbyteral council, establish other forms of ascetical life which imitate the eremitical life which may or may not belong to an institute of consecrated life. Consecrated virgins and widows living in the world and having publicly professed chastity can also be accepted. The ecclesiastical authority which confirms these statutes is the patriarch with the Synod of Bishops of the Patriarchal Church".

[94] "By means of particular law, other kinds of ascetics who imitate eremitical life, whether they belong to an institute of consecrated life or not, can be constituted. Consecrated virgins and widows living apart in the world, having publicly professed chastity, can also be established".

of bishops. Since it is a matter of simple particular law, the eparchial bishop is competent to enact it in his own eparchy; however, it is unlikely that he will oblige himself to obtain the approval of the statutes to the patriarch and synod.

Let us conclude the examples with an examination of MPL article 19[95], which provides that particular law of the Church *sui iuris* can permit the appointment of a married presbyter in conformity with CCEO can. 247 § 2[96]. An eparchial bishop in the United States is not competent to enact such a law for his own eparchy because it is not within his competence to enact *ius particulare Ecclesiae sui iuris*. Further, appointment of married presbyters to office in the United States is contrary to special norms enacted by the Apostolic See[97].

4. Ramifications in Laws Lacking Territorial Extension

Given the territorial restriction of patriarchal authority (cf. CCEO can. 78 § 2), the territorial restrictions of the legal force of laws enacted by the synod of bishops (cf. CCEO can. 150 § 2) and the possibility of the extension or non-extension of the force of law to laws enacted by the synod of bishops (cf. CCEO canon 150 § 3), one must conclude that the Eastern Code foresees the existence of two legal systems in effect in each of the patriarchal churches. Such a dichotomy can have awkward effects.

For example, MPL article 39[98] significantly modifies of the general provision of CCEO can. 358[99] regarding ascription (incardination) of clerics by stating that by the reception of any of the three minor orders, i.e., cantor, lector and subdeacon, one is ascribed in the eparchy. Such an arrangement is possible at the level of *ius particulare Ecclesiae sui iuris*; it exceeds the competence of the eparchial bishop to enact such law. Therefore, lacking approval of the Apostolic See, the Maronite Church now has two systems of clerical ascription: ordination to minor orders inside the territory of the patriarchal church and ordination to the diaconate outside the territory of the patriarchal church.

Similar disparities of discipline that can be resolved only with the intervention of the Apostolic See also exist in the case of the obligation of clerics to celebrate the divine office (MPL art. 43)[100].

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[95] "The vicar general and the episcopal vicar must be celibate presbyters. In case of necessity, the latter may be a married priest".

[96] "The protosyncellus and the syncelli are to be celibate presbyters, unless the particular law of their Church *sui iuris* has established otherwise; if possible, they should be from the clerics ascribed to the eparchy; they are to be not less than thirty years of age, have a doctorate, licentiate or expertise in some sacred science; be commendable for sound doctrine, uprightness, prudence and practical experience".

[97] Sacred Congregation for the Eastern Church, decree *Qua sollerti*, 23 December 1929, in: AAS 22 (1930) 99-105.

[98] "By reception of any of the minor orders a seminarian is enrolled in the eparchy".

[99] "Through diaconal ordination, one is ascribed as a cleric to the eparchy for whose service he is ordained, unless in accord with the norm of particular law of his own Church *sui iuris*, he has already been ascribed to the same eparchy".

[100] MPL art. 43 (cf. CCEO c. 377): "Cleries in major orders must celebrate the divine office in choir or privately".

Regarding disciplinary laws enacted by the synod of bishops and promulgated by the patriarch but lacking approval of the Apostolic See, it is to be noted that the eparchial bishop is free to promulgate a law that is identical, similar or even contrary to the disciplinary laws of the patriarchal church that do not enjoy the force of law outside the territory of the patriarchal church. Disciplinary laws enacted by the synod of bishops have a certain moral weight, but the prohibition against the enactment of legislation contrary to superior legislation is not applicable since there is no superior legislation *in vigore*.

For example, CCEO can. 331 § 1 allows for particular law to permit students not called to the clerical state to be educated in a minor seminary; MPL article 35 prohibits such students from boarding as internal students. An eparchial bishop can enact the same particular law in his eparchy or provide otherwise according to the provisions of the common law.

Another scenario should be taken into consideration. The synod of bishops can enact particular law in a specific matter; subsequently, an eparchial bishop can, if it is within his competence, enact the same provisions in his own eparchy. If, in the future, the synod of bishops should change the law, the eparchial bishop is not obliged to modify his own eparchial law.

5. A Proposal for Greater Clarity

There are some who will not share the conclusions drawn in this paper. Nevertheless, the study has shown that the present system gives rise to confusion regarding the force of law of synodal enactments. Under the current provisions, the extraterritorial extension of the force of law is left to two authorities, one inferior (the eparchial bishop) and one superior (the Roman Pontiff or the Apostolic See). In the case enactment of eparchial law on the part of the eparchial bishop, there are limitations as to what he can enact or as to what he might be willing to enact. In the case of approval on the part of the Apostolic See, we have shown that the act of approval effectively impinges upon the self-governing authority of the patriarchal churches.

An *ad hoc* alternative arrangement could be that synodal enactments intended to have the force of law throughout the patriarchal church would be submitted to the Apostolic See for a *recognitio* that would have the limited scope of assuring that the synodal law is not contrary to doctrine, the common law or customs.

V. Conclusion

One analyzing the particular law of an Eastern Catholic Church must approach the task with a gentle and understanding disposition for a variety of reasons. One must realize that the resources of some of the Eastern Catholic Churches are quite limited and that the task of enacting particular law is quite demanding. One must also take into account that the Eastern Catholic Churches

have only been truly "emancipated" in the middle of the twentieth century. Before that, they were not self-governing, but governed. Above all, for many of the Eastern Catholic Churches, this is a period of crisis: many of these churches find themselves in the midst of political upheaval and social turmoil. At such times, survival – not legislative refinements – is the priority.

CODE OF PARTICULAR LAWS OF THE SYRO-MALABAR CHURCH

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The work of the codification of the Particular Law[1] (PL)[2] of the Syro-Malabar Church (SMC)[3] started soon after the promulgation of the *Code of Canons of the Eastern Churches* (CCEO). The Code of Canons of the Eastern Churches limits itself to the codification of the discipline common to all Eastern Churches, leaving to the competent authorities of these Churches the power to regulate by Particular Law all other matters not reserved to the Holy See[4]. CCEO defines the term Particular Law in canon 1493 §2. When CCEO was promulgated in 1990, the Roman Pontiff expressed his mind regarding all that the Code entrusts to Particular Law thus:

> "Besides, in this matter, let it be noted well that this Code leaves to the Particular Laws of each *sui iuris* Church, those things which are considered not necessary for the common good of all Oriental Churches. On this matter our mind is that those who are endowed with legislative power in each *sui iuris* Church take steps to formulate their Particular Laws as quickly as possible, keeping in mind the traditions of their own rite as well as the teaching of the Second Vatican Council"[5].

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[1] Originally, this study was made on Particular Laws which were promulgated and published in *Synodal News* part by part and they have been in force in the Syro-Malabar Church. On 3rd December 2013, Major Archbishop George Cardinal ALENCHERRY decreed that the publication of the particular laws, statutes of the important organs and guidelines for various commissions in a single volume entitled *Code of Particular Law of the Syro- Malabar Church*. Thus, the study is updated. SMMAc, Code of Particular Law of the Syro- Malabar Church, Mount St. Thomas, Kochi2013, vii.

[2] The following are the principal abbreviations are used in this study: art./artt. = article/articles; c./cc. = canon/canons; CCEO = Code of Canons of the Eastern Churches; CPL= Code of Particular Law; CPLSMC = Code of Particular Law of the Syro- Malabar Church; MAC = Major Archiepiscopal Church; PL = Particular Laws; PLSMC = Particular Law of the Syro-Malabar Church; SMC = Syro-Malabar Church; SMMAC = Syro Malabar Major Archiepiscopal Church; SMMAc = Syro Malabar Major Archiepiscopal curia; SMPL = Syro-Malabar Particular Law.

[3] George Nedungatt has made a historico-juridical study on this topic: G. NEDUNGATT, Laity and Church Temporalities, Appraisal of a Tradition, Bangalore 2000, 334-378; for a short study on the topic in Malayalam language cf. A. THAZHATH, Prathyeka-Niyamangal Syro-Malabar Sabhayil, in: S. VADAKKEL – G. MADATHIKKANDATHIL (ed.), Paurastyasabagalude Kanonakal Sabhajivithathil, Kottayam 1998, 970-80.

[4] This is explicitly stated in the guidelines for the revision of the Code of Oriental Canon Law. cf., Pontificia Commissione Codici Iuris Canonici Orientalis Recognoscendo, Nuntia no. 3 (1976) 21-23. Particular Law in the Code of Canons of the Eastern Churches by Ivan Žužek is a good study on this topic: I. ŽUŽEK, Particular Law in the Code of Canons of the Eastern Churches, in: J. CHIRAMEL – K. BHARANIKULANGARA (ed.), The Code of Canons of the Eastern Churches. A Study and Interpretation, Alwaye, India 1992, 39-56.

[5] "Quibus de rebus mens Nostra est, ut qui legislativa potestate in singulis Ecclesiis sui iuris gaudent, peculiaribus normis, proprii ritus traditionibus praeoculis habitis necnon Concilii Vaticanii II praeceptis, qua, celerrime consulant"; AAS 83 (1990) 1038.

The Syro-Malabar Church which is the second largest Churches *sui iuris* after Ukrainian Church in the Oriental Catholic communion of the 22 Churches *sui iuris*, has the distinction of being the first of all the Eastern Catholic Churches to start and finish the codification of its Particular Laws. I shall sketch briefly the *iter* of this codification, the main provisions and the lacunae. I conclude the study pointing out the challenges of this Church *sui iuris* in the realm of its Particular Laws.

I. Particular Laws in CCEO

CCEO c. 1493 reads as follows:

> "§ 1. Under the name 'common law' in this Code come, besides the laws and legitimate customs of the entire Church, also the laws and legitimate customs common to all the Eastern Churches.
>
> § 2. Under the name 'Particular Law' come all laws, legitimate customs, statutes and other norms of law, which are neither common to the entire Church nor to all the Eastern Churches".

From this canon,

> "it is evident that the term ius particulare applies to all those laws that are not applicable to all Oriental Churches, much less to the entire Catholic Church, but to a 'part' of it - to one sui iuris Church, whether patriarchal Church or a Metropolitan Church or Remainder Church"[6].

The term is used as correlative of *ius* commune. The expression *ius particulare (propriae) Ecclesiae sui iuris* excludes eparchial laws and every other inferior PL. Prof. Ivan Žužek in 1991 at Bari in the International Congress on the Meeting of the Eastern and Western Canons, explained about this canon in his paper "Particular Law in the Code of Canons of the Eastern Churches". He explains:

> "This canon contains the conciliar text (LG no 27) relative to the 'proper, ordinary and immediate' power of the eparchial bishops, who govern their eparchy *ut vicarii et legati Christi*, the exercise of which can be circumscribed only by the supreme authority of the Church"[7].

However, the history of canon law shows that local synods have made canons circumscribing the exercise of the power of eparchial bishops.

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[6] K. BHARANIKULANGARA, Particular Law of the Oriental Catholic Churches, in: Journal of St. Thomas Christians 23, nn. 2-4 (April- December 2012) 87.

[7] ŽUŽEK, Particular Law (= note 4), 92.

II. The Genesis of Particular Laws

The Code of Canons of the Eastern Churches (CCEO) contains those canons that are common to all the Oriental Catholic Churches, which however, may differ as regards liturgy, theology, spirituality, discipline, customs, traditions etc. To safeguard and promote them the CCEO has more than 200 provisions, which require the making of Particular Laws by the legislative authority of each, Church *sui iuris*[8].

III. History of the Codification of Particular Laws

The history of the Codification of Particular Laws of Syro-Malabar Church has undergone different phases. The codification process was started in 1991 and ended in 2014. It was a journey lasted about 23 years. Finally in December 2014 the Code of Particular Law of Syro-Malabar Church was published as a single volume. Let us make a bird's eye view of the codification process of the PLSMC step by step.

1. Bishops' Committee

Giving heed to the words of the Supreme Pontiff the Syro-Malabar Bishops' Conference held on 30 November 1990 agreed on the need for formulating Particular Laws including the Synodal Statutes for the SMC and consequently elected a Bishops' Committee to facilitate the process of codifying the Particular Laws[9].The bishops' committee was assisted by an Expert's committee[10].

2. The Synodal Commission

After the elevation of the SMC to the dignity of Major Archiepiscopal Church, both the Bishops' committee as well as the expert committee was re-constituted by Archbishop Abraham Kattumana, the Pontifical Delegate to the

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[8] Particular Laws of Patriarchal and Major Archiepiscopal Churches need no approval of the Roman Pontiff wherever the provisions are given in CCEO.

[9] J. THALACHALLOR, Particular Law of the Syro-Malabar Church, in: F. ELUVATHINGAL (ed.), Syro-Malabar Church since the Eastern Code (Festschrift in honour of G. Nedungatt), Trichur 2003,104; SMMAc, Code of Particular Law of the SMC, viii: "The Committee consisted of Mar Matthew Vattackuzhy (convener), Mar Kuriakose Kunnassery and Mar Jacob Thoomkuzhy. The Bishops' committee Chairman collected the names of Canon Law experts from all the Syro-Malabar dioceses. From a list thus prepared, the Bishops' committee selected 37 experts with the provision to include any additional member, whose name was not in the list proposed by the hierarchs. However this inclusion needed previous clearance from the hierarch concerned. The first meeting of the committee of experts was held at Renewal Centre, Ernakulam on 4-5 March 1991. Three more members were co-opted to the committee after the first meeting and the total members of the expert committee became 43 including the Bishops".

[10] SMMAc, Code of Particular Law of the SMC, viii.

Syro-Malabar Church[11], and he officially opened the first SM synod of bishops (from 20-25 May 1993) at Ernakulam[12]. Mar Antony Cardinal Padiyara, the then Metropolitan Archbishop of Ernakulam was elevated to the dignity of the Major Archbishop and he was installed as the first Major Archbishop on 20 May 1993[13].

3. The Pontifical Delegate and the Codification

Fr. George Nedungatt had formulated certain model guidelines[14]. They were taken over by the Particular Law Committee. The Bishops' committee, with its consulters as well as the expert committee under the direction of the Pontifical Delegate Archbishop Abraham Kattumana worked assiduously in preparing drafts of Particular Laws[15] on the various activities of the Church. The expert committee was divided into seven different subcommittees. These committees worked according to the procedural guidelines given to them[16].

The drafts prepared by the subcommittees were brought to the general meetings of the members of the subcommittees. These drafts were simultaneously

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[11] The Congregation for the Eastern Churches through its decree dated Dec. 16, 1992 made public the appointment of Archbishop Abraham Kattumana by the Roman Pontiff as his special delegate to the newly erected Major Archiepiscopal Church. Cf. Synodal News 1, no. 1 (1993) 8.

[12] Synodal News 1, no. 1 (1993) 4-7.

[13] SMMAc, Code of Particular Law of the SMC, ix; Synodal News 1 (1993) 10-11.

[14] G. NEDUNGATT presents "The Guidelines for the Particular Code of the Syro-Malabar Church" under the following headings: "(1) Preamble, (2) Title, (3) A Code true to the Church Identity, (4) Oriental Character of the PCSMC, (5) Indian Character of PCSMC, (6) Principle of Subsidiary, (7) A Code for today and Tomorrow and not for Yesterday, (8) Ecumenical Character of PCSMC, (9) Pastoral Nature of PCSMC, (10) The Laity, the Clergy and the Religious, (11) The Missionary Thrust of PCSMC, (12) Mindful of the Diaspora, (13) Participation of all, (14) The Structure of PCSMC, (15) Other Directives, (16) Bishops' Commission and (17) Approval", in: The Spirit of the Eastern Code, Rome – Bangalore 1993, 218-221.

[15] The pontifical delegate invited Fr. Nedungatt to the major archiepiscopal curia to draft the statutes of the permanent synod, the superior tribunal, the major archiepiscopal tribunal and the major archiepiscopal assembly. Though the pontifical delegate had already got someone to draft them, he was not satisfied with the drafts provided by them. Therefore, he requested the help of Fr. Nedungatt. He came to the curia and stayed there for almost two weeks during summer vacation in 1994 and completed the drafting of the statutes. The synod approved all the four for promulgation without many modifications. Cf. J. PORUNNEDOM, Memoirs: Rev. Dr. George Nedungatt SJ: Canonist and Teacher, in: ELUVATHINGAL, Syro-Malabar Church since the Eastern Code (= note 9), 16; also in: Journal of St. Thomas Christians 23 (2011) 2, 3, 4 (Festschrift), 14.

[16] Procedural Guidelines for The Drafting of The Particular Laws of The Syro-Malabar Church were the following: "(1) The Particular Laws should be based on the Codex Canonum Ecclesiarum Orientalium (2) Each Sub-Committee is expected to point out to the General Committee those canons which give provision for particular law (3) In drafting the canons of the particular laws special attention should be given to the following points (3.1) The Sources (3.1.1) Pre-Portuguese (until the 16th century), (3.1.2.) From 1599-1887, (3.1.3) From 1887-1990, (3.1.4) Present constitutions and statutes of Juridical Institutes, (3.2.) The existing particular customs, traditions and laws (Their variants in dioceses and regions are to be noted), (4) Specify the laws and structures to be supplemented, (5) Find the lacunae in the present code and in the present juridical structures in the Syro-Malabar Church, (6) Make a study of the particular laws of other Churches and Christian denominations and (7) Each sub-committee has to prepare a schema of the particular laws in the sections assigned to it, indicating their sources". Cf. THALACHALLOR, Particular Law of the Syro-Malabar Church (= note 9), 105; SMMAc, Code of Particular Law of the SMC, ix-x.

published in the Synodal News with the request to the readers to send their observations to the Curia. The observations and suggestions received in the Major Archiepiscopal Curia were given to the Synodal Commission. In the light of the observations and suggestions, the Commission had to submit the revised drafts to the Synod for final discussion and approval[17]. On 1 January 1995 the Pontifical delegate promulgated ad experimentum for a period of three years the Statutes of the Permanent Synod, the Statutes of the Superior Tribunal the statutes of the Major Archiepiscopal Ordinary Tribunal and the Revised Statutes of the of the St.Thomas Apostolic Seminary Vadavathoor[18].

The sudden and unexpected demise of the Pontifical Delegate on April 4, 1995 slowed down considerably the pace of the activities of the commission for PL. Following the death of Mar Abraham Kattumana, Mar Antony Cardinal Padiyara, the Major Archbishop, continued to lead the Church.

4. Completion of Codification Process and the Code of PLSMC

Subsequent to the resignation of Mar Antony Padiyara from the office of the Major Archbishop, Mar Varkey Vithayathil C.Ss.R. was appointed the Apostolic Administrator in 1997 and as Major Archbishop in 1999. It was he as Apostolic Administrator and later as Major Archbishop who promulgated the rest of the Particular Laws[19].

All the Particular Laws promulgated up to 2003 and the Particular Laws on the Permanent Diaconate were published as a single volume of the Synodal News[20]. The codified version of the Particular Laws of the SMC was published in 2003 in Synodal News[21]. It constituted the Text of the PL of the Syro-Malabar Church till the publication of the Code of Particular Law of the Syro-Malabar Church. Since then a few studies have been published on the Particular Law of the SMC[22].

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[17] Synodal News 3 (1995) 20.

[18] SMMAc, Code of Particular Law of the SMC, x-xi.

[19] Ibidem, xi.

[20] Synodal News 11, no. 1 (2003); Mar Paul Chittilapilly, the chairman of the Commission for Particular Law had informed the Synod held during 5-16 November 2001 that the particular laws promulgated in different periods would be edited into one code. Cf. ibidem 9, nos. 1-2 (2001) 21; Mar Paul Chittilapilly had been appointed the chairman of the Commission during the synod held from 12 to 21 June 1997, following the resignation of Mar Mathew Vattackuzhy from the chairmanship due to his ill health. Cf. ibidem 5, no. 2 (1997) 19.

[21] Ibidem 11, no. 1 (2003) 3-11 (Preamble). Synodal News is the official organ of the Syro-Malabar Major Archiepiscopal Church. It started publication in August 1993. In its first issue the origin of the Synodal News could be traced. "It was the wish of the fathers who assembled together for the First Syro-Malabar Bishop's Synod from 20 to 25 May 1993 at Ernakulam that a bulletin be published at least after each synod to keep the Church informed of the work of the Synod and of the Major Archiepiscopal Curia and to communicate all important news in our Church. They themselves proposed a provisional title 'Synodal News'." It continues to be published after every Synodal session.

[22] THALACHALLOR, Particular Law of the Syro-Malabar Church (= note 9), 100-116; S. KOKKARAVALAYIL, The Particular Law of the Syro-Malabar Church: an Appraisal, in: Ephrem's Theological Journal 11 (2007) 178-197; M. VATTAPPALAM – J. PORUNNEDOM – M. KOCHUPURACKAL (ed.), A Study on the Particular Laws of The Syro-Malabar Major Archiepiscopal

The newly published text of the (3rd Dec. 2013) Code of Particular Law of the Syro- Malabar Church has the following structure: 1. Decree of Promulgation (v-vii) 2. Preface (viii-xiv) 3. Preamble with Sections one and two (xv-xix) 4. Part I deals with Particular Laws (1-48) 5. Part II deals with Statutes (49-133) and Part III deals with Guidelines (135-176). In publishing it, Mar George Alencherry wrote:

> "The law contained in this Code have already been promulgated and published part by part and they have been in force since they were promulgated"[23].

The Preface of the Code of Particular Law of the Syro-Malabar Church gives a brief general account of the codification history of the Code of Particular Law of SMC. It follows Preamble of CPLSMC. In it Section One, first sketches a brief history of SMC and Section Two deals with the sources of its PC.

IV. Preamble of the CPLSMC

The Preamble of the Code of PLSMC has got two sections. Section one deals with the history of the Syro-Malabar Church and Section two deals with the sources of PLSMC. We make a brief study on it.

1. Section one: A Note on the chequered History of the Syro-Malabar Church

The Church of St. Thomas Christians is an apostolic Church founded in India by the apostle Thomas. This Church later came into life-relation with the Persian Church (East Syrian Church). This relationship made the St. Thomas Christians share the liturgical, spiritual and other ecclesial traditions with the East Syrian Church. At the same time

> "the Christians of St. Thomas kept their distinctive character especially in Church administration and socio-cultural and ascetic-spiritual life"[24]. The effective administration "of the community was in the hands of the

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Church, Bharananganam 2007; S. KOKKARAVALAYIL, Syro-Malabar Particular Law: an Adequate Response to CCEO's Call?, in: Pontificio Consiglio per i Testi Legislativi (ed.), Il Codice delle Chiese orientali: la storia, le legislazioni particolari, le prospettive ecumeniche, Vatican City 2011, 225-242; M. KOCHUPURACKAL, Particular Law of the Syro-Malabar Church: An Evaluation of the Present Stage, in: Eastern Lagal Thought 9-10 (2010-2011) 177-191. The present study has been facilitated by these studies.

[23] Fulfilling the long desired dream of the Syro-Malabar Church, the Major Archbishop George Cardinal Alencherry published Code of Particular Law of the Syro-Malabar Church in a single volume on 3rd December 2013. In publishing it Mar George Alencherry wrote: "The laws contained in this Code have already been promulgated and published part by part and they have been in force since they were promulgated". Cf. G. ALENCHERRY, Code of Particular Law of the Syro-Malabar Church, Kochi 2013, vii.

[24] Chief Editor, Preamble, in: Synodal News 11, no. 1 (2003) 5.

archdeacon, a native priest. The archdeacon carried out the administration through general and local assemblies (*Palliyogam*). The sum total of this life was called the Law of Thomas (*Mar Thoma Margam*)"[25].

The chequered history of the SMC can be classified under four periods: (1) the Indian Christian Period[26] (1st century to 4th century), (2) the Chaldean Period[27] (4th century to 16th century), (3) the Latin Period[28]-under *Padroado* and *Propaganda Fide* (16th century to 19th century) and (4) the Syro-Malabar Period[29] (from 19th century). Accordingly, we also

> "trace the juridical sources successively of each period to understand better the present Code of Particular Law"[30].

With the promulgation of the Code of Canons of the Oriental Churches (CCEO) in 1990, the Syro-Malabar Church entered into a juridical crisis, as it did not fit into any of the four categories of Churches *sui iuris* envisaged by this Code[31]. It was a Church with two independent metropolitans and without a common head. The Code had not provided for such a Church. Therefore, with the promulgation of the Code,

> "the status of SMC became canonically anomalous. Pope John Paul II appointed a three member Pontifical Commission. On 16th December 1992, following the recommendation of the Pontifical Commission (1992) headed by Archbishop Thomas White, raised the SMC to the status of a Major Archiepiscopal Church with the title of Ernakulam-Angamaly"[32].

Mar Antony Padiyara, the then Metropolitan of Ernakulam was appointed its Major Archbishop.

> The "*territorium proprium* of the SMC was determined to be the then existing two metropolitan provinces of Ernakulam and Changanacherry"[33].

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[25] Ibidem, 5.

[26] A. M. MUNDADAN, History of Christianity in India I, Bangalore 1989, 9-77.

[27] Ibidem , 78-115.

[28] Ibidem, 242- 347.

[29] IDEM, Indian Christians Search for Identity & Struggle for Autonomy, Bangalore 1984, 50-108.

[30] Chief Editor, Preamble (= note 24), 6-7. The name "Syro-Malabar" was in use locally; when Rome took it over, it became official.

[31] It was George Nedungatt who articulated the canonical anomaly and alerted the SMC hierarchy against accepting any compromise offered by a Pontifical commission in Sept. 1992. Cf. PORUNNEDOM, Memoirs, in: Journal of St. Thomas Christians (= note 15), 14-16.

[32] Through the Apostolic Constitution *ad perpetuam in memoriam*, the Syro-Malabar Church was elevated to the dignity of Major Archiepiscopal Church on the 16th of December 1992: cf. Synodal News I no. 1 (1993) 10.

[33] Chief Editor, Preamble (= note 24), 7.

2. Section two: The Sources of the Code of Particular Law

The Second part of the Preamble deals with the juridical sources[34]. The sources are many and varied. They have become complex owing to the different jurisdictions over the St. Thomas Christians during their "Indian, Chaldean, Latin and Syro-Malabar periods"[35].

2.1. Ancient Laws and Customs of the Indian Christian Period

The sources of the first Indian Christian community, which responded to the call of the Apostle in its particular socio-cultural environment, received the identity of an Apostolic and Indian Church. Here we find the first stage. It's PL, which originated

> "in response of the first Christians to the teaching of the Blessed Apostle, came to be known as the "Law of Thomas"[36].

2.2. The Sources of the Chaldean Period

During the Chaldean period, the St. Thomas Christians shared some of the East Syrian rules and regulations, as the East Syrian prelates brought with them some of the East Syrian Law Codes[37].

2.3. The Sources of the Latin Period

During the Latin period, after the 16th century, many Western Church laws were introduced in the Syro-Malabar Church[38].

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[34] In the programme of the Publication of the sources of Oriental Canon Law through auspices of the Roman Pontifical Commission for the Oriental Code, "a study of the sources of the canon law of Syro-Malabar Church had been included and assigned to Msgr. Joseph Panjikaran. A similar project assigned to Placid Podipara CMI was an analogous study of the sources of the Canon Law of the Syro-Malankara Church. Whereas the work of Placid Podipara CMI was published in two volumes in 1937 and 1940 among the Fonti. The former never saw the light of day. It is said that the task was completed and submitted by Msgr. Joseph Panjikaran. The text he submitted was in English and he was paid for his work in dollars by Vatican. Then, we dont't know what happened to the text in the transit for translation of it into Latin or Italian". The above cited popularly "unknown" episode was shared by Nedungatt during his "Father Placid Podipara CMI endowment annual lectures" titled "The Eastern Code, An Indian Contribution" held at the Institute of Oriental Canon Law, Dharmaram Vidya Kshetram, Bangalore, 6-8 February, 2014. Andrews Thazhath through his work titled "The Juridical Sources of the Syro-Malabar Church: A Historico-Juridical Study" seeks to fill that long felt lacuna. A. THAZHATH, The Juridical Sources of the Syro-Malabar Church: A Historico-Juridical Study, Kottayam 1987.

[35] Chief Editor, Preamble (= note 24), 8

[36] THAZHATH, The Juridical Sources (= note 34) 1-63.

[37] Ibidem, 64-107; cf. also J. KOLLAPARAMBIL, Sources of the Hierarchical Structure of the St. Thomas Christian Church in the Pre-Diamper Period, in: B. PUTHUR (ed.), The Life and Nature of the St. Thomas Christian Church in the Pre-Diamper Period, Kochi 2000, 161-181.

The synod of Diamper (1599), the statutes of Bp Ros (1606) and the statutes of Archbishop Mellano (1879) were the most important canonical sources of this period. The Coonan Cross Oath was an expression of the revolt of the St Thomas Christians against Latinization introduced through the Synod of Diamper.

2.4. The Sources of the Syro-Malabar Period

Many canonical enactments were made during the Syro-Malabar period starting from 1887. Almost all the Syro-Malabar eparchies enacted eparchial statutes[39].

V. Review of the Code of Particular Law of the Syro-Malabar Church

First of all, I present a summary of the present Code of PL of the Syro-Malabar Church. The newly promulgated Code of Particular Law contains three parts: (1) Part I: Particular Laws; (2) Part II: Statutes; (3) Part III: Guidelines. While studying the newly promulgated Code of Particular Laws, I mention about the *iter* of each title of the Particular Laws, the new major amendments introduced in them, place a few observations on them and suggest the Particular Laws yet to be enacted in the context of *lacunae*.

1. Particular Laws

These Particular Laws could be termed as norms complimentary to CCEO. It is because these norms are made wherever the provisions are indicated in CCEO to apply the particular law of each Church *sui iuris*. The first part of the CPLSMC, i.e., norms complementary to CCEO, comprises of fifteen titles and it contains altogether 220 articles.

1.1. Title I: Major Archbishop and the Structures at the Major Archiepiscopal Level[40]

The PL of this section was approved by synod (5-17 November 2001) and it was promulgated on 10 January 2002[41]. It had 20 articles. In the newly promulgated Code of PLSMC it has 21 articles and is treated in three titles such as: Title I on Major Archbishop and the Structures at the Major Archiepiscopal Level (art. 1-7); Title II on Eparchies and Bishops (art. 8-19) and Title III which deals with Exarchates and Exarchs (art. 20-21).

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[38] Cf. J. THALIATH, The Synod of Diamper, Roma 1958 (reprinted Bangalore 1999). Chief Editor, Preamble (= note 24), 9; cf. THAZHATH, The Juridical Sources (= note 34), 108-237.

[39] Chief Editor, Preamble (= note 24) 9-10; cf. THAZHATH, The Juridical Sources (= note 34), 238-308.

[40] Synodal News 11, no. 2 (2003) 10-12.

[41] Ibidem 9, nn. 1-2 (2001) 101-102.

Observations

(1). Art.1 fixes the frequency of the canonical visit of the eparchies by the major archbishop as once in 10 years. It is a response to CCEO c. 83 § 1, which requires that the frequency of the major archbishop's visit be fixed by the PL.

(2). CCEO 86 § 1 n. 2 prescribes that

"if the Particular Law provides, the patriarch can ordain all the bishops of the patriarchal Church. PL is silent about it"[42].

CPLSMC also is silent about it.

1.2. Title II: Eparchies and Bishops

This is a new division of CPLSMC on Eparchies and Bishops different from PL existed. It has twelve articles.

1.3. Title III: Echarchies and Exarchs

It is also a new division made in the present CPLSMC differing from the PL existed.

1.4. Title IV: Parishes and Parish Priests

It is an entirely new title in the CPLSMC different from that of the existed PL. There are seven articles in it. It is a pooling of articles from various sections of the existed PL. For example, art. 22-23 are taken from the existed PL on the section dealing with Major Archbishop, Metropolitan, Bishops, Exarchs and the Organs assisting the Eparchial bishop in the governance of the Eparchy (art. 18-19); art. 24-27 are pooled from the sections on Clerics in General of the existed PL (art. 45, 47, 48 and 52); and art. 28 is transferred from the section on Monks and Other Religious as well as the Members of Other Institutes of Consecrated Life of the existed PL (art. 92).

1.5. Title V: Clerics[43]

This title was named in the existed PL as Clerics in general. These laws were promulgated on 1st January 1999[44] became effective on the same day. There were 32 articles in it. But in the new title of CPLSMC there are only 26 articles. They deal with annual vacation, requested transfer, promotion of vocations, seminaries

[42] KOKKARAVALAYIL, The Particular Law (= note 22), 183. He made this comment on the previous PL before the present CPLSMC is published. It is a lacuna also in the present CPLSMC.

[43] Synodal News 7, no. 1-2 (1999) 100-103.

[44] Ibidem 6 (1998) 53.

and programme of formation, minor orders of the SMC like Karoyusa and Heupadiaknusa (diaconate and sub-diaconate) and their functions, rights and obligations of clerics and clerical dress etc.

Observations

(1). Art. 46 § 1 (former PLSMC art. 34 § 1): To excel in the virtue of chastity clerics shall follow the means taught by the holy fathers and the masters of spiritual life (CCEO c. 374). Art. 46 § 2 (former PLSMC art. 34 § 2): Before receiving the order of diaconate, candidates destined for priesthood shall freely declare in writing their commitment to a state of celibate life. Among the St. Thomas Christians of India the clergy was married or celibate till their discipline was latinized by the synod of *Diamper* in 1599[45]. The Second Vatican Council directed such Churches to return to their ancestral traditions if they have deviated from them (OE 6). George Nedungatt makes the following comment in this regard:

> "It is paradoxical that while people show much zeal in liturgical matters for de-latinization and for returning to the Chaldean forms, no comparable move is made for the restoration of the Chaldean discipline of married clergy. It does not necessarily follow, however, that all that is pre-*Diamper* must be restored without discerning what is best suited for today whether in canon law or in liturgy"[46].

(2). Art. 32 of the title V of CPLSMC is an amended version of the previous PLSMC art. 51. The reason for the amendment is that the term 'cleric' is generic. Therefore, distinction is made as parish priest, parochial vicar, parochial administrator, etc. The term "other clerics" may refer "to persons like protosyncellus, syncellus, judges, finance officer, chancellor, permanent deacons, etc. Their cases are determined by the eparchial norms"[47].

1.6. Title VI: Permanent Diaconate

This title on permanent diaconate originally was approved by the Syro-Malabar synod (15 to 27 July 2002) and it was promulgated on March 31st, 2003[48].

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[45] In Gouvea's printed text of the manuscript on the decrees of the synod of Diamper we find the following details: Decree 16 defines the nature of the celibacy of a priest; Decree 17 clarifies that the invalidly married priests to officiate only after separation; Decree 18 explains that the wives of priests to receive the privilege only on separation and Decree 19 resolves when can priests who are sons of priests to officiate in a liturgical ceremony. Cf. THALIATH, The Synod of *Diamper* (= note 38), 224 (appendix).

[46] NEDUNGATT, Spirit of the Eastern Code (= note 22), 59.

[47] KOCHUPURACKAL, Particular Law (= note 22), 180.

[48] Synodal News 11, no.1 (2003) 136.

There are 32 articles (art. 55-86) at present in it just like the former PLSMC (art. 53-84). CCEO speaks of permanent diaconate, in c. 354, which legislates on the formation of the deacons not destined for priesthood.

Observation

It seems that since the SMC is having enough vocations to priesthood the creation of permanent diaconate is not a legal exigency at present. In this context formulating 32 articles for this section seems to be unwarranted. Whether the permanent diaconate belonged to the juridical traditions of the SMC is still a debatable issue.

1.7. Title VII: Monks and Other Religious as well as Members of Other Institutes of Consecrated Life

The former PLSMC of this section was originally approved by the Syro Malabar synod, and it was promulgated on 10 Jan. 2002[49]. The present title VII of CPLSMC has only 10 articles (art. 87-96) in contrast to the former PLSMC which had 13 (art. 85-97).

Secular Institutes (CCEO c. 569): The former PLSMC of this section was approved by the Syro-Malabar synod in its session from 5 to 17 Nov. 2001, and it was promulgated on January 10th, 2002[50]. In the new CPLSMC there are 5 articles (art. 97-101) and it is part of Tile VII which also refers to Other Institutes of Consecrated Life. The whole section is verbatim of the former PLSMC (art. 98-102).

1.8. Title VIII: Societies of Apostolic Life (c. 572)

The former PLSMC of this section on the Societies of Apostolic Life was originally approved by the Syro-Malabar synod (in its session from 5 to 17 Nov. 2001), and it was promulgated on 10 Jan. 2002[51]. In the present title of CPLSMC there are 23 articles (art. 102-124) whereas in the former PLSMC they are numbered from art. 103-125. There is only one canon in CCEO (c. 572)[52] which

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[49] Ibidem 9 (2001) 101-102.

[50] Ibidem, 101-102.

[51] Ibidem, 101-102.

[52] There was no corresponding canon in the 1986 Draft of *Codex Iuris Canonici Orientalis*. Sebastian Vadakkel, now bishop of Ujjain noted in his doctoral dissertation on the statutes of the Missionary Society of St. Thomas (MST), the practical difficulties that would be created for MST, destined to work mostly in areas under Latin jurisdiction, if the Oriental Code contained no norm at all, which MST could invoke but had to rely simply on the Particular Law of SMC. Nedungatt advised him to move his Superior General to have recourse to the Pope. The Pope ordered the insertion of a canon. During a private conversation with me George Nedungatt shared with me the above details. On MST (an indigenous Society of the Apostolic Life of the Syro-Malabar Church), a short description in Italian

governs this form of consecrated life, and that canon eaves it to the PL to regulate the Societies of Apostolic Life. There are a few such Societies in the Syro-Malabar Church.

Observations

(1). Art. 111 of the former PLSMC has been commented by Sunny Kokkaravalayil:

> "Members of another sui iuris Church cannot licitly be admitted to a Society of Apostolic Life of the SMMAC without the permission of the Apostolic See (c. 451). However, can the SMC candidates join the Societies of the Apostolic Life of other Churches sui iuris without such permission? No specific norm is given in the Syro-Malabar PL in this regard, which is much more urgent today in Kerala"[53].

To understand it better, this comment is to be read along with the present article 110 of the title VIII of CPLSMC on Societies of Apostolic Life.

(2) When we check through the iter of c. 572 of CCEO,

> "we understand that at the eleventh hour, when the Schema of the CCEO was in its final revision at the pontifical desk, c.572 was introduced into CCEO at the expressed wish of the pope John Paul II"[54].

After the promulgation of the CCEO, the synod of bishops of SMC took over the statutes of the Missionary Society of St. Thomas (MST) and

> "ruled that it is the PL of which there is question in canon 572 until the PL that governs the Societies of Apostolic Life is formulated and promulgated"[55].

It is understandable and perhaps unavoidable in the circumstances. It was a provisional arrangement and it becomes the PL today. But to take over the statutes of MST for future as the PL for SMC is perhaps unwarranted. If MST changes its statutes, would the CPLSMC change ipso iure?

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language can be found in the article by S. VADAKKEL, Societa Missionaria di S. Tommaso Apostolo, in: E. G. FARRUGIA (ed.), Dizionario Enciclopedico dell'Oriente, Rome 2000, 716.

[53] KOKKARAVALAYIL, The Particular Law (= note 22), 187.

[54] Synodal News 10 (1997) 40-42; B. KOCHUPARAMPIL, Societies of Apostolic Life in CCEO and CIC and Societies of Common Life According to The Manner of Religious of CCEO (Unpublished LOCL Thesis, Institute of Oriental Canon Law, Dharmaram Vidya Kshetram), Bangalore 2013, 35.

[55] Synodal News 10 (1997) 40-42.

1.9. Title IX: Evangelisation of Peoples

The former PLSMC of this section was originally approved by the Syro-Malabar synod (in its session from 5 to 17 Nov. 2001), and it was promulgated on January 10th, 2002[56]. The present new title of CPLSMC on Evangelization of Peoples has 6 articles (art. 125-130) just as the former PLSMC (art. 126-131).

1.10. Title X: Divine Worship and especially Sacraments

The former PLSMC of this section was originally approved by the Syro-Malabar synod (in its session from 5 to 17 Nov. 2001), and it was promulgated on January 10th, 2002[57]. There were 24 articles in it (art. 132-155). In the present title X of CPLSMC on 'Divine Worship and especially Sacraments', there are only 19 articles.

Observations

(1). Article 135 § 1 provides the possibility of giving the sacrament of Divine Eucharist together with baptism and chrysmation. It was a Synodal decision published in Synodal News of 2010[58]. It is directed towards

> "reviving the ancient practice of administering the sacraments of initiation-baptism, confirmation and the Eucharist which lay the foundations of every Christian life"[59].

(2). Article 145 § 1 of the title X of CPLSMC is art. 148 § 1, of the former PLSMC states that

> "the names of candidates for promotion to sacred orders of presbyterate and diaconate, whether eparchial or non-eparchial are to be announced in the parish church of each candidate during the Divine Liturgy on two consecutive days of obligation before the ordination"[60].

It seems that it is a revival of the ancient yogam and its customary practices of St. Thomas Christians community. It also expresses an inclusive language for denoting candidates to sacred orders whether they are of eparchial, religious institutes and other institutes of consecrated life of the Syro-Malabar Church.

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[56] Ibidem 9 (2001) 101-102.
[57] Ibidem, 101-102.
[58] Ibidem 18, nn. 1-2 (2010) 102.
[59] Catechism of the Catholic Church, n. 1212.
[60] Synodal News 17, nn. 1-2 (2009) 70.

Marriage: The former PLSMC of this section was originally approved in the Syro-Malabar synod and promulgated them on 15 July 1997[61]. There were 41 articles in PLSMC (art. 160-200). In the new CPLSMC also there are only 41 articles (art. 150-190). It is a verbatim of the PLSMC section on Marriage.

Observations

(1). The marriage laws of CPLSMC are elaborate and have taken into account the customs of the Syro-Malabar faithful and their cultural situation.

(2). Article 163 §2 mentions that

> "the permission may be granted by the proto-presbyter of either of the parties for the publication of banns even before betrothal on written application of both the parties, endorsed by the respective parish priests. The parish priest of the party who has obtained the dispensation shall communicate the matter to the parish priest of the other party along with Form[62]. The provision is made "because for this purpose the local hierarch need not be approached"[63].

(3). The provision in art. 165 § 4

> "states that in the case of dispensation from banns as per art. 165 §§ 2&3, either of the parties shall submit a petition, stating the reasons, to the competent authority"[64].

This PL is necessitated because the competent authority of the place where the marriage is celebrated need not be a competent superior of either of the parties.

(4). The present article 178 § 2 of CPLSMC on Marriage was art. 188 § 2 published in Synodal News of 2004, which declares that petition for this dispensation must have the endorsement of the parish priest and recommendation of the local hierarch of the Catholic party[65].

(5). The present article 178 § 3 of CPLSMC on Marriage was art. 188 § 3 in the previous PL of SMC. It affirms that even if dispensation from the form of celebration of marriage is granted for a most grave reason, there should be a public form of celebration[66].

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[61] Ibidem, vol.5 (1997), 43.
[62] Ibidem 17, nn. 1-2 (2009) 70-71.
[63] KOCHUPURACKAL, Particular Law (= note 22), 182.
[64] Synodal News 12, nn.1-2 (2004) 35.
[65] Ibidem, 35.
[66] Ibidem 17, nn. 1-2 (2009) 71.

"This PL is made because the clause 'sacred rite'[67] contained in article 188 § 3 of PLSMC and it was dropped from the text"[68].

(6). There is an amendment in Art. 189 § 2: However, avoiding scandal, the officiating Catholic priest may invite a non-Catholic minister to read a scriptural passage or to give a brief exhortation[69]. The reason for the amendment is that

"multiple blessing to a marriage is forbidden and celebration of marriage with dispensation from form is in no way encouraged"[70].

1.11. Title XI: Sacramentals, Sacred Times and Places, Venerations of the Saints and Other Acts of Devotion

The new title XI has 4 introductory articles (art. 191-194) which speaks about sacramentals and its ministers. It also speaks about a register to record deaths in all parishes.

Feast and Penance (cc. 880 §3; 882): The former PLSMC of this section was approved by the Syro-Malabar synod (in its session from 5 to 17 Nov. 2001), and it was promulgated on 10 Jan. 2002[71]. There were four articles (art. 156-159) in it. In the new CPLSMC on Feast Days and Penance there are 5 articles (art. 195-199). The Abstinence is obligatory in SMC on all Fridays except the Fridays between Christmas and Epiphany and the first Friday after Easter. Abstinence is recommended on all days of Lent (Sauma), period of Annunciation (Suvara), all days 3 days fast (Moonnu nombu), 8 days of fast (Ettu nombu), and 15 days of fast (Pathinachu nombu), (art. 198).

Observations

(1). In the former PLSMC art. 156 § 2 stated that the obligation of the feasts of Epiphany, Ascension, Peter and Paul may be fulfilled on the following Sunday after the actual day. But the Synod of SMC decided to delete altogether from the PL as the Apostolic See did not give approval. It does not appear in the present CPLSMC.

(2). The art. 156 § 3 of former PLSMC stated that the feasts of the Blessed and Saints of the SMMAC are important and are to be celebrated with due solemnity. But art. 195 § 2 of CPLSMC states that the feasts of the Blessed and

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[67] The sacred rite defined by CCEO c. 828 § 2, is the intervention of a priest who assists and blesses the marriage.

[68] KOCHUPURACKAL, Particular Law (= note 22), 182.

[69] Synodal News 12, nn. 1-2 (2004) 35.

[70] KOCHUPURACKAL, Particular Law (= note 22), 179.

[71] Synodal News 9 (2001) 101-102.

Saints of the SMMAC are important and they are to be celebrated as per the directions of the Apostolic See, with due solemnity[72]. Canonization and veneration of saints are regulated by the norms of the Apostolic See. There are sufficient norms of the Apostolic See in the matter, which are to be observed. In addition to it SMC, if needed, can have particular norms.

1.12. Title XII: Baptized non-Catholic coming into Full Communion

The former PLSMC of this section was approved by the Syro-Malabar synod and is promulgated on 10 Jan. 2002[73]. There were only 2 articles (art.210-211) in it but in the new CPLSMC on this title there are 3 (art. 200-202) articles.

Observation

Art. 210 of the former PLSMC is amended in the present text of art. 200 of CPLSMC as follows:

> "The parish priest can receive a baptized non-Catholic individual lay person into the Catholic Church as per the eparchial norms. The person to be received into the Catholic Church shall submit a written petition to the authority determined in the eparchial norms, with the recommendation of the parish priest (c. 898 § 3)"[74].

This amendment is justified by the following reason

> "the wordings of the article 'individual lay persons' in the former text of Art. 210 of PLSMC were not specific"[75].

1.13. Title XIII: Recourse against Administrative Decrees

The former PLSMC of this section was approved by the Syro-Malabar synod in its session from 5 to 17 Nov. 2001, and it was promulgated on 10 Jan. 2002[76]. It had only one article (art.213)[77]. The present title XIII with a single article (art. 203) is verbatim of the former PLSMC.

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[72] Ibidem 12, nn.-2 (2004) 35.
[73] Ibidem 9 (2001) 101-102.
[74] Ibidem 17, nn. 1-2 (2009) 71.
[75] KOCHUPURACKAL, Particular Law (= note 22), 182-183.
[76] Synodal News 9 (2001) 101-102.
[77] Ibidem 11, no. 1 (2003) 51.

1.14. Title XIV: Temporal Goods of the Church

The former PLSMC of this section was approved by the Syro-Malabar synod and they were promulgated on 17 December 1999[78]. It had 9 (art. 201-209) and the present title on Temporal Goods of the Church has 14 (art.204-217) articles.

Observations

(1). An amendment in the former PLSMC on art. 207 were made and the present art. 212 reads:

> "the term of perpetual foundations shall be for a maximum period of twenty-five years. Afterwards it shall be made use of for the purposes envisaged in c. 1047 § 2"[79].This amendment is made "because the PL has no competence to establish a norm against the common law. As per c. 1047, § 2, the temporal goods of a non-autonomous foundation entrusted to a juridical person subject to an eparchial bishop must be designated for the institute mentioned in c. 1021, § 1. The institute mentioned, that is, the fund for the support of the clergy who offer service to the eparchy unless the donor has expressly manifested some other intention"[80].

(2). The former PLSMC of this section in art. 208 has undergone an amendment introduced by the synod in 2010 and at present the article is 214 shows the following:

> "Alienation of property exceeding an amount of Rupees Ten Lakhs/One Million (Rs. 10, 00,000) up to Twenty five Crores/Two Hundred and Fifty Million (Rs. 25, 00, 00,000) is to be done only with the consent of the finance council and the eparchial consulters. An amount exceeding Rupees Twenty five Crores/Two Hundred and Fifty Million (Rs. 25, 00,00,000) up to Fifty Crores (Rs. 50,00,00,000) needs the consent of the Major Archbishop with the Permanent Synod[81]. Alienation of property above Rupees fifty crores (Rs. 50, 00 00, 000) can be done only with the consent of the major archbishop who is in turn needs the consent of the synod of bishops (c.1036)"[82].

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[78] Ibidem 7 (1999) 100.
[79] SMMAc, CPLSMC, art. 212, p. 45. Cf. Synodal News 12, nn. 1-2 (2004) 35.
[80] KOCHUPURACKAL, Particular Law (= note 22), 179-180.
[81] Synodal News 18, nn. 1-2 (2010) 40.
[82] SMMAc, CPLSMC, art. 214.

This amendment is

"necessitated as a result of the periodic revision due to the market fluctuation of the value of Indian Rupees"[83].

1.15. Title XV. Trial

The former PLSMC of this section was approved by the Syro-Malabar synod in its session from 5 to 17 Nov. 2001, and it was promulgated on 10 Jan. 2002[84]. There were 3 articles (art. 214-216) in it. The present title XV Trial in CPLSMC also has only 3 articles (art. 218-220) and there is no substantial change from the text of the former PLSMC on this section.

2. Statutes

Part II of the newly promulgated CPLSMC deals with Statutes of the Synod of Bishops, Permanent Synod, Superior Tribunal, Major Archiepiscopal Tribunal, Major Archiepiscopal Assembly and of Palliyogam (Ecclesial communion of all Christian faithful in the Syro-Malabar Church). In general, statutes are required for the good of the Church, its smooth functioning, and to carry out its mission properly and effectively, although many of them, strictly speaking, are not demanded by the CCEO.

2.1. Statutes of the Synod of Bishops

One of the priorities of the SMC as soon as it was made a Major Archiepiscopal Church was to enact the statutes of the synod of bishops. The synod held from 22 November to 4 December 1993 approved the statutes. The entire text of the statutes was published in September 2000[85] and it was promulgated along with the entire published Particular Laws of the SMC[86]. It contained 23 (art. 1-23) articles, most of which are subdivided. In the newly promulgated CPLSMC also there are only 23 (art. 1-23) articles just like the former PLSMC. Except a few beautification touches done on the former text the statutes of the Synod of Bishops in CPLSMC is verbatim of the former PLSMC.

[83] KOCHUPURACKAL, Particular Law (= note 22), 183.
[84] Synodal News 9 (2001) 101-102.
[85] Ibidem 8, no. 1 (2000) 44-64.
[86] Ibidem 11, no.1 (2003) 79-97.

Observation

Jose Porunnedom, then chief editor of Synodal News wrote that "except for certain matters many of the articles are repetition of the canons of the CCEO"[87].

2.2. Statutes of the Permanent Synod

The former PLSMC on these statutes were approved by the Syro-Malabar synod (of 7-23 November 1994), promulgated ad experimentum for three years on January 1st, 1995,[88] and definitively on August 1st, 2000[89]. They contained a preamble and 4 titles, each subdivided into different articles. Altogether there were 19 (art. 1-19) articles. In the newly promulgated CPLSMC there are only 18 (art. 1-18) articles. The last article on the former text of PLSMC is eliminated in the present CPLSMC. In art.16 which clarifies in what all matters permanent synod is to be consulted by the major archbishop, nn.1-12 are newly added differing from former PLSMC. Differing from the former PLSMC in the new CPLSMC art. 17 is divided into two paragraphs and a few additional numbers (3) are newly incorporated into it. Art. 17 with two paragraphs and § 2 having 36 numbers, clarifies in what all instances consent of the permanent synod is needed for major archbishop and as well as for an administrator of SMMAC.

Observation

Except these textual changes mentioned above it is verbatim of the former PLSMC on the statutes on the permanent synod. Most of the articles in former PLSMC as well as in the new CPLSMC are verbatim of the CCEO. All the instances are listed where the permanent synod is to be consulted and where the consent of this body is required (Articles 16 nn. 1-13 & article 17 nn. 1-36).

2.3. Statutes of the Superior Tribunal

The former PLSMC on these statutes were approved by the Syro-Malabar synod of November 7-23, 1994, promulgated ad experimentum on January 1, 1995,[90] and definitively on August 1st, 2000[91]. They contained 5 titles, each subdivided into articles, which amounted to 35. In the newly promulgated CPLSMC there are also 5 titles and altogether there are 35 articles (art.1-35) and it concludes with an appendix which deals with the General Moderator of the administration of justice. The General Moderator of the Administration of Justice in the SMC is ex officio the president of the Synodal tribunal. He keeps vigilance over the major archiepiscopal tribunal and other lower tribunals.

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[87] J. PORUNNEDOM, Particular Law on Major Archbishop, Metropolitan, Bishops, Exarchs and the Organs assist the Eparchial bishop, in: IDEM – VATTAPPALAM – KOCHUPURACKAL, A Study on the Particular Laws of The Syro-Malabar Major Archiepiscopal Church (= note 22), 51-63.

[88] Synodal News 3 (1995) 29.

[89] Ibidem 8 (2000) 66.

[90] Ibidem 3 (1995) 39.

[91] Ibidem 8 (2000) 67.

The Synod of Bishops of the SMC is the Superior Tribunal of the SMC (CCEO c. 1062 § 2).

In receiving "an appeal from the Synodal Tribunal, the major Archbishop convokes the Synod of bishops, sits as the superior Tribunal presided over by himself or his delegate, and proceeds as per canons 1309-1321"[92].

2.4. Statutes of the Major Archiepiscopal Tribunal

This tribunal was erected on 1 September 1st, 1994 after the Synod of bishops approved its statutes[93]. The former PLSMC on the statutes of Major Archiepiscopal Tribunal were approved in the synod of 7-23 November 1994, promulgated ad experimentum on 1 January 1995,[94] and definitively on 1 August 1st, 2000[95]. The statutes of the former PLSMC were classified into 3 titles and altogether there were 48 articles. In the newly promulgated CPLSMC, the statutes of the Major Archiepiscopal Tribunal also have 3 titles and there are only 47 (art. 1-47) articles in it. The present text of the statutes on the Major Archiepiscopal Tribunal in CPLSMC is verbatim of the former PLSMC.

The SMMAC adjudicates matters of judicial importance at five different levels: Synodal Tribunal, Superior Tribunal (Synod), Major Archiepiscopal Tribunal, Metropolitan Tribunals and Eparchial Tribunals. The qualified personnel of the Major Archiepiscopal Tribunal are chosen representing the entire territory of the Syro-Malabar Major Archiepiscopal Church[96].

2.5. Statutes of the Major Archiepiscopal Assembly

The former PLSMC on the statutes of Major Archiepiscopal Assembly were approved in the synod (of October 28- November 15 1996), and promulgated on March 15, 1998[97]. The structure of the statutes was presented in the following way: it had a preamble and there were 12 (art.1-12) articles in it. In the newly promulgated CPLSMC, the statute of the Major Archiepiscopal Assembly also has a preamble and there are only 12 articles (art. 1-12) in it. The present text is a

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[92] J. MUNDAKATH, A look into the Statutes of the Superior Tribunal and the Statutes of the Major Archiepiscopal Tribunal, in: VATTAPPALAM – PORUNNEDOM – KOCHUPURACKAL, A Study on the Particular Laws of The Syro-Malabar Major Archiepiscopal Church (= note 22), 180-181.

[93] Synodal News 3 (1995) 40. Whereas CCEO c. 1063 § 1 speaks of "ordinary tribunal", the qualification "ordinary" is omitted in the PLSMC. Nedungatt who drafted the statutes of the same, on being asked the reason for the omission replied that since there was no canonical provision for any "extraordinary" tribunal, the qualification "ordinary" was superfluous. This reasoning was accepted. Indeed, the question should rather be why there is the qualification "ordinarium" in CCEO c. 1063 § 1. Since that addition is not justified, the omission in the PLSMC is justified (Private communication with me by G. NEDUNGATT).

[94] Synodal News 3 (1995) 52.

[95] Ibidem 8 (2000) 65.

[96] MUNDAKATH, A look into the Statutes (= note 92), 171-182.

[97] Synodal News 6 (1998) 75.

verbatim of the former text of PLSMC. The preamble of the statutes states the following:

> "The Major Archiepiscopal Assembly of the SMC is the gathering together of a representative cross-section of the same Church, integrating the spirit and dynamism of the ancient ecclesial institution of the Thomas Christians called Yogam. In it is restored and updated that organ in fidelity to the tradition of the universal Church and in obedience to the legislation given by the Roman Pontiff to the Eastern Catholic Churches ... so that it is made to correspond to the changed historical situation and the new hierarchical status of the Syro-Malabar Church"[98].

The Major Archiepiscopal Assembly is a consultative body for dealing with matters of major importance of the Church and its mission (cf. art. 1 § 1)[99]. It was an assembly or Yogam of representative of all the local communities that decided matters concerning the entire Church. Though the Major Archiepiscopal Assembly

"is not a parliament or legislature of the SMC, it is a forum for discussion and the expression of views and desires in the spirit of Christian freedom and responsibility"[100].

Observations

(1). The institution of yogam forms part of the Way or Law of Thomas, the most fundamental source of the SMPL. By making it

> "a mere consultative body, it is deprived of its ancient power in the decision making process"[101].

The PL will do well

> "to have the laity elect their lay representatives to the Patriarchal/Major Archiepiscopal Assembly following the ancient tradition of the Church in India which was not unique to the Thomas Christian Church since it was met with also in North Africa and elsewhere"[102].

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[98] Statutes of the Major Archiepiscopal Assembly in: SMMAc, CPLSMC, 101; cf. Synodal News 11, no. 1 (2003) 128.

[99] SMMAc, CPLSMC, 101; See also Acts of the Syro-Malabar Major Archiepiscopal Assembly 1998, (Mount St. Thomas 1999), 23. Three hundred and fifty three members participated in the first Major Archiepiscopal Assembly of the Syro-Malabar Church held at Mount St. Thomas form 12 to 14 Nov. 1998.

[100] Statutes of the Major Archiepiscopal Assembly, in: Synodal News 6 (1998) 84; ibidem 11, no. 1 (2003) 134.

[101] KOKKARAVALAYIL, The Particular Law (= note 22), 195.

[102] G. NEDUNGATT, Liberation from the Dark Ages of the Pre-Diamper Indian Church, in: Journal of St. Thomas Christians 24, no. 2 (2013) 29.

(2). In no. 4 of art. 6 of the Statutes of the Major Archiepiscopal Assembly it is stated that

> "the Major Archbishop in consultation with the Permanent Synod may nominate to the Assembly an adequate number of priests, religious and lay faithful to provide proper representation to the Syro-Malabar faithful living outside the Syro-Malabar eparchies or exarches"[103].

(3). Better Representation for Women: The synod of bishops in its meeting from August 17-28, 2010 gave a directive regarding the presence of women in ecclesiastical bodies. Accordingly in the new CPLSMC on Statutes of the Major Archiepiscopal Assembly it is stated that

> "the maximum number of lay delegates from an eparchy shall be ten; at least one- third of them shall be women"[104].

However, there was a decision of the Synod of 2010. It read as follows:

> "Unless the law or the nature of the bodies preclude it, 50% of the members in the eparchial and parish bodies, shall preferably be women. However, their number shall not be less than 25% of the total members in these bodies"[105].

However, regarding the representation for women in major archiepiscopal assembly it is reduced to one third of ten representatives from an eparchy.

2.6. Palliyogam-Procedure Rules

Palliyogam is a laudable heritage of the SMC that expresses the ecclesial communion of all Christian faithful in the Church. Though it has been a common heritage of this Church, with regard to the administration of the parishes, the mode of its operations varied in different eparchies. Hence a uniform PL on Palliyogam Procedure Law, applicable to the parishes of the Church sui iuris was required.

The former PLSMC on the statutes of the Palliyogam were approved by the Syro-Malabar synod on 16 Jan. 1998, and promulgated on the same day[106]. There were 77 rules in it. In the newly published CPLSMC, the statutes of the Palliyogam have 78 rules and they are treated under 3 sections. Except a few changes for example, the new CPLSMC on the Palliyogam also is verbatim of the former PLSMC.

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[103] SMMAc, CPLSMC, 104; cf., Synodal News 17, nn. 1-2 (2009) 70. The synod in its meeting during August 17-28, 2009 enacted it. It may be for better representation of women.

[104] SMMAc, CPLSMC, art. 6 n. 4, 104.

[105] Synodal News 18, nn. 1-2 (2010) 166-167.

[106] Ibidem 6 (1998) 44.

> "restored considerably the powers of the Palliyogam though not the complete autonomy it enjoyed in the past. The Palliyogam procedural Rules bestow more power, rights and duties to laity in keeping with Vatican Council II (Apostolicam Actuositatem 10, Ad Gentes 21 etc.), than the existed eparchial statutes on Palliyogam in the Syro-Malabar Church"[107].

Observation

(1). There is provision for an administrative tribunal in every eparchy (n. 71) constituted by the eparchial bishop to deal with and settle disputes arising from the Palliyogam meetings and functioning. The Palliyogam has ample power in the decision-making process. For example,

> "To pass resolutions regarding construction of a church, chapels and buildings for any of the parish institutions and buying or selling or borrowing or gifting of movable or immovable properties" (Rule 8.9 of Palliyogam).

3. Guidelines

In the newly promulgated CPLSMC there are 11 approved Guidelines on Different Subjects. Originally, most of them were published in *Synodal News* in its various volumes. These guidelines are of juridical in nature. (1.) Guidelines for Pastoral Collaboration in Parishes with the Institutes of consecrated Life and Societies of Apostolic Life (approved by the Synod of Bishops of the SMC in its session held from 15 to 20 November 1999)[108]; (2) Guidelines for Raising a Religious Congregation to the Major Archiepiscopal status and for granting nihil obstat for pontifical status to a religious congregation (approved by the permanent synod on 12th Sept. 2008)[109]; (3) Guidelines for Recognizing Lay Associations of Syro-Malabar Faithful outside the Syro-Malabar Eparchies in India and Abroad[110]; (4) Guidelines for Pastoral Care of Migrants[111]; (5) Guidelines for the Formation of Permanent Deacons in the Syro-Malabar Church[112]; (6) Guidelines for the Functioning of Major Archiepiscopal Commission for Finance[113]; (7) Guidelines

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[107] For the genesis of the Palliyogam Procedure rules cf. NEDUNGATT, Laity and Temporalities (= note 3), 334-350 (chapter "The Particular Law of the Syro-Malabar Church on Laity and Temporalities"); M. MADATHIKUNNEL, Palliyogam Procedure Rule of the Syro-Malabar Major Archiepiscopal Church – A Study, in: VATTAPPALAM – PORUNNEDOM – KOCHUPURACKAL, A Study on the Particular Laws of The Syro-Malabar Major Archiepiscopal Church (= note 22), 161-170.

[108] SMMAc, CPLSMC, 134-136.

[109] Ibidem, 137-139; cf. Synodal News 16, nn. 1-3 (2008) 81-83.

[110] Ibidem, 140-142.

[111] Ibidem, 143-147; cf. Synodal News 17, nn. 1-2 (2009) 112-116.

[112] Ibidem, 148-154; cf. Synodal News 12, nn. 1-2 (2004) 82-88.

[113] Ibidem, 154-155.

for the Functioning of the Liturgical Commission[114]; (8) Guidelines for the functioning of Commission for Laity[115]; (9) Guidelines for conferring Honours and Titles[116]; (10) Guidelines for Giving Simple Burial The synod of bishops held during 3-15 November 2003 clarified the meaning of simple burial which is given to those who commit suicide. Simple burial means "a burial with no homily, no Qurbana, no use of microphone, using only two ornamental umbrellas (muthukudas), one cross and one priest for the burial. In 'scandalous cases of suicide'[117] not even the simple burial may be given. In such cases the body will not be allowed to be taken inside the church. The priest may bless the grave sometime outside the funeral service"[118]. This clarification may sound too rigorist and it lacks the pastoral sense evinced by some other Patriarchal Churches; (10) Instruction regarding Free State Certificates, Kuries and Marriage Preparation Course[119].

VI. Concluding Observations and Comments

(1). I have briefly narrated the codification history of the Particular Laws of the SMC ever since its erection as a Major Archiepiscopal Church in 1992. Mar Abraham Kattumana, the Pontifical Delegate, and the Major Archbishops who efficiently succeeded him organized the activities of the various committees for the codification of the Particular Laws. After strenuous work involving research and consultation, Code of the Particular Laws of the SMC is published.

(2). With the publication of CPLSMC in a single volume, SMC can claim that the work on drafting the PL has come to an end, at least those parts which are demanded by the common code and the most needed sections of SMPL. The Synod of Bishops of the SMC has codified its PL by adopting and adapting the disciplinary norms that pertain to the genuine tradition of the SMC. In the same way the Malankara Oriental Catholic Church, a sister Church *sui iuris* of the St. Thomas Christians in India also has promulgated their Code of Particular Laws[120].

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[114] Ibidem, 156-162

[115] Ibidem, 163-171; cf. Synodal News19, nn. 1-3 (2011) 161-178.

[116] Ibidem, 172-174.

[117] Whether a case of suicide is scandalous is to be determined by the local hierarch. Priests who have very narrow and subjective criteria may also cause public harm by denying a church burial.

[118] Synodal News 11, no. 2 (2003) 36.

[119] SMMAc, CPLSMC, 176.

[120] The Syro-Malankara Catholic Church has completed the codification of its particular laws in a comparatively short time and it is promulgated under the title *The Code of Particular Canons of the Syro-Malankara Catholic Church* on 10th March 2012 by Baselios Mar Cleemis, the Major Archbishop of Syro-Malankara Major Archiepiscopal *sui iuris* Church. The Syro-Malankara Catholic Church is a sister Church in the catholic communion of the St. Thomas Christians in India. In 1930s a group of Malankara Orthodox Syrian Christians in India under the leadership of Mar Ivanios reunited with the Catholic Church. It is a vibrant Oriental Catholic Church following the Antiochene rite in India with a population of more than 500000. It is praiseworthy achievement that Syro-Malankara Catholic Church which started the codification of their Code of Particular Canons in March 2005 and completed its work by September 2010. They received the recognitio from the Holy See on 7th Sept. 2011. The promulgated *Code of Particular Canons of the Syro-Malankara Catholic Church* is printed and

(3). How has the new Code of the Particular Laws been received by the Syro-Malabar community? It is too early to give an answer to it. However, since most of these PL were in force since 2003 we could make some evaluation on it. As a whole, Syro-Malabar community is slowly assimilating the values of different units of Particular Laws. The reception of the Particular Laws by this vibrant community is positive and widespread. For example the Procedure Rules of Palliyogam (the general body of the parish) was actually a restoration of the Palli prathipurusha yogam (the general body of the parish community) that existed in the Church in the ancient times. This gave ample opportunity for the laity in the affairs of the Church. Therefore, the procedural law of the Palliyogam was well received by the community. Laity is given due importance in the affairs of the Church. Clergy, Religious are better equipped in the reception of the Particular Laws of Syro-Malabar Church.

(4). The Particular Laws on divine worship and especially on sacraments have restored the ancient practice of the sacrament of initiation, that is, conferring chrysmation and Holy Communion along with the sacrament of Baptism in the Syro-Malabar Church. From the history we understand that in the context of adult baptism, the administration of initiatory sacraments together happened in the Church. How far it is prudent and pastorally relevant today if we revive the ancient practice along with infant baptism is debatable.

(5). The Particular Laws on marriage has incorporated the ecumenical spirit of the CCEO. It is a positive step. Thus, the mutual agreement between the Syrian Orthodox Church and SMC in the area of marriage is incorporated in the Particular Laws of the Syro-Malabar Church.

(6). The newly published Particular Laws of the SMC are true to the identity of this Church. It brings a balancing note on its Oriental, Indian and Western heritage in the making up of its Particular Laws. The lawmakers have achieved their goals by meticulously following the guidelines.

(7). SMC has made good use of the room left by CCEO for PL. While an unbiased critic will acknowledge that the work accomplished in the field of PL testifies to the sense of responsibility and seriousness with which the pastors of SMC wish to guide the Church, he may have suggestion for modification or improvement or for filling out lacunae.

(8). How far the guideline on applying the principle of subsidiarity has been followed in different units of the Particular Laws of the SMC is debatable. Did we succeed in the de-centralization and distribution of the powers at the eparchial and parish levels? Do our Particular Laws succeed in incorporating the co-responsibility aspect of our People of God and their equal dignity of being lay, clerical and men-women religious? Through our Particular Laws did we succeed in promoting the fraternity and co-operation among them? It is an area where SMC has more scope for improvement.

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published as a text in 2012. When we study the text of the *Code of Particular Canons* of the Syro-Malankara Catholic Church, we may come to know that there are also shortcomings in it and still it has ample room for improvement.

(9). Apart from the value of these laws as complementary to CCEO, a few criteria for evaluating CPLSMC would be whether it is rooted in the traditions of St. Thomas Christians, and at the same time adequate to meet the present-day needs of SMC, whether it promotes unity among Churches, unity among the faithful within the Syro-Malabar Church, involvement of the faithful in the civil society's interests and their commitment to the gospel values, etc., all of which are areas of great concern in the situation of multifaceted existence of SMC today. Finally, critical studies have evidenced certain lacunae and areas needing revision in the Particular Laws of the SMC. Our review of the already published Particular Laws might reveal that the CPLSMC are open to improvement. There are still a few printing errors in the newly published CPLSMC.

(10). A final Observation: In the codification of the PLSMC the minutes of the work done by the various commissions have not been published (if they were written down at all!) in a manner of analogous to the periodical Nuntia of the PCCICOR. This omission will be regretted by those who know how useful, even necessary, it is to consult Nuntia for the proper understanding of CCEO. Moreover, in the PLSMC no reference to fonti is cited especially on the texts of Particular Laws, Statutes and Guidelines. These omissions also will be regretted especially in the future when PLSMC will be taken up for revision, since no Code, whether common or particular, is supra-temporal, not needing reform or revision in course of time.

PARTICULAR LAW CONCERNING EASTERN CATHOLICS ENTRUSTED TO THE PASTORAL CARE OF HIERARCHS OF ANOTHER CHURCH *SUI IURIS*

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Before coming to the heart of the matter, we should first try to see what kind of juridical configuration is going to apply to the Eastern Catholics with whom we are here concerned. We have to do with those who are entrusted to the pastoral care of a hierarch of another church *sui iuris*, a situation which one finds for the most part in those regions which do not form part of the territory belonging to the same church *sui iuris* as the faithful. For convenience, these regions are also frequently referred to as "diaspora", a term which is however increasingly viewed as unsatisfactory today, both among our Catholic colleagues and among the Orthodox[1]. The situation of these Eastern Catholics, then, may take two different forms.

I. Hierarchs responsible for the pastoral care of Eastern Catholics who lack a hierarch of their own

The Code of Canons of the Eastern Churches (1990, hereinafter referred to as CCEO) prescribes as follows, in c. 916 § 5:

> "In places where not even an exarchy has been erected for the Christian faithful of a certain Church *sui iuris*, the local hierarch of another Church *sui iuris*, even the Latin Church, is to be considered as the proper hierarch of these faithful".

As this enables us to conclude that canon law indicates the local hierarch as the proper hierarch of these faithful, and this hierarch may even belong to the Latin Church[2]. It is also interesting to take examine the terminology employed. The text does not say that the Eastern faithful are "under the jurisdiction" of this hierarch, which might give the impression that Eastern faithful can be subject to a Latin hierarch and so relativise the importance of belonging to a Church *sui iuris* with its own rite. On the contrary, the canon designates the hierarch of another

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[1] Cf. J. FARIS, Eastern Churches in a Western World: The Relationship to the Churches of Origin, in: Logos: A Journal of Eastern Christian Studies 40 (1999) 119-140, and A. ARJAKOVSKY, La question de la "diaspora" au prochain concile pan-orthodoxe: Propositions pragmatiques, in: Les enjeux du prochain concile de l'Église orthodoxe. Actes du colloque organisé par l'Institut Saint Serge et l'Université de Leuven, Paris, 18-20 octobre 2012 (in print). Cf. also R. POTZ, "Lokalkirche, kanonisches Territorium und Diaspora". Eine historisch-rechtsvergleichende Einleitung, in: C. G. FÜRST – R. POTZ (ed.), Diaspora (Kanon 22), Hennef 2012, 12-24.

[2] Latin canon law does not use the term "Hierarch", but we know it is the equivalent of Ordinary in Latin canon law. Cf. CCEO c. 984 and CIC c. 134.

Church *sui iuris* as the "proper hierarch". It follows that the Eastern faithful are not left abandoned; there is in fact a hierarch who has obligations in relation to them with a view to the provision of pastoral assistance for example[3], or to whom they can apply when they have need of a dispensation or other graces and favours. The same canon however also proposes a solution for the situation where several hierarchs belonging to different churches having their own jurisdiction exercise their mandate in the same place, in the following specification:

> "If, however, there are several local hierarchs, that one whom the Apostolic See has designated is to be considered as their proper hierarch or, if it concerns the Christian faithful of a certain patriarchal Church, the one whom the patriarch has designated with the assent of the Apostolic See".

The presence of several hierarchs in the same locale inevitably makes it necessary that the proper hierarch be explicitly designated. Two procedures are envisaged: one where the Apostolic See designates the hierarch, or alternatively, if the faithful in question belong to a patriarchal church, the patriarch will be able to designate the proper hierarch of the faithful of his church, but he will need the assent of the Apostolic See.

As for the practical application of this second part of c. 916 § 5: Given that it may be the case that several hierarchs exercise their pastoral ministry in the same place – a Latin Ordinary, for example, and one or more Eastern hierarchs of the different churches *sui iuris* may be appointed there – the Apostolic See or the patriarch would be able to designate one of the Eastern hierarchs, in preference to the Latin Ordinary, as proper hierarch of the Eastern faithful. An illustration of this possibility is to be seen in the Chaldean faithful in Greece, whose patriarch designated the apostolic exarch of the Catholics of the Byzantine rite in Athens as their proper hierarch. In all these cases, the faithful will be assigned to the hierarch of a Church *sui iuris* other than the church to which these faithful belong. All the same, in the majority of cases, it will be a Latin Ordinary. In our research we have restricted ourselves to the consideration of this configuration of Eastern faithful of whom the proper hierarch is a Latin Ordinary.

The 1983 *Code of Canon Law* is concerned with this question of pastoral assistance to Eastern faithful only from the point of view of the diocesan bishop, decreeing as follows:

> "If he has faithful of a different rite within his diocese, he is to provide for their spiritual needs either by means of priests or parishes of that rite or by means of an episcopal vicar"[4].

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[3] Cf., e. g., M. BROGI, Obblighi dei Vescovi latini verso i fedeli di una Chiesa orientale cattolica inseriti nella loro diocesi, in: P. GEFAELL (ed.), Cristiani orientali e pastori latini (Monografie Giuridiche 42), Milan 2012, 3-31.

[4] CIC/83 c. 383 § 2.

This specifies the obligations of the diocesan bishop and the means he is to use for the task. Taken as a whole, this c. 383 CIC shows us that the Eastern Catholics are there considered as a category of faithful who find themselves in the territory of the diocese whose bishop is obliged to have a care in virtue of his pastoral role.

In all these cases, then, it is the local bishop or one of the local bishops who is the proper hierarch of the Eastern Catholics and who will be obliged to furnish them with all they have need of for their spiritual life. We will not go into the details of this pastoral organisation here, as it forms no part of the subject with which we are concerned.

A slightly different configuration is found in the countries where Ordinariates exist for the Eastern faithful who lack a proper hierarch of their own. The majority of these Ordinariates were established between 1939 and 1959. These Ordinariates are for the most part pluri-ritual, which is to say that the faithful of different Churches *sui iuris* are assigned to a single Ordinary, who frequently is a Latin prelate[5]. This solution, which grew out of concrete practice[6], corresponds to that envisaged in CD 23:

> "Where there are faithful of a different rite, the diocesan Bishop should provide for their spiritual needs and different means are proposed, like for instance: nominating priests or constituting parishes of the same rite".
>
> But the text also explicitly states:
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> "Otherwise the Ordinary himself may perform the office of an Ordinary of different rites"[7].

Even if this text gives the impression that this decision only depends on the Ordinary himself, in reality the office of an Ordinary of different rites needs to have been set up by the Roman Pontiff, and this act will be accompanied by the establishment of an Ordinariate. However, the two codes of canon law currently in force do not allow for this possibility, nor has any statement of legislative force

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[5] Despite the fact that other Ordinariates are entrusted to an Eastern Hierarch, we only take into consideration here the pluri-ritual Ordinariates entrusted to a Latin prelate.

[6] The Annuario Pontificio refers in its historical notes to the Apostolic Letter "Officium Supremus Apostolatus", July 15, 1912 as source for these Ordinariates. Concerning the historical development cf. A. KAPTIJN, Gli Ordinariati per i fedeli cattolici oriental privi di gerarchia propria, in: GEFAELL, Cristiani orientali (= note 3), 234-267.

[7] CD 23: "For this same purpose, where there are faithful of a different rite, the diocesan bishop should provide for their spiritual needs either through priests or parishes of that rite or through an episcopal vicar endowed with the necessary faculties. Wherever it is fitting, the last named should also have episcopal rank. Otherwise the Ordinary himself may perform the office of an Ordinary of different rites. If for certain reasons, these prescriptions are not applicable in the judgment of the Apostolic See, then a proper hierarchy for the different rites is to be established". Cf. http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vatii_decree_19651028_christus-dominus_en.html [8. 8. 2013].

apart from the codes been issued on this subject. This permits us then to conclude that these Ordinariates are solutions for a particular case and not subject to any kind of universal legislation. Whatever may be the concrete configuration in which Eastern Catholics find themselves and wherever they may be, they are not without a proper hierarch.

II. Different types of Particular Law

After having seen who is responsible for the pastoral care of those Eastern Catholics located outside the territory of their churches *sui iuris*, we should now turn to particular law. What is meant by this expression? Since we are interested here above all in Latin Ordinaries having Eastern Catholics under their pastoral care, we will restrict ourselves to the notion of particular law to be found in the *Codex Iuris Canonici* of 1983. The CCEO, which is explicitly concerned at times with the Latin faithful, and so also with the Latin Ordinaries, does not establish any relation between the latter and particular law.

In CIC/83, canons 12 and 13 mention particular law. They do not formulate a definition, but are principally concerned with ascertaining in what territory and in relation to what persons these laws exercise mandatory force. Two elements are immediately clear: 1. Particular laws are those established for a particular territory and 2. Particular laws are presumed to be territorial and not personal, unless it is otherwise evident. The mandatory force of particular laws depends on three conditions which have to be verified in conjunction: they concern the people for whom they were made *and* who have a legal tie to the territory by means of their domicile or quasi-domicile *and* who are actually present in the territory. As mentioned by Ladislas Örsy in his commentary on these canons:

> "In other terms, a burden carried in a territory should be imposed neither on those who do not belong to it nor on those who belong to it but happen to be away"[8].

We can deduce from these elements that particular laws may be enacted by the authorities who exercise legislative power in the territory in question. In practice it may be the diocesan bishop, the Conference of Bishops, or even the Roman Pontiff himself when he issues laws for a defined territory within the Church[9].

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[8] L. ÖRSY, Commentary under can. 12, in: J. CORIDEN – TH. GREEN – D. HEINTSCHEL (ed.), The Code of Canon Law. A Text and Commentary, New York 1985, 32.

[9] By contrast with the CIC, which uses the plural "particular laws" (*leges particulares*), the CCEO speaks of "particular law" (*ius particularis*) in the singular. This explains the fact that, in the CCEO, texts other than the laws alone form part of this category: also mentioned are legitimate customs, statutes and others norms of law. The common element between them being that they are neither common to the entire Church nor to all the Eastern Churches. In our opinion, the two Codes are not in contradiction, they just have a different way of presenting the matter. This means that we should be concerned here not just with particular laws, but also with customs and statutes. Then too, there is

Since it is practically impossible to research systematically with a view to determining whether individual diocesan bishops who have not been appointed by the Apostolic See as pluri-ritual Ordinaries of the Eastern Catholics have issued norms of particular law on the subject of Eastern Catholics resident in their respective dioceses, research in any case would be extremely unlikely to result in meaningful conclusions. Therefore, we shall restrict ourselves here to particular law issued by the Conference of Bishops. This indicates at the same time that we are taking into consideration above all those countries which are predominantly of Latin tradition.

Another qualification concerns not the authors of this particular law, but its content. We searched for norms aimed explicitly at Eastern Catholics resident in a defined Latin territory. It has not been possible to list all those norms of particular law which also apply to Eastern Catholics by implication, for example, with regard to their representation in the diocesan institutions.

After all these preliminaries (a little lengthy, but necessary in our view), we can finally come to the heart of the matter. We are going first of all to speak of possible norms of particular law issued by Latin Ordinaries who have been appointed by the Apostolic See as pluri-ritual Ordinaries of Eastern Catholics who do not have a hierarch of their own Church *sui iuris*. In the second section we will then examine the possible norms of particular law concerning Eastern Catholics resident in Latin dioceses and issued by the Latin Ordinaries in a collective manner, that is to say when convoked in a Conference of Bishops.

III. Particular law in the pluri-ritual Ordinariates

We have already spoken of the foundation of these pluri-ritual Ordinariates, or rather of the absence of any juridical foundation, since no universal legislative text exists in relation to them. Let us now examine the facts. Currently a number of pluri-ritual Ordinariates with a Latin prelate as Ordinary exist in all parts of the world. A pluri-ritual Ordinariate for the Eastern Catholics lacking a hierarch of their own rite was set up in Brazil in 1951. The Archbishop of Rio de Janeiro was appointed as its Ordinary with exclusive jurisdiction over the Eastern Catholics throughout the national territory[10]. Some years ago, in 2010, the bishop of Belo Horizonte was nominated as the Ordinary for the Eastern Catholics in Brazil[11]. In 1954 a pluri-ritual Ordinariate was established for all the faithful of the Eastern rite in France, the charge of it being given to the Archbishop of Paris acting as its

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the people of God to take into account when it is a matter of customs and juridical persons who pass statutes.

[10] Sacred Congregation for the Oriental Church, Decree "Ordinariatus in Brasilia constituitur pro fidelibus rituum orientalium" November 14, 1951, in: AAS 44 (1952) 382-383. By that time, in the name of the Congregation mention was made only of the Oriental Church in singular. Only in 1965, with the C.A. "Regimini Ecclesiae Universae", the plural has been introduced: Congregation for the Oriental Churches.

[11] Cf. Annuario Pontificio. This appointment occurred after the retirement of cardinal Scheid, former bishop of Rio de Janeiro, as Ordinary for the Eastern catholic faithful in Brazil.

Ordinary. The latter, by contrast with his counterpart in Brazil, exercises his jurisdiction cumulatively with the jurisdiction of the local Ordinaries[12]. In Austria we find a slightly different situation. From 1945 on, the Archbishop of Vienna was the Apostolic Delegate for the Ruthenian faithful of Austria. A change occurred in 1956 when he was appointed Ordinary with exclusive jurisdiction for the Catholics of the Byzantine rite resident in Austria. From that moment, his power of jurisdiction has been that of an Ordinary rather than a delegated power; he exercises it not just in relation to the Ruthenian Catholics but also in relation to all the Catholics of the Byzantine rite, which thus represents an extension of his authority[13]. In 1959, we find an Ordinariate being set up in Argentina for the faithful of the Eastern Rite throughout the country, with exclusive power of jurisdiction for these faithful being assigned to the Archbishop of Buenos Aires[14]. Finally, in 1981, an Ordinariate for the Catholics of the Greek and Armenian rites was set up in Poland. The Archbishop of Warsaw exercises the jurisdiction of Ordinary for these faithful, a jurisdiction which was ten years later extended to cover all Eastern Catholics lacking a hierarch of their own rite[15].

The powers of the Ordinary are not explained in any great detail in the decrees by which the various Ordinariates were constituted. The decree concerning France, for example, describes him as a proper Ordinary who governs the Ordinariate with the rights determined by law, so exercising a charge ("*munus*") conferred on him by the Holy Father. The decree of 1951 with regard to the Ordinariate in Brazil even mentions that the Ordinary is vested with all the faculties which have been enjoyed up to this time by the various Latin Ordinaries. The use of this term "faculties" does not however mean that this is a case of delegated authority conferred without the mediation of an office. The decree CD 23 mentions this, and canonical doctrine was in agreement, even before the Council, in saying that the Ordinaries, whatever they may be, hold an office[16]. Furthermore, the word "Ordinary", in itself suggests that stability which characterises ecclesiastical offices. This implies then, that the Ordinary is in possession of an ordinary governing power. If it is a question of faculties, in our view we are rather concerned here with habitual faculties which are passed on to the successor in government, i.e. the next person to hold office as Ordinary. These faculties are added to the authority of government of the Ordinary or define it more precisely. The decrees establishing the different Ordinariates include an

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[12] Holy Congregation for the Oriental Church, Decree "Ordinariatus pro omnibus christifidelibus ritus orientalis in Gallia degentibus instituitur", July 27, 1954, in: AAS 47 (1955) 612-613.

[13] The decree on the constitution of this Ordinariate has never been published in the AAS. However, it can be found in Wiener Diözesanblatt nr. 120 (August 1, 1956).

[14] Holy Congregation for the Oriental Church, Decree "Ordinariatus pro fidelibus ritus orientalis in Argentina erigitur", February 19, 1959, in: AAS 54 (1962) 49-50.

[15] The only information we have comes from the Annuario Pontificio, then, as far as we know, the documents concerning this Ordinariate have not been published.

[16] Cf. A. BOUREL DE LA RONCIERE, L'Ordinariat pour les fidèles de rite oriental en France, in: L'Année Canonique 3 (1954-1955) 341; F. WERNZ – P. VIDAL, Ius Canonicum II: De personis, Rome ^{3}1943, n. 367, 426. More recently, J. GONZALEZ AYESTA, La naturaleza jurídica de las «facultades habituales» en la codificación de 1917, Navarra 2000, 122.

enumeration of these. The greater part of these faculties are vested in all the Ordinaries in accordance with the Codes of Canon Law; however, that which gives the Ordinary the power of establishing personal parishes for the Eastern Catholics derogates from the arrangements provided by the Code of 1917, because the latter requires that the Ordinary request an apostolic indulgence from the Apostolic See. The decree thus assigns this right to the Ordinary in a habitual manner, and likewise to his successors in office.

Besides mentioning these faculties, the constitutive decrees of the Ordinariates do not speak of any legislative power of the Ordinaries. Both Codes, CIC and CCEO[17], detail that Ordinaries/Hierarchs possess at least ordinary general executive power or ordinary power of government[18], which means that they do not necessarily possess legislative and judicial power[19]. However, if they do not have the power to enact laws, in virtue of their executive power, they are able to issue general executory decrees determining the methods to be observed in applying the law or urging the observance of laws[20].

So what is the situation *de facto*? Are any general executory decrees in existence in the Ordinariates? Our research with regard to the above-mentioned Ordinariates have not come up with any results. It would appear that the Ordinaries in question did not make use of their power in this field. The only exception here is the Ordinariate in France. In 1984, the Ordinary at the time, Cardinal Jean-Marie Lustiger, published an ordinance on the appointment of parish priests of the Eastern rite resident in France[21]. This ordinance provides that, at the request of the Cardinal Ordinary, the patriarchs shall present one or more candidates of their rite, stating the motives for their selection, for approval by the Congregation for the Eastern Churches. If the candidate is a religious, he must further have been presented by the superior of his order or at least have received the latter's consent. These proposals, accompanied by the opinions of the Congregation for the Eastern Churches and the results of any enquiries that may have been carried out, are submitted by the Cardinal Ordinary to the bishop of the diocese in question, i.e. in cases where the parish priest will be appointed in a

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[17] Arrieta is of the opinion that these Ordinariates are part of the Latin canon law because their structure does not coincide with that of circumscriptions characteristic of Eastern canon law. Cf. J. I. ARRIETA, Diritto dell'organizzazione ecclesiastica, Milan 1997, 365, or also IDEM, La costituzione di Ordinariati nella prassi pastorale dell'attenzione dei fedeli orientali, in: E. GÜTHOFF – S. KORTA – A. WEISS (ed.), Clarissimo Professori Carolo Giraldo Fürst. In memoriam Carl Gerold Fürst (Adnotationes in Ius canonicum 50), Frankfurt am Main 2013, 57-58, speaking about the origin of the Ordinariates "constituted with the technical instruments of Latin law". For another opinion cf. P. GEFAELL, Enti e Circoscrizioni meta-rituali nell'organizzazione ecclesiastica, in: H. ZAPP – A. WEISS – S. KORTA (ed.), Ius Canonicum in Oriente et Occidente. Festschrift für Carl Gerold Fürst zum 70. Geburtstag (Adnotationes in Ius Canonicum 25), Frankfurt am Main 2003, 493-508 (here: 507).

[18] CIC c. 134; CCEO c. 934 § 3.

[19] CIC c. 135; CCEO c. 985 § 1.

[20] CIC c. 31. CCEO does not have an equivalent canon. Cf. also J. HUELS, Anglicanorum coetibus: Text and Commentary, in: Studia Canonica 43 (2009) 389-430 (here: 401).

[21] J.-M. LUSTIGER, Ordinance "Nomination des curés de rite oriental résidant en France", October 7, 1984, in: Archives of the Ordinariate in Paris.

diocese other than the archdiocese of Paris. The intervention or actions of the bishop of this diocese are not specified, seeing that the text continues by saying that, ultimately, the Cardinal Ordinary will come to a final decision and proceed to make the appointment. We can conclude from this that the Cardinal Ordinary is all the same the sole authority with power of decision, even if he asks the patriarchs, the Congregation for the Eastern Churches and the local bishop for their opinions if needed. In all these cases, the opinion given seems to be purely consultative in function. In the case of the parishes of an Eastern Catholic Church which does not have a patriarch at its head, the Cardinal Ordinary will contact the Congregation for the Eastern Churches and, following enquiries, proceed to the appointment.

Since this ordinance was published in 1984, no specific provisions were made for the churches other than patriarchal besides the provision to consult the Congregation. However, we are of the opinion that, in light of the CCEO, the provisions concerning the patriarchs should be applied also to Major Archbishops[22]. Regarding the other types of Churches *sui iuris*, that is, the Metropolitan Churches *sui iuris* and the miscellaneous Churches[23], a simple consultation of the Congregation is sufficient[24]. The Congregation always can ask these authorities for their opinion.

The fact that the Cardinal Ordinary has been willing to commit himself to consultation with the proper authorities of the Eastern Catholic church in question, the responsible ecclesiastical office in Rome and his fellow bishops directly concerned is worthy of positive remark, the more so in view of the fact that there was nothing in Latin law that would oblige him to do so. These regulations bring to mind c. 193 § 3 of the CCEO, although the latter stipulates that the Patriarch not only has to be consulted but also has to agree. If not, the matter has to be referred to the Apostolic See. The ordinance of Cardinal Lustiger does not go as far as that, but it does entail an obligation at least to take into account the views of the proper authorities of the Eastern Church concerned.

From the formal point of view, it may be noted here that the Cardinal Ordinary mentions the fact that he is formulating the dispositions of the ordinance "in agreement with the Congregation for the Eastern Churches". This does not indicate that he would have had need of any sort of delegated power or faculty to publish this ordinance[25], but rather, obviously enough, that the Congregation is in agreement with the procedure envisaged, where it will play the part of an intermediary, while at the same time being entitled to submit its opinions.

Now, does the content of the ordinance correspond to what is foreseen in CIC c. 31, that is does it determine more precisely the methods to be observed in

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[22] Cf. CCEO c. 152.

[23] We owe this last expression to Mgr John Faris, with gratitude.

[24] We just remember that these ecclesial authorities have no power whatsoever outside the territory of their Church. Therefore a different procedure in respect to these Churches *sui iuris* seems justified.

[25] We remember that the Congregation cannot delegate or confer a power of legislation which it does not possess itself . The exercise of legislative power by a Roman dicastery only occurs in special cases and with the specific approval of the Roman Pontiff. Cf. C.A. 'Pastor Bonus', June 28, 1988, art. 18.

applying the law or urge the observance of laws? The latter certainly does not apply, but we can consider that the Cardinal Ordinary details the method to be observed in applying c. 383 § 2 concerning the provisions for the spiritual needs of faithful of a different rite by means of priests or parishes of that rite. Eventually, it concerns the conjunction of this canon with the one on the appointment of chaplains or of parish priests[26]. The ordinance does not contain anything contrary to the law in force. Within the framework of the law, it indeed gives details how to apply it.

In conclusion we may state that the pluri-ritual Ordinaries are very well able to issue general executory decrees concerning the Ordinariate and its functioning. Apparently few of the Ordinaries, in fact, have felt the need to do so.

IV. Particular law issued by the Conferences of Bishops

As we said above, we are concerned to see whether norms of particular law have been promulgated by the local Latin Ordinaries in a collective manner, that is to say as convoked in the respective Conferences of Bishops. Our research have not come up with a great deal in the way of results. To judge from their websites, few of the Conferences of Bishops have promulgated norms directly concerning the Eastern Catholics resident in their territories. Since the research conducted by our colleague Professor Pablo Gefaell and published two years ago[27], the situation has not changed in any essential way. As our esteemed colleague mentioned in his study, the Portuguese Conference of Bishops has been engaged in drawing up norms for some years already, as he cites a draft document dating from 2009. However, the project does not seem to have achieved any result to date, and the website of the Conference of Bishops does not include any reference to norms of this nature.

The Conferences of Bishops of other countries that include a certain number of Eastern Catholics in their territory have not apparently deemed it necessary to issue particular law to organise the pastoral care of these faithful. As far as we know, only one document exists in this respect, published by the Spanish Conference of Bishops, but this, from a formal point of view, cannot be considered as a particular law in the strict sense. We will come back to this shortly. Moreover, the content of this document has already been commented on by two of our colleagues, Professors Gefaell and Lorusso[28], for which reason we

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[26] Cf. respectively CIC cc. 565 and 523.

[27] P. GEFAELL, L'attenzione agli Orientali cattolici nei documenti delle Conferenze Episcopali, in: IDEM, Cristiani orientali e pastori latini (= note 3), 353-378.

[28] Cf. IDEM, Nota ai documenti della Conferenza Episcopale Spagnola sui cristiani orientali, cattolici e non cattolici, in: Ius Ecclesiae 18 (2006) 861-876; IDEM, I documenti della Conferenza Episcopale Spagnola sui cristiani orientali, cattolici e non cattolici, in: Š. MARINČÁK (ed.), Diritto particolare nel sistema del CCEO. Aspetti teoretici e produzione normativa delle Chiese orientali cattoliche (Orientalia et Occidentalia 2), Košice 2007, 355-371; L. LORUSSO, Servizio pastorale agli orientali cattolici in Spagna, in: Angelicum 4 (2007) 423-436.

will limit ourselves here to a very brief summary of some subjects treated in this document.

At its 18th Plenary Assembly on 21 November 2003, the Spanish Conference of Bishops approved a document entitled "Guidelines for the pastoral care of Eastern Catholics in Spain"[29]. The term "guidelines" ("orientations") in itself indicates that the bishops did not have the intention of issuing any real juridical norms. Moreover, as our two colleagues note, this document was not promulgated in accordance with the procedure prescribed for normative documents of the Conference of Bishops. It did not come with the approval of the Apostolic See – which is required if norms of particular law, adopted in plenary assembly by at least two thirds of the members having the right to cast a vote, are to be promulgated and to come into force[30]. This would be the more important in view of the fact that certain innovations are included in the document in relation to the law in force. For this reason the document cannot be considered as just a simple instruction. Professor Gefaell is of the opinion that this document should rather be described as a general executory decree in what concerns its content[31]. We can conclude that it is a document intended to provide orientation, which does not bind the persons addressed under an obligation to act accordingly.

Leaving aside the question concerning the juridical nature of this document, let us now turn to its content. It may be observed that two kinds of guidelines are presented here: those which concern the organisational structures of the pastoral care of Eastern Catholics, and those relating to the celebration of the sacraments and the administrative questions associated with their celebration. For the moment we will leave this latter area aside, as it would involve a somewhat detailed discussion.

In relation to issues of organisational structure, a remarkable fact faces us in the establishment of a "Department for the Pastoral Care of Eastern Catholics". This department is an institution of the Conference of Bishops, and it has above all the role of coordination: the director of the department is at the service of the Conference of Bishops, and in particular of any diocesan Ordinary[32], he will be obliged to maintain regular contact with the Congregation for the Eastern Churches and to be in touch with the synods of the Eastern Catholic churches.

Thus it is clear that the director of the department has a coordinating function; in fact he is a veritable connecting link between the different authorities involved – the Conference of Bishops, the individual diocesan bishops, the responsible Roman ecclesiastical office and the responsible institutions of the

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[29] Orientaciones para la atención pastoral de los católicos orientales, in: Boletín Oficial de la Conferencia Episcopal Española XVII, n° 71 (31 décembre 2003) 56-63. We take as foundation the text published in MARINČÁK, Diritto particolare, 497-507.

[30] GEFAELL, Nota, 861; LORUSSO, Servicio, 423.

[31] GEFAELL, ibidem.

[32] "Diocesan Ordinary" is an unusual expression in Latin canon law.

Eastern Churches sui iuris. He does not exercise any jurisdiction in relation to the Eastern Catholics, as this is in all cases the responsibility of the diocesan bishop[33].

Let us now look at the dispositions of the Guidelines regarding pastoral structures at a local level. Sociological facts form the point of departure: the Latin parish priest has the responsibility of ascertaining the presence of Eastern Catholics at diocesan level – or in our opinion, it would be more accurate to say at parish level. Several paths open up when this happens: either it may be possible to set up a diocese (sic!) for the Eastern Catholics, or on the other hand, when this is not possible in view of their low numbers, their wide dispersion or their conditions of work, the diocesan bishop may be able to appoint a Latin priest for the pastoral care of these faithful.

At the diocesan level, the document envisages setting up parishes which may include Eastern Catholics belonging to different Churches sui iuris and which thus would be pluri-ritual. The parish priest may be Latin, in which case it will be necessary to apply for a bi-ritualism indult. The document does not specify how to proceed if the Latin parish priest is responsible for a pluri-ritual parish. He would not be able to celebrate according to all these rites. This is perhaps because Eastern Catholics in Spain are for the most part members of the Greek Catholic Ukrainian and Romanian churches[34], that is to say two churches with rites derived from the Byzantine tradition. However, the risk that the Latin parish priest may be tempted to celebrate quite simply according to the Latin rite does not seem to us outside the realm of possibility especially since the document wishes to see celebrations in a common language and recommends Spanish for the purpose.

This brief glimpse gives us an idea of the subject that may be broached in documents prepared at the level of a Bishop's Conference. The absence of a real particular law of the Bishop's Conferences in this area suggests the question what particular law would be capable of regulating in this domain, and what are the conditions of its being promulgated. This will be considered in the last part of our presentation.

V. De iure condendo

We now focus on the competences of the Conferences of Bishops, as coordination on this level would be highly desirable, though on the other hand we have found that little has yet been done in this field. It will be necessary to take into account two aspects: first that of the appropriateness, and then the content and form of particular law.

Certain documents of the Magisterium provide elements relating to the question of appropriateness. The Pontifical Commission for the Pastoral Care of

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[33] GEFAELL, NOTA, 870.

[34] Cf. M. CRUZ MUSOLES COBEDO, Criterios pastorales y jurídicos aplicables a los católicos orientales en España, especialmente en materia matrimonial. A la luz de la Pastoral de migraciones, el Código de Cánones de la Iglesias Orientales y la Instrucción Dignitas Connubii, in: Revista española de derecho canónico 65 (2008) 537-562 (here: 546).

Immigrants and Tourists made the point, in a circular letter dating from 1978 and addressed to the Conferences of Bishops, that the question of immigrants is *ipso facto* a question going beyond diocesan borders. It is for this reason that episcopal commissions at national level are extremely useful and constitute a meeting point for collegial and local responsibility. They do not detract from the responsibility of the individual diocesan bishop, but provide an indispensable service to the dioceses which are not always in a position to cope with the multiple and complex problems resulting from migration. This is why the Pontifical Commission would like to see solidity between the churches and some form of pastoral coordination[35]. If the Pontifical Commission does not explicitly envisage the formulation of norms of particular law, the specification of the objectives referred to above does not exclude it either, and in some cases would even encourage it. The establishment of a national episcopal commission, for example, would have to be defined in the statutes of the Conference of Bishops, thus in a document of particular law. Apart from that, the bishops have the choice of the means – whether they wish to make use of their legislative power or just of their executive power[36], both being possible. As for matters more specifically pertaining to the Eastern Catholics, Pope John Paul II considered this question in his Apostolic Letter *Orientale Lumen* of 1995:

> "A particular thought goes to the lands of the diaspora where many faithful of the Eastern Churches who have left their countries of origin are living in a mainly Latin environment. These places, where peaceful contact is easier within a pluralist society, could be an ideal environment for improving and intensifying cooperation between the Churches in training future priests and in pastoral and charitable projects, also for the benefit of the Orientals' countries of origin.
> I particularly urge the Latin Ordinaries in these countries to study attentively, grasp thoroughly and apply faithfully the principles issued by this Apostolic See concerning ecumenical cooperation *and the pastoral care of the faithful of the Eastern Catholic Churches, especially when they lack their own hierarchy* [my italics, AK].
> 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. The Eastern Catholic Bishops will not neglect any means of encouraging an atmosphere of brotherhood, sincere mutual esteem and cooperation with their brothers in

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[35] Pontificia Commissione per la Pastorale delle Migrazioni e del Turismo, Lettere Circolare "Nella sua sollecitudine" alle conferenze episcopali sul tema "Chiesa e mobilità umana", 26 maggio 1978, in: AAS 70 (1978) 357-378. Cf. also Enchiridion Vaticanum, VI, n. 820-873 (here: 869).

[36] See by analogy M. WIJLENS, Gesetzgebung für das Volk Gottes. Vollmacht und Auftrag des Diözesanbischofs, in: I. RIEDEL-SPANGENBERGER (ed.), Rechtskultur in der Diözese. Grundlagen und Perspektiven (Quaestiones Disputatae 219), Freiburg im Breisgau 2006, 249-274 (here: 255).

> the Churches with which we are not yet united in full communion, especially with those who belong to the same ecclesial tradition.
> Where in the West there are no Eastern priests to look after the faithful of the Eastern Catholic Churches, Latin Ordinaries and their co-workers should see that those faithful grow in the awareness and knowledge of their own tradition, and they should be invited to cooperate actively in the growth of the Christian community by making their own particular contribution"[37].

Here likewise there is no explicit reference to the legislative powers of the bishops, but it is nonetheless to be understood: if the Latin Ordinaries have to apply the principles concerning the pastoral care of the faithful of the Eastern Catholic Churches, especially when they lack their own hierarchy, one of the ways to do this can be by formulating norms to help the implementing of the principles.

With reference to the content, we must first of all consider the question whether the Conference of Bishops is able to exercise any legislative authority in relation to the Eastern Catholics resident in its territory. We have to conclude that canon law does not assign any important role to the Conference of Bishops for the organisation of its pastoral responsibilities in relation to these groups of the faithful. The Code of Canon Law of 1983 places an emphasis on the responsibility of each individual local bishop, as we have seen, rather than on any joint action by the bishops of the given country. Expanding this perspective, we find that the Instruction "*Erga migrantes caritas Christi*" of 3 May 2004, on the subject of immigrants, does on the other hand attribute certain responsibilities to the episcopal conferences. Here, however, we are dealing with tasks of coordination and contact with the local bishops, with the responsible dicasteries in Rome and with the Conferences of Bishops of the countries from which the immigrants come, particularly for the dispatch of missionaries, all this through the mediating agency of a national episcopal commission having its own director[38]. The legislative authority of the episcopal conference does not directly come into play here.

This leads us to ask whether the Bishop's Conference would be able, in fact, to exercise its authority to make laws in the area of pastoral care of Eastern Catholics, and if so, under what conditions. We can distinguish three different situations. The first is mentioned in c. 455 § 1 CIC stipulating that the Conference of Bishops can issue general decrees, that means documents containing common prescriptions and being considered as laws[39]. In other words, the Conference of Bishops can formulate norms of particular law, but only in those cases in which the common law prescribes it. So there is need for a specific reference in the universal norms attributing the competence to issue particular law to the Conference of Bishops. In certain cases, the Conference of Bishops is obliged to

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[37] JOHN PAUL II, Apostolic Letter "Orientale Lumen", May 2, 1995, online in: www.vatican.va.

[38] Cf. Instruction EMCC, Juridical and pastoral provisions, art. 19-20.

[39] Cf. CIC c. 29.

legislate; in others, it is an optional right[40]. Being an institution of Latin law, the Conference will exercise these assigned powers principally in relation to the Latin Church. We have seen that universal law does not prescribe or recommend any particular law in regard to Eastern faithful, except possibly in what concerns those statutes of the Conference which may, for example, envisage the setting up of a national commission for immigrants with its own director and determine the competences of the one and the other. However there is nothing to prevent it from paying attention to the situation of the Eastern Catholics including them within the scope of this particular law. Thus the Conference could incorporate specifications concerning the Eastern Catholics within the norms of particular law which apply to the Latin faithful, whether it is a matter of new norms or of already existing ones that are to be supplemented.

Agreements on the subject of the ministry of priests or other clerics of these churches, concluded between the bishop a quo and the bishop ad quem, are an example of this type of particular law. The Italian Conference of Bishops drew up an agreement on the subject of priests coming from abroad – a situation which includes, obviously, Eastern Catholic priests. Thus a model agreement could be formulated by the episcopal conference, specifying the important points in relation to the structures and competences of the Eastern Catholic churches and leaving room, if possible, for them to be adapted by the diocesan bishop according to the local circumstances. This is particularly important with reference to financial questions relating to salaries, social security, reimbursement of expenses etc., above all if a division of the costs will need to be arrived at by appealing to a sense of diocesan solidarity.

Another example is the presbyteral council of the diocese, for which c. 496 stipulates that it is to have its own statutes approved by the diocesan bishop, "in light of the norms issued by the conference of bishops". Thus the Conference would be able, for example, to prescribe a proportional representation of Eastern priests in case they have not been elected by their peers. The bishop would be able to oversee these developments and act to restore equilibrium in case of need, by the direct appointment of a few members.

A second situation is foreseen where c. 455 § 1 continues: "or when a special mandate of the Apostolic See, given either motu proprio or at the request of the conference, determines it". In the areas where universal law is silent, such as here on the subject of Eastern Catholics, the Conference of Bishops would be able to promulgate a particular law, if it receives a special mandate for the purpose from the Apostolic See[41].

In all the other cases, the competence of individual diocesan bishops remains intact, implying as the only other possibility for the Bishops Conference of issuing

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[40] Cf. for instance Secretariat of State, Letter to the Presidents of the Episcopal Conferences, November 8, 1983, in: Communicationes 15 (1983) 135-139.

[41] The M.P. "Apostolos Suos" issued by pope JOHN PAUL II on May 21, 1998, n° 20, reminds these same norms.

particular law "that each and every bishop gives his consent"[42], which represents a third situation. All this holds good, in the last two situations, for norms which are aimed directly and exclusively at the Eastern Catholics.

As for the content of this particular law, the norms which are directly concerned with the pastoral care of Eastern Catholics may, as in the Spanish example, focus on the establishment of pastoral structures in the form of parishes by formulating procedures of consultation, for instance, especially ensuring that the superior authorities of the Eastern Church *sui iuris* are consulted, and in prescribing measures for financing such initiatives. However, they cannot oblige the bishop to erect a parish for Eastern faithful in his diocese, unless every bishop gives his consent to it, because this belongs to the specific competence of each individual diocesan bishop[43]. They may specify the maintenance of registers, organise the distribution of priests and specify the conditions for the exercise of their ministry, determine the conditions for the celebration of the sacraments, particularly when the minister and the faithful are not of the same Church *sui iuris* and so on.

Two other examples demonstrate that there is not always latitude for the Conference of Bishops because of the proper power of the diocesan bishop. The constitution of the Pastoral Diocesan Council depends on the bishop, as do the statutes[44], and many bishops have indeed promulgated particular law concerning this institution. It seems out of the question that the Conference should issue norms insisting on proportional representation of Eastern faithful in this Council, in accordance with their presence in the diocese. This would be possible only if the situation referred to above and envisaged by CIC c. 455 § 4 should apply in this case that is to say if all the diocesan bishops give their consent. The same would apply with regard to the representation of Eastern Catholics at a diocesan synod[45].

Besides this, the Conference of Bishops has to take into account that there are areas which fall under the jurisdiction of still other authorities or institutions within the Church. We think here of bodies or institutions which have a certain legislative autonomy, like the institutes of consecrated life and the societies of apostolic life. These institutions themselves establish their proper law based on a Rule and on constitutions and statutes. The Conference of Bishops would not be able to legislate on aspects which come under the internal government of such institutions.

In the context of this presentation, it is appropriate to point to a field which is still frequently neglected but which, in our opinion, represents a matter of urgency – namely, the training of ordained ministers. The Conference of Bishops has the

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[42] Cf. CIC c. 455 § 4: In the cases where neither the universal law nor a special mandate of the Apostolic See has granted the conference of bishops the power mentioned above in § 1, the competence of individual diocesan bishops remains intact; and neither the conference nor its president may act in the name of all the bishops unless each and every bishop has given his consent.

[43] CIC c. 518 in conjunction with c. 515 § 2.

[44] CIC cc. 511-514.

[45] Cf. CIC cc. 460-468.

obligation of formulating norms for training in the permanent diaconate, as well as the programme for the training of priests[46]. These norms would be able to take account of the possible presence in Latin seminaries of candidates coming from the Eastern Catholic Churches, by specifying how these can receive training in keeping with their rite. It is not just a necessity if they are to put themselves at the service of the communities of their Church sui iuris – observance of the proper rite is at the same time a right and an obligation for these candidates[47]. Even if such candidates are few in number, their rights must be respected. Norms of particular law promulgated by the Conference of Bishops could help bring this matter to the attention of the bishops and encourage them to respect these rights. A coordination in this field could help realise this aim. In an era where seminaries are increasingly interdiocesan and Eastern Catholics not necessarily numerous and at the same time widely dispersed over the national territory, concentration of the few means available – particularly through the involvement of training staff and training centres – would be a favourable option and would benefit from measures at national level.

VI. Conclusion

Concerning the pluri-ritual Ordinariates entrusted to a Latin prelate, only one of them, constituted in France, has elaborated proper norms by way of an ordinance with respect to the appointment of parish priests. According to canonical categories, this document represents a general executory decree, since the Ordinary does not necessarily possess legislative power, but he can issue this kind of decree in virtue of his executive power. However, it cannot be called "particular law" in a strict sense.

If at the present time, few norms of particular law, or none at all, promulgated by the Conference of Bishops are in existence, this is not a situation that is necessarily bound to continue. We have tried to demonstrate that canon law offers latitude for the promulgation of laws of this nature. We have seen, first of all, that the Conference of Bishops can legislate even when the law does not assign it the competence to do so in a specific field, provided it requests and obtains a special mandate from the Apostolic See or it can legislate with the unanimous consent of the diocesan bishops in the fields belonging to their competence. In the second place, it can benefit from occasions where canon law does assign it legislative competence in order to include the Eastern Catholics and their specific needs in these norms. This situation, moreover, would be the easiest to bring about on the juridical level. However it does call for increased awareness on the part of the bishops who are members of the Conference, and for the will to

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[46] CIC cc. 236 et 242.

[47] Cf. CCEO cc. 41 and 343; CIC c. 214. Cf. L. SABBARESE – D. SALACHAS, Chierici e ministero sacro nel Codice latino e orientale. Prospettive intereccclesiali, Rome 2004; or also D. SALACHAS – K. NITKIEWICZ, Rapporti intereccclesiali tra cattolici orientali e latini. Sussidio canonico-pastorale, Rome 2007, 103-104.

take Eastern Catholics and their pastoral needs into account. In our opinion, the problem with particular law of the Conference of Bishops is not so much of a juridical nature, but rather a matter of the mindset.

CHIESA UNIVERSALE E CHIESE *SUI IURIS* TRA DIMENSIONE RITUALE E UNITÀ DI FEDE (CELIBATO E PRASSI DEL SACERDOZIO UXORATO)

Carmela V e n t r e l l a M a n c i n i, Bari

I. L'unità di fede nella conservazione dei riti: il periculum animae tra induzione ed imposizione

In una prospettiva volta a consolidare l'unità della Chiesa attraverso la conservazione delle pluralità rituali, la sollecitudine per la situazione dei cattolici di rito orientale nel mondo ha rappresentato un punto fermo dell'attività del magistero ecclesiastico. Paradigmatica, a tal proposito, risulta essere l'enciclica di Benedetto XIV *Allatae sunt* del 1755 che, in una lettura moderna del progetto di conversione dei popoli, evidenzia la necessità di rispettare le tradizioni delle singole Chiese *sui iuris* quale parte del patrimonio universale[1]. Per il valore prodromico di alcune soluzioni, prospettate e recepite nell'evoluzione dei tempi, alcuni passaggi del documento presentano ancor oggi aspetti rilevanti sul piano normativo e pastorale.

Nella codificazione di regole volte a disciplinare situazioni conflittuali derivanti dalla convivenza di culture diverse e nell'obiettivo di recuperare alla fede cattolica quanti erano stati deviati dallo scisma, significative risultano essere le risposte agli interrogativi, posti alla Chiesa di Roma dai sacerdoti in terra di missione; i nodi più urgenti da risolvere riguardavano l'alternativa se consentire ai cattolici orientali, privi di una loro chiesa specifica, di celebrare i loro riti particolari nelle chiese latine o se, invece, più drasticamente "togliere la varietà nella stessa Chiesa" ("*ad tollendam varietatem in ipsa Ecclesia*"); ne sarebbe derivato, nello specifico, che Armeni e Siriani avrebbero dovuto rinunciare alla propria identità spirituale, lasciando il vecchio per abbracciare il nuovo calendario nelle questioni riguardanti i tempi liturgici, in particolare con riferimento alla solennità pasquale, alla comunione annuale e alla quaresima nonché ai giorni festivi, mobili e immobili[2].

Inoltre, altri dubbi erano sorti intorno alla possibilità dei pastori latini di dispensare gli orientali dall'osservanza delle proprie prescrizioni alimentari nei periodi di digiuno: lo scopo era quello di evitare lo *scandalo*, data la difformità delle norme in materia di astinenza[3].

La questione venne rimessa alla Congregazione generale dell'Inquisizione che, all'unanimità e in modo efficace, affermò che "nulla doveva deve essere innovato" ("*nihil esse innovandum*")[4]; la conseguenza fu, dunque, che i missionari

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[1] Cf. L. LORUSSO, Il rispetto dei riti orientali nell'evangelizzazione delle genti: attualità dell'Enciclica Allatae sunt di Benedetto XIV, in: Ius Missionale 1 (2007) 73ss.

[2] Benedictus XIV, Bullarium IV, Romae 1758, § 1 (p. 175).

[3] Ibidem, § 2 (p. 175s). In argomento, cf. C. VENTRELLA MANCINI, Tempo divino e identità religiosa. Culto rappresentanza simboli dalle origini all'VIII secolo, Torino 2012, 3ss.

[4] Ibidem, § 3 (p. 176).

non avevano alcun potere derogatorio quanto ai riti orientali e che i greci potevano radunarsi nelle chiese latine per svolgere in esse le sacre funzioni con il proprio rito. Tale soluzione era nel senso del rispetto dei "precetti equitativi del diritto" ("*praecepta aequitativi juris*"), che esigeva il "dovere di ospitalità" ("*urbanitatis officia*") verso chi non disponeva dei luoghi adatti alle celebrazioni[5].

Per convertire gli erranti "all'unità e alla Santa Cattolica religione" ("*ad unitatem, Sanctamque Catholicam religionem*")[6] non era sufficiente eliminare o indebolire il rito orientale; infatti, si era dedicata ogni cura all'eliminazione delle deviazioni dalla retta dottrina, senza provocare alcun danno al venerabile Rito orientale[7]. L'unico compito del missionario era, in effetti, quello di richiamare il cattolico orientale alla fede cattolica e non indurlo al rito latino[8].

Nella rinnovata consapevolezza emergeva, quindi, il principio secondo il quale la salvaguardia della Chiesa nella sua totalità passava attraverso la perpetuità della specialità dei riti e dell'individualità spirituale dei cattolici d'Oriente, anche sotto il profilo dell'assistenza di sacerdoti del medesimo rito. L'esigenza di conservazione del proprio credo fu, infatti, all'origine di alcuni interventi del pontefice sull'autorità civile per assicurare la presenza di due vescovi, uno latino e l'altro greco, nei luoghi a forte mescolanza di cattolici occidentali e orientali[9].

La Chiesa latina è stata perseverante nella considerazione del patrimonio spirituale e culturale delle legittime diversità, con il limite rappresentato da ciò che poteva costituire, nei casi di convivenza, "un pericolo per le anime e l'onestà della Chiesa" ("*periculum animarum, vel honestati Ecclesiasticae*")[10]. Tra questi, secondo un atteggiamento che sarà costante nel corso degli eventi, emergeva il caso della tradizione del clero uxorato che, nelle peculiari contingenze storiche e sociali, veniva interpretata quale pericolosa occasione di corruzione; in particolare, si temeva che i latini, "attratti forse da quella libertà che era stata riservata ai greci di trattenere, dopo l'ordine sacro, le mogli che avevano sposato prima di ricevere l'ordine"[11], potessero passare "sconsideratamente" ("*impudenter*") ai riti "forestieri" ("*alienigenae*")[12].

Il connaturato valore di estraneità insito nel termine utilizzato fa riemergere antichi dissidi tra chiese territorialmente lontane e di tradizioni diverse, innalzando gli steccati intorno ad una questione che, paradossalmente, andava a trasformare, nelle zone di missione, gli ospiti in ospitanti in virtù della supremazia del rito

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[5] Ibidem, § 41 (p. 191).

[6] Ibidem, § 4 (p. 176).

[7] "[...] uno verbo omnem curam collatam fuisse, ut errores Catholicae Fidei adversi evellerentur; vero nunquam id actum esse, ut venerabili Orientali ritui detrimentum ullum inferretur" (ibidem, § 6, p. 177).

[8] "[...] munus namque hoc unum Missionario domandatur, revocandi Orientalem ad Cathlicam Fidem, non vero ipsum ad Latinum Ritum inducendi" (ibidem, § 19, p. 181).

[9] È quanto fece Onorio III con riferimento al re di Cipro; ibidem, § 8 (p. 177).

[10] Ibidem, § 9 (p. 177).

[11] "[...] allerti fortasse, ea libertate, quam noverant Graecis praeservatam, retinendi post Ordinem sacrum, uxores, quas duxerant, antequam eundem Sacrum Ordinem suscepissent" (ibidem, § 20, p. 181).

[12] Ibidem.

latino, usato dalla Santa romana Chiesa, "che è Madre e Maestra delle altre chiese e deve preferirsi a tutti gli altri riti" ("*quae Mater est et Magistra aliarum ecclesiarum, reliquis omnibus ritibus praeferri debet*")[13].

Lo spostamento dell'asse geografico d'interesse determinato dal prevalere delle ragioni politiche, sottese al moderno fenomeno degli spostamenti di massa di popolazioni verso Paesi di tradizione latina, sulle ragioni della originaria evangelizzazione delle genti, non modifica il problema evidenziato dei limiti relativi al rispetto incondizionato delle pluriformità delle famiglie liturgiche delle Chiese orientali; il patrimonio tipico di queste ultime, non circoscritto alla sola dimensione rituale[14], rischia di essere compromesso nel confronto con la Chiesa latina e le sue istituzioni.

L'ingente flusso migratorio che caratterizza la società odierna impone, invero, una riflessione con particolare riferimento al profilarsi di nuove esigenze di tutela individuale e collettiva nella prospettiva identitaria. La convivenza forzata, nei medesimi spazi, dei credi e delle religioni crea i presupposti per un'analisi in merito alle concrete possibilità di soddisfazione di tali occorrenze, come evidenzia la vivace casistica giurisprudenziale di settore nei singoli Stati. Il problema della tutela positiva della libertà religiosa investe, però, anche profili interconfessionali e, ancor più significativamente, intraconfessionali.

Proprio in relazione a quest'ultimo aspetto, la nostra indagine si propone l'obiettivo di verificare la rilevanza che viene ad assumere nella Chiesa cattolica, nella *visione unitaria di fede*, l'elemento particolare del "territorio" sulla "condizione comune di battezzato"; il punto sul quale s'intende investigare trae origine dal fatto che, con riferimento ad alcune questioni particolari, la prevalenza accordata alla *dimensioni rituali* delle "comunità accoglienti" – pur nella condivisione, con "chi è accolto", dell'appartenenza – possa creare discriminazioni tra le identità.

II. Praestantia ritus latini e perseveranza normativa

La consapevolezza giuridica della pari dignità delle Chiese, attraverso il riconoscimento dell'eredità spirituale e liturgica, disciplinare e teologica, nelle diverse sue tradizioni, quale patrimonio della Chiesa universale[15], in un "superamento" dell'esclusività del diritto canonico latino quanto all'assoggettamento alle sue leggi di tutti i battezzati, viene a volte contraddetta da atti territorializzanti, che inducono ad una rilettura dell'elemento tradizionale della *praestantia ritus latini*.

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[13] Ibidem.

[14] Il rito, in realtà, nella peculiare concezione orientale, "è il patrimonio liturgico, teologico, spirituale e disciplinare, distinto per cultura e circostanze storiche di popoli, che si esprime in un modo di vivere la fede che è proprio di ciascuna Chiesa *sui iuris*" (c. 28 § 1 CCEO).

[15] Cf. Decretum de Ecclesiis Orientalibus Catholicis, nn. 3, 5, in: Enchiridion Vaticanum I, 266ss.; Decretum de Oecumenismo, nn. 16-17, ibidem, 314ss.

Il diritto-dovere di rendere il culto a Dio secondo le prescrizioni del proprio rito e di seguire una particolare forma di vita spirituale è consacrato come prerogativa universale del fedele[16]; infatti, nella peculiare dimensione interrituale, in considerazione altresì della situazione giuridica legata all'ascrizione o al passaggio ad una chiesa rituale secondo le specifiche norme codiciali[17], tale disposizione è stata riprodotta emblematicamente anche nel codice orientale[18]. Al riguardo, la generale previsione di conformità agli insegnamenti della Chiesa di appartenenza, quale limite per l'esercizio delle prerogative evidenziate, pone sul piano pratico, nei casi di convivenza obbligata, alcune problematiche su questioni essenziali, che sono al centro di notevoli differenze tra comunità di rito diverso.

La libertà cultuale, pur tutelata da un solido impianto di norme, porta con sé il timore dell'inattuazione a proposito di tipiche situazioni che, mentre sono poco percepite sul piano teorico, nella realtà si presentano in uno scenario conflittuale quando è lo "spazio" a diventare protagonista di singolari dinamiche interattive. In questi casi, inverosimilmente, le interpretazioni divergenti su importanti contenuti della dottrina sono favorite proprio dal carattere non assolutistico degli stessi, lasciando aperta la possibilità di un confronto nell'ottica di soluzioni orientate a favorire l'unità ecclesiale e la concretizzazione di inconsueti profili di tutela della uguaglianza dei riti.

In questa prospettiva si pone la legge del celibato degli ordinati *in sacris* che, pur non rivestendo carattere di definitività, costituisce un punto caratterizzante il patrimonio dottrinale della Chiesa latina. Per quest'ultima, in realtà, quello del celibato è "un dono speciale di Dio", a tutela del quale è necessaria un'adeguata formazione durante gli anni di seminario[19], diventando con l'ordinazione obbligo "speciale", al punto che la violazione dello *status caelibatus* viene a configurare delitti particolarmente gravi, puniti con pene *latae sententiae* anche per lo *scandalo* che producono nella comunità[20].

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[16] Cf. cc. 214 CIC; 17 CCEO. Cf., sul punto, O. CONDORELLI, Giurisdizione universale delle Chiese sui iuris? Tra passato e presente, in: P. GEFAELL (ed.), Cristiani orientali e pastori latini, Milano 2012, 91ss.

[17] Cf. cc. 111 e 112 CIC.

[18] Sul concetto di "rito" nelle codificazioni, latina ed orientale, cf. M. D. BROGI, Obblighi dei vescovi latini verso i fedeli di una Chiesa orientale cattolica inseriti nella loro diocesi, in: ibidem, 15ss.

[19] Il c. 247 CIC impone una *congrua educatio ad servandum statum caelibatus*, in quanto dono speciale di Dio, che richiede apprezzamento nonché accettazione consapevole e responsabile. Una "illuminata pedagogia" del celibato sacerdotale è la "meta" a cui tende l'educazione programmatica seminaristica in vista della preparazione di "personalità integralmente *umane, cristiane e sacerdotali*" (CONGREGAZIONE PER L'EDUCAZIONE CATTOLICA, Orientamenti educativi per la formazione al celibato sacerdotale, 11 aprile 1974, in: Enchiridion Vaticanum V, 201ss).

[20] Il c. 132 del codice pio-benedettino considerava la violazione del celibato *sacrilegio*, riferimento che è stato omesso nel codice vigente. Sull'interpretazione del silenzio cf. J. FERREIRA PENA, Fondamenti dottrinali del celibato ecclesiastico dal CIC 1917 al CIC 1983, in: Periodica 83 (1994) 241ss.

Così è per l'attentato di matrimonio anche solo civile da parte di un chierico, che non esclude la dimissione dallo stato clericale, nel caso in cui lo stesso, nonostante l'ammonizione, continui a dare *scandalo*[21].

Si consideri, inoltre, che la perdita dello stato clericale non comporta per sé la dispensa dall'obbligo del celibato, in quanto legge dal valore perenne e imperituro nonostante "il passare del tempo"[22], e che rimane di esclusiva competenza del Romano Pontefice[23].

In quest'ottica, sempre al fine di evitare lo *scandalo* tra i fedeli, alcune Conferenze episcopali hanno negato il diritto all'identità religiosa vietando, in alcune parti del mondo, l'esercizio del ministero sacerdotale a quegli orientali che hanno scelto lo *status* uxorato previsto dalla Chiesa di appartenenza. È questo uno dei casi in cui il "territorio" viene ad incidere sull'esercizio dei diritti riconosciuti[24].

Il codice orientale, infatti, confermando la plurisecolare tradizione non celibataria, prevede la libertà di scelta circa la condizione del clero, che è accolta *in via concettuale* dalla Chiesa latina in quanto, come questione di disciplina, non viene ad incidere sulla fede. Anche l'attuale pontefice, prima di salire al soglio petrino, ebbe a ribadire, sul tema tanto discusso nel cattolicesimo occidentale, la natura disciplinare e, quindi, in *astratto* mutevole, del celibato dei sacerdoti, osservando in merito che "essendo una questione di disciplina, non di fede, si può cambiare"[25].

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[21] Cf. cc. 1394 CIC, 1453 § 2 CCEO. A tutela del celibato, per evitare gli scandali, a seguito di condotte pericolose, il c. 277 §§ 2 e 3 CIC ammonisce i chierici ad agire con le persone con la dovuta prudenza attribuendo, inoltre, al Vescovo il dovere-diritto sia di prevenzione, attraverso l'emanazione di opportune norme in questa materia, sia di giudizio nei casi concreti.

[22] CONGREGAZIONE PER LA DOTTRINA DELLA FEDE, Per litteras ad universos omnibus locorum ordinariis et moderationibus generalibus religionum clericalium de modo procedendi in examine et resolutione petitionum quae dispensationem a caelibatu respiciunt, 14 ottobre 1980, § 3, in: Enchiridion Vaticanum VII, 552.

[23] Cf. c. 291 CIC.

[24] È il noto caso dei sacerdoti greco-rutheni non ammessi negli Stati Uniti a causa del *gravissimum scandalum* arrecato ai fedeli latini. Cf. F. MARTI, I rutheni negli Stati Uniti. Santa Sede e mobilità umana tra Ottocento e Novecento, Milano 2009, 136ss.

[25] Nelle suggestive pagine che raccolgono il colloquio con Abraham Skorka (Il cielo e la terra. Il pensiero di Papa Francesco sulla famiglia, la fede e la missione della Chiesa nel XXI secolo, Milano 2013, 53s.), JORGE BERGOGLIO, a proposito di un sentimento che aveva provato nei confronti di una ragazza mentre era ancora in seminario, afferma: "Nella chiesa occidentale, alla quale io appartengo, i preti non possono sposarsi come nelle chiese cattoliche bizantine, o in quella ucraina, russa o greca. I sacerdoti possono sposarsi, i vescovi no, devono essere celibi. A volte li prendo in giro, gli dico che hanno una donna in casa ma che non si sono resi conto di essersi comprati anche una suocera. È un tema che viene discusso nel cattolicesimo occidentale, su sollecitazione di alcune organizzazioni. Per ora si tiene ferma la disciplina del celibato. C'è chi dice, con un certo pragmatismo, che stiamo perdendo manodopera. Se, per ipotesi, il cattolicesimo occidentale dovesse rivedere il tema del celibato, credo che lo farebbe per ragioni culturali (come in Oriente) non tanto come opzione universale. Per il momento, io sono a favore del mantenimento del celibato, con i pro e i contro che comporta, perché sono dieci secoli di esperienze positive più che di errori. [...] poi la chiesa orientale continuò la tradizione non celibataria, in quanto scelta personale, al contrario di quella occidentale. È una questione di disciplina, non di fede. Si può cambiare". Nel clima di riforme inaugurato dall'attuale Pontefice, anche il neo-eletto Segretario di Stato vaticano, Pietro Parolin, sul problema del celibato ribadisce: "Non è un dogma della chiesa e se ne può discutere perché è una tradizione ecclesiastica ... E'

Al di là dell'indiscussa legittimità della prassi secolare delle Chiese orientali circa lo stato dei chierici coniugati[26], come evidenziato nell'intervento suesposto proprio dal valore "possibilistico" del discorso di Bergoglio nella prospettiva della Chiesa latina, in concreto riteniamo che il *fondamentale* modello occidentale di sacerdozio celibatario sia trattato come *prevalente* nel confronto con l'alterità; i vari interventi inducono, cioè, a ritenere che *in linea di fatto*, più che disciplinare[27], il celibato si ponga come questione teocentrica, attinente quindi alla sostanza stessa della fede, di cui è "testimonianza" vivente, un "segno di tipo particolare", capace di generare *scandalo* in una prospettiva anche positiva; non solo, dunque, come spinta al male, provocando la rovina spirituale del fedele[28] nel senso moralistico alla base delle norme codiciali ma, in un'evoluzione del concetto stesso in funzione della cultura e dell'epoca in considerazione, pure nel significato di turbamento della coscienza collettiva per la *meravigliosa* attestazione della grandezza della fede[29]. Il vincolo indissolubile fra fede e *scandalo*, concetto quest'ultimo che, "al pari del concetto di 'fede' è una categoria specificamente cristiana che si riferisce alla fede"[30], ha conseguenze giuridiche di notevole interesse[31].

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possibile parlare e riflettere e approfondire quei temi che non sono articoli di fede e pensare ad alcune modifiche, però sempre al servizio dell'unità e secondo la volontà di Dio" (Corriere della sera, 11 settembre 2013).

[26] Sul "valore universale del celibato sacerdotale" cf. D. SALACHAS, I ministri sacri orientali nelle circoscrizioni latine, in: GEFAELL, Cristiani orientali e pastori latini, 135ss.

[27] "La convenienza della connessione del celibato con l'ufficio sacerdotale o della loro limitata disgiunzione non costituisce una semplice *scelta disciplinare*: è decisione di governo ecclesiastico, la quale non può basarsi in forma esclusiva né sulla sola luce della fede né sulla mera indagine sociologica, ma deve risultare dalla fusione armonica dei due elementi [...]". Il celibato sacerdotale è "una scelta fondamentale sul piano della *fede*", e rivelandosi come sacrificio, nella dimensione di una progressiva assimilazione al Cristo, in "uno slancio di affetto verso l'Invisibile non può appoggiarsi che sullo sguardo soprannaturale" e "non accetta di ricevere la sua giustificazione che dalla *fede*" (CONGREGAZIONE PER L'EDUCAZIONE CATTOLICA, Orientamenti educativi per la formazione al celibato sacerdotale, n. 12, p. 198ss.). Sull'argomento, cf. S. SODARI, Keshi, preti sposati nel diritto canonico orientale, Trieste 2000, passim.

[28] TOMMASO D'AQUINO, Summa theologiae, II-II, q. 43, art. 3.

[29] Interessanti, sul tema, le riflessioni di BENEDETTO XIV in occasione dell'incontro internazionale dei sacerdoti, in conclusione dell'anno sacerdotale, tenutosi in Piazza San Pietro il 10 giugno 2010: www.vatican.it [1. 4. 2014]. Alle domande del sacerdote europeo sulla profondità e sul senso autentico del celibato ecclesiastico, il pontefice afferma che il celibato è "un'anticipazione del mondo della resurrezione", e che esso rappresenta "per il mondo agnostico, il mondo in cui Dio non c'entra, un *grande scandalo* perché mostra proprio che Dio è considerato e vissuto come realtà". Abrogare il celibato significherebbe "distruggere la radice della nostra cultura. Perciò il celibato conferma il 'sì' al mondo futuro, e così vogliamo andare avanti e rendere presente questo scandalo di una fede che pone tutta l'esistenza su Dio".

[30] S. KIERKEGAARD, Scuola di cristianesimo, Milano 1950, 95.

[31] PABLO VI, nella Lettera Enciclica *Sacerdotalis caelibatus*, 24 giugno 1967, § 85-86, in: Enchiridion Vaticanum II, parla del grande "disonore" e "turbamento", che provoca la condotta di quei sacerdoti che, contro il "sacro celibato e la fedeltà integrale dei ministri", chiedono le dispense dal celibato, rendendosi responsabili di situazioni "scandalose".

III. Leggi rinforzate e valore derogatorio

Il diritto e il dovere delle Chiese, d'Oriente e d'Occidente, di reggersi secondo le proprie discipline particolari, ha comportato la promulgazione di due codificazioni canoniche che, nel primo canone, in modo esemplare, riproducono nella sostanza, sia pur con una formulazione differente in alcuni tratti, il principio della generale distinzione dei destinatari[32]. In merito a quest'ultimo aspetto, la novità legislativa della duplicazione delle leggi ecclesiastiche universali viene, inevitabilmente, ad incidere sul quadro "sovraordinato" delle fonti in considerazione della problematica conciliabilità, che a volte insorge per la regolamentazione di peculiari situazioni, tra il principio ecclesiologico della divina unità della Chiesa cattolica, "riunita da un unico Spirito" e la particolarità dei diritti delle Chiese orientali. È da rimarcare infatti che, in una dinamica più ampia, il codice latino s'impone universalmente relativamente a quei contenuti che propongono "principi supremi" in materia di verità di fede o che dichiarano il diritto divino.

Da questo angolo visuale, alla luce delle riflessioni svolte non si può non evidenziare come il legame ontologico fra celibato e sacerdozio si rifletta, invero, sull'ordinamento canonico nel suo complesso rendendo, sul piano concreto, la legge sul celibato, tradizionalmente inquadrata fra le leggi puramente ecclesiastiche, come legge rinforzata nei contenuti specifici sia in relazione alle categorie dei destinatari sia sotto il profilo operativo della derogabilità.

L'analisi testuale del can. 373 *CCEO* fa emergere, significativamente, una diversa connotazione formale della *norma* sul celibato rispetto alla *prassi* del sacerdozio uxorato. La prima si pone come legge universale che, secondo le espresse ragioni di *convenienza teologica*, "deve essere tenuta *ovunque* in grandissima stima", in quanto risponde alla tradizione della *Chiesa universale*, di cui parte integrante è la Chiesa orientale; la seconda ha una validità circoscritta a determinati territori nel riconoscimento normativo che il legislatore, successivamente alla codificazione latina, fa "della prassi delle Chiese orientali", garantendo sul piano normativo, contro ogni tendenza di latinizzazione, l'esistenza di questa peculiare tradizione[33].

La rilevanza dell'elemento della "territorialità" nell'approvazione giuridica dello stato uxorato quale alternativa, fondata sulla consuetudine, al modello universalmente riconosciuto del progetto di vita celibataria è confermata dal fatto che in alcune Chiese orientali, tra cui la Chiesa Siro-malabarese, quella Siro-malankarese e la Chiesa Etiopica, il celibato continua ad essere legge per i ministri sacri. Oltre a ciò si consideri che, comunque, in via generale, importanti riserve sono poste alla condizione del clero coniugato; infatti, dopo l'ordinazione non è

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[32] Cf. in argomento, S. DIMITRIOS, Lo status giuridico-pastorale degli orientali cattolici in emigrazione, in: Anuario argentino de derecho canonico 16 (2009/10) 164ss.

[33] PAOLO VI, Sacerdotalis caelibatus, § 40, argomentando intorno alle limitazioni scaturenti dallo *status* uxorato così come sopra evidenziate, mostra come "anche quelle venerande Chiese posseggano in certa misura il principio del sacerdozio celibatario e quello di una certa convenienza del celibato per il sacerdozio cristiano, del quale i vescovi possiedono l'apice e la pienezza".

consentito il matrimonio, attentando invalidamente lo stesso colui che è costituito nell'ordine sacro[34], così come ad essere proibite sono anche le nozze dei sacerdoti vedovi e dei vescovi.

A tal proposito, risulta degna di nota la disposizione, di cui al can. 758 § 3 CCEO, la quale, in una visione gerarchizzata delle fonti, riconosce alla Sede Apostolica il potere d'intervenire con una normativa speciale a regolare l'ammissione agli ordini sacri dei coniugati, non esclusa pertanto la possibilità di influire su una prassi tradizionale[35]. È quanto accaduto in alcuni territori a prevalente tradizione latina, dove sono stati ammessi solo chierici orientali celibi.

In una prospettiva di universalità della Chiesa, l'atteggiamento assunto in merito da alcune Conferenze episcopali impone una serie di considerazioni rilevanti con riferimento non solo all'ordine proprio della Chiesa nella sua molteplicità, ma anche in merito alla valutazione circa le conseguenze che tale questione potrebbe determinare rispetto ai rapporti tra società civile e società religiosa. Il rischio paventato è che, di fronte al fenomeno dell'immigrazione, si producano disagi in àmbiti in cui la mancanza di regolamentazione giuridica determina significative lacune nella tutela dell'individuo; l'impedimento all'esercizio del proprio ministero nella legittima condizione potrebbe determinare, ad esempio, l'esclusione dei sacerdoti uxorati dal sistema di sostentamento del clero con inevitabili ripercussioni sulle loro famiglie[36].

Non è rara la situazione in cui i cattolici orientali immigrati nei Paesi di rito latino vengono privati dell'assistenza pastorale e, più in generale, del diritto-dovere di mantenere le proprie tradizioni a causa degli ostacoli all'esercizio del ministero da parte del clero uxorato. A tal proposito, è da segnalare che anche la Conferenza episcopale italiana ha escluso dal proprio territorio la presenza di preti sposati. È quanto risulta da una lettera riservata del 13 settembre 2010, inviata dal cardinale Bagnasco al primate della Chiesa greco-cattolica rumena. In essa si afferma che la Cei, "dopo aver attentamente esaminato la questione anche alla luce dei dati numerici relativi alla consistenza delle comunità etniche provenienti da Paesi dell'Est europeo e alla situazione del clero nelle diocesi italiane, ritiene che, al presente e in linea generale, non esista la 'giusta e ragionevole causa' che giustifichi la concessione della dispensa"; si precisa, inoltre, che

> "la convenienza di tutelare il celibato ecclesiastico e di prevenire il possibile sconcerto nei fedeli per l'accrescersi di presenze sacerdotali uxorate prevale infatti sulla pur legittima esigenza di garantire ai fedeli cattolici di rito orientale l'esercizio del culto da parte di ministri che parlino la loro lingua e provengano dai loro stessi Paesi"[37].

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[34] Cf. c. 804 CCEO.

[35] Cf. c. 758 § 3 CCEO.

[36] Proprio il grave stato di disagio economico che pregiudicava il mantenimento delle proprie famiglie fu all'origine della concessione a undici rutheni della dispensa pontificia dall'obbligo del celibato per esercitare negli USA il ministero ordinato. Cf. in merito, MARTI, I rutheni, nota 244 (p. 483).

[37] Adista (4 dicembre 2010) n. 93, 7.

Sul piano operativo, nell'esigenza di conciliare l'unità di fede con la varietà della prassi, la facoltà di derogare alla legge generale del celibato, ammettendo all'ordinazione, nella Chiesa latina, chierici sposati nel rispetto delle proprie leggi particolari, è condizionata pertanto dalla concessione di una dispensa che consenta, nelle situazioni concrete, di attenuare la rigidità della legge. Solo in presenza di una causa *iusta et rationabilis* i singoli sacerdoti, "che possono costituire anche, in senso stretto, una comunità"[38], sono esonerati dall'osservanza dell'obbligo del celibato e hanno la capacità di esercitare il proprio ministero in circoscrizioni organizzate all'interno della Chiesa latina. Il riferimento è alla previsione, per ragioni pastorali, di erezione nel medesimo territorio di strutture di carattere personale – distinte secondo il rito dei fedeli migranti o altro criterio –, tra le quali gli Ordinariati, che tuttavia non escludono il profilarsi di soluzioni altrettanto lesive delle identità[39].

IV. Missio ad intra e nuova pastorale dell'accoglienza

L'imponente fenomeno dell'immigrazione, che vede interessate molte comunità provenienti dall'Europa dell'Est, pone alla pastorale problematiche emergenti con particolare riferimento all'esercizio delle prerogative legate all'identità religiosa[40]. La condivisione di spazi, nel rinnovato scenario politico ed economico, evidenzia alcune differenze rituali, un tempo impercettibili, che s'impongono ora all'attenzione sociale.

In una visione dinamica e totale del mandato missionario, il recupero delle tradizioni orientali diventa oggi un'importante sfida che la Chiesa deve affrontare. Si profilano, quindi, inconsueti profili d'intervento della *missio ad intra*, orientati alla creazione di un vincolo essenziale tra Chiesa universale e Chiese particolari, al di là di qualsivoglia tentativo di inculturazione di un modello esclusivo, nel recupero della comunione interna e fuori da ogni particolarismo o individualismo.

Nell'ottica del conseguimento di una vera unione ecclesiale *ad intra*, s'impone quindi un nuovo profilo della missionarietà, frutto di "una pastoralità specifica dell'emigrazione"[41], che comporta un'azione sinergetica e complessa: la necessità di acquisire da parte degli emigrati e delle loro comunità una consapevolezza rinvigorita della fedeltà alla propria identità, mentre, da parte delle chiese d'accoglienza, il dovere di tradurre concretamente nelle norme e nelle pratiche il rispetto della teologia e dei patrimoni orientali.

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[38] Cf. PAOLO VI, De facultate dispensandi, 15 giugno 1966, in: Enchiridion Vaticanum II, § 6 (p. 683).

[39] Cf. A. KAPTIJN, Gli ordinariati per i fedeli cattolici orientali privi di gerarchia propria, in: GEFAELL, Cristiani orientali e pastori latini, 233ss.

[40] Sulla necessità di elaborare un "diritto canonico dell'emigrazione" cf. D. SALACHAS, La situation canonique des catholiques de rite oriental dans des pays européens ou prédomine la tradition occidentale, in: Kanon 22 (2012) 179.

[41] Sull'importanza di una pastorale specifica dell'emigrazione cf. l'elenco finale delle proposizioni approvato, il 26 ottobre 2010, dal Sinodo dei Vescovi sul tema "La Chiesa cattolica nel Medio Oriente: comunione e testimonianza", propositio 11: www.vatican.it [1. 4. 2014].

Perfettamente compatibile risulta essere l'elaborazione di una specifica *missione*, che interessi tutte le Chiese perché, attraverso un'adeguata preparazione e solide strutture ecclesiali, si realizzi un progetto comune nel senso della piena cattolicità e apostolicità della Chiesa.

In questo quadro e alla luce del sistema normativo vigente, per la stessa unità dei cristiani e in vista delle problematiche crescenti, un'attenzione particolare meriterebbe la formazione di coloro che sono destinati ai ministeri sacri: gli aspiranti al sacerdozio di qualsiasi Chiesa *sui iuris*, anche di quella latina, dovrebbero essere istruiti accuratamente nella conoscenza delle peculiarità rituali con una mentalità inclusiva e non esclusiva verso le diversità, in modo da potersi relazionare con rispetto e consapevolezza con gli altri fedeli cristiani con i quali entrano in contatto per ragioni di ufficio, di ministero o incarico[42].

In merito, anche nel confronto con la promulgazione del codice orientale, spazi d'intervento potrebbero crearsi in relazione alle norme latine nell'ambito della formazione permanente del clero nel quale, ad esempio, la funzione pedagogica svolta dall'indottrinamento sul valore univoco del celibato mal si concilia con il diritto-dovere che gli orientali hanno di tutelare la tradizione di ogni singola Chiesa *sui iuris* quale parte del patrimonio universale della Chiesa[43]. L'"educazione" al celibato, quale momento insopprimibile della formazione seminaristica, evidenzia effettivamente come la Chiesa intenda delineare, attraverso "sussidi" che tengono in grande considerazione anche le scienze umane, quali pedagogia, psicologia e sociologia, regole di una condotta univoca contro le inclinazioni negative, instillando nei candidati alla vita sacerdotale quella "visione di fede" alla base

> "di tutto lo svolgimento delle ragioni che militano a favore del sacro celibato nel suo significato cristologico, ecclesiologico ed escatologico"[44].

Il celibato, connesso con la dottrina del vangelo, costituisce "un bene per la chiesa e il servizio degli altri [...]"[45], e i suoi pastori esprimono la preoccupazione di un confronto inusuale nei territori a forte tradizione latina[46].

Esemplari, quanto all'aspetto in esame, sono le proposizioni del Sinodo dei vescovi sul Medio Oriente che, al di là dei legittimi utenti, consentono di riflettere sulla condizione canonica delle Chiese orientali in tutto il mondo proponendo, al

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[42] Cf. c. 41 CCEO. Sulle strutture di coordinamento sul territorio cf. P. GEFAELL, L'attenzione agli orientali cattolici nei documenti delle conferenze episcopali, in: IDEM, Cristiani orientali e pastori latini, 353ss.

[43] Cf. c. 40 § 3 CCEO.

[44] CONGREGAZIONE PER L'EDUCAZIONE CATTOLICA, Orientamenti educativi per la formazione al celibato sacerdotale, n. 5 (p. 199).

[45] CONGREGAZIONE PER LA DOTTRINA DELLA FEDE, Per litteras ad universos [...], n. 3 (p. 553).

[46] La difficoltà di gestire la convivenza fra sacerdoti celibi e uxorati ha portato il Pontefice ad un commissariamento con vescovi di rito latino della Chiesa italo-albanese di rito bizantino presente in Italia con due eparchie, quella di Lungro in Calabria e quella di Piana degli Albanesi in Sicilia, con evidente lesione del diritto all'identità di queste comunità.

contempo, un valido disegno di regolamentazione di aspetti peculiari; tra questi emerge in particolare l'importanza di una formazione dei seminaristi volta ad "approfondire l'unità nella diversità"[47] e, nel consolidamento della "cultura dell'apertura e della convivialità"[48], la necessità che l'educazione religiosa passi attraverso centri d'incontro aperti a tutte le chiese in una collaborazione operosa coinvolgente anche i laici, le scuole cattoliche e le università. L'obiettivo è quello di raggiungere da parte di tutti gli operatori, a qualsiasi livello, una formazione sociale idonea "in vista della comprensione reciproca tra tutti i membri della società"[49]. In tale scenario, tra le nuove prerogative, s'impone il diritto-dovere *all'assistenza spirituale*[50] che, oltre all'esigenza di creazione di strutture di accoglienza, organizzazione di incontri scadenzati e regolari tra le gerarchie, etc., implica in primo luogo l'opportunità di affrontare da parte di commissioni a composizione mista lo studio di alcune tematiche essenziali in vista dell'adozione di misure appropriate per il bene comune e della formulazione di soluzioni generali utili a favorire un'efficiente azione d'intervento.

Così, tra i problemi attuali, vengono in risalto le questioni legate all'estensione della giurisdizione dei Patriarchi orientali alle persone delle loro chiese sparse ovunque[51], alla previsione di forme di solidarietà materiale tra le diocesi ricche e meno ricche, alla creazione per i sacerdoti di un'associazione *Fidei Donum* per favorire l'aiuto reciproco tra diocesi e chiese[52]. Si configura, inoltre, la possibilità di avere preti sposati fuori dai territori patriarcali, particolarmente in quei luoghi nei quali, non essendoci diocesi per i fedeli cristiani di qualche Chiesa *sui iuris* e dovendosi riconoscere come Gerarca proprio quello di un'altra Chiesa, non esclusa la Chiesa latina, si verificherebbe un *vulnus* sotto il profilo dell'appartenenza giuridica e del diritto ad una cura pastorale specifica[53]; ciò comporterebbe l'istituzione di un sistema di protezione sociale esteso, oltre che ai religiosi, anche alle mogli dei preti uxorati e ai loro figli minorenni.

Il Sinodo, infatti, pur riconfermando il valore universale del celibato, "stimato e apprezzato sempre e dovunque nella Chiesa cattolica, in Oriente come in Occidente", auspica "la possibilità di avere preti sposati fuori dai territori patriarcali" al fine di "assicurare un servizio pastorale in favore dei fedeli, dovunque essi vadano, e per rispettare le tradizioni orientali"[54].

Quanto detto è in sintonia con l'atteggiamento di comprensione e di distensione con il quale la Chiesa di Roma ha trattato, più di recente, le conversioni degli appartenenti alla Chiesa anglicana. Il riferimento è alla costituzione apostolica *Anglicanorum coetibus*, che ha previsto l'istituzione di

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[47] Propositio n. 25.
[48] Propositio n. 32.
[49] Propositio n. 30.
[50] Propositio n. 14.
[51] Cf. R. COPPOLA, Territorialità e personalità nel diritto interconfessionale, in: Folia canonica 4 (2001) 70ss.
[52] Propositio n. 16.
[53] Cf. c. 916 § 5 CCEO. Cf. D. SALACHAS, Lo Status giuridico-pastorale degli orientali cattolici in emigrazione, in: Anuario Argentino de derécho canonico 16 (2009-2010) 161ss.
[54] Propositio 23.

Ordinariati personali per gli Anglicani – che entrano nella piena comunione con la chiesa cattolica – , eretti dalla Congregazione per la Dottrina della Fede all'interno dei confini territoriali di una determinata Conferenza episcopale, previe consultazioni con la stessa[55]. Lo scopo è quello di mantenere in vita all'interno della Chiesa Cattolica le tradizioni liturgiche, spirituali e pastorali della Comunione anglicana, "quale dono prezioso per alimentare la fede dei suoi membri e ricchezza da condividere"[56]. Ciò richiede una formazione congiunta del clero sulla base di accordi e secondo programmi specifici[57].

Quanto alla problematica del clero uxorato, in conformità con quanto stabilito nell'art. VI §§ 1 e 2 di detta Costituzione e in linea con una prassi ormai adottata nella Chiesa, l'Ordinario che, in piena osservanza della disciplina sul celibato clericale nella Chiesa latina, *pro regula* approverà all'ordine del presbiterato solo uomini celibi, potrà rivolgere petizione al Romano Pontefice, in deroga al can. 277, § 1, per ammettere caso per caso all'Ordine sacro del presbiterato anche uomini coniugati, secondo i criteri oggettivi approvati dalla Santa Sede[58].

Nell'accogliere tra i ministri cattolici il clero episcopaliano uxorato, già nel 1980 la Santa Sede aveva precisato che l'eccezione alla norma del celibato, concessa in favore di queste singole persone, non doveva essere intesa come un cambiamento del pensiero della Chiesa circa il valore del celibato sacerdotale, che continua a rappresentare "la norma" anche per i futuri candidati al sacerdozio di questo gruppo[59].

In modo singolare, però, le norme complementari alla Costituzione Apostolica *Anglicanorum coetibus* evidenziano, anche nella comparazione con la condizione delle Chiese orientali cattoliche, una maggiore derogabilità della legge sul celibato. L'art. 11, infatti, consente agli ex pastori anglicani sposati persino l'accesso al ministero vescovile e la possibilità di essere nominati Ordinari, con piena autorità giurisdizionale nell'esercizio del ministero pastorale e sacramentale[60].

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[55] Cf. BENEDETTO XVI, Costituzione apostolica *Anglicanorum coetibus*, 4 novembre 2009, § 1: www.vatican.it [1. 4. 2014]. Cf. E. BAURA, Gli ordinariati personali per gli ex-anglicani. Aspetti canonici della risposta ai gruppi di anglicani che domandano di essere ricevuti nella Chiesa cattolica, in: Ius ecclesiae 24 (2012) 13ss.

[56] § 5 III.

[57] CONGREGAZIONE PER LA DOTTRINA DELLA FEDE, Norme complementari alla Costituzione Apostolica Anglicanorum coetibus, 4 novembre 2009, art. 10: www.vatican.it [1. 4. 2014].

[58] BENEDETTO XVI, 4 novembre 2009.

[59] Former episcopalian clergy who are married into the catholic priesthood, giugno 1980, in: Enchiridion Vaticanum, 7, 1111.

[60] Cf. art. 11 § 1.

FUNDAMENTAL PRINCIPLES OF THE NEW CHARTER OF THE ORTHODOX CHURCH OF CYPRUS*

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I. Introduction

The Church of Cyprus has known three Charters in recent history. The first was ratified in 1914 (1929), the second in 1979[1] and the third, which is now in effect, was ratified on September 13, 2010[2]. All three Charters are expressions of the canonical tradition of the Church of Cyprus, a tradition that is in continuity with that of the *Katholike Ekklesia*. At the same time, each of the Charters clearly manifest the effects of circumstantial factors. They also bear the imprints of other texts such as the Charters of other local Churches[3].

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* After thanking the organizing committee for kindly inviting me to be a speaker at the XXI Congress of the historical Society for the Law of the Eastern Churches, I wish to note the gaping absence of our beloved former colleague (or should I say teacher?), Konstantinos Pitsakes. Please allow me to humbly dedicate this talk to his memory, especially as he was a highly active and influential member of the Draft Committee for the current Charter of the Church of Cyprus. Αἰωνία ἡ μνήμη!

[1] Concerning the Charter of 1979, cf. Ch. K. PAPASTATHES, Περὶ τὴν διοικητικὴν ὀργάνωσιν τῆς Ἐκκλησίας τῆς Κύπρου, Thessaloniki 1981; IDEM, Τὸ νέο Καταστατικὸ τῆς Ἐκκλησίας τῆς Κύπρου, in: Ὕδωρ ἐκ Πέτρας 3/ε'-ς' (1980) 5-17 (= Νομοκανονικὲς μελέτες, Πρότυπες Θεσσαλικὲς ἐκδόσεις, Trikala-Athens 2009, 247-256); K. Th. POLYZOÏDES, Ὑπόμνημα εἰς τὸν Καταστατικὸν Χάρτην τῆς Ἐκκλησίας τῆς Κύπρου, Thessaloniki 1997. The text of the Charter of 1914 and its revision of 1929 can be found in Metropolitan BARNABAS D. TZORTZATOS, Οἱ βασικοὶ θεσμοὶ διοικήσεως τῆς αὐτοκεφάλου Ἐκκλησίας τῆς Κύπρου, μετὰ ἱστορικῆς ἀνασκοπήσεως, Athens 1974, 35-61 and 75-118 respectively. Cf. also: M. Phr. KLEANTHOYS, Ἀρχιεπισκοπικὲς ἐκλογὲς στὴν Κύπρο. Μία ἱστορικὴ ἀναδρομὴ στὸν 20ὸ αἰῶνα, Leukosia 2005, where one finds a reprint of the Charter of 1914 (p. 99-134), the revision of 1929 (p. 139-197) and the Charter of 1979 (p. 203-310). For the text of the Charter of 1979 cf. also Ἀπόστολος Βαρνάβας 40 (1979) and G. A. POULES, Νομοθετικὰ Κείμενα Ἐκκλησιαστικοῦ Δικαίου. Σχόλια-Βιβλιογραφία, Athens ^{5}2002, 417-552.

[2] The Charter of 2010 was composed in a style that maintained older grammatical forms (for the text cf. Καταστατικὸς Χάρτης τῆς Ἁγιωτάτης Ἐκκλησίας τῆς Κύπρου, Leukosia 2010) as well as in Demotic Greek (in print), the latter being the official text. The Draft Committee of the Charter was constituted of the following members: Metropolitan Neophytos of Morphou (President), Metropolitan Basileios of Constantia-Ammochostos, Alekos Markides, Attorney General of Cyprus, Georgios Poules, Professor of the Democritus University of Thrace, Konstantinos Pitsakes, Professor of the Democritus University of Thrace, Theodoros Yiangou, Professor of the Aristotle University of Thessaloniki, and Rev. Chrysostom Nassis, Lecturer of the Aristotle University of Thessaloniki, who also acted as the Committee Secretary. Concerning the new Charter, cf. Metropolitan BASILEIOS (of Constantia-Ammochostos), Ὁ νέος Καταστατικὸς Χάρτης τῆς Ἐκκλησίας Κύπρου (2010), in: Κιβωτὸς φιλίας. Τιμητικὸς τόμος γιὰ τὸν καθηγητὴ Θεόδωρο Ἰ. Παναγόπουλο, Athens 2011, 1115-1132.

[3] Cf. M. Phr. KLEANTHOUS, Ἀρχιεπισκοπικὲς ἐκλογὲς στὴν Κύπρο, 31ss; N. CHRISTODOULOU, Τὸ Ἀρχιεπισκοπικὸ ζήτημα τῆς Κύπρου κατὰ τὰ ἔτη 1900-1910, Leukosia 1999, where one can find the complete bibliography on the issue (p. 138-143); B. EGGLEZAKIS (Archimandrite Paul), Εἴκοσι μελέται διὰ τὴν Ἐκκλησίαν Κύπρου (4ος ἕως 20ὸς αἰών), Athens 1996, 582ss; Chr. IKONOMOU, Διάλογος εὐθύνης γιὰ τὶς ἀρχιεπισκοπικὲς ἐκλογὲς τῆς Ἐκκλησίας τῆς Κύπρου, Thessaloniki 2003.

The effects of circumstantial factors can be seen, for example, in the composition of the first Charter of the Church of Cyprus[4]. In fact, relevant discussions on it began during the 1880s, that is, right after the island became a protectorate of United Kingdom in 1878. This new situation necessitated the composition of a legally binding document for the Church, such as a Charter. The elaboration of the 1914 Charter extended over a period of many years. It was finally adopted in 1914, after many consultations and, at times, intense deliberations, all of which fluctuated due to the unstable political and social environment.

Likewise, circumstantial factors affected the progress in the development of the second Charter for the Church of Cyprus. Specifically, in 1951, after the accession of Archbishop Makarios III (1950), the issue of revising the 1914 Charter was raised. Successive committees were established to this end. Yet their work was delayed significantly because of the many national ordeals that Cyprus faced. The new Charter was completed in 1979, twenty-eight years after its initial inception[5]. With regard to the Church's third Charter, according to statements made by Archbishop Chrysostomos II, its enactment was dictated, in part, by the fact that Cyprus became a full member of the European Union on May 1, 2004.

With regard to extrinsic influences on the Charters of the Church of Cyprus, one may note similarities between specific articles of the Charter of 1914 and those of the Charter of the Church of Crete enacted in the year 1900. The Metropolitan of Kitium, Meletios Metaxakis (1910-1918)[6], who was deeply involved in the process of developing the Charter of 1914[7], clearly used the Charter of the Church of Crete[8]. The decision of Metaxakis to utilize such sources did not arouse feelings of dejection in the Church of Cyprus because already by the 19th century, the Church of Cyprus had shifted its attention from Constantinople, the center of the Orthodox Church, and began seeking theological, pastoral, and canonical support from the Church of Greece. This trend continued

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[4] Cf. the newspaper Πατρὶς 10/23. 6. 1911, number 137. Cf. also the specific study by E. SERGIOU, Ἡ καταστατικὴ νομοθεσία τῆς Ἐκκλησίας τῆς Κύπρου μέχρι καὶ τὴν ψήφιση τοῦ Καταστατικοῦ Χάρτη τοῦ 1979, Leukosia 2007, 61ss.

[5] SERGIOU, ibidem, 83-98.

[6] On Meletios Metaxakis cf. K. PATELOS, Μελέτιος Β΄ ὁ Μεταξάκης, Alexandria 1966; M. FOUYIAS (Metropolitan of Aksum), Ἀπὸ τὸ Ἡμερολόγιον τοῦ Πατριάρχου Μελετίου, in: Ἐκκλησιαστικὸς Φάρος 53 (1971) 391-499; Th. PROVATAKES, Ὁ Οἰκουμενικὸς Πατριάρχης Μελέτιος Μεταξάκης, Athens 1988; A. TYLLYRIDES, Meletios Metaxakis 1871-1935, in: Ἐκκλησία καὶ Θεολογία 4 (1983) 655-929; IDEM., Meletios Metaxakis and English Diplomacy, ibidem 5 (1984) 551-832; IDEM, Documents inédits des archives du ministère français des affaires estrangères sur Meletios Metaxakis, ibidem 6 (1985) 627-710; A. NANAKES (Metropolitan of Arcalochorion), Ἡ χηρεία τοῦ Οἰκουμενικοῦ Θρόνου καὶ ἡ ἐκλογὴ τοῦ Μελετίου Μεταξάκη 1918-1922, Thessaloniki 1991; IDEM, Ἐκκλησία ἐθναρχοῦσα καὶ ἐθνική, Thessaloniki [2]2007, 142ss.

[7] Cf., for example, his Report "Το the beloved and honorable members of the Draft Committee for the Church's Charter (Πρὸς τὰ ἀγαπητὰ καὶ ἔντιμα μέλη τῆς συντακτικῆς τοῦ Καταστατικοῦ Νόμου τῆς Ἐκκλησίας Ἐπιτροπῆς)", in: Ἐκκλησιαστικὸς Κήρυξ 1 (1911) 10-18; IDEM, Ἀπόσπασμα ἱστορικοῦ ἐγγράφου περὶ τοῦ τρόπου ἐκλογῆς τοῦ Ἀρχιεπισκόπου Κύπρου, ibidem 6 (1916) 418-422; ANONYMOUS, Τὸ σύστημα τῆς ἐκλογῆς τῶν ἀρχιερέων ἐν Κύπρῳ, ibidem, 411-417.

[8] Cf. Sp. TROIANOS – K. PAPAGEORGIOU, Θρησκευτικὴ νομοθεσία. Εἰδικὴ νομοθεσία – βιβλιογραφία – νομολογία, Athens 2009, 1350-1406.

in subsequent decades as well. Evidence of this can be seen in the Chapter on Churches (Parishes) of the 1979 Charter (articles 80ff), which incorporates formulations similar to those of Regulation 2/1969, "On sacred churches, parishes, and priests", of the Church of Greece.

It is clear, therefore, that none of the three Charters were issued in a vacuum. As a matter of fact, a series of seven legislative texts were released prior to the ratification of the 1914 Charter. Some of these were fully adopted while others remained proposals *de lege ferenda*. These texts are as follows:

1. "Draft Regulations on the internal administration of the Greek Orthodox Church of Cyprus" (1885).

2. "Bill regulating the management of the property of the Orthodox Church in Cyprus" (1890).

3. "Legal opinion on the Church's relations with the State" (1891).

4. "Organizational Regulations governing matters of the Archiepiscopal Throne until the appointment of Archbishop" (1900).

5. "Law on the management of the property of the Autocephalous Greek Orthodox Church of Cyprus" (1904).

6. "'Bill' of Joannes Kyriakides on the election of the Archbishop" (1907).

7. "Civil law on the election of Archbishop" (1908)[9].

After the ratification of the 1914 Charter, various *lacunae* were immediately noticed and new texts were issued seeking to amend these gaps. In 1917 two "Special Regulations" were issued, one "On the Councils of the Thrones" and the other "On parish administration". In the same year, two statutes, called "*Diataxeis*", were also passed. The first was "On *Chorepiscopoi*" and the second was "On procedures in ecclesiastical courts". In the following year, 1918, two sets of "Special Regulations" were published: 1. "On the subsidiary fund"; and 2. "On priests and those serving in parishes"[10]. In 1929, the 1914 Charter was revised to include these improvements. Yet this revision was never put into effect, as it awaited final ratification by the State which never came[11]. The above shows that one must clearly keep context in mind when seeking to address issues pertaining to particular laws and current issues in the Churches.

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[9] SERGIOU, Η καταστατική νομοθεσία, 135-193.

[10] Ibidem, 194-244.

[11] Ibidem, 84. Meletios METAXAKIS held a positive view of the ratification by the State of the Church Charter. Cf. his Report "To the beloved and honorable members of the Draft Committee for the Church's Charter" (= fn. 7), 11.

In today's paper I shall limit myself to the 2010 Charter of the Church of Cyprus. In particular I shall discuss the following issues: ecclesiastical "citizenship", the composition of the Sacred Synod and the right of appeal of deposed hierarchs, the convocation of the Sacred Synod and its members, and the ever controversial issue of the election of hierarchs, especially the Archbishop.

II. Ecclesiastical "citizenship"

In recent theological and canonical literature, the Charter of 1979 has been praised for its system of electing hierarchs. This system called for the participation of the laity in the voting process. This practice was viewed as implementing the relevant ancient ecclesiastical custom. Conversely, in the Charters of other Churches, episcopal elections are viewed as the sole prerogative of the Sacred Synod. In these cases, the laity takes on the role of simple observers, witnessing the maneuvers surrounding the election of their pastor. Often enough they even become passive receivers of unpleasant situations made public, without the power of intervention. At the same time the 1979 Charter was harshly criticized for regulations that directly oppose fundamental ecclesiological principles, the most noted example being Article 2 which specified the following:

> "Members of the Orthodox Church of Cyprus are all Orthodox Christians permanently residing in Cyprus as well as all those of Cypriot descent, incorporated through baptism into its Orthodox Church (i.e., of Cyprus), currently residing in a foreign land"[12].

This statute allowed for the constitutional possibility of recognizing not only permanent residents of Cyprus as members of its local Church. It also recognized all Cypriots "naturalized" through baptism into the Church of Cyprus, who later emigrated to other countries, even ones with a predominately Orthodox population. It is evident that the author of this specific Article was affected by ethnophyletic ideologies. He ignored the essential canonical basis in the formation of jurisdictions, namely the territorial principle, whereby jurisdictions are established exclusively within specific geographical boundaries[13]. At the same time, precisely because it is not based on the canonical norms set by the Ecumenical Synods, the above Article leaves room for the global expansion of the Church of Cyprus, since Cypriots throughout the world maintain their original

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[12] For a critique of this article cf. G. PAPATHOMAS, Ἡ ἀντιθετικὴ σχέση τῆς κατὰ τόπον Ἐκκλησίας καὶ τῆς Ἐκκλησιαστικῆς «Διασπορᾶς» (Ἡ ἐκκλησιολογικὴ ἐνότητα ἔναντι τῆς «συνεδαφικότητας» καὶ τῆς «πολυ-δικαιοδοσίας»), in: Σύναξη 90 (2004) 28-44 [also in French: Contacts 57.210 (2005) 96-132]. Cf. P. RODOPOULOS, Τὸ ρωσσικὸν κανονικὸν ἔδαφος – Τὸ ἐσθονικὸν ζήτημα, in: Μελέται Β΄. Νομοκανονικὰ-Ἱστορικοκανονικὰ κ.ἄλ. [Ἀνάλεκτα Βλατάδων 66], Thessaloniki 2008, 227-242 [also in English: ibidem, 243-257].

[13] On the canonical principle of distinguishing the geographical boundaries of local churches cf. IDEM, Ἡ γεωγραφικὴ δικαιοδοσία κατὰ τὸ Ὀρθόδοξον Κανονικὸν Δίκαιον – Τὸ φαινόμενον τοῦ ἐθνοφυλετισμοῦ κατὰ τοὺς προσφάτους χρόνους, ibidem, 63-80 [also in English: ibidem, 47-62].

membership status. Consequently, on the pretext of pastoral solicitude, the Church of Cyprus could willfully intrude in the jurisdiction of other Churches.

The spirit of this specific Article is symptomatic of the ecclesiastical and canonical pathogenesis that currently burdens the Orthodox Church in general. This disease spreads through both regulatory texts and a host of actions and decisions of local Churches. At times it even threatens the very unity of the Church. A case in point is documented in the Charter of the Church of Russia. According to the respective provision, the jurisdiction of this Church extends

> "to persons of Orthodox faith who live in the canonical territory of the Russian Orthodox Church in Russia and to Orthodox Christians living in other countries who freely come under to this jurisdiction" (*Charter of the Church of Russia*, 1988 and 2000: Art. 1 § 3)[14].

A similar Article is found in the *Charter of the Church of Romania:*

> "The Orthodox Romanian Church is constituted by the community of Orthodox Christians – the clergy, monks, and laity – assembled, according to canonical order, into the parishes and monasteries of the Eparchies of the Patriarchate of Romania, both within and without the borders of Romania" (Art. 1. See Arts. 5 §1, 6 §2, 8 §1, 2; cf. 132 §1, 2, 3)[15].

The Church of Romania recently acted upon the above provisions of its Charter by establishing a monastery in Jericho without the express consent of the Patriarchal Synod of Jerusalem. Consequently, the Synod decided to cease commemorating the Patriarch of Romania at the Diptychs until the situation was rectified. During the deliberations between the two Churches, representatives of the Patriarchate of Romania claimed that it was within the purview of their Patriarchate to minister to the many Romanian pilgrims travelling to the Holy Land. After compromises on the part of both Churches, thankfully, full communion between the two Churches was restored.

The starting point in the line of thought presented here is the view that each "Mother" Church is obliged to provide pastoral care for all Orthodox Christians who originate from its primary jurisdiction but are currently residing abroad. For this reason they set up national Churches in the *Diaspora*, sending to them predominately compatriot clergy to serve the liturgical and pastoral needs of their

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[14] For a Greek translation of the 1988 Charter of the Church of Russia cf. IDEM, Ὁ Καταστατικὸς Χάρτης περὶ τῆς διοικήσεως τῆς Ρωσσικῆς Ὀρθοδόξου Ἐκκλησίας (8 Ἰουνίου 1988), Thessaloniki 1990 (= Μελέται Β', 187-225). The specific article is to be found here at p. 29. For a Greek translation of the 2000 Charter of the Church of Russia cf. K. KYRIAZOPOULOS, Πηγὲς τοῦ Ἐκκλησιαστικοῦ Δικαίου τῆς Ρωσικῆς Ὀρθόδοξης Ἐκκλησίας, τ. Α', 1. Τὸ ἰσχύον ἐσωτερικὸ Καταστατικὸ τῆς Ρωσικῆς Ὀρθόδοξης Ἐκκλησίας (2000). 2. Συλλογὴ συνοδικῶν διατάξεων καὶ διαταγμάτων τῆς τοπικῆς κληρικολαϊκῆς συνόδου τῆς Μόσχας (1917-1918), Thessaloniki 2008.

[15] On the new Charter of the Church of Romania cf. the Master's Thesis of Deacon G. SILVESTROS, Ἡ διοικητικὴ ὀργάνωση τοῦ Πατριαρχείου τῆς Ρουμανίας βάσει τοῦ Καταστατικοῦ Χάρτου αὐτοῦ, Thessaloniki 2011.

"flock". In fact, however, by such actions, these Churches commit the canonical offense of incursion (εἰσπήδησις). The Fourth Pre-Synodal Consultation held in Chambésy, Geneva on June 6-13, 2009 – convened as part of the ongoing preparations for the convocation of the Holy and Great Synod of the Orthodox Church – established the basis for the canonical (or at least a more canonical) resolution to the problem of the *Diaspora*. It specifically decided to establish fixed, regional Assemblies of Canonical Orthodox Bishops, composed of all the hierarchs of the national Churches within a given territory of the *Diaspora*. The president of the Assembly is to be

> "the primate from among the hierarchs of the Church of Constantinople or, in the absence of such, the foremost hierarch of the primatial Churches, according to the order of the Diptychs" (*Joint Agreement*, ii.2).

At the same time, the Consultation decided that there can be no *"Diaspora"* within the traditional jurisdictions, that is, the Patriarchates as well as the Autocephalous and Autonomous Churches.

The Draft Committee of the 2010 Charter sought to eradicate all suspicions of a global ethno-ecclesiastical jurisdiction for Cyprus. Following the sacred canons and the recent decision of the Fourth Pre-Synodal Consultation, the Committee formulated this particular Article as follows: "The Church of Cyprus is constituted by all Orthodox Christians living on the island" (Art. 1 § 3).

This means that Cypriots, no longer living in Cyprus, are not to be considered members of the Church of Cyprus. Rather, they are viewed as members of the Orthodox Church of their new place of residence. Likewise, Orthodox Christians living in Cyprus, irrespective of legal status or place of origin, are all accepted as members of the Church of Cyprus. They enjoy all the rights and responsibilities stemming from the sacred canons and the Church's Charter. Among these, is the right to vote at episcopal elections, provided that one be over eighteen years of age, live permanently in Cyprus for "at least one year", and be enrolled in the Register of voters (Art. 23 § 1). The Church is responsible for drafting this Register with the assistance of the State, should it be necessary (Art. 23 § 3). Indeed the Church, finding herself in line with the teaching of the Apostles and her canonical tradition, as formulated most especially during the Byzantine period, has always been supra-national. Suffice it to cite the classical expression of Balsamon, who articulates the political ideology of the Byzantines, with the consolidating role of the supra-national Church within the bounds of the Byzantine State: "All who boast of being Orthodox, be they from the East or Alexandria or any other place, are called 'Romans'"[16].

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[16] G. RHALLES – M. POTLES, Σύνταγμα τῶν θείων καὶ ἱερῶν κανόνων IV, Athens 1854 (reprint: 1966), 451.

III. The composition of the Sacred Synod – the right of appeal of deposed hierarchs

The current Charter of the Church of Cyprus, as noted above, was ratified on September 13, 2010. In the Archbishop's Introductory Address, offered during the celebratory session of the Sacred Synod for this occasion, he referred to the increase of the number of metropolises and dioceses in the Church as the Charter's the "first innovation". This was accomplished, according to the Archbishop, so that

> "the Church of Cyprus could obtain a full Synod (πλήρης Σύνοδος), one required for an Autocephalous Church to free itself from the need of taking recourse to adjacent Churches for the resolution of its internal problems"[17].

In fact, the increase of metropolises and dioceses was not a by-product of the new Charter. Rather, it took place gradually during sessions of the Sacred Synod, held between 2007 and 2009. With the establishment of each Eparchy, the Synod aimed at increasing the effectiveness of the Church's pastoral ministry to the faithful. Keeping in mind the requirements of the canons (Sardica 6, Chalcedon 12), this should be the reason behind all such decisions. Nevertheless, the increase also served the need of constituting a Synod that had at least thirteen members, making it possible for it to act as a competent judicial body that can adjudicate alleged offenses of hierarchs possibly leading to deposition. The increase in bishops was a demand that came to the fore after the well-known affairs of the recent past, beginning in 1973, when the Greater Synod was convoked to depose the three Cypriot metropolitans.

In fact, however, this idea can be discerned already in the text of 1929 (Art. 23), composed by the successor of Meletios Metaxakis, Nikodemos Mylonas. The relevant Article states the following:

> "Regarding the deposition of bishops, the Sacred Synod adjudicates as an investigatory Court. And in the event it finds incriminating evidence suggesting deposition, it refers the accused bishop to trial before a Synodal Court made up of thirteen bishops".

For the constitution of this multi-member Court, the Presider would ask the ancient Patriarchates and the Church of Greece to each send "two bishops", who would make up the Court along with the three hierarchs of Cyprus (Art. 23).

This increase was shaped by historical reasons as well. It was viewed as a corrective to one of the first actions taken during the Latin occupation at the expense of the Orthodox of Cyprus, namely, the reduction of the number of Orthodox Eparchies, including the Archdiocese, to four. Hence, overturning this situation continued to be an objective of the Church of Cyprus for centuries.

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[17] Καταστατικὸς Χάρτης τῆς Ἁγιωτάτης Ἐκκλησίας τῆς Κύπρου. Leukosia 2010, 5.

Prior to the ratification of the 1914 Charter, the Synod included the abbots of two Stavropegic monasteries, those of Kykkos and Machairas, as well as two clergy *officiarii* of the Archdiocese (the Archimandrite and the Exarch). None of them were bishops, yet they participated in the Synod so that it could be composed of more members[18]. These clerics participated in the Synod until 1914, at which time it was decided that only bishops (the Archbishop and the Metropolitans of Paphos, Kitium, and Kyrenia) could attend synodal sessions. Meletios Metaxakis played a major role in imposing this restriction[19]. His position was greatly influenced by the so-called "Archiepiscopal issue" in the early 20th century.

In particular, within a period of fifteen months, two hierarchs of the Church of Cyprus, Metropolitan Epiphanius of Paphos[20] (January 24, 1899) and Archbishop Sophronius (May 9, 1900), fell asleep in the Lord. As a result, only two of the Synod's members were bishops, one of whom (namely, Metaxakis) refused to attend. During the intensive and in large measure divisive deliberations for the election of a new Archbishop, Meletios Metaxakis, one of the key contenders for the archiepiscopal throne, claimed that the Synod was not "complete" (τελεία)[21] because it lacked a prelate (πρῶτος). Of course, it is known that, according to canon 16 of Antioch, a complete Synod presupposes the presence of a prelate: "And that shall be accounted a full synod, in which the metropolitan is present"[22].

Likewise, canon 1 of the Apostles stipulates that "a bishop be ordained by two or three bishops"[23]. It was, therefore, impossible to elect, and especially to ordain, a new Archbishop or Metropolitan of Paphos, as the Synod was incomplete indeed. In order to avoid a similar situation in the future, Art. 6 of the 1914 Charter made provision for its enhancement as necessary:

> "If it so happens that a synodal quorum may not be achieved, on account of either the vacancy of a throne or other causes, then the presiding hierarch invites *chorepiskopoi* to attend as surrogates".

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[18] Cf. CHRISTODOULOU, Τὸ Ἀρχιεπισκοπικὸ ζήτημα τῆς Κύπρου, 233.

[19] Ibidem, 30. Cf. Γνωμοδότησιν Ἀρχιμανδρίτου Μελετίου Μεταξάκη ἀντιπροσώπου τῆς Ἐκκλησίας τῶν Ἱεροσολύμων ἐπὶ τοῦ Ἀρχιεπισκοπικοῦ ζητήματος, καταχωρηθεῖσα ἐν τῇ ὑπ' ἀριθμὸν ΙΖ' καὶ χρονολογίαν 28 Σεπτεμβρίου 1907 συνεδρίᾳ τῆς ἀντιπροσωπείας τῶν Ἁγιωτάτων Πατριαρχικῶν Θρόνων, SAI: 840/1908 K.A.K. Cf. also "To the beloved and honorable members of the Draft Committee for the Church's Charter" (= fn. 7), 14-16 and ANONYMOUS, Τὸ σύστημα τῆς ἐκλογῆς τῶν ἀρχιερέων ἐν Κύπρῳ, 411ss.

[20] On Epiphanius, cf. K. KOKKINOPHTA, Κυκκώτικα Μελετήματα Α', Κέντρο Μελετῶν Ἱερᾶς Μονῆς Κύκκου, Leukosia 1997, 151-181.

[21] Cf. "To the beloved and honorable members of the Draft Committee for the Church's Charte" (= fn. 7), 13-14.

[22] RHALLES – POTLES, III, Athens 1853, 154.

[23] RHALLES – POTLES, II, Athens 1852, 1.

When there are no *chorepiskopoi*, the abbot of the Kykkos monastery is invited, "and if he is inhibited or abstains, another abbot is invited according to the priority of the monastery". The same Article envisions that,

> "Whenever there are less than two bishops, then, along with the abbot, the presiding hierarch invites another bishop, whom he requests from one of the adjacent Orthodox Churches".

A similar clause, in conformity with the spirit of canon 12 of Antioch, is to be found in the 1979 Charter (Arts. 13 and 14), as well.

I must note here that, according to the 1914 Charter, the Synod also functioned as a Court of First Instance for Hierarchs, even though it only had four member-bishops. This Court even had the legal competence to depose a bishop, contingent upon the "unanimity of those who constitute the Synod, expecting the accused". In this instance, the accused had the right to appeal the case to a Court of Second Instance. This Court would be convened by the president of the Synod and would consist of the hierarchs of Cyprus and an additional five members, namely, representatives from the four ancient Patriarchates and the Church of Greece.

On this point, in the Archives of the Archdiocese of Cyprus covering the last 115 years, one finds at least five appeals to the Ecumenical Patriarchate[24] and three more to the other ancient Patriarchates and the Church of Greece, on cases of a judiciary or administrative nature. This fact made the possibility of appeal a requirement for the new Charter. This is especially true, inasmuch as there is no provision in it for a Court of Second Instance for Hierarchs, one that can assure that a hierarch found guilty continues to have the time-honored right to a second trial. Hence, both the contemporary and historical canonical practice of Cyprus justifies the explicit introduction of Article 81, concerning the right of appeal to the Ecumenical Patriarchate (ἔκκλητον), which in no way limits or reduces the autocephalous status of the Church of Cyprus[25]. In any event, the introduction of

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[24] On the handling of ecclesiastical crises in Cyprus by the Ecumenical Patriarchate, cf. Th. STAVRIDES, Οἰκουμενικὸ Πατριαρχεῖο καὶ Κύπρος. Τὰ πατριαρχικὰ ἔγγραφα τῶν ἐτῶν 1600-1878, Leukosia 2001, 31ss. The support and aid of the Ecumenical Patriarchate for the resolution of contemporary ecclesiastical problems of Cypre are expressed from as early as 1901 (cf. CHRISTODOULOU, Τὸ Ἀρχιεπισκοπικὸ ζήτημα τῆς Κύπρου, 79ss). Likewise the support of the Ecumenical Patriarchate can be seen in 1947, when Metropolitan Joachim of Derkoi was sent, followed later by the Metropolitans Adamantios of Pergamum and Maximus of Sardes, to complement the Holy Synod and to hold archiepiscopal elections (cf. A. N. MITSIDES, Ἡ συμβολὴ τῶν Μητροπολιτῶν Περγάμου Ἀδαμαντίου καὶ Σάρδεων Μαξίμου εἰς τὴν ἀνασυγκρότησιν τῆς Ἱεραρχίας τῆς Ἐκκλησίας τῆς Κύπρου, Ἀναφορὰ εἰς μνήμην Μητροπολίτου Σάρδεων Μαξίμου 1914-1986, IV, Geneva 1989, 9-24). Finally, the Ecumenical Patriarchate collaborated in the resolution of the problems of 1973 and of 2002 (matter of Athanasios of Limassol) and in the release of Archbishop Chrysostom I (Greater Synod, Geneva 2006).

[25] On the right of appeals cf. the following: S. TRIANTAPHYLLIDOU, Περὶ ἐκκλήτων δικῶν ἐπισκόπων κατὰ τὸ ἐν Ἑλλάδι ἰσχύον Κανονικὸν Δίκαιον, Volos 1911; G. LILAIOS, Τὸ δικαίωμα τῶν ἀρχιερέων τοῦ ἐκκλήτου ἐνώπιον τοῦ Οἰκουμενικοῦ Πατριάρχου καὶ εἰδικὰ θέματα ἐπὶ τῆς δικονομίας τῆς ἐκκλησιαστικῆς δίκης, Athens 1980; Ph. TAKTOPOYLOS, Τὸ ζήτημα τοῦ ἐκκλήτου στοὺς κανόνες τῆς Σινόδου τῆς Καρθαγένης (419) (Master's Thesis), Athens 2010. Cf. also Metropolitan MAXIMOS (of Sardes), Τὸ Οἰκουμενικὸν Πατριαρχεῖον ἐν τῇ

this Article, which is founded upon canons 9 and 17 of Chalcedon, was dictated, as noted above, by the need for the existence of a Court of Second Instance for Hierarchs, because the number of bishops on the island is insufficient to assure the just composition of this instrument of the court. Moreover, given the separation of Church and State in Cyprus, there can be no internal examination of ecclesiastical decisions by the State, even for their formal legitimacy. The Ecumenical Patriarchate, therefore, functions as safeguard, primarily in meting out justice but also in assuring the unity of the Church of Cyprus.

IV. The convocation of the Sacred Synod and its members

The Sacred Synod is convoked by the Archbishop of Cyprus. When he is impeded, "it is convoked and presided over by the first in order from among its members". This *taxis* follows the precedence of thrones, as they are maintained in the ecclesiastical tradition of Cyprus. According to the wording of the Article 4 of the current Charter, the Archbishop's proxy takes on this temporary status "with the consent and at the directive of the Archbishop, whenever such may be attained". In the 1979 Charter, no provision was made for the possibility of the objective inability of the Archbishop to yield his right to convoke the Synod to the next metropolitan in order, a legal *lacuna* that became evident and quite often preoccupied the Synod during the recent, prolonged ailment (2001-2006) of the late Archbishop, Chrysostomos I[26]. This gap was resolved in the new Charter by the addition of the phrase, "whenever such may be attained".

All hierarchs, including titular bishops, are *ex officio* members of the Synod, and all enjoy full voting rights.

> "The Sacred Synod is constituted by the canonically elected and ordained hierarchs of active status, that is, the Archbishop, the Metropolitans, and the Bishops (eparchial and titular)" (Art. 3; cf. Arts. 4 § 2, 5§ 2).

Historically, with Article 11 of the "Synodal *Diataxeis* on *Chorepiskopoi*" (1917), it was rendered possible for *chorepiskopoi* to participate in the Synod. This possibility was actualized only after the Synod extended to the *chorepiskopoi* a special invitation. After receiving an invitation, a given *chorepiskopos* was only offered the right to express his opinion during synodal sessions. He was not allowed to vote on any issue, except when there was a vacant throne. In such a case, the surrogate had "all the rights of a synodal member". Likewise, a

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Ὀρθοδόξῳ Ἐκκλησίᾳ. Ἱστορικοκανονικὴ μελέτη, Thessaloniki 1972, 138ss; Bl. PHEIDAS, Ἐκκλησιαστικὴ Ἱστορία Α΄, Athens 2002, 638ss, 814ss, 819ss and 824ss; IDEM, Τὸ ἔκκλητον, in: Χριστιανὸς 32 (1993) 83ss.

[26] Cf. the consultative opinion of the following professors: G. A. POULES, Ἡ ἀναλογικὴ ἐφαρμογὴ τοῦ ἄρθρ. 59 τοῦ Καταστατικοῦ Χάρτη τῆς Ἐκκλησίας τῆς Κύπρου, in: Νομοκανονικὰ I, 2 (2002) 83-90 (= IKONOMOU, Διάλογος εὐθύνης, 86-96); Bl. PHEIDAS, Τὰ νομοκανονικὰ κριτήρια συγκλήσεως τῆς Ἱερᾶς Συνόδου τῆς Ἐκκλησίας τῆς Κύπρου, ibidem, 91-100 (= IKONOMOU, ibidem, 72-85) and P. BOUMES, Ἡ ἀναπλήρωση τοῦ Πρώτου εἰς τὴν Ἐκκλησίαν τῆς Κύπρου, ibidem, 71-82 (= IKONOMOU, ibidem, 97-112).

chorepiskopos enjoyed the privileges of a full member, whenever his presence was necessary in order to establish a quorum.

The substitution of a synodal member by a *chorepiskopos* was also foreseen by the 1979 Charter (Art. 14)[27]. According to the same document (Art. 11), *chorepiskopoi* were allowed to attend the sessions of the Synod. However, according to the wording of the Charter:

> "On administrative matters of the Church, [they] simply express a consultative opinion, without voting".

The same held true when a *chorepiskopos* functioned as a proxy. In practice, however, this Article was amended, as *chorepiskopoi* were given the right to vote, even on administrative issues. A case in point was the decision to relieve Archbishop Chrysostomos I of his duties. Currently, as mentioned above, even titular bishops are considered full members of the Synod and enjoy all rights and privileges stemming from their office. As a final note here, I mention that the title "*chorepiskopos*" has now been abandoned, though it was traditionally maintained in the recent canonical vocabulary of the Church of Cyprus.

Though there is a clear status for titular bishops in the Charter, the same cannot be said regarding eparchial bishops (Karpasia, Arsinoe, and Amathus). For the latter there is obscurity with respect to their rights. Specifically, during church services held in churches of their Eparchy, their name is commemorated "after the name of the Hierarch, upon whom the dioceses is dependent" (Art. 13 § 3). According to the canonical norm, only the name of the eparchial bishop should be commemorated. Similarly,

> "the economic auditing of churches and the entire administration of the parishes of the diocese, are to be effected jointly with the churches and parishes of the eparchy, from which it is dependent" (Art. 13 § 3).

In addition, eparchial bishops can be allocated additional responsibilities from their immediate superior (Art. 13 § 3). With these stipulations, it is not entirely clear whether these hierarchs are quasi-eparchial[28] or titular bishops.

V. The election of hierarchs

The process of electing hierarchs was the focal point of many discussions, especially leading up to and during the election of Archbishop Chrysostomos II in 2006. This was the reason behind the more "judicious" review of the participation of laity in the election of hierarchs made during the deliberations of the current

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[27] SERGIOU, Ἡ καταστατικὴ νομοθεσία τῆς Ἐκκλησίας τῆς Κύπρου, 216-217.

[28] On eparchial bishops, cf. I. P. CHRISTINAKE-GLAROU, Οἱ «ἐπαρχιῶται ἐπίσκοποι» κατὰ τοὺς ἱεροὺς κανόνες, Athens 2004.

Charter[29]. I will not go into great detail on this issue, but simply present the position and the spirit of the Draft Committee in choosing the specific electoral system as outlined in Articles 19-30 of the Charter. I must first point out that all of the members of the Committee recognized that the participation of the laity in the election of hierarchs as a key element in the tradition of the Church of Cyprus. Therefore, according to the local ecclesiastical tradition, the laity should not have been excluded from the electoral process. Likewise, it would have been equally improper for the canons to be ignored, as they categorically disallow the participation of the laity in the election of bishops (see canon 4 of Nicaea I, canon 3 of Nicaea II, and canons 12 and 13 of Laodicea[30]).

The Committee also seriously considered the canonical appropriateness for the Synod to be converted into an "ordaining body" that would simply be forced to conform to the decision of the people. In effect, according to the previous system (Arts. 59-63 of the 1979 Charter), the laity held a disproportionately large percentage in the process vis-à-vis the members of the Synod. Moreover, this system did not grant the Synod the legal capacity to intervene in the event the candidate elected was for whatever reason not capable of being elevated to the rank of bishop. Maintaining the previous system would both have been uncanonical and anti-ecclesiological. It would also greatly contradict the fundamental 1st Article of the new Charter, which ordains that the Church of Cyprus "is governed on the basis of the divine and sacred canons".

In drafting its final proposal, the Committee took the following into consideration: 1) the experience gained from the recent archiepiscopal elections; 2) the extensive discussions and documented proposals of the Draft Committee for the 1979 Charter, describing the various possible systems for the election of hierarchs, as recorded analytically in the Introductory Report of Archbishop Chrysostomos I[31]; and 3) the desire for a system that will not create divisions among the people. These considerations created the conditions leading the Committee to present the system foreseen in Articles 19-30 of the Charter. According to the provisions therein, the people nominate the three candidates constituting the *triprosopon*, and the Synod freely elects one of the three. In this way the local practice is harmonized with the Law of the Church at large. Besides, testimony for a similar system has existed in the Church's nomo-canonical tradition (see, for example, Novella 123 of Justinian). The preferred system restores the primary role of the Sacred Synod, avoids the complexity of the process in the 1979 Charter – with the Special and General Representatives and the two electoral bodies (*ex officio* and elected) of the electoral congress – and gives the laity the ability to nominate directly, by an entirely democratic method, that celibate cleric who has "the qualifications of eligible episcopal candidates" (Art. 30). This system will be successful, if the Sacred Synod remains sensitive to

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[29] Cf. the Introductory Address of Archbishop Chrysostom II of Cyprus, Καταστατικὸς Χάρτης τῆς Ἁγιωτάτης Ἐκκλησίας τῆς Κύπρου, op. cit., p. 6-8.

[30] Cf. RHALLES – POTLES, II, 122 and RHALLES – POTLES, III, 183, respectively.

[31] Cf. the following: Εἰσηγητικὴ ἔκθεση τῆς Α. Μ. τοῦ Ἀρχιεπισκόπου Κύπρου ΧΡΥΣΟΣΤΟΜΟΥ στὸ νέο Καταστατικὸ Χάρτη τῆς Ἐκκλησίας τῆς Κύπρου, in: Ἀπόστολος Βαρνάβας 40 (1979) 382-385.

the will of the laity, especially when a candidate accumulates the absolute majority of votes.

VI. Summary

The present paper presents some of the fundamental canonical issues that the current Charter of the Church of Cyprus (2010) covers in accordance with the canonical tradition of the Orthodox Church. In particular, the topic of ecclesiastical "citizenship" is addressed, inasmuch as the new Charter remedies the clause of the previous Charter (1979) that included all Cypriots living abroad in defining who constitute members of the Church of Cyprus. With the above ethnophyletic statute, the fundamental ecclesiological principal of territoriality was negated. The second matter discussed pertains to the allowance made for convicted hierarchs to appeal their case before the Synod of the Ecumenical Patriarchate, a procedure introduced for the first time in a Charter of the Church of Cyprus. Furthermore, provisions of the Charter are examined that address issues of constitution and convocation of the Sacred Synod as well as the crucial process of electing hierarchs. Regarding the latter, the Charter introduces new conventions that limit and rearrange the mode of participation of laity in the process, arguably rendering it more in line with elementary canonical precepts.

THE CURRENT LAW OF THE RUSSIAN ORTHODOX CHURCH

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In this paper I will review the authoritative sources, bi-laws and institutions, which are currently guiding the life of the Russian Church.

I. Sources

1. Old Testament

The Holy Scriptures are at the heart of the Russian ecclesiastical law. Besides Decalogue[1], a very few elements of Mosaic law are used, in addition to the Decalogue (Exodus 19:10-25), as for instance certain passages related to ritual uncleanness (Leviticus 15:3)[2]. Church courts take into account a requirement of having two or three witnesses in order for an accusation to be reviewed[3]. Traces of some moral maxims can be found as for instance followed regarding punishments, "affliction shall not rise up the second time" (Nahum 1:9)[4].

2. New Testament

All the words of the Savior, all the words of the Apostles are the foundation for all church laws. Such words superceed canons in their authority. They could be taken instance by instance out of the Holy Scripture, employed as canons and set apart in the same fashion as canons are arranged in canonical collections.

3. Byzantine law

The so-called Nomokanon of Patriarch Photios contains canonical material approved by Council of Trullo (691). In its second canon this council listed the following canons as mandatory for the whole Orthodox Church: The Canons of the Apostles; the Canons of the Ecumenical Councils[5]; the Canons of significant Local Councils[6]; Major Canons of the Holy Fathers[7]. In 883 under St. Patriarch

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[1] Exodus 20:2-27

[2] Canon 2 of St. Dionisios of Alexandrei: engl. transl. in Nicene and Post-Nicene Fathers [NPNF], 2nd Series vol. 14, Grand Rapids MI 1979, 600.

[3] Deuteronomy 19:15; Tim. 1, 5:19. Cf. Apostolic Canon 75: NPNF 14, 599.

[4] Apostolic Canon 25: NPNF 14, 595.

[5] Nicea (325), Constantinople (381), Ephesus (431), Chalcedon (451).

[6] Ancyra (314), Neo Caesarea (c. 314), Gangra (c. 340), Antioch (c. 330), Laodicea (between 342 and 381), Sardica (343), Carthage (419), Constantinople (394).

[7] St. Cyprian of Carthage (d. 258), St. Dionysios of Alexandria (d. 265), St. Gregory of Neocaesarea (d. 270), St. Peter of Alexandria (d. 311), St. Athanasios of Alexandria (d. 373), St. Basil of Caesarea (d. 379), St. Gregory of Nazianzen (d. 390), St. Gregory of Nyssa (d. 394), St. Amphilochios of Ikonion (d. after 394), Timothy of Alexandria (d. 385), Theophilos of Alexandria (d.

Photios, these canons were expanded with the edicts of the Seventh Ecumenical Council (787), and also of the 861 and 879 Synods of Constantinople, and along with the Epistle of St. Tarasios (d. 806)[8]. These canons became part of *Nomokanon of 14 Titles* and they later came to be, by general consensus, accepted as the core canonical corpus of the Orthodox Church[9].

According to the first canon of the Council of Chalcedon (451), it is imperative that the entire Orthodox Church obey all previously formulated canons[10]. Fidelity to the canons was once more confirmed by the first canon of the Council of Nicea II (787)[11]. At the time of his consecration, a bishop solemnly declares his allegiance to the holy canons (Souncil of Nicea II, Canon 2[12]). The canons do not act by themselves, but they serve the bishops of the Russian Orthodox Church as authoritative guidelines in adjudicating specific cases.

4. Old Russian and synodal period

In the ninth century St. Methodios of Macedonia translated the *Synagoge in 50 Titles* of John Scholastikos and some texts from the *Ecloga* of Constantine V[13], from Greek into Slavonic. In the Slavic lands this collection was known as *Kormchaia*. The best example of this collection is *Efremovskaia Kormchaia* (12 c.). Various texts, including Russian ones, were added. In 1272 the Council of Vladimir approved *Kormchaia* for use in the Russian Church[14]. It was copied many times, and the first printed edition was republished five times before 1839.

In 1721 the Patriarchate was abolished and a new form of the governence was introduced in the Russian Church. The Most Holy Governing Synod was a state agency accountable to the emperor who, as in European Protestant states, became a head of the church[15]. Some canons from this period lasted until 1917 are still used. For instance regarding marriage: the decision of 1810 does not recognize any spiritual relations between male and female sponsors of a child[16].

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412), St. Cyrill of Alexandria (d. 444) and Gennadios of Constantinople (d. 471). Cf. G. NEDUNGATT – M. FEATHERSTONE (ed.), The Council in Trullo revisited (Kanonika 6), Rome 1995, 64-69. – All groups of canons mentioned here are studied in W. HARTMANN – K. PENNINGTON (ed.), The History of Byzantine and Eastern Canon Law to 1500, Washington, DC 2012.

[8] J. A. MCGUCKIN, The Ascent of Christian Law, Yonkers, NY 2012, 260.

[9] Ibidem, 261.

[10] NPNF 14, 268.

[11] NPNF 14, 555.

[12] NPNF 14, 556.

[13] Zakon Sudnyi Liudiam (The Penal Code for Laymen). Cf. I. ZUZEK, Kormcaja Kniga (Orientalia Christiana Analecta 168), Rome 1964, 18; 20.

[14] Ibidem, 35.

[15] M. SZEFTEL, Church and State in Imperial Russia, in: R. L. NICHOLS – TH. STAVROU (ed.), Russian Orthodoxy under the Old Regime, Minneapolis 1978, 131.

[16] A. SMIRENSKY, Matrimonial legislation in imperial Russia, 1700-1918 (M.Th. thesis, St. Vladimir's Orthodox Theological Seminary), Yonkers, NY 1995, 5. Cf. Trullo, Canon 54.

According to the same decree of 1810 marriages between relative are banned up to and including the fifth-degree of consanguinity[17].

In 1839 a committee under the supervision of St. Filaret Drozdov published *Kniga Pravil*, which is the main canonical collection of the Russian Church[18]. Unlike the *Kormchaia*, the *Kniga Pravil* contains only canons taken from *Nomokanon in 14 Titles*, though no imperial edicts are included. The *Kniga Pravil* reflects the influence of the *Pedalion* of St. Nikodemos the Hagiorite[19]. Although the *Kormchaia* has never been formally abolished, in fact it was replaced by the *Kniga Pravil*.

5. All-Russian Local Council of 1917-1918

On March 2, 1917, Emperor Nicholas II abdicated the throne. The Provisional Government facilitated the convocation of an All-Russian Local Council in August 1917. This was a very productive and inspiring event, since no councils had taken place during the Synodal period (1721-1917)[20]. This council set a goal to harmonize Tradition with the emergent reality of the separation of church and state[21]. The council could not function normally under circumstances of Civil War. It finished its work on September 20 of 1918[22]. Only now, after the collapse of the communist regime, the Russian Church has returned to the analysis of the church matters reviewed by the council of 1917-1918[23].

The main decision of the council was the restoration of the Patriarchate. Besides the bishops, the council consisted of representatives from the clergy, monastics, parishes and dioceses[24]. The council established three high church

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[17] V. TSYPIN, Tserkovnoe pravo, Moscow 2009, 681.

[18] ZUZEK, Kormcaja, 268-269.

[19] Ibidem, 269.

[20] During the Synodal period, a kind of collegiality was maintained by the rotation of the diocesan bishops who participated in the sessions of the Synod, but most of the laws were adopted at the direction of the imperial authority.

[21] I. PAPKOVA, The Freezing of Historical Memory? The Post-Soviet Russian Orthodox Church and the Council of 1917, in: M. D. STEINBERG – C. WANNER (ed.), Religion, Morality, and Community in Post-Soviet Societies, Washington DC 2008, 59.

[22] D. POSPIELOVSKY, The Orthodox Church in the History of Russia, Yonkers, NY 1998, 206.

[23] See in documents adopted by Inter-Conciliar Assembly of the Russian Orthodox Church of the Russian Orthodox Church. Межсоборное присутствие Русской Православной Церкви: www.msobor.ru [7. 2. 2014].

The council had the following committees: 1) liturgical, 2) the supreme of church organization, 3) the diocesan administration, 4) of the ecclesiastical court, 5) improvement of the parish, 6) the legal status of the Church, 7) worship, evangelism and church art, 8) church discipline, 9) domestic and foreign missions, 10) edinoverchestva and Old Believers, 11) monasteries, 12) Theological Academy, 13) religious schools, 14) parochial schools, 15) teaching the law of God in secular schools, 16) church property and the economy; 17) the legal and financial status of the clergy, 18) relations with the Georgian Church, 19) publishing, 20) personnel of the Council. Deiania Sviashchennogo sobora Pravolslavnoi Rossiskoi Tserkvi 1.2., Moscow 1918, 143.

[24] POSPIELOVSKY, The Orthodox Church in the History of Russia, 203.

authorities to operate in the period between councils: the Patriarch, Holy Synod, and the Supreme Church Council[25].

The decisions of the council impacted existing structures of the Russian Church on the levels of metropolitan districts, diocesan and parish councils, diocesan courts. The council adopted a list of reasons justifying the granting of ecclesiastical divorce[26].

6. Pan-diaspora Councils

The Russian Orthodox Church Outside of Russia as a self-governing part of the Russian Church, also in some case employs a Pan-diaspora Council composed of representatives of the monks and bishops, clergy and laity, after the manner of the composition of the council of 1917-18[27]. For instance such a pan-diaspora council in 2006 reviewed the proposal of the restoration of ecclesiastical communion between the church in Russia and the diaspora.

7. Statutes

Statutes of the Russian Orthodox Church have been adopted at the Local Council of 1945, the Bishop Council of 1961 and the Local Council of 1988[28]. The latter statute survived until the Bishop Council of 2000. From here on I will be citing extensively from the Revised Statutes adopted at the 2013 Bishops' Council[29] (This is the latest version of the Statute that incorporates versions of 2000 and 2009).

II. Institutions

1. Local Council

The idea of such a council was introduced by 1917-18 council. The council, composed of bishops, clergy members, monastics and laity, addresses issues surrounding the election and retirement of the Patriarch of Moscow, and provides autocephaly and autonomy to the parts of the Russian Church. The word "local" in this context is opposed to "universal", as in the "Universal Orthodox Church". Thus "local" means "belonging to the Russian Church as such".

The Local Council of the Russian Orthodox Church is summoned by the Bishops' Council of the Russian Orthodox Church[30]. The latter can also set the

[25] POSPIELOVSKY, The Orthodox Church in the History of Russia, 205.

[26] E. V. BELIAKOVA, Tserkovnyi sud i problemy tserkovnoi zhizni, Moscow 2004, 606-608.

[27] Regulations of the Russian Orthodox Church Outside of Russia: Compendium of Regulations, Statutes and Laws of the Russian Orthodox Church Outside of Russia, New York 2006, II.12, 47.

[28] Addenda were made in 1990.

[29] Hereafter cited as "Revised Statute of 2013". Ustav Russkoi Pravoslavanoi Tserkvi, Russkaia Pravoslavnaia Tserkov': Ofitsial'nyi Sait: www.patriarchia.ru/db/document/133114 [21. 8. 2013].

[30] II.2. "Pomestnyi Sobor", Ustav Russkoi Pravoslavnoi Tserkvi 2013.

agenda of the Local Council, for example to develop and express the position of the Russian Orthodox Church on vital issues such as the relationship between the Church and the state or society.

2. Bishop Council

If the Local Council is the highest authority in matters of election of Patriarch, the Bishop Council, according to the Revised Statute of 2013, is the highest authority

> "in doctrinal, canonical, liturgical, pastoral, administrative and other matters related to both internal and external Church life, in the maintenance of fraternal relations with other Orthodox Churches, in determining the nature of the relationship with non-Orthodox denominations and non-Christian religious communities, as well as with states and with secular society"[31].

The Bishop Council is the supreme supervisory authority of the ROC. On it depends whether the Local Council shall assemble or not. The only exceptions to this rule is the question of the election and dismissal of the Patriarch, and the provision of various forms of independence to the parts of the Russian Church. These issues are decided by the Local Council. All the following aspects of church life are controlled by the Bishop Council:

> "a) the preservation of the purity and integrity of the Orthodox Faith and the norms of Christian morality, and the interpretation of the doctrine on the basis of Scripture and Sacred Tradition, while maintaining doctrinal and canonical unity with the fullness of the Universal Orthodoxy;
> b) maintainence of the dogmatic and canonical unity of the Russian Orthodox Church;
> c) the adoption of the Statute the Russian Orthodox Church and the introduction of amendments and additions;
> d) resolution of fundamental theological, canonical, liturgical and pastoral issues related both to internal and external activities of the Church;
> e) the canonization of saints;
> f) the competent interpretation of the holy canons and other church regulations;
> g) the expression of pastoral concern for the problems of the present;
> h) determination of the nature of the relationship with state institutions;
> i) submission to the Local Council proposals for the creation, reorganization and abolition of autonomous and self-governing Churches;
> j) Approval of the Holy Synod on the establishment, reorganization and abolition of exarchates, the metropolitan districts, metropolitanates and

[31] III.1. "Arkhiereiskii Sobor", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133124.html [21. 8. 2013].

dioceses, the definition of their boundaries and names, as well as the approval of the Synods of self-governing Churches on the establishment, reorganization and abolition of metropolitan sees and dioceses;
k) Approval of the Holy Synod on the establishment, reorganization and abolition of synodal institutions and other bodies of church government;
l) in anticipation of the Local Council - propose regulations regarding the meeting programs, agendas and composition of the Local Council;
m) to monitor the implementation of the decisions of the Local and Bishop Council;
n) discussion of the activity of the Holy Synod, the Supreme Church Council and Synod agencies;
o) approval, cancellation and changes to the legislative acts of the Holy Synod;
p) the establishment of procedures for all ecclesiastical courts;
q) review of reports on financial matters of the Holy Synod, and the approval of the principles of planning of the upcoming church-wide revenues and expenses;
r) approval of new church-wide awards"[32].

The Bishop Council is the highest court for all bishops of the ROC. All bishops are obliged to take part in it. Decisions are taken by open or secret ballot.

3. Patriarch

According to the Revised Statute adopted by the Bishop Council in 2013 His Holiness Patriarch is elected by the Local Council, but he is accountable both to the Local and Bishop Council[33]. The Patriarch is responsible for implementing the decisions of the Local Councils and the Synods of Bishops, and to communicate with members of other local churches on behalf of the ROC. The Patriarch may suspend the decisions of Holy Synod.

4. The Holy Synod

According to the 2013 Revised Statute of the Russian Orthodox Church, the Synod of Bishops of the Russian Orthodox Church are to direct church life during the period between councils. The Synod consists of nine regular members and five non-permanent members. Permanent members of the Synod are the Metropolitans of Kiev and All Ukraine, St Petersburg and Ladoga, Krutitsy and Kolomna, Minsk and Slutsk, Patriarchal Exarch of All Belarus, Chisinau and All Moldova, Astana and Kazakhstan, the head of the Metropolitan District of the Republic of

[32] III.5. "Arkhiereiskii Sobor", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133124.html [21. 8. 2013].
[33] IV.2. "Patriarkh", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133121.html [21. 8. 2013].

Kazakhstan, Tashkent and Uzbekistan, the head of the Central Asian Metropolitan District, ex officio-Chairman of the Department for External Church Relations and the Chancellor of the Moscow Patriarchate[34].

All dioceses are divided into groups and members are invited to attend the sessions as temporary members in order of seniority. Two sessions are held each year, one in summer and one in winter. Cases are resolved by a general vote. The jurisdictional duties of the Holy Synod are

> "a) to care for the sound preservation and interpretation of the Orthodox faith and the norms of Christian morality and piety;
> b) to serve the internal unity of the Russian Orthodox Church;
> c) to maintain unity with the other Orthodox Churches;
> d) the organization of internal and external activities of the Church and the solution of the matters of church-wide significance;
> e) to interpret the canonical decisions and the resolution of difficulties associated with their use;
> e) the regulation of liturgical matters;
> f) the issue of disciplinary regulations relating to the clergy, religious and church workers;
> g) to evaluate the most important events in the field of interfaith, and inter-religious relations;
> h) to maintain inter-religious relations, both on the canonical territory of the Moscow Patriarchate and beyond;
> i) to coordinate the actions of the entire Russian Orthodox Church in its efforts to achieve peace and justice;
> j) the expression of pastoral concern for social problems;
> k) to address special epistles to all the faithful of the Russian Orthodox Church;
> l) to maintain proper relations between the church and the state in accordance with the Charter and applicable law;
> m) the approval of the statutes for the autonomous Churches and the metropolitan districts;
> n) to adopt the civil statutes of the Russian Orthodox Church and its canonical units, as well as making amendments and additions;
> o) to review of the journals of Synods' Exarchates, the Metropolitan District;
> p) issues related to the establishment or dissolution of the units accountable to the Holy Synod of the Russian Orthodox Church subject to approval by the Bishop Council;
> q) to establish procedures for the possession, use and disposal of the buildings and property of the Russian Orthodox Church;
> r) to approve the decisions of the General Ecclesiastical Court in the cases stipulated by the Regulations of the ecclesiastical courts"[35].

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[34] V.4. "Sviashchennyi Sinod", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133126.html [21. 8. 2013].

The Synod appoints bishops, leaders of spiritual schools, abbots, inspects the activities of bishops, approves the budget of the ROC. The Synod can create preparatory Commissions and prepare for the Bishop Council cases relating to

"a) the decision of the important theological issues relating to internal and external activities of the Church;
b) the preservation of the text of the Holy Scriptures, its translation and publication;
c) the preservation of the texts of the liturgical books, its correction, editing and publishing;
d) the canonization of saints;
e) the publication of collections of the holy canons, textbooks and teaching aids for religious schools, theological literature, periodicals and other official editions of the required books;
f) the improvement of theological, spiritual and moral training of clergy and the activities of religious schools;
g) mission, catechesis and religious education;
h) the state of spiritual enlightenment;
i) the monasteries and monks;
j) works of mercy and charity;
k) the proper state of church architecture, icon painting, singing and applied arts;
l) church monuments and antiquities in the jurisdiction of the Russian Orthodox Church;
m) the production of church vessels, candles, vestments and all that is needed to maintain the liturgical tradition, beauty and good in the temples;
n) the pensions for clergy and church workers;
o) the solution of economic problems"[36].

The Synod of Bishops makes sure that "the actions of all organs of ecclesiastical authority in the dioceses, deaneries and parishes meet regulations of the law"[37]. The Synod of Bishops has the right to dispose of the property of the ROC. The Patriarch of the Russian Orthodox Church is the manager of the funds of the Synod.

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[35] V.25. "Sviashchennyi Sinod", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133126.html [12. 8. 2013].
[36] V.28. "Sviashchennyi Sinod", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133126.html [21. 8. 2013].
[37] V.31.c. "Sviashchennyi Sinod", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133126.html [21. 8. 2013].

5. The Supreme Church Council

The third All-Russian authority established by the Local Council of 1917-18 is the Supreme Church Council. The Supreme Church Council performs an advisory role for the Synod of Bishops. Officially it is the lowest of the executive authorities, following the Bishop Council and Synod. His Holiness the Patriarch is the Chairman. The Supreme Church Council consists of the chairmen of the following divisions of the Holy Synod:

"a) the Administrative Department, acting as part of the Moscow Patriarchate on the Rights of the Synodal institutions;
b) the Department for External Church Relations;
c) the Publications Board;
d) the Education Committee;
e) Financial and economic management;
f) Division of monasteries and monastic life;
g) The Department of Religious Education and catechesis;
h) The Department for Church Charity and Social Service;
i) The Department for Mission;
j) The Department for Relations with the Armed Forces and law enforcement agencies;
k) The Department of Youth Affairs;
l) Department for Church and Society;
m) Information Division;
n) Department of the prison service;
o) The Committee for Cooperation with the Cossacks;
p) the Patriarchal Council for Culture"[38].

The Supreme Church Council is a major decision-making body of the Russian Church. For instance, the Supreme Church Council and not the Synod made a comment on behalf of the Russian Church regarding the "Pussy Riot" incident[39]. The journals of the meetings of Supreme Church Council are not available to the public. According to information provided to me by an anonymous expert from the Moscow Patriarchate, the members of the council have access only to the information relevant to their particular assignment.

[38] VIII.6. "Vyshii Tserkovnyi Sovet", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/2777567.html [21. 8. 2013].

[39] Russian Orthodox Church Asks for Mercy for Pussy Riot, in: Ria Novostic: http://en.rian.ru/russia/20120817/175283026.html [18. 8. 2013].

6. Inter-Conciliar Assembly of the Russian Orthodox Church

This is another interesting establishment inspired by the all-Russian local council of 1917-18. It may include bishops, clergy, monks and lay people. Currently this body effectively uses the internet to gather opinions on various documents. For example the Regulation of the Monasteries and Monastics evoked over 1000 online comments[40]. The Inter-Conciliar Assembly of the Russian Orthodox Church consists of the following committees[41]: Theological Committee; On Church Administration and on How to Apply the principle of Collegiality (conciliarity) in Church Life; On Church Law; On Issues of Liturgical Life and Church Art; On Issues of Parish Life and Practical Parish Issues; On Church Mission; On Ecclesiastical Schools and Religious Education; On Social Activity and Charity; On Coordination among Church, State and Society; On How to Overcome Church Schisms; On Relation with non-Orthodox Christians and Other Religions; On Church Activity regarding Mass Media[42].

All these committees draft documents for discussion at Bishop Councils. The committees include both male and female representatives of the Russian Church. So far the experience with the documents has been mixed. The already mentioned discussion on the monasteries and monastics and on the liturgical language produced two opposing trends that were difficult to harmonize[43]. As a result the drafts of those two documents were sent back by the bishops for further clarification[44].

7. Church Court

The Revised Statute of 2013 contains a section on ecclesiastical courts[45]. The court in the Russian Orthodox Church is divided into three stages:

> "a) Diocesan Court, which is the court of first instance *for the clergy of the diocese* (emphasis mine A.P.) The Diocesan Bishop appoints the chairman, deputy chairman and secretary of the court. Diocesan Assembly elects at least two members of the court. All members of the Court shall be elected for three years. The diocesan bishop must approve all decisions of the court.

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[40] Prockt Polozhenie o monastyriakh i monashestvuiuschchikh: Bogoslov.ru: www.bogoslov.ru/text/2603108.html [18. 8. 2013].

[41] Cf. http://msobor.ru/doc.php?id=53 [18. 8. 2013].

[42] "Sostav komissii Mezhsobornogo prisutstviia": Russkaia Pravoslavnaia Tserkov': Ofitsial'nyi Sait Moskovskogo Patriarkhata: www.patriarchia.ru/db/text/1615480.html [22. 8. 2013].

[43] The document was titled "On the Church Slavonic Language in the Life of the Russian Church" and the discussion was going around this language instead of discussing possibility to use other languages than the "sacred" ones.

[44] "Prezidum Mezhsobornogo prisutstvia vernul v profil'nuiu komissiiu prockt dokumenta 'O monastyriakh'", in: Tserkovnyi vestnik: http://e-vestnik.ru/news/prockt_o_monastyryah_vernuli_na_dorabotku [21. 8. 2013].

[45] IX. "Tserkovnyi Sud", Ustav Russkoi Pravoslvanoi Tserkvi 2013: www.patriarchia.ru/db/text/1331130.html [22. 8. 2013].

b) The General Ecclesiastical Court is the court of the second instance. It considers the cases of bishops and leaders of Synodal institutions. It controls the arbitrariness of the diocesan trials. This General Ecclesiastical Court is part of the administration of Moscow Patriarchate and not and an independent body.
c) The third and final authority is the Court of the Bishop Council. The Patriarch is exclusively accountable to this court".

III. Current structures

1. Autonomous Churches

The Japanese and the Chinese Orthodox Churches are autonomous. The Ukrainian Orthodox Church is a self-governing church with a large degree of autonomy. According to the Statute of the ROC

> "the council of the autonomous church adopts the Statute regulating the management of the Church on the basis and within the limits provided by the Patriarchal tomos. The project of the statute of the autonomous church is subject of the written approval by the Patriarch of Moscow and All Russia"[46].

2. Self-governing Churchs and Exarchates

These have their own internal statutes and enjoy greater independence than metropolitan districts. These include under the Statute of the Russian Orthodox Church[47]: The Latvian Orthodox Church; the Orthodox Church of Moldova; the Estonian Orthodox Church and the Russian Orthodox Church Outside of Russia as Self-Governing Churches.

All of these churches have their own internal laws governing their lives in addition to the present Statute of the Russian Orthodox Church. The Belarusian Orthodox Church is an exarchate and has its own charter. The Statute states that exarchates are created on a "national-regional basis". This raises a question obeying a canonical principle of diocesean organization based on geographical principle[48].

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[46] X. "Avtonomnye Tserkvi", Ustav Russkoi Pravoslvanoi Tserkvi 2013: www.patriarchia.ru/db/text/1405097.html [22. 8. 2013].

[47] XI "Samoupravliaemye tserkvi", Ustav Russkoi Pravoslvanoi Tserkvi 2013: www.patriarchia.ru/db/text/133132.html [22. 8. 2013]; "Ekzarkhaty": www.patriarchia.ru/db/text/133136.html [22. 8. 2013].

[48] Cf. exegesis on Apostolic Canon 34 by TSYPIN, Tserkovnoe Pravo, 376-377.

3. Metropolitan Districts

This is another form of independence proposed by the Council 1917-18. According to the Revised Statute of 2013, a group of dioceses together forms a metropolitan district[49] with its synod, and the statute. These include the Metropolitan District of the Republic of Kazakhstan, the Central Asian Metropolitan District. Apparently a metropolitan district is a step on the way to a self-governing church. (In fact I do not see any differences between self-governing churches and Metropolitan Districts.)

4. Metropolitanates

According to the Revised Statute of 2013[50] two and more dioceses of the ROC can be combined into a metropolitanate. They hold a Bishop Conference no less than twice an year. Metropolitanates don't have their own exclusive legislation.

5. Diocese

The Diocesan Bishop:

"[...] c) is responsible for the implementation of the provisions of this Statute, [...]f) approves civil by laws of parishes, monasteries and other institutions in his diocese, [...]

j) presents the candidates for the position of parish rectors, [...]

m) approves the members of parish councils"[51]

He also "has the right to temporarily excommunicate a lay person" and he "regulates matters of divorce"[52].

6. Vicariates

Vicar bishops are subject to the diocesan bishop whose authority is defined by the ruling bishop. A suffragan bishop has authority to summon the conference of the diocese, whose decision is subject to the approval of the diocesan bishop[53].

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[49] XIII. "Metropolich'ii okrug", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/1405165.html [22. 8. 2013].

[50] XIV. "Mitropoliia", Ustav Russkoi Pravoslvanoi Tserkvi 2013: www.patriarchia.ru/db/text/2777626.html [22. 8. 2013].

[51] XV.1.18. "Eparkhii", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133139.html [22. 8. 2013].

[52] XV.1.19. "Eparkhii", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133139.html [22. 8. 2013].

7. Diocesan Assembly

The Diocesan assebly is the governing body of the diocese, which

"a) elects delegates to the Local Council;
b) elects the members of the Diocesan Council and the Diocesan Court;
c) establishes the necessary diocesan institutions and cares for their financial security;
d) develops diocesan rules and regulations in accordance with the conciliar decrees and decisions of the Holy Synod;
e) supervises the course of diocesan life;
f) hears reports on the state of the diocese, on the work of the diocesan institutions, the life of the monasteries and other canonical units belonging to the diocese, and make decisions on them"[54].

The diocesan council is elected by diocesan assemblies and is therefore accountable to the Diocesan Assembly. Like the Holy Synod in the period between the councils, the Diocesan Council oversees the implementation of the decisions of the diocesan assemblies and determines the boundaries of the deaneries. In addition to the Diocesan Council under the direct leadership of the diocesan bishop is a diocesan administration.

The Moscow Patriarchate has an Analytical and Controlling Unit that has the task of ensuring the implementation of the Statute of the Russian Orthodox Church and other guiding documents in the dioceses of the Russian Orthodox Church[55].

8. Deanery

The Dean is the "eyes of a bishop" in relation to various aspects of a life of a group of parishes in one area of the diocese. For example at the direction of the diocesan bishop the dean might conduct a preliminary investigation of offenses and give the the bishop recommendations regarding candidates to fill vacancies. The dean may attend parish meetings and convene meetings of the deanery[56].

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[53] XV.2. "Eparkhii", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133139.html [8. 2. 2014].

[54] XV.3.38. "Eparkhii", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133139.html [22. 2013].

[55] "Interv'iu rukovoditelia kontrol'no-analiticheskoi sluzhby Upravleniia delami Moskovskoi Patriarkhii igumena Savvy (Tutunova) gazete Izvestiia": www.patriarchia.ru/db/text/1249515.html [19. 8. 2013].

[56] XV.63, 64. "Eparkhii", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133139.html [22. 8. 2013].

9. Parishes

According to the Revised Statute of 2013

"1. The Parish is a community of Orthodox Christians, consisting of clergy and laity, united around the church. The parish is a canonical unit of the Russian Orthodox Church, under the authoritative supervision of their diocesan bishop and under the guidance of the priest appointed by that bishop.

2. The parish is formed by the voluntary agreement of the Orthodox citizens who have reached the legal age with the blessing of the diocesan bishop. To obtain the status of a legal entity registered by the arrival of state bodies in accordance with the legislation of the country where the parish is located. The boundaries are set by diocesan parish council [...] Managing of the parish is exercised by the diocesan bishop, the rector, the parish assembly, the parish council, the chairman of the parish council"[57].

The governing body of the parish is the Annual Parish Assembly, the duties of which include

"a) maintaining the internal unity of the parish and the promoting its spiritual and moral development;

b) the adoption of the Charter of the civil parish, amendments thereto, which shall be approved by the diocesan bishop and shall enter into force on the date of state registration;

c) the adoption and exclusion of members of the parish council;

d) election of the parish council and the audit committee;

e) planning of financial and business activities of the parish;

f) ensuring the safety of church property and seeing to its increase;

g) the adoption of spending plans, including the size of deductions for charitable, religious and educational purposes, and their submission for approval by the diocesan bishop;

h) the approval of the plans and review of construction documents for the construction and repair of church buildings;

i) to review and the approval of the diocesan bishop of the financial and other records of the parish council and the reports of the Audit Committee;

j) approval of the staffing and determination of the members of the clergy and the parish council;

k) to determine the disposition of property coming to the conditions defined in this Statute, the Statute of the Russian Orthodox Church (civil), the Charter of the diocese, the parish charter and applicable laws;

l) taking care of everything you need for worship according to the Orthodox standards (canons);

[57] XVI. "Prikhody", Ustav Russkoi Pravoslavnoi Tserkvi 2013; www.patriarchia.ru/db/text/133141.html [22. 8. 2013].

m) concern about the state of church music;
n) commencement of petitions before the parish and diocesan bishop and also the civil power;
o) review complaints against members of the parish council, the Audit Commission and present them to the diocesan administration"[58].

Just as the synod for the entire church and the diocesan council for the diocese, a parish council is the executive body of the parish between meetings of parish assembly and solves everyday problems of the parish. Brotherhood and sisterhood with the existing parishes, lose the registration in the event when they came from the jurisdiction of the ROC[59].

10. Monasteries

Monasteries are guided and live according to the Statute of the Russian Orthodox Church, civil statutes, Regulation of the Monasteries and Monastics and their own charters that must be approved by the diocesan bishop[60].

11. Religious Educational Institutions

These are subject to the Education Committee of the Holy Synod. The Patriarch is the head of all educational institutions. Canonically local institutions are subject to the diocesan bishop in whose territory they are located[61]. The question arises to what extent the educational institution of self-governing churches ar subject of the Education Committee of the ROC, e.g., Holy Trinity Seminary in Jordanville, NY of the Russian Orthodox Church Outside of Russia.

12. Property and Financial Security

The means for the existence of the Russian Orthodox Church come from donations, contributions from business profits (e.g., manufactures of church items), from "from securities and deposits, deposit accounts"[62], as well as from contributions from dioceses, monasteries, parishes of Moscow. The administrator of the Moscow Patriarchate is the Patriarch. Foreign institutions of Moscow

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[58] XVI.4.43. "Prikhody", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133141.html [22. 8. 2013].

[59] XVI.17. "Prikhody", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133141.html [22. 8. 2013].

[60] XVII.8. "Monastyri", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133143.html [22. 8. 2013].

[61] XVIII. "Dukhovnye uchebnyie zavedeniia", Ustav Russkoi Pravoslavnoi Tserkvi 2013: www.patriarchia.ru/db/text/133145.html [22. 8. 2013].

[62] XX. "Imushchestva i sredstva", Ustav Russkoi Pravoslvanoi Tserkvi 2013: www.patriarchia.ru/db/text/133149.html [22. 8. 2013].

Patriarchate may receive subsidies from the general church funds. The chairman of the parish council, abbot or the rector are managers of the funds[63].

IV. Recent Documents on Church and Society issues

1. The Bases of the Social Concept of the Russian Orthodox Church

The Bishop Council of the Russian Orthodox Church in 2000 adopted a unique document: The Bases of the Social Concept of the Russian Orthodox Church[64]. This a unique document is of general interest since it is an attempt to express the orthodox philosophy on the list of topical issues: Church and nation; Church and state; Christian ethics and secular law; Church and politics; Labor and its fruits; Property; War and peace; Crime, punishment, reformation; Personal, family and public morality; Personal and national health; Problems of bioethics; The Church and ecological problems; Secular science, culture and education; Church and mass media; International relation. Problems of the globalisation and secularism.

It contains an important analysis taken form the history of the Soviet period. This analysis helped to achive the union of the Russian Orthodox Church and the Russian Church Abroad:

> "III.5. If the authority forces Orthodox believers to apostatize from Christ and His Church and to commit sinful and spiritually harmful actions, the Church should refuse to obey the state. The Christian, following the will of his conscience, can refuse to fulfill the commands of state forcing him into a grave sin. If the Church and her holy authorities find it impossible to obey state laws and orders, after a due consideration of the problem, they may take the following actions: enter into direct dialogue with authority on the problem, call upon the people to use the democratic mechanisms to change the legislation or review the authority's decision, apply to international bodies and the world public opinion and appeal to her faithful for peaceful civil disobedience"[65].

The document calls the bishops to defend social justice before the government:

> "III.8. Among the traditional areas of the social efforts of the Orthodox Church is intercession with the government for the needs of the people, the

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[63] XX.22. "Imushchestva i sredstva". Ustav Russkoi Pravoslvanoi Tserkvi 2013: www.patriarchia.ru/db/text/133149.html [22. 8. 2013].

[64] Cf. Department for External Church Relations of the Moscow Patriarchate: http://orthodoxeurope.org/page/3/14.aspx [22. 8. 2012].

[65] Department for External Church Relations of the Moscow Patriarchate: http://orthodoxeurope.org/page/3/14.aspx [22. 8. 2012].

> rights and concerns of individual citizens or social groups. This intercession is a duty of the Church, realized through verbal or written interventions by appropriate church bodies with the governmental bodies of various branches and levels"[66].

The document confirms the prohibition of the clergy to be members of political organizations, to participate in the election campaign, to hold public office. It is important that *Bases of Social Concept* qualifies civil marriages (i.e., those that only have legal registrations, but not church sanctifications) as valid[67].

2. Regarding Foreign Missions of the Russian Church

On July 16, 2013 the Holy Synod of the Russian Orthodox Church adopted a document under this title in which the Russian Church is expressing commitment to dialogue with other religions:

> "The current understanding of the mission is based on a culture of dialogue. Recognition of the principle of freedom of religious choice suggests that for the representatives of other religions, the basic form of the witness must be a dialogue. Russian Orthodox Church is involved in interreligious dialogue in different forms and at different levels, marking and defending their positions on matters of public concern, such as the moral norms and values, peaceful coexistence, justice, respect for human dignity, the protection of the environment, bioethics, human rights and etc. The Orthodox Church, according to its own doctrinal and canonical principles, assesses the system of beliefs and religious practices of other religions. In relation to people who are followers of these religions and secular ideologies, its position is a position of respect and love"[68].

The document also refers to the need for clarification for those of non-Orthodox who are interested in the history of the Orthodox Church.

V. Conclusion

The Bishop Council and the Synod of the Russian Orthodox Church in their decision making are guided by Holy Scriptures, *Nomocanon* of Patriarch Photios, and some norms of synodal period. The All-Russian Local Council of 1917-18 is of utmost importance and its legacy is studied and implemented. The introduction

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[66] Department for External Church Relations of the Moscow Patriarchate: http://orthodoxeurope.org/page/3/14.aspx [August 22. 8. 2012]

[67] Personal, Family and Public Morality, X.2.: Department for External Church Relations of the Moscow Patriarchate: http://orthodoxeurope.org/page/3/14.aspx [22. 8. 2012].

[68] "O sovremennoi vneshnei missii Russkoi Pravoslvanoi Tserkvi": www.patriarchia.ru/db/text/3102956.html [19. 8. 2013].

of powerful Supreme Church Council is a good example of this. There is no official codex of legally binding church law documents. On November 21, 2012 the committee on church law of Inter-Council Presence of the Russian Orthodox Church under the chairmanship of Patriarch Kirill adopted a decision to codify the sources of canon law for the Russian Church[69].

In addition to the Revised Statute of 2013 there are also local church legislations maintain by self-governing and autonoumous churches. The question is how to apply the provisions of the Statute of 2013 where, as for example in the ROCOR, there is a local law governing the life of the dioceses and parishes.

It seems that the Synod is mainly ocuppied with practical issues, whereas the Supreme Church Council is a policy making think-tank. I wonder if, in real life, the Supreme Church Council has higher status than the Synod.

Priest Paul Adelgeim analyzing the Statute the ROC (2009) indicates that in the parishes of the Russian Orthodox Church not all parishioners are registered[70]. Father Paul draws attention to the possibility of arbitrary action by the bishop who may dismiss all parish council[71] (2009 Statute. Charter 7.3.). The bishop is accountable for the proprety (Statuted Charter 11.7.). Father Paul interprets the situation thus: "The highest ecclesiastical authority does not control the diocesan bishop. The parish does not have the right to appeal the sentence and even tyranny of the bishop"[72]. It is difficult to judge the validity of this statement. There is the paragraph 31.e in the Chapter on the Holy Synod in the Revised Statute 2013 that states that the Synod oversees implementation of the Statute[73], but many Russian clergy would probably agree with Fr. Paul's assessments.

The Ecclesiastical Court begins its work. On June 26, 2013 General Ecclesiastical Court issued its opinion on a number of canonical sanctions imposed by the diocesan courts on clergy of various dioceses. In three of the cases examined, the General Church Court corrected local decisions[74].

Hopefully, the General Ecclesiastical Court could also protect a plaintiff if a local bishop is part of a disputed situation. How could a diocesan bishop try a case where he himself might be the defendant? So far there are no clear criteria to decide in what cases diocesean courts should not try a case of a diocesan clergyman. At the moment, the General Ecclesiastical Court may decide to review

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[69] "Prezidium Mezhsobornogo prisutstvia odobril spisok tem dlia izucheniia komissiami Prisutstviia v budushchem": Russkaia Pravoslavnaia Tserkov': Ofitsial'nyi Sait Moskovoskogo Patriarkhata: www.patriarchia.ru/db/text/2637643.html [22. 8. 2013].

[70] I was writing these words on July 27, 2013. Fr. Paul was murdered on August 5.

[71] "Vstupil v silu novyi Ustav Prikhoda RPTs": http://adelgeim.livejournal.com/21832.html [23. 8. 2013].

[72] "Vstupil v silu novyi Ustav Prikhoda RPTs": http://adelgeim.livejournal.com/21832.html [23. 8. 2013].

[73] www.patriarchia.ru/db/text/133126.html [23. 8. 2013].

[74] Priest John Sekirin has received back his right to wear ecclesiastical attire and receive Holy Communion by clerical right. Deacon Serge Krasnov instead of defrocking has been suspended for five years. Many proceedual irregularities were detected in the case of Priest Andrei Kleimenov. "Vipiski iz reshenii Obshchetserkovnogo suda ot 16 iunia 2013 g": www.patriarchia.ru/db/document [23. 8. 2013].

such a case[75], but nor are there any clear criteria to decide in what instances they may.

There is also Analytical and Controlling Unit of the Moscow Patriarchate headed by a French born Archimandrite Savva (Tutunov). This role of this department to serve as ombudsman for the entire Russian Church.

So, the question of the extent to which the Russian Church applies her ancient and modern statutory provisions in contemporary life remains open.

[75] February 4, 2014. "Raz"iasnenie Obshchetesrkovnogo suda Russkoi Pravoslavnoi Tserkvi o poridke podachi zaiavlenii i rassmotreniia del": www.patriarchia.ru/db/text/3554665.html [9. 2. 2014].

THE CURRENT REGULATION OF THE SAINT JOHN MONASTERY IN PATMOS

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I. Introduction

1. The framework of Particularity: Definitions, Overviews and Fundamental Principles

My presentation promises to show that the new Regulation is the outcome of the very same method, by which Orthodox Churches prefer to refresh their law: by further specification of an existing rule, which initially had been designated for the protection of one or more legal interests or goods. It is a constructive particularization in terms of establishing more effective, but still canonical, methods of protection.

Most dictionaries agree that particularity is "the state or quality of being particular as opposed to general". Consequently, we are entitled to use the word *particular* to describe a concept or a structure which is deprived of the quality of generality. But, which kind of generality determines its opposite when we speak about ecclesiastical law? Universality, one could easily answer. The rules applied to the whole Church. It would be a paradox, if universal law would not be considered as the fundamental church law, on which each particular law is grounded. Here we cannot speak about a transformation which leads to an absolute diversion, but about the maintenance of a harmony in the combination, known and described in the canonical literature by the classic motto "unity in diversity" and "diversity in unity". It is known that these two terms describe a model of co-existence.

Nevertheless, it is generally accepted that the rules of co-existence are determined by the universal and not the particular law. This is a rational conclusion perfectly expressed by Thomas Aquinas. Aquinas enjoyed putting things in order. Epitomizing the views of scholastic philosophers on fundamental law, he shaped a hierarchical scale of "human law", with the eternal law of the Universe on the top, the divine law of Revelation in the middle and the natural law of Creation below. These were, according to Aquinas, the constituents of the cornerstone of all the diverse laws and customs of contemporary societies and governments[1].

According to this concept, in the field of ecclesiastical law, universality, is placed at the higher part of a structure, which defines the interaction between each individual ecclesiastical community and the universal and unchangeable rules of the Church. On the contrary, particularity becomes more noticeable at the bottom

[1] Cf. M. CLUNCHY's preface in: A. MUSSON, Expectations of the Law in the Middle Ages, Rochester NY 2001, IX.

of the structure, as it is the outcome of diverse adjustments of universal law to a specific area of ecclesiastical jurisdiction.

Under this broad conception of universality, it is more than obvious that the theological origin of universal church law is Revelation. The revealed justice is holy, sacred, fundamental, universal, infallible and unchangeable. Orthodox theology recognizes these qualities in the ratio and scope of the rules and orders of the Holy Tradition, comprising not only the simple and accurate rules and orders of the Bible, especially the evangelical and the apostolic ones, but also the holy canons, the legislation issued or sanctioned by the Ecumenical Synods. If the legislator is an Ecumenical Synod, then the law is universal and attains universal power and application. If the legislator is a Bishop or a Synod of a specific and limited church periphery, *episkopi, metropolis* or an eparchy, then the law is particular. It is compulsory only for the faithful of this periphery and not the whole body of the Church.

It is an irony that the holy canons of the first millennium are the outcome of a transformation which, on a superficial and not substantial level, followed a reversal of course compared with the direction of Aquinas: a course from particularity to universality. This is due to a historical reality: the texts of the Holy Canons were formulated in a period during which legislative practice had a circumstantial character. The Ecumenical Synods used to upgrade local regulations to universal rules of the whole Church.

Let me speak with some examples. The Second Ecumenical Synod produced law of particular character, but later when the ecumenicity of the Synod was recognised and declared by the next Ecumenical Synods, its rules were consequently recognised as universal law. Another example is provided by the Synod in Trullo. The Synodical Fathers, codified the universal law of the Church, including canons of local synods and of some of the holy fathers, canons which thereafter received ecumenical validity. On the other hand, the Third Ecumenical Synod, took some measures against all of the followers of Nestorius in all local churches. This is undoubtedly universal law. But the Third Ecumenical Synod also took measures for an autocephalous local Church, the church of Cyprus. Someone could say that this rule belongs to a sort of particular law. But this assumption is wrong, since the status of an autocephalous Church generates legal and canonical consequences which, on so many levels, are to be respected by all the other local churches, and this means that they are to be respected universally.

Consequently, the canonical essence of particularity in orthodox canon law is territoriality. There is no other horizontal division in ecclesiastical jurisdiction. There is no other criterion to determine whether a rule is of particular or universal appliance, but its legislator. An Ecumenical Synod produces *ius universale*, whereas a local Synod produces *ius particulare*.

Universal law is produced by the "constitutional" legislation of the Church, a body of unchangeable and fundamental principles and rules which guarantee unity, stability and certainty of justice. Particular law is more related to governmental justice, that is, to the legal provision of realistic solutions. The general principles of Canon Law formulate a safe and steady framework of the

ruling powers in the Church. However, these principles would remain pointless and dysfunctional, without governmental applications through a number of clear, specific, particular provisions, which deal with contemporary problems and cover legal gaps. Of course, Aquinas was aware of all these, and this is why he placed his hierarchical structure under God's Providence.

The evaluation of each legislative effort depends on the smooth and undisturbed continuity between universality and particularity. In terms of canon law, this continuity is established with the initial and universal axioms of the dogmatic tradition and ecclesiological heritage of the whole Church, and manages to sustain the values and qualities of this heritage, when dealing with the needs of a particular ecclesiastical territory (locality) either on a special occasion or circumstance or on a regular level. If this continuity is disturbed, then we cannot speak about a canonical solution, but about a "καινοτομία" (*kainotomia*), the Greek word for innovation, composed of two other words, "καινός" (*kainos*) which means "new", and "τομή" (*tomē*) which means "a cut". A new rule that cuts the strings from canonical tradition is not pleasantly accepted by the Holy Canons. However it is contrary to the Church's legislative tradition to use the argument of continuity as a weapon against any legislative adjustment to contemporary circumstances and new challenges. The real enemy of "continuity" is not "modification", but "alienation". On the contrary, when a piece of particular law is wisely adjusted to the new demands of reality, we manage to enhance canonical continuity, by keeping it vivid, meaningful and alive. Lawmaking in orthodox ecclesiastical jurisdiction follows a method of developing the existing rules, instead of abolishing them, through a practice of further specification, in order to keep "the letter" of contemporary church law in accordance with the "spirit" of the Holy Canons and the fundamental legal principles of the Holy Tradition.

The new Regulation of St. John's Monastery in the Holy Island of Patmos, is indisputably a most interesting example of the justifiable and effective amendment of a piece of particular law. At first glance, the Regulation might give the impression that it includes some serious alterations of the previous legal and canonical status of the Convent. However, the bottom line is that the new Regulation is nothing more than a codification of the existing particular law. It was time that the provisions of the Founder, which, along with a series of Patriarchal Acts and enduring practices, had formulated a steady body of rules of law and created a firm legal tradition that has lasted for ten centuries, were prudently codified.

2. Historical Legislative Review

Patmos, the island of Apocalypse, has been established as the Holy Island of Christianity. In 1981, it was officially pronounced a Holy Island by the Greek State (L.1155/1981) and along with the surrounding isles (islands of Leipsoi, Agathonision, Lebetha, and Arkioi with their small islands around them), comprises the Patriarchal Exarchy of Patmos, subject to the jurisdiction of the Ecumenical Patriarchate. According to the official website of the Ecumenical

Patriarchate, "this special state of the only remaining Patriarchal Exarchy of Patmos was certified by Imperial and Patriarchal sigillia due to the Royal and Patriarchal nature of the Monastery of St John the Theologian. The Exarchy is honorarily given from the Great Church of Christ to the Abbot of the Monastery of St. John the Theologian on Patmos, whom it has assured for centuries with unique liturgical, administrative and judiciary duties"[2]. These few phrases communicate the unique character of the Monastery of St John. The Monastery is not only another stavropeigion of the Ecumenical Patriarchate, but also the centre of the Eucharistic Communion of the Patriarchal Exarchy[3].

The Monastery was founded in the eleventh century by Christodoulos from Latros, who received Patmos as a donation[4] by Alexios I Komnenos (1081-1118) in a chrysobull[5]. He issued the *Rule* of the Convent in May 1091. A year later, he was forced to abandon the island and move to Euboea. On March 10, 1093 he issued his *Testament*, and on March 15, he drew up the *Codicil*. The day after, he died. Then, some of his followers returned to Patmos to bury Christodoulos' body and created the first Brotherhood of the Convent.

It is clear that the Monastery from its very beginning was exempted from the control of local bishops. The original grant, which is lost, must have been issued by Patriarch Nicholas III Grammatikos (1084-1111). The Monastery received reconfirmations of its patriarchal stavropeigion from Patriarch John IX Agapetos (1111-34) in 1132 and from Patriarch Luke Chrysoberges (1157-70) in 1158. It must be noted that during the Venetian occupation of Patmos, due to the Fourth Crusade that overthrew Byzantine rule in Constantinople in 1204, the Convent's ownership of more than 20 dependencies outside of Patmos, in other islands and the coasts of Anatolia, were not questioned. Patmos returned to the authority of

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[2] Holy Patriarchal Monasteries: http://www.ec-patr.org/patrdisplay.php?lang=el&id=8 [5. 9. 2013].

[3] For the history and the nomocanonical status of the Exarchy in Patmos, see ad hoc the study in Greek of the previous Abbot and Exarch of Patmos, Antipas-Pavlos NIKITARAS under the title "Πατριαρχική Έξαρχία καί ἡ Ἱερά Μονή Πάτμου" [The Patriarchal Exarchy and the Holy Monastery of Patmos] (Katerini 2005). Cf. also E. CONSTANDINIDES, Τό κανονικόν καθεστώς τῆς Πατριαρχικῆς Ἐξαρχίας Πάτμου [The canonical status of the Patriarchal Exarchy of Patmos], in: Minutes of the International Symposium of St John's Holy Monastery of Patmos (1088-1988), Patmos, 22-24 September 1988, Athens 1989, 11-21.

[4] In the Byzantine era, donations from the Emperor, the members of the imperial family and other prominent officials and clergymen were a common way by which monasteries acquired their estate property. For the legal status of these donation cf. the widely known dissertation of I. KONIDARIS, Τό δίκαιον τῆς μοναστηριακῆς περιουσίας ἀπό τοῦ 9ου αἰῶνος μέχρι τοῦ 12ου αἰῶνος [The law of the monastic property from the 9th to the 12th century], Athens 1979, 55ss.

[5] See the recent edition in NIKITARAS (= note 3), 251-256. See also G. APOSTOLAKIS, Οἱ αὐτοκρατορικές δωρεές στήν Ἱερά Μονή Πάτμου καί ἡ νομική ἀξία τῶν "χρυσοβούλων λόγων". Τό ἰδιοκτησιακό καθεστώς τῶν δωρηθέντων ἀκινήτων κατά τίς περιόδους τοῦ βυζαντινοῦ, ὀθωμανικοῦ, ἰταλικοῦ καί ἑλληνικοῦ δικαίου [The imperial donations to the Holy Monastery of Patmos and the legal value of the 'chrysobulls'. The property status of real estate donations within the periods of byzantine, ottoman, italian and greek law], Katerini 2002, 53-74. The study includes the text of the chrysobull and introductory notes and comments). Apostolakis receives the text from the edition of E. A. VRANOUSI, Βυζαντινά Ἔγγραφα τῆς Ἱερᾶς Μονῆς Πάτμου. Α΄ Αὐτοκρατορικά [Byzantine documents of the Holy Monastery of Patmos. A΄ Imperial (documents)], Athens 1980, 55-68.

the Nicaean emperors late in the life of their government in exile. Theodore II Laskaris (1254-58), probably in 1258, confirmed all of the monastery's possessions. So did Michael VIII Palaiologos (1259-82) in the first year of his reign. Between 1258-1272, an unidentified patriarch upheld the monastery's independence against encroachment by two local bishops, Constantine of Ikaria and Neilos of Leros. The Palaiologians, Andronikos II (1282-1328)[6] and Andronikos III (1328-41)[7], in 1292 and in 1329 respectively, confirmed the Patmos Convent in its possessions. After that, the Knights Hospitallers of St. John conquered Rhodes in 1306-10, but it took thirty years for the Patmian Brotherhood to recognize the Knights' authority over their own island (1340). It is worth noting that despite the difficult periods, the Monastery was never taken by force. It has been argued that after the fall of Constantinople in 1453, the Convent prudently recognized Ottoman rule, in order to retain its self-governance[8]. However, this was not a free choice. The Convent, as an ecclesiastical entity, followed the fate of its supervisory ecclesiastical authority. If the monks had refused to recognize Ottoman rule, then they would have cut the spiritual strings with the Ecumenical Patriarchate. Such action would be canonically questionable, if not inappropriate.

We do not know exactly when the Monastery lost its coenobitic character. There was no Turkish settlement in the island, since the Sublime Porte respected Mehmet's II (1454) will. His firmans established for Patmos a self-taxation system. Mehmet delegated to Matthew, metropolitan of Myra and Patmos' superior, the authority to collect the island's taxes. Firmans related to self-taxation and measures of the Monastery's protection from plunderers were also issued from Beyazid II (1496, 1503, 1507), and Suleiman the Magnificent (1521/22). Although Patmos was under the rule of the Ottoman Empire, the dominant role of the Monastery, as one of the greatest spiritual centers of Christianity, was never questioned. The tax collectors acted as political and not ecclesiastical authorities. None of the successors of Mehmet the Conqueror would act differently. The Monastery never ceased to be under the ecclesiastical jurisdiction and spiritual guidance of the Ecumenical Patriarch.

Throughout the era of Turkish rule, the Patmian Convent kept seeking confirmations of its independence from the Patriarchs of Constantinople, in order to manifest, in a modest and implicit way, its stavropeigian character and its strong link with the Patriarchate[9]. The Monastery's direct connection with the

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[6] Cf. APOSTOLAKIS, 75-84, VRANOUSI, 133-139.

[7] Cf. APOSTOLAKIS, 85-92, VRANOUSI, 146-150.

[8] Cf. P. KARLIN-HAYTER, *Christodoulos: Rule, Testament* and *Codicil* of Christodoulos for the Monastery of St. John the Theologian on Patmos, in: J. T.-A. CONSTANINIDES HERO (with the assistance of G. CONSTABLE), Byzantine Monastic Foundation Documents: A complete translation of the Surviving Founders Typika and Testaments 2 (Dumbarton Oaks Studies 35), Washington D.C. 2000, 567.

[9] Such Confirmations are preserved from the following patriarchs: Pachomios I (1504), (1512), Joseph III (1561), Cyril I Loukaris (1624), Dionysios III Muselimes (1673), Parthenios IV Mongilalos (1680), Kallinikos II (1688), Kosmas III (1715), Jeremias III (1722), Joannikios III (1762), Sophronios II (1780), Gregory V (1797), and Germanos IV (1843): Cf. ibidem, 568 and 577, note 40. Cf. also F. MIKLOSICH – J. MÜLLER, Acta et diplomata graeca medii aevi sacra et profana VI, Vienna 1890,

ecclesiastical authority of Constantinople was rarely disturbed. For example, in 1579, Sylvester, patriarch of Alexandria tried, without success, to restore the coenobitic order of the Monastery. However, we cannot surely support that his intervention had the character of a claim of authority over the Monastery. In 1713, the Monastery established Patmias, the historic School, which drew students from all over Greece and other countries. Two years later, in 1715 during the reign of Patriarch Kosmas the III, the Synod of Constantinople decided to establish an Exarchy in Patmos, with the Monastery as its seat.

During the late seventeenth century Patmos was plundered. Neophytos Grimanis, the archbishop of Karpathos, carried out a remarkable rebuilding program. Grimanis, for his benefactions, became known as the "new founder" of the Monastery. However, Grimanis' economic support was not accompanied by any kind of authoritarian intervention in the convent's life. In the 19th century, the monastery still operates as an idiorhythmic convent. Pursuant to the Treaty of Paris, signed on 10.2.1947, the Dodecanese islands, were annexed to Greece. However, the expansion of the territorial boundaries of Greece had no effect on the ecclesiastical status and legislation of Dodecanese. On the contrary, the 2nd paragraph of the third article of the Greek Constitution accepts that the ecclesiastical provinces of the Dodecanese, that is five Metropolises and the Patriarchal Exarchy of Patmos, remain directly under the jurisdiction of the Ecumenical Patriarchate. The metropolitans of the Dodecanese are elected by the Holy Synod of the Ecumenical Patriarchate, in which they participate as soon as they are installed on their metropolitan throne.

However, there are specific matters, such as the protection of monuments of archaeological value, of the environment, the national security and the public interest, that are ruled by the Greek Law. In 1956 an earthquake caused extensive damage. The Ephorate of Antiquities of the Dodekanese in conjunction with the Greek Ministry of Education, carried out an extensive rebuilding program. In 1970, the monks of the Monastery enacted a Regulation, ratified by the Ecumenical Patriarch. The Greek State Council, in its decision 142/1979, determined that the Monastery is a Private Law Legal Entity, self-governing and independent[10]. In 1989, by a special decision of Patriarch Demetrios I, the Convent returned to its initial coenobitic life. In this sense, the Regulation of 1970 was superseded. The Convent was governed pursuant to the old tradition of the Monastery, the Rule of Christodoulos, the monastic canons of St Basil, and the special decisions of the Ecumenical Patriarch and the Synod of Constantinople on particular matters.

261-62 (1504), 262-64 (1512), 264-65 (1561), 293-96 (1624), 300-303 (1673), 304-5 (1680), 305-9 (1688), 317-19 (1715), 328-32 (1722), 340-44 (1762), 359-65 (1780), 374-79 (1797), 383-86 (1843).

[10] This decision has been criticized by Ch. PAPASTATHIS, Τό ἀναπαλλοτρίωτο ὑπέρ τῶν πρεσβυγενῶν Πατριαρχείων, Συμβολή στή μελέτη τοῦ ἄρθρου 18 παρ. 8 τοῦ Συντάγματος [The inelienability in favour of the presbygenē Patriarchates. Contribution to the study of article 18 paragraph 8 of the Constitution], in: Hon. Vol. Serafeim Tika, Archbishop of the Church of Greece, Thessaloniki 1984, 523, note 32. Cf. also APOSTOLAKIS (= note 6), 95-96.

Conclusively, throughout the Christian centuries, Patmos was subject to various political formations, but the Monastery since its foundation has always been under the spiritual supervision of the Ecumenical Patriarch. Initially the Convent was governed as a stavropeigion, pursuant to the *Rule*, the *Testament* and the *Codicil* of Christodoulos. The *Rule* followed the canonical tradition of Christian monasticism based on the monastic rules of Basil the Great. Since then, many Patriarchal decisions regarding the canonical status and function of the Monastery, and the way of life of the monks have been issued. In modern times, after the contemporary concept of legal entities had been established in the legislation, the Monastery was undisputedly recognized as one of them. However, apart from the Internal Regulation of 1970, which was kept in force until 1989 there were no other successful attempts of codifying the rules of function of the Monastery. The Brotherhood was governed by the Rule of Christodoulos, and its legal gaps were covered by the monastic canons of St Basil, and the special decisions of the Ecumenical Patriarch and the Synod of Constantinople on particular matters[11]. Demetrios I restored the coenobitic character of the Convent (sigillio 677/1989)[12]. At the dawn of the 21st century, the world opened its cultural "gates" and financing "roads". The need for a codification of the rules that determine the canonical and legitimate function of the Brotherhood became urgent and vital.

On the 5th of January 2013 his Beatitude the Ecumenical Patriarch Bartholomew and 12 Synodical Metropolitans of the Holy Synod in Constantinople, took the initiative for a final and complete solution. They approved the new Internal Regulation of the Monastery, to protect the continuity of the monastic tradition of the Convent and confront the new challenges on a legitimate and canonical basis. The issuance of the Regulation followed the universally established canonical practice. It was promulgated by the Brotherhood and then submitted to their supervisory ecclesiastical authority (here: the Ecumenical Patriarch) for approval by the competent Synod (here: the Holy Synod of the Church of Constantinople).

II. The New Regulation of Patmos Monastery

The new Internal Regulation of the Monastery is comprised of 66 articles, divided into 12 chapters. Before taking a glance at its content, I should here make a linguistic observation. The text uses a simple, modest version of puristic Greek. Its semantic development is dense and strictly oriented towards its regulatory aims. Clarity and precision are the dominant features of the Regulations' legislative prose. It is more than obvious that the author's priority is to eliminate the chances of ambivalent interpretations.

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[11] Cf. the opinion of K. VAVOUSKOS, Νομικόν Καθεστώς Πατριαρχικῶν καί Σταυροπηγιακῶν Μονῶν ["Legal Status of Patriarchal and Stavropeigiaka Monasteries"], in: Armenopoulos 40 (1986) 401-402.

[12] NIKITARAS (= note 3), 365-368.

In the first Chapter, under the title *Constitution,* Spiritual *and Legal Nature, Supervision, Seat and Aims*, we are informed about the canonical and legal status of the Convent. In the first article of the Chapter, it is stated that the Monastery is a Patriarchal *stayropeigion*, founded by Christodoulos from Latros, who duly received the donation of Patmos by Alexios I Komnenos (1081-1118) in a chrysobull. The author of the Regulation chose to quote the exact phrase of the Emperor, which established the Monastery as an independent and self-governing entity. He also recalled that the Convent has been operating as the seat of the patriarchal Exarchy since the Synodical Decision of 1715 during the reign of Patriarch Kosmas the III. The last paragraph completes the framework of the canonical status of the Monastery as the Seat of the Exarchy. The Abbot, in his capacity as Exarch, with the support of the Synaxis of Elders on important matters "shall exercise the Patriarch's rights and privileges, as his representative" and he "shall always refer to the Ecumenical Patriarch and the Synod".

The second article of the Chapter referring to the Synodical Decision during the days of Patriarch Demetrios (1989), repeats the Patriarchal mandate of keeping the Monastery coenobitic and self-governed in perpetuity. It is stated that the Monastery functions under the prevailing monastic law of the holy canons, the *Rule* of its founder Christodoulos of Latros and the Synodical Decisions of the Ecumenical Patriarch on circumstantially arousing matters of any kind of interest, either broader or narrower. There is also a specific reference to Decision 142/1979 of the Greek State Council, which declares that the Monastery is a Private Law Legal Entity, self-governing and independent.

The third article identifies the territorial borders of the Monastery with those of the Exarchy. However, it provides the Monastery with the capacity of establishing dependencies "in other islands and locations", too. The next article distinguishes the two principal aims of the Monastery: the first purpose of the Monastery is the repentance and sanctification of the monks who reside and live in the Monastery. The second one, is care for the worship, pastoral and welfare services of the Exarchy, including the good operation of the Patmias Ecclesiastical School. In other words, the Monastery has a double identity. It is concurrently a monastic entity and the seat of the local Eucharistic community. From both standpoints the Brotherhood declares their steady desire to maintain the traditional role of the Monastery as an important contributor to social co-hence and well being in the island.

The second Chapter of the Regulation, under the title *Authorities of the Coenobium*, includes three articles. They respectively determine the spiritual, administrative and executive authorities of the Monastery. The Abbot by himself, exercises the spiritual authority (Article 5), and alongside the Synaxis of Elders, constitutes the administrative body of the Monastery. More specifically, according to the holy Monastery rules, godly obedience to him is required by all practicing hieromonks, deacons, monks and novices within the Holy Monastery (Article 6). The executive body of the Monastery is comprised of the Abbot, along with two (2) members appointed by the Synaxis of Elders. During the time between one

meeting of the Synaxis of Elders and the next, they execute all decisions taken by the Synaxis of Elders (Article 7).

The Third Chapter of the Regulation, under the title *About the Abbot*, consists of seven articles and is one of the most significant Chapters of the Regulation. It provides the rules that determine the competences and duties of the Abbot as a monastic authority (Articles 8) and as the Exarch of Patmos (article 9), his qualifications (article 10), the procedure of his election (article 11), the approval of his election and his installation through a special appointment service (article 12), and last, but not least, the occurrence of a vacancy because of death, resignation or punishment (article 13). The primacy of honor and other possible attributes of former Abbots are also regulated (article 14).

The Abbot is elected for life. He should be at least 35 years old, distinguished for his piety, love for his brothers, knowledge of ecclesiastical things, administrative charisma and monastic experience. He also should have received an appropriate secular education and be a member of the Brotherhood for at least seven years (article 10).

In general, pursuant to article 8, the Abbot, among the usual competences of monastic authority, convenes, at regular set dates, the Synaxis of the Brotherhood, with a previously determined Agenda, for the purposes of joint reflection and exchange of opinions on the work following the last Meeting of the Synaxis of the Brotherhood, as well as discussion of any problems that may be faced; he thereupon informs the Mother Church through a report and a certified copy of the Minutes. He is by virtue of office the Spiritual Father of the Monastics as well, laboring diligently for their spiritual progress and hearing their confessions regularly and attentively. In aiming spiritually to benefit the brothers and to ensure the wellbeing and balance of the Monastery, he assigns the Brotherhood's work and services wherever needed. He also heads the Synaxis of Elders, the Synaxis of Brotherhood, the Holy Services, the Altar, Holy Wakes and all other services, fasting and all physical exercise, always with modesty, ensuring the Holy Canons, Monastery institutions and provisions of the present canon are followed without change. He also convenes the Synaxis of Elders and the Synaxis of the Brotherhood to a plenary meeting and presides over them. He introduces, as Chairman, the topics of the Agenda, drafted under his authority, gives the floor to those who request it and takes away this right from anyone who is out of line. In general, he oversees the discussions and ensures they are conducted in decency. He may provide the brothers with a temporary leave of absence on account of ministry, illness or other need which require them to be absent from the Monastery. He makes recommendations to the Synaxis of Elders on appointment or dismissal of novices, the ordination of brothers as monks and the elevation of spiritually mature clergy to the status of "Megaloschimos". Similarly, he makes recommendations on the ordination of brothers to priests. He represents the Holy Monastery before any ecclesiastical, administrative, council, communal and any other authority and European organization and, in general, before any natural or private-law/public-law legal person. If, for any reason, he cannot attend, he is substituted and represented by a brother appointed by the Convention of the

Elders. Similarly, he represents the Monastery before any judicial Authority, of any instance and jurisdiction, following a decision by the Synaxis of Elders and its council approval by the Ecumenical Patriarchate. Any legal means of protecting the rights of the Holy Monastery can only be pursued following approval by the Holy Synod of the Ecumenical Patriarchate, and by the Abbot and the Convention of the Elders of the Holy Monastery. He always signs the documents of the Holy Monastery, the minutes, the payment and receipts accounts, the contracts for sale-purchase, exchange, gift, lease, etc. following the decision and authorization by the Convention of the Elders. The form of the signature is as follows: "The Abbot of Patmos (name) and my brothers in Christ" (Article 8).

The 9th article shapes the competences of the Abbot, as the Exarch of Patmos. It is stated that each Abbot also holds the title of Patriarchal Exarch, appointed as such by the Ecumenical Patriarch, according to the centuries-old local ecclesiastical tradition. As a Patriarchal Exarch, the Abbot is the spiritual and ecclesiastical Father of all Orthodox Christians of Patmos and the surrounding isles, always exercising the rights according to the Holy Canons and relevant ecclesiastical legislation. He is at the forefront of every action for the moral, spiritual, social and cultural progress of the residents of the Exarchy and, in general, attends to their ministerial and spiritual needs through the clergy. All the ecclesiastical establishments, parishes, churches, chapels, pilgrimages, Monastery's and priories and all monastery appendixes in the Exarchy come within the spiritual canon and administrative jurisdiction of the Abbot, as Patriarchal Exarch, who holds the Exarchy seal. He seals all documents issued by him as Patriarchal Exarch and also holds a Book of Deeds and complete Records. He signs as follows: "The Abbot and Patriarchal Exarch of Patmos (name)". At the end of each year, he submits a report to the Ecumenical Patriarchate on the overall state of the Monastery and the religious, moral, spiritual and social state of the Christians of the Exarchy and, in general, on the ecclesiastical matters entrusted to him (Article 9).

It has been already noted that the double purpose of the Monastery shapes the two different operational frameworks of its institutional identity: the identity of a monastic society and the identity of the spiritual and administrative center of the Eucharistic community of the whole Exarchy. This follows not only from the first chapter of the Regulation, but from other provisions too.

Since there is no literature, yet, because it has not been long since the Regulation was signed, this is a first attempt to shed some light on the matter. Before any other observation, it should be noted that the Convent of Patmos, as a monastic brotherhood, does not differ from any other monastic society, which as any other "ecclesiastical institution", is a member of the local Eucharistic Community over which the competent Metropolitan presides with paternal and protective care. Here, the competent Metropolitan is not a local one, but the Ecumenical Patriarch himself, who acts and decides either in person or by his representative, which is the Exarch.

Consequently, the Abbot has full spiritual and administrative leadership of the Brotherhood, and meanwhile, like every other Abbot, exercises his power

within the limits of legality under the spiritual and paternal supervision of his Higher Authority, the Ecumenical Patriarch. He is freely elected by the Brotherhood, and he makes all the decisions, either by himself or at important matters deciding jointly with the Synaxis of Elders, in compliance with the applicable rules.

At the same time, the Abbot is the Exarch of Patmos. As Exarch, he represents the Patriarch with full powers, except the power to ordain priests, since he is not a bishop. Being an Exarch means that he is entitled to act on behalf of the Patriarch according to His Beatitude's directions. It must be noted that the Abbot is democratically elected by the Brotherhood to rule the Monastery. The Patriarch may not intervene further in the elections, beyond the approval of the date and result. However, the moment the Ecumenical Patriarch, after a legal inspection of the procedure, approves the result of the elections, and the new Abbot is installed, he *ipso facto* fills the vacant position of the Exarch. This is strong evidence that the Ecumenical Patriarchate never ceased placing a high priority on the Monastery's self-governance and remains firmly committed to it.

However, as a member of the Exarchial Eucharistic Community, the Monastery duly functions under the canonical and ecclesiastical jurisdiction of the Exarchy of the Ecumenical Patriarch. The Ecumenical Patriarch paternally and in a protective way, exercises the highest oversight of the Monastery, ensuring its regular operation in accordance with the Divine and Holy Canons, the Internal Regulation, the Decisions and General Regulations of the Holy Synod and the applicable civil law.

In particular, the rights and duties of the Ecumenical Patriarch include:

1. The commemoration of his name during all services and ceremonies that take place in the Monastery, in accordance with established ecclesiastical tradition and canonical order (Article 25 § 2).
2. The approval or determination of the date of the Abbot's election (Article 11§ 2).
3. The ratification of the result of the Abbot's election (Article 12 § 1).
4. The determination of the date of the ordination and installation of the new Abbot, according to the Typicon of the Monastery (Article 12 § 2).
5. The approval of the decision of the Synaxis of the Brotherhood which accepts the resignation of the Abbot (Article 13 § 2).
6. The decision on the appeal of the Abbot against his removal by the Synaxis of the Brotherhood.
7. On nomination of the Abbot, the appointment of the members of the Synaxis of Elders for a period of one year (Article 15 § 1).
8. The ratification of the election of one or more new members of the Synaxis of Elders. The new member is elected by the Synaxis of Elders, on nomination from the Abbot (Article 17 § 1).

9. The ratification of the suspension or the acceptance of the resignation of a member of the Synaxis of Elders (Article 17 § 4).
10. The prior approval of a monk's ordination as a priest or deacon (Article 23 § 13).
11. The ratification of the Brotherhood's proposal for the amendment of the Internal Regulation of the Convent and the Regulations of the dependency Monasteries and Churches (*Metochia*). In this case the Patriarch acts jointly with the Holy Synod (Article 22 § 5, and 60 § 2).

Beyond the eleven special competences of the Patriarch, provided throughout the Articles of the Regulation, with the most significant one being the approval of the election, removal or resignation of the Abbot, and the appointment of the Synaxis of Elders, it must be noted that the joint decision of the Patriarch and the Holy Synod is presumed to be competent (Article 66 § 2), except for matters regarding the smooth operation of the Coenobium (see Article, 15 § 8).

It must be noted that there are also some actions which are exercised exclusively by the Holy Synod. We can divide them in two groups: the first is related to the panegyric announcement of the Holy Synod as the supreme Judicial Power of the Convent and the second is related to the role of the Synod as the supervisory authority of the Convent's finances. More particularly, the Holy Synod is the only competent authority to pass judgment in case of any accusation of a monk who is also a clergyman, and his conviction would lead either to the deprivation of a title of authority or to a permanent dismissal of the Brotherhood.

Additionally, the Holy Synod is the only competent authority for the following:

1. The auditing of the financial records of the Monastery in accordance with the principles of good management and transparency and in line with the civil law. The Abbot at the end of each February submits to the Holy Synod the annual financial report, with an assessment of all managerial actions of their legality and feasibility, executed by a valid audit entity.
2. The prior approval of placing a part of the Convent's capital reserves in safe and efficient investments
3. The prior approval of purchasing, renting and selling real estate. The Holy Synod examines the legality and the feasibility of the sale. If the Convent intends to lease a piece of its real estate for more than five years, or less but without a contest, the permission of the Holy Synod is also needed.
4. The prior approval of selling any asset of the Convent.

The fourth Chapter of the Regulation under the title *About the Synaxis of Elders and the Committee* includes a group of five articles, concerning the composition and duties of the Synaxis of Elders (Article 15), the competences of

the Executive Committee (Article 16) and other issues of membership (Article 17), the procedures for the hearings of the Synaxis of Elders (Article 18) with a special provision on how communications are formally opened by the Abbot and read by the Secretary, during a Meeting of the Synaxis (Article 19).

The Synaxis of Elders, alongside the Abbot, constitutes a permanent collective governing body, having supervision of the convent and entrusted with the smooth operation of it. The members of the Synaxis of Elders are selected and appointed each year by the Ecumenical Patriarchate from among the members of the Brotherhood on the recommendation of the Abbot. It is composed of 5 members in addition to the Abbot, and when the members of the Monastery reach twenty (20), the Synaxis may be expanded to nine members, including the Abbot[13]. The Synaxis of Elders governs the Monastery in all but the spiritual matters. Indicatively, its main duties are:

1. Carrying out the financial, managerial and treasury services of the Holy Monastery; managing the movable and immovable property of the Holy Monastery
2. Accepting or rejecting gifts or inheritances, buying or selling land, entering into loan or other agreements, with the prior approval of the Ecumenical Patriarchate
3. Attending to the provision of all necessary supplies
4. Drafting the annual budget and an income-expenditure account of the Holy Monastery submitting it for approval to the Ecumenical Patriarchate
5. Appointing a Legal Advisor and authorizing him to represent the Holy Monastery
6. On the recommendation of the Abbot, appointing or dismissing novices, ordaining brothers as monks, elevation to the status of "Megaloschimos" and ordaining brothers to priests presbyters
7. In general, the Synaxis, among other duties, is entitled to take decisions on any matter not expressly mentioned at the Regulation, but needed for the smooth operation of the Convent.
8. Also, the Synaxis is responsible for the election, on the recommendation of the Abbot, of two of its members to serve on the Executive Committee alongside the Abbot, which reports to the Convention of the Elders on a regular basis.

The members of the Executive Committee cooperate closely alongside the Abbot and exercise administrative and managerial duties under his Chairmanship.

[13] Further increases are permitted following any increase in the members of the Convent and in proportion of one additional member for five additional convent brothers (1:5) and as such on a total of twenty five (25) Convent brothers the Convention of the Elders will have ten members, etc.

One of its members is specifically entrusted to carry out the functions of Treasurer. More specifically the Committee:

1. Executes the decisions of the Synaxis of Elders,
2. Oversees and manages the current matters of the monastery's property, within the limits of the decisions of the Synaxis of Elders,
3. Holds under its own responsibility the keys of the treasury of the Monastery and its official stamp.

The fifth Chapter of the Regulation is devoted to the *Synaxis of the Brotherhood.* The main issues of this Chapter include the constitution and composition of the Brotherhood, acquisition and loss of Membership, the enrollment and removal of Novices, duties of the Brothers and the Novices, matters upon their spiritual and economical position.

It is worth noting that the Synaxis of the Brotherhood is endowed with specifically and clearly mentioned duties and rights. More particularly, the Brothers of the Convent have the right to participate in the election of the Abbot and may, after having been registered in the Book of Monks for seven years, put themselves forward for consideration for the position of Abbot.

Appendicular brothers lack the above administrative rights unless considered conventees, following a relevant application by them, which is examined and decided by the Synaxis of Elders.

The Synaxis of the Brotherhood is composed of all Convent and appendicular brothers and is convened by the Abbot, following a decision by the Synaxis of Elders in the presence of a quorum (2/3 of its members).

1. The Synaxis elects the Abbot, as Chapter C of the Regulation provides.
2. It decides through a 2/3 majority on the resignation of the Abbot, and on proposal by the Synaxis of Elders, for the removal of the Abbot, prior to the final judgment and decision by the Ecumenical Patriarchate
3. In addition, following the recommendation of the Synaxis of Elders, it decides on the amendment of the Internal Regulation through a 2/3 majority. As already mentioned, any decision to amend the present Regulation is validly effected only following ratification by the Ecumenical Patriarchate and the Holy Synod.

The Synaxis of the Brotherhood can be convened by the Abbot himself, to receive a spiritual talk by him or another distinguished person. It must be noted that although the Synaxis or the Brotherhood is the electoral body which elects the Abbot, it does not elect the members of the Synaxis of Elders and cannot depose them, when necessity arises, by means of a judicial condemning vote.

The sixth chapter, under the title *About Order and Services (Diakonimata),* includes eleven articles and follows the provisions of the Rule of Christodoulos,

regarding the Order in Worship, the table and the duties of the brothers responsible for particular services, (*diakonemata*). The service of the Monastery of Apocalypse is particularly described by a single article of the seventh chapter. The servant should be a hieromonk accompanied by two or three monks.

Chapters eight and nine respectively determine the *managerial rules for any dependant property* of the Monastery located either within the Exarchy (*hexartema*) or outside of its territory (*metochion*).

The tenth chapter, under the title *Management of the Monastery's Property*, includes twenty articles. We have already mentioned the most significant rules of this chapter and defined the framework of the financial supervision of the Convent, exercised by the Ecumenical Patriarchate. In principle, the Convent as a legal entity from the standpoint of both ecclesiastical and civil law (article 17 paragraph 1 of the Constitution of Greece, First Protocol of the European Convention on Human Rights, paragraph 1.1) retains the prerogative of owning and managing its own ecclesiastical property, pursuant to the respective orders of the Regulation (article 42). In article 43, the provisions of Greek legislation L.D. 22.4/16.5/1926 in conjunction with articles 4 and 23 of M. L. 1539/1938, and P.D. 31.12.1948/10.1.1949 on the inalienable nature of the Convent's ownership right are called upon. The Regulation makes a reference only to the specific articles and the specific matter of registering the right to the property and its inalienable nature and does not make a general reference to Greek legislation. This is a reasonable choice, given that the Convent is subject to the special ecclesiastical Dodecanese regime and not to that of the Autocephalous Church of Greece. Therefore, such a general reference would not be wise, as it would cause confusion in the issue of applicable law and might raise the question of a *pro rata* application of Greek law on numerous matters. A positive answer to such a question would cause more confusion. Nonetheless, although not referred to *expressis verbis*, general Greek law provisions concerning all religious communities and churches on Greek territory do constitute the applicable law on the Holy Convent of Patmos, too. For example, as it arises from Articles 966 and 971 of the Greek Civil Code, the objects, designated to serve religious aims and for the whole period of this designation, belong to the category of the "non-market goods". Nobody can argue that the buildings, the premises and the belongings of the Convent are excluded from the "non-market goods", just because the Regulation does not provides such clause.

Therefore, although the Regulation does not follow the example of the Charter of the Church of Greece and makes no explicit reference to the abovementioned articles, the Monastery cannot be sold, leased or donated to others. In addition, without express reference to Greek legislation, the Regulation follows it in all prohibitions of the sale and disposition of property concerning public order rules. These Greek law prohibitions concern property of historical, cultural and archaeological significance. Most particularly, article 47 of the

Regulation provides that the Convent shall not under any circumstances sell or otherwise dispose its property, nor convert its edifices, or sell or change its buildings of archaeological, historical or cultural significance for any other use whatsoever (Article 47). Furthermore, the economic resources of the Convent shall consist of income derived from the legally and canonically accepted sources and activities specifically described in the 40th article of the Regulation. From the 41st Article we can derive that the Convent is self-supporting, and shall also contribute financial assistance to philanthropic and missionary aims, to the Patmias School, the Exarchy, and the Ecumenical Patriarchate, and any other purpose decided by the Synaxis of Elders, subject to the rules of the Regulation, which define prudential supervision and audit.

It must be noted that the Brotherhood proposed to the Ecumenical Patriarchate, and the Ecumenical Patriarchate agreed, to provide the Regulation of the Convent with a very strict model of supervision on the finances and managerial actions regarding the legal status of the monastic property. This model is definitely not an "innovation". On the contrary it is familiar to all Charters of the five different ecclesiastical regimes, and in line with the Greek legal environment. Nevertheless, the design of this model for controlling the legality and regularity of sales and purchases, leasing and renting, and in general of any kind of disposition of movables, immovables and votives is similar to the model tried and tested over decades contained in the Charter of the Church of Greece, as well as the relevant pieces of legislation of the Greek State[14]. The above choice is easy to explain as Patmos, from a political perspective, belongs to the State of Greece. Consequently, the method of the financial audit of the Holy Convent must be compatible with the particularities of national legislation on management of Convent property and in general of all public benefit and charity foundations.

This good choice by the Patriarchate and the Holy Convent of Patmos serves the principle of equal treatment in regards to the legal entity of the Convent compared to the other monastic legal entities of the Greek territory. The Convent, given the exercise of a heretofore not very strict financial audit by the spiritual supervisory authority, from time to time faced criticism that it enjoyed beneficial treatment compared to other Convents which belong to the Greek Church, and are subject to strict fiscal audits by the State and preventive supervisory review by the Holy Synod of the Church of Greece. In my view, increasing the degree of supervision and preventive review of the administration and management was deemed necessary to show that the Ecumenical Patriarchate has taken adequate measures to ensure transparency and prudent management in the eyes of the Church, the Greek State and the International Community, and in order to protect the Convent from being an easy target of defamation. In reality, according to my assessment, this choice did not increase the capacity of the Ecumenical Patriarchate to have the oversight control of the finances. *This capacity had*

[14] Cf. S. TROIANOS' concise presentation of the administrative supervision on the finances of the Convents of the Church of Greece: Τὸ καθεστῶς διοικήσεως τῶν ἱερῶν μονῶν) [The status of administration of the Holy Monasteries], in: Ekklesia 77 (2000) 29-31.

already been awarded to the Patriarchate, when the Monastery became a stavropeigion, according to the monastic rules and orthodox Canon Law. What the Regulation has really changed is that, for the first time in the history of the Convent, the procedure for financial management has been set in detail, as well as control and inspection, to meet the legal requirements.

The eleventh chapter provides for the *disciplinary review of the members* of the Brotherhood.

The *last chapter* provides for the official celebrations of the Convent, the separate seals of the abbacy and the legation, the assignment of the administration of the Convent to the sovereign Ecumenical Patriarchate in case the Convent falls into decline due to lack of monks or other reasons. In this event and for as long as necessary for repopulating the Convent or restoring it to normal operation, the property and assets of the Convent shall be administered by the Ecumenical Patriarchate.

The last article assigns competence to the Holy Synod for any matter not provided for by the Regulation, following a report by the Abbot and the Synaxis of Elders. In addition, the article strictly mentions that the Regulation was drafted by the Brotherhood and approved by the Holy Synod. Paragraph 3 provides that it comes into force upon approval by the Holy Synod whilst the last paragraph provides for its amendment or repeal procedure. It becomes effective either through a recommendation by the Synaxis of Elders and a decision by the Ecumenical Patriarch or *ipso jure* by the Holy Synod, i.e. without prior request or recommendation by the Convent.

III. General Conclusion

In conclusion, apart from a few minor obscurities, which can be addressed using the usual methods for the interpretation of legal texts, the New Regulation of the Holy Monastery of Patmos is detailed and comprehensive and leaves no margin for misinterpretations or seemingly lawful deviations from the letter and spirit of its content. The fact that after so many centuries of operation, the Holy Convent of Patmos finally has a composed and comprehensive regulatory text is of historical significance. It highlights that the particular law of the Eastern Orthodox Church, is, day by day, being adjusted to the contemporary legal environments. Legal rules that are transparent and general in nature enhance the principle of legality and legal certainty.

THE CHURCHES AND RELIGIOUS ORGANIZATIONS IN ROMANIA, BETWEEN TRADITION AND TRANSITION

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In the last decades, Romanian society has undergone a series of transformations, especially of a legislative nature, transformations that have had a great impact over all the sectors of activity. It must be said that in terms of ecclesiastical legislation or of state legislation regarding religious cults, there a series of novelties and adjustments to legislation were registered in order to correspond as much as possible to the new Romanian realities.

We are talking about a country that was a former member of the Soviet bloc where religious manifestation was obstructed for a long period of time, the Church being forced to withdraw into the so called "liturgical ghetto" and its manifestation *extra murros* being impossible. Therefore, the system of Byzantine symphony so often invoked in the relationship between the Church and the State, was removed. As in the Byzantine symphony, though, the Church continued to pray for the State and often to ask the State to allow a series of actions and manifestations. This relationship continued even after 1990, when the State started to support the Church again, but it is often tempted to subdue the Church.

Since the subject of our meeting is related to "Particular Laws of the Churches", I will present some aspects of the new Statute of the Romanian Orthodox Church with its legal implications, as well as some aspects governed by other laws regarding religious cults in Romania.

I. Particular Laws for the Orthodox Church in Romania – past and present

In the present territory of Romania, statutes in the true sense of the word have existed ever since the 19th century. The first of them is the *Organic Statute of the Metropolitan Andrei Şaguna,* drafted in 1868 and approved in 1869 by the supreme head of the Austro-Hungarian Empire. This Statute served as a model for the Statute that stands as the basis of the organization of the Romanian Patriarchate in 1925, although there functioned outside Transylvania a Statute for the organization of the Orthodox Church since 1872. The acceptance of the principles of the Orthodox Church Statute from Transylvania was a condition of the church here to unite with that of the other Romanian provinces. The changes that took place on the political scene after the Second World War brought about the elaboration of a new Statute for the Church, enacted on 23 February 1949.

Under similar conditions of changes at the end of the 20th century, the need to renew the Romanian Orthodox Church Statute emerged. After 1990, the former Statute was already cluttered with over 100 amendments which aimed to reassert the freedom of religion, the autonomy of the Church, the redefinition of the relationships between the Church and the State, the regulation of religious assistance in schools, hospitals, and prisons or regulations regarding the Romanian

diaspora. The Statute of the Orthodox Church proved to be a necessity, as it was for any other denomination recognised by the state, under Article 29 of the Romanian Constitution that reads:

> "All religions shall be free and organised in accordance with their own statutes, under the terms laid down by law".

In the same time, the Law 489/2006 on Religious Freedom and the General Status of Denominations shows that religious denominations are regulated in accordance with the Constitution and based on Law 489/2006.

II. The new Statute of the Romanian Orthodox Church (2008)

The new Statute of the Romanian Orthodox Church tries to combine tradition with the perpetual transition of the Romanian society. In a certain sense, the new Statute continues the previous one, because we can still find traces of the Organic Statute of Metropolitan Andrei Şaguna from Transylvania. A first special feature of the Statute highlighted by the Patriarch Daniel[1] is that in the Statute *a strong emphasis on the relationship between freedom and responsibility can be distinguished and between our own autonomy and cooperation with the others* at any level: national, regional and diocesan. Within this special feature, at the basis of which ultimately lies the free will that is encountered on the coordinate *freedom – responsibility*, it can be noticed that the Church is encouraged to take responsibility for the Orthodox values and their proper management according to the specific needs of areas, parishes and of the Church as a whole.

Another specific feature of the new Statute of the Romanian Orthodox Church is that it *intensifies synodality* in the sense that it ensures responsibility and greater power to bishops. Nevertheless, it creates a larger framework for the cooperation between clergy and laity by the introduction of new provisions for the National Church Assembly, in the Diocesan Assembly and especially in parishes, which are covered under new rules in the new Statute. The current Statute tries to present the elements that lie at the basis of the Romanian Orthodox Church's organisation and functioning, and it makes reference to canonical tradition and to panorthodox communion, the dimension of territorial and personal activity, the predominance of the pastoral-missionary dimension and the arrangement of religious services within church offices.

From the very first article, the new Statute gives a sign of ecclesiological coherence. If in the former Statute the Romanian Orthodox Church was presented as an institution that "comprises Orthodox Christians from both Romania and

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[1] Statutul pentru organizarea şi funcţionarea Bisericii Ortodoxe Române [= ROC Statute], Bucharest 2008, 9. The ROC Statute was revised in 2011, but it was not published in the Official Gazette of Romania, so from a juridical perspective it can not be taken into account.

abroad"[2], the first article of the present Statute underlines the identity of the Church as

> "the community of Orthodox Christians, clergy, monks and lay people, canonically constituted in parishes and monasteries in the dioceses of the Romanian Patriarchate inside and outside the Romanian frontiers, which witness God in the Holy Trinity, the Father, Son and Holy Spirit, based on the Holy Scripture, liturgical services and canonical order"[3].

The difference between the two phrases is fundamental. If the first phrase is associative, showing that the Church comprises Christians, without giving any definition of the Church's manifestation, the current phrasing underlines the communion character of the Church. Article 6 is the one that continues to display the difference in perspective. If an association is built up of people, the Church consists of communities that come together in the name of Christ and honour Him as Head of the Church. The Church is the community of those who take the Holy Eucharist, and it is organised according to society's particularities.

III. The Lay persons and their role in the acceptance of the news Statute

As previously mentioned, the new Statute intensified synodality, in the sense that it grants a greater responsibility and power to the Synod, composed of all the bishops of the Romanian Orthodox Church. The argument used in favour of such a regulation is that synodality represents the guarantee of some wise decisions which is why infallibility is a feature of synodality. At the same time, synodality showcases the democratic spirit that must come first in the leading of all institutions. As a matter of fact, this kind of management was known in Christianity from a very early stage, an eloquent example being the Apostolic Synod of Jerusalem in the year 50. In my opinion, as a member of the Transylvanian ecclesiastic community and knowing how much the Metropolitan Nicolae Bălan struggled in the 1920s to undertake Şaguna's principles, in the Statute of the Romanian Patriarchate, I cannot help declaring my disagreement against such centralisation of decision-making power and against reducing the position of lay people in the Church. If until now, in the election of bishops, because it is here that the greatest changes have occurred, lay persons took part in the elections, often prevailing against some bishops' desires, given that they represented two thirds of the Diocesan Assembly structure with decisional power, now the final decision rests solely with the Synod formed only of bishops. The Church canons and the practice of other sister Orthodox Churches were surely invoked, but I have never been a big fan of following and shifting law only because it functions elsewhere, thus giving up what has been applied for over half a century without any harm to the Church. It was argued that lay persons would

[2] Art. 1 of the Statute on the organisation and functioning of the Romanian Orthodox Church.
[3] See J. ZIZOULAS, L'Etre Ecclesial, Genève 1981, 192.

not know the priorities of the Church's pastoral and missionary work, or that they could be influenced by one of the proposed candidates. We must not forget, though, that the bishops themselves nominate the members of the Eparchial Assembly which could be of good quality or not, depending on what each bishop wants to have in his eparchy. The bishops' decision-making power has been greatly enhanced. Whether this is beneficial or not remains to be seen. Anyway, the active role of lay persons in the elections of bishops was described as long ago as 1939 by the greatest Romanian canonist, Liviu Stan in his work, *The lay persons in the Church*[4].

In another train of thought, if we talk about collaboration with lay persons, we may say that it is a very good thing because human beings need attention and in order to draw them out from daily routine, the Church should give them new responsibilities. Responsibility brings them closer to the Church and thus they can accomplish things for the institution that has placed trust in them. Moreover, the establishment of the organisational pattern of forums composed of two-thirds lay persons creates a good impression of the Church's activity. This is a normal thing because we could say that by "Church" we do not only mean clergymen but also lay persons, the Church being a divine-human institution by definition. Therefore, lay persons continue to be part of ecclesiastical structures in the same proportion, only that these structures lost their decision-making right, to the detriment, in favour of a merely advisory one.

As a novelty element, although until now only adult males residing in that parish attended the Parish Assembly, in the new Statute in Article 54 paragraph 2 it is shown that the Parish Assembly is formed by the adult faithful from that parish, both males and females. At the same time, the priest was not considered administrator of the Church's wealth, but the vestryman had this function; in reality this did not occur in any parish of the country. Now it is stated that the priest is responsible for the wealth of the church, counting on the help of one or even two vestrymen.

IV. Theological education according to the new Statute and civil laws

This Statute governs the theological education for the training of clergy, as well as aspects regarding the teaching of religion in public schools (starting with Article 115). The pre-university orthodox theological units of education are integrated in Romania in the pre-university and university state system, based on the protocols concluded between the Romanian Patriarchate and the Ministry of Education since 1991. The education plans and curriculum for the pre-university education are established by the Holy Synod; university curricula are only approved by the Synod, after having been previously established by the Faculties of Theology and approved by the Metropolitan Synods.

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[4] L. ȘTAN, Mirenii în Biserică. Studiu canonic-istoric, Sibiu 1939, 251-609.

Most of the Faculties of Theology in Romania are of recent date. They appeared after 1990, even though some may claim a longer history. Where they previously existed, this was interrupted in 1948, when the Communist regime was established. The situation in Romania was similar in this regard to that of Russia or Ukraine, rather than to that of the German Democratic Republic (where the faculties of theology continued to function in state universities) or Poland (which kept a Catholic university in Lublin)[5]. In Romania, only two theological institutes survived the Communist period: in Bucharest and Sibiu.

Passing of the institutions of theology in universities was justified as a return to the state before 1948, invoking, in the case of theological faculties also, the principle of reparative justice to bring things to the *status quo ante* – the stage before establishment of state communism and official atheism.

After the events of 1989, the return of academic theology within the university was not awaited too long. The university level "theological institutes", as they were then called, became faculties of theology in 1991, being included in state universities following a protocol between the Ministry of Education, the State Secretariat for Religious Affairs (SSRA) and the Romanian Patriarchate. The Protocol, signed in May 1991[6], took into account three existing institutes at the time, in Bucharest, Sibiu and Iaşi (established in 1990). The provisions of the Protocol were implemented with the start of the new academic year (1991-1992). According to the Protocol, the enrollment was to be fixed, for the Department of Pastoral Theology (whose graduates would be able to request entry into the clergy), by the Patriarchate, and for the double specializations (Letters and Theology, Theology and Social Assistance), by the Patriarchate and the university (Article 4)[7].

From Church's perspective, the protocol has solved several issues simultaneously. First, it solved the problem of financing theological institutes. Passing under the patronage of State, the funds problem for organizing theological studies ceased to be a problem, being automatically transferred to the universities and public authorities. The solution of transforming private theological institutions into public faculties allowed, as a result, the development of academic theology. Within a decade, the number of Orthodox theological schools increased from three (the date of signing the Protocol) to fifteen (eleven faculties and four departments of Orthodox theology). The number of students and teachers has also increased, along with institutional and financial capacity of the Orthodox theology to finance researches, organize congresses, edit publications, etc.[8]

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[5] S. P. RAMET, Nihil Obstat: Religion, Politics, and Social Change in East-Central Europe and Russia, Durham –London 1998, 6.

[6] Protocol No. 9870 of May 30, 1991.

[7] Cf. http://www.ftoub.ro/index.php?option=com_content&view=article&id=88%3Aistoricul-facultatii &catid=8%3Astatic&Itemid=286&lang=en [2. 8. 2013].

[8] According to figures from the National Statistics Institute (NSI), Învăţământ superior la începutul anului universitar 2008-2009 [Higher Education at the Beginning of the Academic Year 2008-2009], Bucharest 2009, 8-11.

Romanian Theology from the public universities is actually a theology largely subordinate to the denominations, although *the State (University) gives the money and the Church gives the blessings*. According to the *Framework Regulation of the Faculties of Orthodox Theology in the Romanian Patriarchate* (approved by the decision 2411 of the Holy Synod from June 4-5, 1998)[9], these structures "are under dual subordination, to the Romanian Orthodox Church and to the public universities they belong to" (Art. 1). The framework in which the theology faculties operate is formed, in addition to the Regulation, by the Education Law (1/2011), the Academic Charter of each University, the Statute of the Romanian Orthodox Church (Part II, chap. 1, art. 115-121) and the Protocol signed on May 30, 1991 between the Orthodox Church and the Ministry of Education, through which old theological institutes in Sibiu and Bucharest, as well as the newly established Faculty of Theology in Iasi, were integrated into state universities.

According to the Framework Regulation, the mission of the faculties of Orthodox theology is to "contribute to strengthening the unity of faith and the promotion of Orthodox spirituality and mission of the Church" in Romanian society (Art. 3). The document here introduces an important distinction which establishes the duties of the two entities to which the faculties of theology are subordinated, namely: the Church and the Ministry of Education. According to this regulation, "organizationally, administratively, technically and financially" the faculties would be subordinated to the university to which they belong, while in terms of "theological and spiritual canon" they would be subordinated to the ecclesiastical authorities (Art. 4). The curricula include, in turn, the consent of the Commission above mentioned. On June 18, 2012 a committee of the Romanian Patriarchate was formed for the dialogue with the Romanian Ministry of Education, especially for the problem regarding the faculties of Orthodox theology, since the problem of the large number of schools of theology in Romania has been raised increasingly and there were concerns about this number and about the quality of theological education. It was decided, by a decision of the Holy Synod, to establish a committee for dialogue with the Ministry of Education in which an objective assessment of all educational institutions would be carried out; a set of measures for the improvement of education at the bachelor level as well as Master and especially Doctorate would also be developed, taking into account the rigors demanded by each level of education.

V. The Social Assistance according to the ROC Statute

After 134 articles on the organization and functioning of the Orthodox Church, the Statute regulates the *religious assistance carried out by the Church*.

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[9] Note that, according to the title of this document, the faculties of theology are part of the Romanian Patriarchate, a significant detail – at least in terms of the ROC – for the relationship between the Church and these institutions.

The Government of Romania has concluded cooperation protocols in the field of social inclusion with different recognized cults such as the Romanian Orthodox Church, the Roman Catholic Church or the Greek Catholic Church. The Government plans on signing such protocols with other cults as well. These protocols institutionalize a cooperation that exists at central and local levels in carrying out social projects. In order to help the disadvantaged Romanians in an effective way, social cohesion, tolerance and respect are mandatory, but commitment is perhaps the most important. In the midst of the false media scandal on the new Act on Cults, the emphasis of the positive part of the text was deliberately missed. Or, the novelty, *par excellence*, of the Act on Cults consists in a totally new restatement, legally and mentally, of the relationships between state and religious denominations. Article 7 (1) specifies:

> "The Romanian State recognises the denominations' spiritual, educational, social-charitable, cultural and social partnership role, as well as their status of social peace".

Further, Article 10 (7) adds an extra concreteness:

> "The State shall also support the activity of recognised denominations in their capacity as providers of social services".

Practically speaking, the State no longer defines its relationships in terms of control. Through social partnership, the post-communist Romanian State makes a significant step towards the recovery of citizenship as a complementary attribute of the political exercise. Religious denominations are social partners and parts of the civil society in the same time. As such, all religious denominations have the possibility of a wider cooperation with public institutions and to enjoy the State's subsidiary support. The latter may not delegate its own obligations, but notes that, through the partnership with the religious dimension of society, it is in a position to perform its duties more coherently and effectively. As we are still far from being a social state after the well-known European model, anchoring the subsidiary principle of partnership in the text of the Act on Cults is similar to a true caesura in the legal thinking of the Romanian state law.

It is obvious that how religious denominations will exploit constructively the chances of this partnership depends greatly on themselves, if it is taken seriously and if it succeeds, two decades after the fall of communism, to give Christian Romania the much needed social dimension of justice, compassion and solidarity.

The Romanian government has agreed to cooperate with the Patriarchate of the Romanian Orthodox Church and representatives of the Conference of Catholic Bishops of both rites in Romania. In the social and pastoral area, the Church understood that a special connection between *liturgy* and *philanthropy* is necessary. The Church has developed an organised system of social activity since 1990, which has experienced particular dynamics over the last years. There are many social institutions within the Romanian Patriarchate and the other

recognised religious organizations, such as institutes for children, for the elderly, social canteens and bakeries, medical assistance centres, social pharmacies, centres of diagnosis and treatment for people with disabilities, counselling centres, assistance centres for victims of human trafficking, and assistance centres for families in need. Several assistance and counselling centres have been established with the help of EU funds.

On the 2nd October 2007, the Treaty of Cooperation in the Area of Social Inclusion between the Romanian Patriarchate and the Romanian government has been signed, and a Treaty of Cooperation regarding Partnership in the Fields of Medical and Mental Assistance between the Romanian Patriarchate and the Ministry of Health was concluded on 24 July 2008.

These new regulations regarding the cooperation between State and Church in the social field cannot simply be explained by the people's trust in the Church. They also stem from a desire to solve several social problems: poverty, bad health, migration, unemployment, special needs of old people, children and disabled persons etc. These problems of Romanian society are not only problems of the state, but also pastoral problems of the Church. Phrased differently, the autonomy and equality of churches in relation to the state does not exclude cooperation and shared responsibility. Tradition must be understood as a dynamic process of creatively dealing with basic principles, not simply as a replication of past models.

By coming to the support of suffering people, the Church revives ancient Christian customs, in which Liturgy is accompanied by an offertory for the poor. The fact that this Statute intensifies the philanthropic mission alongside the liturgical, pastoral and cultural ones, is nothing but an awakening of the consciences of those who suffer that at least the Church supports them.

Another feature of the new Statute is that *it creates a framework for the presence of the Church in society* by using means of communication with the intention of intensifying the liturgical, pastoral, cultural and philanthropic mission. This is a very beneficial fact, because it is through the creation of mass means of communication that one may more easily reach the hearts of larger masses of Christians, who could thereby receive important information on the values of Orthodox Christianity. Although the press and publications were censored until 1989, afterwards more and more religious magazines began to appear and the number of books with a religious profile increased dramatically. Against these new and changing conditions that Romanian society and the Church would face, a series of negative speeches against the Orthodox Church appeared in the lay press. These were linked, for example, to the debates on the restitution of properties that were confiscated by the communist regime to the Greek Catholic Church, by the proposal for a new Act on cults, or other laws, such as legalising prostitution. Therefore, the hierarchs condemned "the hostility" of the lay press. Under these circumstances, the lack of a daily newspaper of the Church was emphasised; this began publication only in 2005 at the initiative of the Metropolitan See of Modova and Bucovina, being called *The Light newspaper*. After the election of Metropolitan Daniel as Patriarch of the Romanian Orthodox Church, the distribution of this daily newspaper across the country widened. Starting with 27

October 2007, it became part of the BASILICA Press Centre of the Romanian Patriarchate, together with Radio, Television, press agency and the weekly newspaper *Sunday light*. All these are part of missionary institutions that are regulated starting with Article 161 of the new Statute.

VI. The situation of the Church buildings

We have already mentioned the issues regarding the restitution of properties confiscated by the communist regime. Through the new Statute, the Orthodox Church clearly established the nature of the goods that can be held by its entities, as part of the church patrimony. Based of their purpose, they can be sacred goods or common goods.

According to Article 170 of the ROC Statute, the church building is part of the sacred goods of the Church. All the churches which were in the property of the Greek Catholic Church before 1948, and of the ROC after that date, were restored, repainted or otherwise altered, and afterwards were consecrated by orthodox bishops. That's why the Church may not now so easily return them. From the perspective of the ROC, the restitution should take into account the number of parishioners of each church, and canon law and not civil law should be used.

We can better understand the ROC's argument applying canon law to resolving the matter of church buildings. If the religious community together with their priest could decide to turn over the cathedral to the Greek Catholic Church, the members of the parishes could also decide in which way the church buildings should go, even if they were constructed by the Greek Catholic believers before 1948. In the situation of the restitution of Church properties in Romania in the 21st century, we can easily observe that, 20 years after the 1989 events there are still problems on this field both on the relation between the State and the Churches and the relation between the Churches in the matter of restitution. The legislation was developed from the State's point of view and restitution is going to be made more easily, because we must say that the most difficult cases are still unresolved. On the side of restitution between the Churches there are still complications, but there have been concrete steps towards normality, and progress is still being made.

A special regulation refers to parochial and monastic *cemeteries*. A delicate problem, whose importance was seen last year, is the lack of adequate places for the burial of faithful belonging to minority cults, as well as of those places under private ownership. Religious cults have regulations in Statutes and their own rules, harmonised with the general principles of Law 486/2006 on the Freedom of Religion and General Status of Denominations. According to Article 28 of this law, a local denominational unit can have and maintain, alone or in association with other denominations, denominational graveyards for their worshipers. Confessional graveyards should be managed according to the regulations of the denomination that owns them.

On the other hand, according to paragraph 4 of the same article, "The authorities of the local public administration are under the obligation to establish

local public graveyards in every village or town", thus supporting the cults that do not have graveyards in all communities, or even if they do, these are considered "closed" (they have no free places of burial available).

The legal system for parochial cemeteries is regulated by the Statute on the organisation and functioning of the Romanian Orthodox Church and by the Regulation on the organisation and functioning of parochial and monastic cemeteries of the Romanian Orthodox Church Eparchies.

In the Statute of the Romanian Orthodox Church there are provisions concerning parochial cemeteries within articles 186-188. According to these provisions, every parish is entitled to posses or set up at least one cemetery for burying the deceased faithful, which is the property of the parish or of the monastery.

Parochial cemeteries, as sacred goods associated exclusively and directly for the rite, cannot be sued, and cannot be alienated, changed, encumbered or sequestered. Article 187 of the Statute provides that the burial places remain the property of the parish and the right of granting cannot be sold by the titular, as it can be transmitted only by succession to the spouse or to relatives up to the 4th degree.

Article 1 of the Regulation on the organisation and functioning of parochial and monastic cemeteries of the Romanian Orthodox Church Eparchies confirms the Statute's provisions: the parochial cemeteries are their property and are considered sacred goods. The parochial cemetery is intended for the burial of parishioners deceased in that parish. The Parochial Council may approve the burial of any other persons. The same Parochial Council administers the cemetery, caring for the enclosure of the land, the good management and preservation of the cemetery's goods, and the building of chapels or charnel houses.

According to Article 9 of the Regulation, burial places fall into two categories: for perpetual use or temporary use, for 7 years. By respecting a specific procedure, the abandonment of the burial places entails the annulment of the grant act.

The burial places in parochial cemeteries are assigned by issuing a grant act. This grant act gives the titular the right to use the assigned place, which cannot be alienated, except according to the Regulation. For this purpose, according to Article 15, the grant right over the assigned burial places for perpetual use can be transmitted by donation, legal or testamentary succession. The donation of burial places can only be done to relatives up to the 4th grade. The burial places transmitted by donation or succession are indivisible.

Concerning burials, they can only be done based on a burial certificate and graves can be opened only after 7 years from the last burial. According to Orthodox Tradition, exhumed remains will be buried in the same place of burial from which they originated. In the case of exhumed remains for the burial of another deceased person in that place, their reburial will take place at the time of the new burial.

In the parochial cemeteries, any funerary construction (tombs, crypts) can be made only after an approval issued for this purpose by the Parochial Council, as

well as a construction permit, except when simple crosses or any other funerary wooden signs are placed on the graves. On burial places for temporary use, only simple crosses or any other funerary wooden signs, as well as simple borders can be placed – Article 29 of the Regulation.

Not keeping clean the funerary construction, the surroundings and graves proves that the burial places were abandoned and may result in the cancellation of the grant act. Abandonment or degradation is determined by the Parochial Council, which periodically checks the state of the burial places and concludes a statement of facts recorded in the register of the cemetery.

Where there are churches or chapels which are historical or architectural monuments, the placement of new graves should comply with the minimum distance provided as a protection area for these monuments, under the legal provisions in force.

VII. Financing Religious communities in Romania

In the same Statute of the Romanian Orthodox Church there are also some stipulations concerning *religious expenses and state assistance*. The financing will be covered from voluntary contributions of the faithful, from the incomes of the cult units and from the contributions from the state budget (Articles 189-191). Being a very topical subject I would like to add a few things:

One of the most important issues for churches and religious organizations all over the world, and in Romania, too, is the finance system for these entities.

According to Law 489/2006, the State's support for religious personnel and activities is granted both in terms of salaries for the clergy and non-clergy staff of the Church and in terms of state funds for building and repairing churches. In this respect, the law differentiates between religious groups (which do not receive any support from the state, or tax exemptions), religious associations (which are exempted from taxes only for their places of worship but do not receive government funding) and recognised *cults* (which are eligible for state support and enjoy tax-exempt status and other facilities). With respect to the latter, the state grants the recognised *cults* financial support on the basis of some subjective criteria: on demand, proportional to the amount of their membership, and according to their real needs – i.e. the support is granted not for specific projects, but according to the size of each denomination. The ambiguous formula thus leaves room for discriminatory financing.

The money necessary for maintaining religious organizations and their activities is being raised and administered by the income of these organizations in accordance with their statutes (Art. 10 [1] of Act No. 489/2006). According to Article 10 (2), religious organizations can levy financial contributions from their members in order to maintain their activities. The State supports community members' and citizens' financial support for religious organizations by making it tax deductible (Article 10 [3]). At the same time, the Act stipulates that no one can be forced to make contributions to religious organizations.

According to Act No. 142/1999, the Romanian State is especially interested in supporting the Romanian Orthodox Church abroad to preserve its cultural, lingual, and religious identity. By Act No. 114/27.4.2007, the Romanian monastery Prodromou on Holy Mount Athos receives annually a sum of money (Article 2) for restoration, reconstruction and maintenance of buildings and its four churches (Article 4) as well as for advertising material and the upkeep of the resident monks' activities.

Article 15 let. E of the Romanian Tax Code determines that only those religious communities are exempt from taxation which gain their income through economic activities and use those only for the upkeep of their charitable and social activities. Religious communities have the exclusive right to produce, sell and trade liturgical products (Act No. 103/1992) and the production and marketing of products necessary for holy services is tax exempt. The exemption exists for religious communities' income from leasing real estate as long as that money is used for upkeep, construction or reconstruction of ecclesiastical buildings. Construction, consolidation, expansion, reconstruction, and restoration of ecclesiastical buildings or buildings used for other religious purposes are exempt from value added tax.

Churches are also exempt from taxation on buildings, areas on which buildings are being constructed, and all landholdings (fields, forests etc.) which are church property (Act No. 571/2003, Article 250 [1] and Article 257 lit. b).

In addition to tax exemption, Romanian tax payers have the opportunity to donate 2% of their income tax to a non-profit organisation or a religious community, according to Article 57 (4-6) and 84 (2-4) of the Fiscal Code. This provision offers religious organizations additional income.

The Romanian State, through the State Secretariat for Religious Denominations, contributes to the construction of new churches and the restoration of old or historical monuments that belong to religious communities.

VIII. Conclusions

As I tried to point out, and as I entitled this lecture, the new Statute of the Romanian Orthodox Church is meant to be placed between tradition and transition. We are looking at a Church that seeks to meet the pastoral-missionary needs of the faithful based on its tradition, but in the same time proves that it is also aware of the modern means for achieving its mission. The Statute regulates the situation of a Church that survived 47 years of communism, but which at the same time knew how to focus on the reality of the end of the twentieth century. Thus, we are talking about a Church that strives to regain the properties confiscated by former regimes, but which in spite of some failures, continues to be involved in social assistance for those in need. Since the position of the press was not always favourable, the Church made its voice known by drawing attention to its actions and existence.

At the same time, the new Statute grants extensive authority to the hierarchs of the Church, as compared to other clergy members or lay persons. Under these circumstances, I was not taken by surprise by the establishment of a union of priests. Surely, based on current legislation this was illegal, a fact confirmed by ECHR, but I hope that those in positions of authority thought about what determined those members of the Church to take this step. Although before 1948 there were Priest Associations that had the courage to speak up then when things went really bad, without fearing any repercussions, nowadays the simple priest has nowhere to turn to solve his discontentment.

Therefore, the new ROC Statute generates a reinforcement of the synodal hierarchical organisation, but also of the priest's role in community, while the role of lay persons is diminished considering that the decision-making structures to which they belonged on a diocesan, metropolitan and patriarchal level, have lost their deliberative vote, being reduced to a merely consultative one, as opposed to the other statutes from 1864 onwards. However, the new Statute reflects the reality in which the Orthodox Church operates, regulating the administrative situation of the Church, and also the issues about the diaspora structures, theological education, religious assistance in hospitals, prisons and asylums, about the property of the church, and press institutions as mechanism for the Church's mission, courts and other activities.

LE PROBLEME JURIDIQUE ACTUEL DES SYNDICATS DU CLERGE DANS L'ÉGLISE ORTHODOXE ROUMAINE

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I. Préliminaires

1. Le contexte interne de l'apparition des syndicats des prêtres au sein de l'Église Orthodoxe Roumaine

Après la Révolution roumaine de 1989, mais plus accentuée à partir de l'année 2008, la discipline canonique de la vie religieuse au sein de l'Église Orthodoxe Roumaine a été marquée et affectée par l'apparition d'une nouvelle réalité, d'une organisation non canonique au sein de l'Église, des «syndicats des prêtres». Dans certaines des métropolies de l'Église Orthodoxe Roumaine on a fondé des syndicats des prêtres, sans l'accord préalable de l'autorité ecclésiastique compétente, en ignorant la discipline canonique interne de l'Église, fondée sur les principes canoniques pour l'organisation et le fonctionnement de l'Église Orthodoxe et en se limitant uniquement à la législation d'état concernant la fondation et l'organisation des syndicats laïques. Comme le constate aussi la Cour Européenne des Droits de l'Homme (CEDH), la fondation des syndicats des prêtres a existé dans la pratique interne de l'Église Orthodoxe Roumaine d'après la Révolution de 1989 mais, on le précise, sans l'accord exprès de la hiérarchie de l'Église, ceci étant constaté dans les décisions des instances roumaines[1].

Mais le syndicat qui a provoqué des tensions dans la vie de l'Église Orthodoxe Roumaine par l'évolution de son combat pour l'enregistrement et pour obtenir la personnalité juridique et qui a créé pour la première fois une position officielle ferme du Saint Synode de l'Église contre une telle forme associative religieuse, a été le Syndicat «Păstorul cel Bun» («Le Bon Pasteur») de la Métropolie de l'Olténie (au sud-ouest de la Roumanie). Ce qui a provoqué une réaction prompte et normale de l'Église a été le fait que ce syndicat, formé de 35 prêtres et laïques employés de l'Église Orthodoxe Roumaine (de la Métropolie de l'Olténie), a obtenu son enregistrement à la première instance de Roumanie, mais aussi à la troisième section de la CEDH, à Strasbourg (la décision publiée le 31

[1] «Par un jugement définitif du 4 octobre 1990, le tribunal de première instance de Medgidia inscrivit au registre des syndicats le syndicat *Solidaritatea*, du clergé orthodoxe de l'archevêché de Tomis – Constanța, et lui octroya la personnalité morale. Par ailleurs, il ressort de la motivation de l'arrêt susmentionné du 3 juin 2008 de la cour d'appel de Iași que le syndicat *Sfântul Mare Mucenic Gheorghe* du clergé orthodoxe a été inscrit au registre des syndicats et a obtenu la personnalité morale en vertu du jugement définitif rendu le 5 juin 2007 par le tribunal de première instance de Hârlău» (§ 30, 31), voir ici http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108841#{"itemid":["001-108841"]}, AFFAIRE SINDICATUL PĂSTORUL CEL BUN c. la ROUMANIE, ARRÊT DE LA TROISIÈME SECTION, (*Requête n° 2330/09*), STRASBOURG, 31 janvier 2012, Renvoi devant la Grande Chambre, 09/07/2012 (le site internet consulté le 10 février 2012).

janvier 2012), ensuite la Grande Chambre de la CEDH établit par sa décision[2] la jurisprudence concernant la liberté religieuse (art. 9, Convention) et l'autonomie de l'Église par rapport à l'État, par l'interprétation de l'article 11 de la Convention par le biais de l'article 9.

Ainsi, l'instance de fond en Roumanie s'est prononcée le 22 mai 2008, en décidant d'enregistrer le syndicat et de lui accorder la personnalité morale, en appuyant sa décision sur

> «les dispositions des articles 2 de la loi no 54/2003, 39 du Code du travail, 40 de la Constitution, 22 du Pacte international relatif aux droits civils et politiques et 11 de la Convention européenne des droits de l'homme» (§ 12),

comme le constate la troisième Section de la CEDH[3]. On a considéré que l'enregistrement du syndicat ne causerait pas un conflit interne entre les prêtres et la hiérarchie supérieure de l'Église[4]. Comme le précise l'instance européenne (la troisième Section), une telle décision de l'instance roumaine a produit une position officielle de l'Archevêché de Craiova qui a rejeté ce fondement des organisations cléricales syndicales dans la vie de l'Église, en soutenant que

> «les dispositions légales internes et internationales sur lesquelles celui-ci avait fondé son jugement (l'instance de fond de Craiova, n.n.) étaient inapplicables au cas d'espèce. Il argua que l'article 29 de la Constitution garantissait la liberté de religion et l'autonomie des communautés religieuses et que ce principe ne pouvait pas s'effacer devant la liberté d'association

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[2] Voir ici AFFAIRE SINDICATUL «PĂSTORUL CEL BUN» c. ROUMANIE, ARRÊT DE LA GRANDE CHAMBRE, *(Requête n° 2330/09)*, STRASBOURG, 9 juillet 2013 *(Cet arrêt est définitif. Il peut subir des retouches de forme).*

[3] «Il nota que la loi n° 489/2006 sur la liberté religieuse autorisait le fonctionnement autonome des organisations religieuses pour autant qu'il ne soit pas porté atteinte à la sécurité nationale, à l'ordre et à la santé publics, à la morale et aux droits et libertés fondamentaux. Observant ensuite qu'il ne prêtait pas à controverse que les membres du syndicat étaient employés en vertu d'un contrat de travail, il jugea que, dès lors, leur droit à se syndiquer, qui était garanti par la législation du travail, ne pouvait pas être subordonné à l'obtention préalable de l'accord de leur employeur. Relativement à la réglementation interne de l'Eglise, le tribunal jugea que la subordination hiérarchique et l'obéissance qui étaient dues par les prêtres à leur employeur en vertu du statut de l'Eglise ne pouvaient pas justifier une restriction d'un droit consacré par la législation du travail car elles ne constituaient pas des mesures nécessaires, dans une société démocratique, à la sécurité nationale, à la sûreté publique, à la défense de l'ordre et à la prévention du crime, à la protection de la santé ou de la morale ou à la protection des droits et libertés d'autrui. Examinant le statut du syndicat, le tribunal estima que la création de celui-ci n'était pas nécessairement la manifestation d'un courant divergent au sein de l'Eglise orthodoxe roumaine, qui mépriserait la hiérarchie et ses traditions, mais que, au contraire, elle pourrait contribuer à la mise en place d'un dialogue entre l'employeur et ses employés quant à la négociation des contrats de travail, au respect du temps de travail et de repos et des règles de rémunération, à la protection de la santé et de la sécurité au travail, à la formation professionnelle, à la couverture médicale, et au droit d'élire des représentants dans les structures de décision et d'y être élu, dans le respect des spécificités de l'Église et de sa mission spirituelle, culturelle, éducative, sociale et caritative» (§ 13, 14, 15).

[4] E. RASSBACH – D. VERM, Analiza hotărârii Sindicatul *Păstorul cel Bun* împotriva României, în: Revistei de Drept Social [RDS] 4 (2012) 32.

syndicale. Selon lui, en reconnaissant l'existence du syndicat, le tribunal s'était immiscé dans l'organisation traditionnelle de l'Eglise, portant ainsi atteinte à son autonomie» (§ 16).

Dans ce contexte, l'Archevêché de Craiova, comme partie dans le procès, a fait recours à l'instance supérieure compétente, le Tribunal de Dolj, qui s'est prononcé définitivement le 11 juillet 2008, en annulant la décision de la première instance et en rejetant l'enregistrement du syndicat. Dans la justification de sa décision, le Tribunal de Dolj a invoqué la législation interne (le droit interne roumain et aussi le droit particulier de l'Église Orthodoxe Roumaine), mais aussi la Constitution et la Loi des cultes no. 489/2006 et le Statut pour l'organisation et le fonctionnement de l'Église Orthodoxe Roumaine, statut conforme à la Loi des cultes de Roumanie et reconnu par l'état roumain par décision du gouvernement. Ainsi, le Tribunal de Dolj, dont la décision a été gardée par la Grande Chambre de la CEDH, par la décision définitive du 9 juillet 2013,

> «observa que la Constitution et la loi n° 489/2006 garantissaient l'autonomie des communautés religieuses et leur droit de s'organiser conformément à leurs statuts. Il nota ensuite que la notion de syndicat n'était pas prévue dans le statut de l'Eglise orthodoxe, en vertu duquel la constitution, le fonctionnement et la dissolution des associations et des fondations religieuses étaient subordonnés à la bénédiction du synode de l'Eglise et les prêtres devaient obéissance à leurs supérieurs et ne pouvaient accomplir d'actes civils, y compris de nature personnelle, qu'avec leur approbation écrite préalable» (§ 18)[5].

Alors, sans respecter l'autonomie externe de l'Église par rapport à l'état[6], le Statut pour l'organisation et le fonctionnement de l'Église Orthodoxe Roumaine, les règlements internes et toute la tradition canonique retrouvée spécialement dans le droit particulier religieux en vigueur de l'Église Orthodoxe Roumaine, les instances juridiques de l'état roumain ont admis en première instance l'enregistrement du syndicat des prêtres et des laïques employés à l'Église, pour qu'ensuite, dans le recours, une telle organisation ecclésiastique syndicale des religieux soit rejetée, en considérant que la Loi des Cultes no. 489/2006 et la

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[5] «Il considéra que l'interdiction de créer toute forme d'association au sein de l'Eglise en l'absence d'accord de la hiérarchie était justifiée par le besoin de protéger la tradition chrétienne orthodoxe et ses dogmes fondateurs et que, si un syndicat venait à être créé, la hiérarchie de l'Eglise serait obligée de collaborer avec un nouvel organe étranger à la tradition et aux règles canoniques de prise des décisions. Enfin, il nota qu'en vertu de la loi n° 54/2003, les personnes exerçant des fonctions de direction n'étaient pas autorisées à créer des syndicats et, tenant compte du fait qu'en vertu du statut de l'Eglise, les prêtres assumaient la direction de leurs paroisses, il conclut qu'ils tombaient sous le coup de cette interdiction» (§ 19, 20), *Arret de la Troisième Section* de la CEDH.

[6] Voir N. MILAŞ, Dreptul bisericesc oriental, Bucureşti 1915, 573; L. IACOB, Personalitatea juridică a Bisericii, in: Studii Teologice 1 (1940) 109; L. STAN, Legea Cultelor, in: Studii Teologice 9-10 (1949) 856; N. Gr. POPESCU-PRAHOVA, Raporturile dintre stat şi Biserică, Chişinău 1936, 6; I.-G. CORDUNEANU, Biserica şi Statul. Două studii, Bucureşti 2006, 52-81.

Constitution de la Roumanie garantissent l'autonomie des cultes religieux et leur droit de s'organiser conformément à leurs propres statuts. Ce fait a déterminé les prêtres adhérents d'appeler à la Cour Européenne des Droits de l'Homme de Strasbourg, dans la cause du Syndicat «Păstorul cel Bun» c. la Roumanie, no. 2330/09, qui, en première instance (la troisième Section) a obligé l'état roumain à reconnaître cette association libre des prêtres en syndicats, en considérant insuffisants les arguments de l'instance de recours de Roumanie pour que la décision définitive de la Grande Chambre du 9 juillet 2013 donne expression à la liberté religieuse et à l'autonomie de l'Église de s'organiser et de fonctionner conformément à son propre droit interne, en complétant la jurisprudence de la Cour dans l'art. 11 de la Convention, *La liberté de réunion et d'association*, mais aussi de l'art. 9, *La liberté de la pensée, de la conscience et de la religion*, étant pour la première fois dans la jurisprudence de la CEDH, que les deux libertés fondamentales aient été en concurrence.

2. La raison d'aborder ce thème: Son actualité et son importance

Vu que cette année on compte 1700 ans depuis l'Édicte de Milan (313) sur la liberté religieuse des chrétiens et conformément à la décision du Saint Synode de l'Église Orthodoxe Roumaine on a déroulé de nombreuses manifestations scientifiques au sein des Facultés de Théologie des Universités d'état de Roumanie concernant la liberté religieuse, dans le présent travail nous avons abordé le problème des syndicats des prêtres dans l'Église Orthodoxe, parce qu'il implique un conflit entre la liberté religieuse et l'autonomie de l'Église d'un coté et la liberté des prêtres de s'associer en syndicats, de l'autre coté, ceci étant une nouveauté juridique y compris pour la jurisprudence européenne, avec nombreuses implications d'ordre canonique.

Nous nous sommes concentré sur la cause du Syndicat «Păstorul cel Bun» c. Roumanie, car elle est de grande actualité, l'évolution de la cause, à partir des instances nationales roumaines et jusqu'à la décision définitive de la Grande Chambre de la CEDH du 9 juillet 2013, qui allait marquer la jurisprudence européenne concernant les relations État-Cultes, mais aussi l'imposition de la liberté religieuse et le droit des cultes de s'organiser et de fonctionner au niveau interne conformément au droit particulier.

Le but du présent travail est d'amener au premier plan des approches juridiques canoniques à l'occasion de cette conférence de notre Société du Droit des Églises Orientales un problème juridique canonique actuel qui a marqué la vie religieuse de l'Église Orthodoxe Roumaine d'après l'année 2008, l'année d'un renouvellement concernant l'organisation et le fonctionnement de l'Église Orthodoxe de Roumanie, par un traitement critique et comparatif. J'ai mis en évidence l'évolution de la problématique en cause, à partir de la description du contexte et du droit interne visant la liberté religieuse et la liberté syndicale, en faisant une évaluation juridique et canonique de la vie syndicale cléricale, avec l'accent sur l'évolution de la cause susmentionnée devant la troisième Section de la CEDH et le manque de fondement de la respective décision du 31 janvier 2012 dans le

contexte de la législation interne en matière et de jurisprudence de la CEDH. Ce n'est pas un traitement exhaustif du thème, qui est vaste et qui entraîne de nombreuses branches du droit, mais dans ce contexte il est important de développer les principes de la législation d'état et religieuse concernant le manque de fondement de la création, de l'organisation et du fonctionnement des organisations syndicales des prêtres au sein de l'Église, comme institution divine et humaine qui est autonome par rapport à l'état et qui se conduit d'après sa propre législation particulière, reconnue aussi par l'état.

Un tel sujet est de maxime actualité, étant nécessaire qu'il soit pris aussi dans la discussion des canonistes de l'Église Orthodoxe et des Églises sœurs[7], son importance résultant de la position ferme de l'Église Orthodoxe Roumaine et d'autres Églises européennes devant une telle anomalie ecclésiologique canonique, mais aussi du fait que les droits et les libertés fondamentales de l'homme ne sont pas en contradiction avec les principes canoniques et ecclésiologiques sur lesquels est fondé le fonctionnement de l'Église Orthodoxe.

II. La troisième Section de la Cour européenne des droits de l'homme (CEDH) concernant la décision dans le cas Sindicatul Păstorul cel Bun contre la Roumanie (N° 2330/09, 31 janvier 2012): Limites et incohérence

Par cette décision de la troisième section de la CEDH du 31 janvier 2012, on a considéré que le Tribunal de Dolj (Roumanie) a atteint à la liberté d'association garantie par l'article 11 de la Convention européenne des droits de l'homme, en refusant l'enregistrement d'un syndicat des prêtres créé au sein de l'Église Orthodoxe Roumaine: «1. *Déclare*, à l'unanimité, la requête recevable; 2. *Dit*, par cinq voix contre deux, *qu'il y a eu violation de l'article 11 de la Convention*»[8].

[7] Pour des détails sur la position des Églises Orthodoxes sœurs concernant les droits et les libertés fondamentales de l'homme: BARTOLOMEU I, Patriarhul ecumenic, Spiritualitatea şi drepturile omului, in: Biserica Ortodoxă şi Drepturile Omului. Paradigme, fundamente, implicaţii, Bucureşti 2010, 50-54; KIRIL, Patriarhul Moscovei, Drepturile omului şi responsabilitatea morală, in: ibidem, 55-67; A. YANNOULATOS, Eastern Orthodoxy and Human Rights, in: International Review of Mission 73, no. 292 (1984) 454-466.

[8] Voir des détails à http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108841#{"itemid":["001-108841"]} [15. 3. 2012].

Deux des sept juges ont eu une opinion séparée[9], ceux-ci par une analyse pertinente arrivant à la conclusion que la plupart des juges (5 juges) «n'a pas

[9] «Au présent arrêt se trouve joint, conformément aux articles 45 § 2 de la Convention et 74 § 2 du règlement, l'exposé de l'opinion séparée des juges Ziemele et Tsotsoria», voir http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108841#{"itemid":["001-108841"]}. Les juges Ziemele et Tsotsoria ont soutenu une opinion dissidente commune, différente de la majorité des juges, en mettant en discussion le contexte particulier du fondement de ce syndicat, dans quelle mesure les prêtres et le personnel laïque employé à l'Église peuvent fonder un syndicat, mais aussi le rôle de l'État en ce qui concerne ses obligations vis-à-vis de la Convention. La position des juges a été partagée par les nombreux spécialistes. Voir G. PUPPINCK – A. POPESCU, Critica hotărârii CEDO cu privire la Sindicatul Păstorul cel Bun contra României (nr. 2330/09), in: RDS 3 (2012) 7; N. HERVIEU, La liberté syndicale franchit les portes de l'Eglise (CEDO, 3e Sect. 31 janvier 2012, Sindicatul 'Pastorul Cel Bun' c. Roumanie): http://combatsdroitshomme.blog.lemonde.fr). On présente ici brièvement cette position des deux juges car elle est très importante dans le contexte de l'actuelle décision définitive de la Grande Chambre (9 juillet 2013), cette vision se retrouvant dans le fondement de la décision de l'instance supérieure européenne. En effet, la présente affaire constitue une nouveauté pour la Cour, car elle entraîne en parallèle la liberté religieuse (l'autonomie des cultes) et la liberté syndicale des membres d'une communauté religieuse dans une société pluraliste : «2. La Cour a souvent mis l'accent sur le rôle de l'Etat en tant qu'organisateur neutre et impartial de l'exercice des diverses religions, cultes et croyances, et indiqué que ce rôle contribue à assurer l'ordre public, la paix religieuse et la tolérance dans une société démocratique, particulièrement entre des groupes opposés (voir par exemple l'arrêt Leyla Şahin c. Turquie [GC], n° 44774/98, § 107, CEDH 2005 XI). Elle a aussi reconnu que la participation à la vie de la communauté est une manifestation de la religion, qui jouit de la protection de l'article 9 de la Convention. Pour ces raisons, elle a dit qu'en vertu de l'article 9 de la Convention interprété à la lumière de l'article 11, le droit des fidèles à la liberté de religion suppose que la communauté puisse fonctionner paisiblement, sans ingérence arbitraire de l'Etat. En effet, l'autonomie des communautés religieuses est indispensable au pluralisme dans une société démocratique et se trouve donc au cœur même de la protection offerte par l'article 9. Si l'organisation de la vie de la communauté n'était pas protégée par l'article 9 de la Convention, tous les autres aspects de la liberté de religion de l'individu s'en trouveraient fragilisés (Hassan et Tchaouch c. Bulgarie [GC], n° 30985/96, § 62, CEDH 2000 XI, Eglise métropolitaine de Bessarabie et autres c. la Moldavie, n° 45701/99, § 118, CEDH 2001 XII, et Saint Synode de l'Eglise orthodoxe bulgare (Métropolite Innocent) et autres c. Bulgarie, n°s 412/03 et 35677/04, § 103, 22 janvier 2009). Selon nous, la présente affaire soulève une question relativement nouvelle pour la Cour en ce qu'elle concerne l'autonomie d'une communauté religieuse dont certains membres se proposent de créer un syndicat», voir http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108841#{"itemid":["001-108841"]}. La troisième section de la Cour européenne des droits de l'homme (CEDH), comme le remarquent les deux juges qui ont eu une opinion différente, a visé la législation interne de la Roumanie qui n'interdit pas d'une manière expresse aux prêtres de fonder des syndicats, sans observer les dispositions du Statut de l'Église Orthodoxe Roumaine (2008), reconnu par le Gouvernement de la Roumanie, par lequel «les membres du clergé doivent recevoir la bénédiction de l'évêque pour créer ou rejoindre une association, une fondation ou une autre organisation (paragraphe 26)». En vertu de la législation civile on peut fonder des syndicats des prêtres, mais non du point de vue de la législation interne de l'Église Orthodoxe Roumaine, respectivement par son propre statut. En effet, deux syndicats des religieux ont reçu la personnalité morale et ont été inscrits dans le registre des syndicats. Dans la perspective de l'actuel Statut de l'Église Orthodoxe Roumanie, de 2008, approuvé par l'autorité légale exécutive, le Gouvernement, l'association des prêtres en différentes formes d'organisation (associations, fondations) doit suivre une procédure statutaire, c'est-à-dire de recevoir la *bénédiction de l'évêque compétent*, autrement «la création du syndicat étant contraire aux règles énoncées dans le Statut de l'Église Orthodoxe Roumaine». La troisième section a argumenté le droit des prêtres de fonder des syndicats au sein de l'Église par le fait que «la création du syndicat en cause n'aurait porté atteinte ni à la légitimité des croyances religieuses ni aux modalités d'expression de celles-ci (paragraphe 75). Selon elle (la majorité de la Cour, n.n.), les juridictions nationales n'ont pas suffisamment établi que le statut du syndicat était incompatible avec une société démocratique ni qu'il représentait une menace pour la

examiné le principal problème [...] *le conflit entre le principe de l'autonomie des communautés religieuses, protégée par les articles 9 et 11, et le droit de fonder un syndicat, protégé par l'article 11* [...]», par conséquent n'existant pas une violation de l'article 11 de la Convention.

1. L'analyse de la controversée décision de la troisième Section de la CEDH (le 31 janvier 2012). De l'autonomie des cultes à la liberté syndicale des prêtres

Le renvoi du cas pour la Grande Chambre de la CEDH a été normal si l'on analyse du point de vue juridique et canonique la décision du 31 janvier 2012 de la troisième section de la CEDH. Une analyse[10] pertinente de la décision a été faite par le Directeur du *European Centre for Law and Justice (ECLJ)*, M. Grégor Puppinck (Docteur en Droit), étant une voix autorisée et compétente, car The European Centre for Law and Justice (organisation consacrée principalement à la défense de la liberté religieuse) s'était porté tierce partie dans la procédure devant la Cour.

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démocratie (paragraphe 76)». Une telle interprétation ignore l'autonomie des cultes de s'organiser et de fonctionner conformément aux propres statuts, les religieux ayant un statut spécial en vertu de leur responsabilité vocationnelle librement assumée. En plus, l'association en syndicats, au sein de l'Église, des prêtres avec les laïques employés à l'Église, est au moins discutable dans la perspective du rôle et du lieu occupé par les laïques dans l'Église, de leurs attributions, de leurs droits et de leurs obligations, mais aussi de la perspective strictement professionnelle. Malgré le fait que les membres du syndicat «ont simplement argué qu'ils n'avaient pas l'intention de contredire les dogmes religieux ou l'organisation de l'Eglise mais que leur objectif principal était la défense de leurs droits économiques et sociaux», une telle organisation syndicale des prêtres introduit une nouveauté dans la vie religieuse incompatible avec la mission du prêtre, avec le fonctionnement canonique de l'Église et cela uniquement si l'on regarde les objectifs de ce syndicat. Comme le constatent les deux juges susmentionnés, «on peut y lire que le syndicat a pour objectif de garantir à chacun de ses membres un travail qui corresponde à ses qualifications professionnelles et, notamment, qu'il organisera et financera des activités religieuses. Naturellement, le document mentionne le droit de grève, et il indique que l'archevêque doit communiquer des informations sur les promotions, les transferts et les questions budgétaires. Nous estimons qu'à la lumière de ces éléments du statut du syndicat, les juridictions nationales pouvaient raisonnablement considérer que la création de pareille organisation remettrait en question la structure hiérarchique traditionnelle de l'Eglise et la manière dont les décisions y étaient prises. Il ne ressort pas du statut que le seul objectif des membres du syndicat ait été de communiquer avec les autorités publiques compte tenu du fait que leurs contrats de travail étaient en quelque sorte reconnus par l'État. Il apparaît par ailleurs, à la lumière des différentes déclarations des parties versées au dossier, que cette affaire a pour toile de fond des dissensions au sein de l'Eglise. Si tel est le cas, les juridictions nationales sont certainement mieux placées que la Cour pour apprécier les faits de la cause». Les deux juges ont soutenu que «[...] En conséquence, nous ne pouvons conclure à la violation de l'article 11 et nous ne souscrivons pas à la décision d'octroyer au requérant une somme au titre de la satisfaction équitable», voir ici http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108841#{"itemid":["001-108841"]}.

[10] G. PUPPINCK, La liberté de l'Eglise contrainte à la Cour européenne des droits de l'homme, in: France Catholique (www.france-catholique.fr), 14 février 2012.

Comme le souligne d'une manière pertinente M. Puppinck, il est facile à constater dans la lecture de la décision du 31 janvier 2012 que c'est

> «une illustration de la tendance de la Cour à se comporter parfois comme un quatrième degré de juridiction, contrairement au principe de subsidiarité, et à manquer de clarté et de cohérence dans sa jurisprudence»[11].

La décision en cause est imprécise et manque de cohérence et de clarté, en observant ses limites de la perspective de l'approfondissement de sa propre jurisprudence, en existant une contradiction avec les principes antérieurs établis dans la jurisprudence de la Grande Chambre. Par conséquent, la troisième Section a changé sa propre doctrine sur la protection de la liberté religieuse (la protection des droits d'autrui), en accentuant dans ce cas l'aspect concernant l'ordre publique:

> «sans se demander si la non-reconnaissance du syndicat pouvait être justifiée par le respect de la liberté religieuse de l'Église, la Section s'est contentée de constater que ce syndicat ne constituait pas une menace pour l'ordre public et la démocratie, et que dès lors, il devait être reconnu légalement»[12].

D'après la conclusion de l'ECLJ, l'erreur fondamentale de la Section a consisté dans le fait qu'elle

> «a rattaché le respect des droits de l'Église non pas à la liberté religieuse, mais à l'ordre public [...] le second problème majeur de l'arrêt, qui découle en partie du premier, est la remise en cause de l'incompétence de l'État en matière religieuse, incompétence qui fonde le principe juridique de l'autonomie institutionnelle de l'Église à l'égard du pouvoir civil»[13].

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[11] Ibidem.

[12] Ibidem.

[13] Ibidem. En ce qui concerne le présent cas, le Syndicat «Păstorul cel Bun» c. la Roumanie, qui entraîne la liberté religieuse et la liberté syndicale des prêtres, le Directeur du *European Centre for Law and Justice*, M. Grégor PUPPINCK (Docteur en Droit) a réalisé une «Synthèse sur la situation des recommandations du Comité des Ministres dans le paysage juridique du Conseil de l'Europe» (27 mars 2012). A cette occasion, en se référant à la Convention et à la CEDH, PUPPINCK a souligné que «La Convention attribue à la Cour la compétence relative à l'interprétation et à l'application de la Convention et de ses Protocoles pour les questions qui lui sont soumises dans les conditions prévues par les articles 33, 34, 46 et 47 [...] En pratique, la Cour, en référence à son préambule, interprète la Convention en faveur du développement, et non seulement de la sauvegarde, des droits de l'homme et des libertés fondamentales. A cette fin, elle a développé la doctrine de l'effectivité des droits et de l'interprétation évolutive selon laquelle "la Convention vise à protéger des droits concrets et effectifs, et non théoriques et illusoires" (*Artico c. Italie*, arrêt du 13 mai 1980, § 33), et est "un instrument coupable, à interpréter à la lumière des conditions de vie actuelles" (*Vo c. France* [GC], no 53924/00, § 82) [...] Bien que la Cour énonce ne pas pouvoir créer un droit qui ne figure déjà dans la Convention et qu'elle ne peut interpréter la Convention contre sa lettre, sa jurisprudence montre que la réalité est plus nuancée. La Cour interprète la Convention de façon extensive (l'article 8 relatif à la vie privée), parfois

Compte tenu du nouveau contexte créé par la décision de la troisième Section, sur la base d'une analyse juridique qui est marquée par des faiblesses visibles, Le European Centre for Law and Justice, en qualité de tiers intervenant, relève les questions suivantes:

> «En effet, une fois reconnu légalement le syndicat, la Cour européenne pourra-t-elle forcer l'Église à collaborer avec lui? Ces syndicalistes disposeront-ils des moyens de l'action syndicale?»[14]

La réponse naturelle est donnée toujours par le respectif tiers intervenant:

> «Non, sauf à dénaturer complètement l'Église et le sacerdoce, comme le firent déjà les soviétiques en Roumanie en imposant la création du syndicat "L'Union des prêtres démocratiques" en 1945»[15].

Un problème fondamental qui naît dans la décision de la troisième Section est le manque de compréhension et d'interprétation correcte de la relation existante entre le prêtre et l'Église, celle-ci étant réduite au niveau de relation sociale de travail, l'Église étant un simple employeur privé et les prêtres de simples employés. Une telle vision par laquelle les prêtres sont perçus comme ayant une relation de travail avec l'Église, relation réduite et réglementée par le Droit du travail, mène à une sécularisation juridique de l'Église et du clergé qui affecte l'autonomie de l'Église en rapport avec l'État, les prêtres, par la vocation sacerdotale, en assumant pour toute la vie leur mission pastorale, en responsabilité envers l'Église[16]. En poursuivant cette ligne, de l'éloignement de l'autonomie de l'Église, on arrive à la prévalence de la liberté syndicale des prêtres au sein de l'Église, avec des conséquences sur le fonctionnement synodal-hiérarchique de l'Église sur la base des principes, de la législation et de la doctrine canonique, tout en gardant l'unité dogmatique, liturgique et canonique avec l'Orthodoxie Œcuménique toute entière.

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contre l'intention originale de ses auteurs (voir par exemple l'arrêt *Schalk et Kopf c. Autriche*, 24 juin 2010, §§ 101, 105 qui étend le champ d'application de l'article 12 (droit au mariage et vie familiale) à des situations non prévues), voire même contre l'interprétation littérale de la Convention (voir par exemple le récent arrêt *Sindicatul Păstorul Cel Bun c. Roumanie* no 2330/09 du 31 janvier 2012 dans lequel la Cour indique, contre la première phrase de l'article 11 paragraphe 2, "*que l'article 11 n'autorise l'Etat à imposer des restrictions au droit syndical qu'aux trois groupes de personnes visés au paragraphe 2 in fine de cette disposition, à savoir les membres des forces armées, de la police ou de l'administration, et sous réserve que ces restrictions soient légitimes*"»: http://eclj.org/PDF/eclj-situation -des- recommandations- du- cm-dans-le-paysage-juridique-du-conseil-de-europe-synthese.pdf [1. 7. 2013].

[14] Ibidem.

[15] Ibidem.

[16] Seulement si on regarde les conditions canoniques pour l'entrée dans le clergé, mais aussi les aspects historiques canoniques et juridiques concernant l'Église – institution religieuse, on constate quel est le rapport canonique pertinent entre l'Église et ses membres, le lieu et l'importance de chaque catégorie de membres au sein du corps ecclésial.

Concernant le «droit à la rétractation» des membres religieux du syndicat «Păstorul cel Bun», il n'a pas été mentionné par la Cour (la troisième Section) mais le droit interne de l'Église de révoquer (par rejet, déposition) les prêtres syndicalistes qui ne revenaient pas à l'obéissance canonique et à la loyauté. Par conséquent, on se demande si l'on met en discussion le droit de l'Église de révoquer ses prêtres[17]. Si le syndicat des prêtres avait été reconnu au sein de la structure organisationnelle de l'Église (de l'employeur), alors certainement certains problèmes seraient nés vis-à-vis de la révocation des leaders de syndicat. Cela parce que, conformément à la Loi no. 54/2003, l'actuelle Loi no. 62/2011, le management du syndicat est protégé contre les formes de conditionnement, contrainte ou limitation de l'exercice de leurs fonctions (l'art. 9). Pour les membres du management du syndicat, le contrat individuel de travail ne peut pas être modifié ou résilié pour des raisons non-imputables à eux, laissées à la disposition de l'employeur, qu'avec l'accord écrit du management du syndicat, conformément à l'art. 10, all. 1, de la Loi no. 54/2003. La révocation des manageurs d'un syndicat peut se faire seulement par la direction du syndicat, pour la violation du statut du syndicat, non pas celui de l'Église, mais aussi des dispositions légales. Dans la décision de la troisième Section on ne comprend pas exactement quelles sont les limites du droit syndical, si l'on peut arriver à la limitation de la liberté religieuse de priver l'Église de son propre droit canonique à la révocation des prêtres membres du syndicat ou faisant partie des organes de direction syndicaux.

En même temps, la Cour (la troisième Section) considère comme étant impossible la renonciation des prêtres et des employés laïques des centres diocésains à leurs droits fondamentaux, parmi lesquels la liberté syndicale (art. 11 de la Convention), basée sur l'importance *du contrat de travail*:

> «La Cour estime que la relation fondée sur un contrat de travail ne saurait être "cléricalisée" au point d'échapper à toute règle de droit civil (voir, *mutatis mutandis*, *Schüth c. Allemagne*, n° 1620/03, § 70, CEDH 2010-). Elle conclut que les membres du clergé et, à plus forte raison, les employés laïcs de l'Eglise ne sauraient être soustraits au champ d'application de l'article 11. Les autorités nationales peuvent tout au plus leur imposer des "restrictions légitimes" conformes à l'article 11 § 2 de la Convention» (§ 65).

Dans la précision de la Cour on observe l'accent mis sur l'importance du contrat de travail, qui ne doit pas être cléricalisé, respectivement sur la relation de travail (employé/prêtre – Église/employeur), cette dernière devant se soumettre à la législation du travail en Roumanie, mais aussi sur la distinction religieux/laïque employé de l'Église concernant l'appartenance à ce syndicat au sein de l'Église. On ne mentionne pas la jurisprudence de la Cour sur le «statut spécifique de la

[17] G. TILKIN, Ar trebui administrat corpul preoțesc al bisericilor de către sindicate ale membrilor acestui corp? Semnificații, limite și incertitudini ale hotărârii CEDO Sindicatul „Păstorul cel Bun" împotriva României, in: RDS 4 (2012) 55.

renonciation, lié à la personne du prêtre de culte»[18]. Cette chose suppose[19] que dans la vertu de l'autonomie, l'Église peut transférer les prêtres conformément à sa propre procédure, le prêtre s'engageant à respecter les règles internes et celles de procédure. Par conséquent, dans la jurisprudence de la Cour on a consacré la possibilité de renoncer à une partie de la liberté personnelle par le prêtre qui doit se soumettre eux règles de l'Église qu'il sert.

Au lieu de prendre en considération le fait que certains membres du syndicat étaient des curés de paroisse, les directeurs spirituels et administratifs de leurs unités territoriales administratives se trouvant dans la compétence des éparchies respectives, présidents des Assemblées paroissiales et des conseils paroissiaux, la Cour a souligné plutôt la nécessité de la distinction entre les religieux et les laïques employés à l'Église avec des contrats de travail et leur droit de s'organiser en syndicat.

En effet, dans certaines diocèses il existe cette tendance de faire confusion entre les droits et les obligations des religieux et des laïques, ces derniers n'étant pas employés à l'Église, parfois les laïques étant soumis a la procédure spécifique aux religieux (ex. le droit canon pénal), contre le statut et les réglementations ecclésiastiques. On impose une telle précision, au moins comme signal pour le respect par la direction ecclésiastique de sa propre législation interne concernant la distinction entre prêtre et laïque et l'effort de ne pas abuser contre les laïques en vertu de l'autonomie religieuse mal entendue ou par l'application abusive, mal intentionnée, de la législation canonique. Malgré tout cela, l'argumentation du Tribunal de Dolj est pertinente, en refusant l'enregistrement du syndicat pour la raison que certains prêtres sont curés de la paroisse. Cet argument de l'instance de Roumanie a été enlevé par la Cour, étant considéré comme controversé et de nature secondaire. Cette position de la Cour est inexplicable, surtout que sa propre jurisprudence soutient la nécessité d'une mise en balance procédurale en rapport avec la nature de la fonction (la cause *Obst c/ l'Allemagne*, no. 425/03, du 23 septembre 2010). Dans cette cause, la Cour a confirmé la décision de l'instance fédérale allemande, habilitée à juger les conflits de travail, en appréciant la mise en balance des intérêts en jeu, compte tenu de l'importance de la fonction de l'employé et de l'infraction respective[20].

De la décision de la CEDH (la troisième Section) on peut observer l'invocation des arguments «exclusivement d'ordre religieux» (§ 77) de l'instance roumaine, en revanche sans analyser si cette motivation est pertinente et suffisante[21]. En plus, pour arriver à la conclusion de la violation de l'art. 11 de la Convention, la Cour se résume à l'analyse des répercussions du contrat individuel de travail, des relations employé-employeur, la sanction de l'employé pour ne pas

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[18] Ibidem, 54.

[19] Voir la cause Ahtinen c/ la Finlande.

[20] Ibidem, 55.

[21] «Eu égard à ces circonstances, la Cour considère que les motifs invoqués par le tribunal départemental n'apparaissent pas suffisants pour justifier le rejet de la demande d'enregistrement du requérant (voir, *mutatis mutandis, Schüth*, précité, § 74, *Siebenhaar c. Allemagne*, n° 18136/02, § 45, 3 février 2011, et *Obst*, précité, § 51)» (§ 86).

accomplir ses obligations et la signature du contrat et la limitation de la liberté syndicale, en invoquant ici la Directive 78/2000/CE:

> «Par ailleurs, la Cour note que les réglementations internationales pertinentes et, en particulier, le cinquième considérant de la directive 78/2000/CE du Conseil, ne permettent pas qu'il soit porté atteinte à la liberté d'association, dont relève le droit de toute personne de fonder avec d'autres des syndicats et de s'y affilier pour la défense de ses intérêts» (§ 83).

Si l'on regarde la modalité d'application du droit du travail concernant la relation entre le prêtre et son Église dans les états membres de l'Union Européenne et du Conseil de l'Europe, on peut constater de nombreuses différenciations, sans pouvoir affirmer qu'il y a, donc, une ressemblance dans le domaine. D'ailleurs, même dans la jurisprudence de la CEDH on accepte une *marge d'appréciation des états* en ce qui concerne la séparation des certaines règlementations de la législation du travail des contrats de travail des employés des cultes légalement reconnus, sauf ceux des prêtres[22]. D'ici peut-on interpréter que les relations de travail des prêtres avec l'Église peuvent être exceptées dans une plus grande mesure de ces normes du droit du travail, compte tenu de la spécificité de ces relations (prêtre-Église) au contexte de l'autonomie des cultes de s'organiser et de fonctionner[23].

> «Le manque de compréhension de la Section en ce qui concerne l'Église, comme institution sacrée, et le sacerdoce, comme relation entre un prêtre et son Église, a eu comme conséquence le traitement de l'Église comme un simple employeur privé, et des prêtres come des simples employés»[24].

Dans ce contexte, les états de l'Union Européenne qui garantissent par la loi l'autonomie des cultes devraient pouvoir disposer aussi à une applicabilité partielle de la législation du travail concernant les relations entre l'Église et les religieux, respectivement le personnel laïque employé dans les unités territoriales administratives ecclésiastiques[25]. En fait, dans ce sens se prononce aussi le Traité du fonctionnement de l'Union Européenne, dans le sens que toute la législation de l'Union Européenne «respecte et ne prévale pas sur le statut dont bénéficient, en vertu du droit national, les églises (les cultes) et les associations ou les communautés religieuses des états membres»[26]. Dans ce contexte, quelles sont les

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[22] Voir *Schüth c/ l'Allemagne* (le 23 septembre 2010, no. 1620/03) et *Obst c/ l'Allemagne* (le 23 septembre 2010, no. 425/03).

[23] Au présent, certains états européens reconnaissent la spécificité des relations de travail entre les prêtres et l'Église, l'Allemagne reconnaissant un caractère clérical du contrat de travail, existant ici des conséquences légales, alors qu'en France on n'impose pas l'obligation à un contrat de travail pour les prêtres catholiques.

[24] PUPPINCK – POPESCU, Critica hotărârii CEDO, 6-7.

[25] TILKIN, Corpul preoțesc, 49.

[26] Voir TFUE, art. 17.

raisons pour lesquelles la CEDH accentue le rapport entre les prêtres et l'Église, comme relations de travail, en entraînant aussi des discussions sur la liberté syndicale? On a mis donc en discussion les régimes partiaux concernant les relations de travail entre les prêtres et l'Église, respectivement la prise en considération ou non des contrats de travail soumis à la législation du travail. C'est un sujet sensible et difficile à aborder dans le contexte actuel de la législation des états, de la législation particulière des Églises et de la jurisprudence de la CEDH.

Cette section de la CEDH a cité du droit interne et international, en constatant une incohérence dans la citation des précédentes, mais aussi un manque d'analyse des arguments de la dernière instance roumaine, du Tribunal de Dolj, «concernant l'autonomie organisationnelle des cultes religieux, y compris les éléments de spécificité des fonctions de prêtre [...]»[27]. La citation du Droit interne, mais aussi international, par la troisième Section de la CEDH se caractérise par omissions, limites et controverses juridiques canoniques. Dans la décision de la CEDH en première instance (la troisième Section) on surprend le fait qu'on omet d'importantes normes internes pertinentes sur le conflit des droits qui constitue le fondement du cas en cause. Comme le constate Gerald Tilkin[28] du département de Droit des religions de l'Université Catholique de Louvain, la Cour n'a pas gardé dans la citation des articles constitutionnels (la Constitution de la Roumanie de 2003) leur ordre numérique, en plaçant avec priorité les articles par lesquels on protège la liberté syndicale (art. 40): «*Le droit à l'association*: (1) Les citoyens peuvent s'associer librement en partis politiques, syndicats, patronats et d'autres formes d'association»[29], et le droit au travail et à la protection sociale du travail (art. 41), en défaveur de la liberté religieuse et de l'autonomie des cultes (art. 29):

> «(1) La liberté de la pensée et des opinions, mais aussi la liberté des croyances religieuses ne peuvent pas être limitées d'aucune manière. Personne ne peut être contraint à adopter une opinion ou bien à adhérer à une

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[27] TILKIN, Corpul preoțesc, 45. Dans les conditions où la Cour aurait analysé toute l'argumentation du Tribunal de Dolj, elle aurait impliqué inévitablement toutes les pièces pertinentes au dossier, en approfondissant les deux perspectives de la législation interne: les dispositions du Statut de l'Église Orthodoxe Roumaine sur la participation de ses membres à l'administration du pouvoir ecclésiastique et les normes du droit roumain sur la fondation des syndicats et le pouvoir des employeurs. Ainsi, en considérant que la motivation de l'instance d'appel de Roumanie est insuffisante, même si elle a tenu compte de l'ensemble du droit roumain, on se pose naturellement des questions comme: l'organisation d'un syndicat des prêtres et des laïques employés au sein de l'Église touche-t-elle à l'organisation synodale hiérarchique de l'Église et du principe canonique constitutionnel (organique)? Une telle organisation syndicale des prêtres affecte-t-elle la procédure des instances disciplinaires et juridiques dans la prononciation des punitions? Alors, est-ce qu'on touche au processus statutaire décisionnel dans l'Église? Ce sont seulement quelques questions auxquelles nous allons répondre d'une manière succincte de la perspective juridique canonique, compte tenu de la législation interne et omise d'être citée d'une manière pertinente par la législation européenne.

[28] Ibidem, 46. Celui-ci a rédigé une étude sur ce thème dans le projet FSR de l'UCL et avec l'appui du projet RELIGARE (UE-FP7-244635), financé par la Commission Européenne.

[29] «Constitution de la Roumanie», publiée dans Le moniteur officiel nr. 767 du 31 octobre 2003.

croyance religieuse, contraires à ses convictions. (2) La liberté de la conscience est garantie; elle doit se manifester dans l'esprit de la tolérance et du respect réciproque. (3) Les cultes religieux sont libres et s'organisent conformément aux propres statuts, dans les conditions de la loi [...] (5) Les cultes religieux sont autonomes par rapport à l'état et se réjouissent de son appui, y compris en facilitant l'assistance religieuse dans l'armée, dans les hôpitaux, dans les pénitenciers, dans les asiles et les orphelinats»[30].

Par cette inconséquence de citation et par l'ordre promu, la Cour a donné priorité à la liberté syndicale par rapport à la liberté religieuse, celle-ci étant protégée par la Constitution de la Roumanie de 2003, mais aussi par l'actuelle Loi no. 489/2006 sur la liberté religieuse et le régime général des cultes (on cite les art. 1, 5, 8, 10, 17, 23, 24 et 26).

En ce qui concerne la citation par la première instance (la troisième section) de la CEDH du Statut de l'Église Orthodoxe Roumaine (2008), on observe non seulement la mention expresse de l'article 43 où l'on montre seulement que le curé est nommé par l'évêque pour une paroisse qui se trouve dans la juridiction canonique de l'éparchie: «La paroisse est la communauté des chrétiens orthodoxes, religieux et laïques, située sur un certain territoire et subordonnée au Centre Archidiocésain du point de vue canonique, juridique, administratif et patrimonial, *menée par un curé de paroisse nommé par le hiérarque (l'archevêque ou l'évêque) de l'éparchie respective*» (cf. can. 2, 31 et 39 ap., 8 IV oecum., 14 VII oecum., 9 Antioche, 10 Carthage)[31], sans corroborer cet article (43, Statut) avec l'article 50 du Statut de l'Église Orthodoxe Roumaine dans lequel on précise en détail quelles sont les attributions du curé de paroisse dans sa qualité d'administrateur des affaires de l'église au niveau de sa paroisse. Parmi ces attributions statutaires, très importantes dans le cas présent, on mentionne:

«[...] c) mène à la réalisation toutes les disposition du présent statut, des règlements ecclésiastiques et des organes religieux centraux et diocésains en ce qui concerne la paroisse; d) mène à la réalisation les décisions des organes diocésains et des dispositions de l'autorité ecclésiastique supérieure (archiprêtre, évêque ou archevêque) reliée à la vie de la paroisse; [...] f) sans l'approbation préalable écrite du hiérarque, il ne peut pas représenter la paroisse dans la justice, devant les autorités locales et devant les tiers, personnellement ou par délégués. Dans la même mesure, les prêtres des paroisses, en vertu du vœu d'obéissance (subordination) devant le hiérarque déposé à l'investissement (Ordination) et, respectivement, les moines, en vertu du vœu monacal de l'obéissance, ne peuvent pas comparer devant les instances justicières sans l'approbation écrite préalable du hiérarque, y

[30] Ibidem.
[31] Voir le Statut de l'Église Orthodoxe Roumaine de 2008.

compris dans des cas d'intérêt personnel; la violation de cette disposition attire des sanctions canoniques et disciplinaires [...]»[32].

En même temps, de la décision de la troisième section de la CEDH on peut constater l'ignorance des articles statutaires concernant les attributions des deux organes collégial mixtes au niveau de l'éparchie, *l'Assemblée diocésaine* (art. 90) et le *Conseil diocésain* (art. 95), le premier étant un organe délibératif et le deuxième un organe exécutif de la composition desquels font partie des prêtres (un tiers) mais aussi des laïques (deux tiers). Si l'on analyse les attributions de ces organes collégiaux et si l'on respecte l'ensemble des dispositions statutaires et réglementaires, les revendications syndicales cléricales n'ont plus leur raison. D'ailleurs, les attributions de ces deux fors religieux, compte tenu de leur composition, donc de la représentativité du corps ecclésial, sont proches aux compétences légales d'une organisation syndicale en vertu de la loi no. 54/2003 (art. 30). Cette loi sur la liberté syndicale en Roumanie a été abrogée par la Loi no. 62/2011 du dialogue social[33] (avant que la troisième section de la CEDH se prononce, en janvier 2012).

Comme l'on a montré ci-dessus, les éparchies autonomes du point de vue interne de l'Église Orthodoxe Roumaine sont menées par des organes compétents unipersonnels (l'évêque) mais aussi par des organes supérieurs collégiaux mixtes, délibératifs et exécutifs. L'organe délibératif pour tous les problèmes administratifs, culturels, socio-philanthropiques, économiques et patrimoniaux de l'éparchie est l'Assemblée diocésaine (art. 90, Statut). Les membres de ce for sont des prêtres (un tiers) et des laïques (deux tiers), ces derniers participant aux élections uniquement avec la bénédiction (l'accord) de l'évêque, comme une garantie de leur croyance, de leur vie morale et de leur implication authentique dans l'activité de l'Église. Les membres laïques peuvent être révoqués par l'Assemblée diocésaine, avec l'accord de l'évêque, si l'on constate qu'ils ne représentent pas les intérêts de l'éparchie et de l'Église, en déroulant des activités contre l'Église. L'Assemblée diocésaine est l'organe collégial supérieur au niveau de l'éparchie, représentant le clergé mais aussi les simples croyants (les laïques), qui participent activement à la vie de l'Église, avec compétence décisionnelle à l'administration du pouvoir religieux, particulièrement à l'exercice du pouvoir juridique.

A coté de l'Assemblée diocésaine fonctionne le Conseil diocésain, formé de 3 prêtres et 6 laïques, élus par l'Assemblée diocésaine. Ce sont des organes collégiaux mixtes statutaires, ayant de la compétence décisionnelle. Un éventuel enregistrement d'un syndicat des prêtres et des laïques aurait mené à l'affectation

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[32] Le Statut de l'Église Orthodoxe Roumaine de 2008. En même temps, l'article 49 du Statut de l'Église Orthodoxe Roumaine précise que «(1) Le curé de la paroisse, comme délégué du hiérarque, est le pasteur spirituel des croyants d'une paroisse, et dans l'activité *administrative il est le manageur de l'administration paroissiale et le président de l'Assemblée paroissiale, du Conseil paroissial et du Comité paroissial.* (2) *L'investissement ou la révocation de l'office de curé de la paroisse se font par le hiérarque*».

[33] La liberté syndicale est réglementée par la Loi du dialogue social, no. 62/2011.

de l'organisation et du fonctionnement canonique, statutaire, de ces organes compétents, car les personnes non-statutaires (les représentants syndicaux) auraient du être invitées à ce conseil diocésain (équivalent juridiquement avec un conseil d'administration). Tout cela parce que l'article 30 (1) de la loi roumaine des syndicats, 54/2003, impose à l'employeur, donc en spécial aux éparchies, «d'inviter les délégués élus des organisations syndicales représentatives et de participer dans les conseils d'administration *à discuter les problèmes d'intérêt professionnel, économique, social, culturel* ou sportif», autrement l'employeur, en vertu de l'art. 51 de la loi mentionnée, étant passible d'une amende comprise entre 20 millions ROL (approximativement 500 Euros) et 50 millions ROL (approximativement 1200 Euros).

Si l'on analyse la loi roumaine des syndicats (la Loi no. 54/2003), on peut observer facilement les compétences très similaires de l'Assemblée diocésaine et du Conseil diocésain par rapport à l'organisation syndicale. Dans le contexte de la représentation des membres du syndicat en rapport avec l'employeur, tout en respectant l'ordre juridique de l'Église, les prêtres et les fidèles laïques sont représentés dans les organes de direction collégiaux, déjà cités, par des élections, ayant de la compétence décisionnelle. La présence des représentants syndicaux affecterait la procédure du fonctionnement et la composition statutaire de ces organes d'administration du pouvoir juridictionnel. Ainsi, on ne peut pas imposer une structure syndicale au sein de l'Église qui affecte son organisation et son fonctionnement canonique traditionnel, la manière de prendre les décisions, celle-ci étant une ingérence concernant l'autonomie organisationnelle des religions. Le refus de l'enregistrement du syndicat dans l'Église équivaut au respect de la liberté religieuse des membres de l'Église, car on peut affirmer que l'élection des membres des organes de direction représentatifs de l'Église constitue une manifestation de la liberté religieuse, comme s'est prononcée la Cour sur l'élection des leaders religieux.

Donc, en ignorant l'ensemble de la législation interne et en omettant la citation de certains aspects essentiels du statut ou de la loi des syndicats, «la Cour (la troisième Section, n.n.) ne s'est pas située dans la position de pouvoir évaluer avec suffisante certitude les données sur la base desquelles peser le *fond* du litige»[34].

Dans l'éventualité de garder la décision de la troisième section de la CEDH, l'enregistrement du syndicat aurait affecté la manière de décision au sein des éparchies, il aurait affecté la tradition orthodoxe toute entière. Ce fait est souligné par la Cour comme étant la motivation insuffisante du Tribunal de Roumanie:

> «[...] Elle (la Cour, n.n.) constate également que le tribunal a fondé le rejet de la demande du requérant, d'une part, sur le besoin de protéger la tradition chrétienne orthodoxe, ses dogmes fondateurs et le mode canonique de prise des décisions et, d'autre part, sur l'impossibilité légale pour les prêtres de se

[34] TILKIN, Corpul preoțesc, 53.

syndiquer étant donné qu'ils exerçaient des fonctions de direction dans leurs paroisses» (§ 71).

Mais cette motivation du Tribunal roumain a été fondée sur le Statut de l'Église Orthodoxe Roumaine, cité ci-dessus, étant ignoré par l'instance européenne, même si le statut a été validé par le Gouvernement de la Roumanie et reconnu par la législation interne. Dans ce cas on impose une limitation de la liberté syndicale (d'association), celle-ci étant nécessaire dans une société démocratique, mais seulement si l'article 11 de la Convention est interprété dans la perspective de l'article 9 sur la liberté religieuse.

L'instance européenne (la troisième section) a cité d'une manière incohérente les articles de la Loi no. 54/2003 sur la liberté syndicale (en vigueur à la date de l'introduction de l'action auprès des instances de Roumanie), sans mentionner

> «les difficultés de révocation des manageurs d'un syndicat (art. 9 et 10), l'imposition légale de participation des délégués syndicaux élus dans les organisations de profil représentatives aux réunions des conseils d'administration (art. 30), et non plus celles qui imposent des sanctions pénales sévères au cas de la violation de la loi sur la liberté syndicale (art. 51 et 53)»[35].

Sans développer ici la citation du Droit international, on précise que la troisième Section se limite initialement à citer uniquement deux textes juridiques sur la défense de la liberté syndicale, l'art. 5[36] de la *Charte sociale européenne* (révisée, 1999) et l'art. 12[37] § 1 de la *Charte des droits fondamentaux de l'Union européenne*, tout en pouvant affirmer que la troisième Section de la CEDH, dans sa décision, invoque souvent certains précédents, sans renvois extensifs, même créatifs en plus[38].

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[35] Ibidem, 46.

[36] «En vue de garantir ou de promouvoir la liberté pour les travailleurs et les employeurs de constituer des organisations locales, nationales ou internationales, pour la protection de leurs intérêts économiques et sociaux et d'adhérer à ces organisations, les Parties contractantes s'engagent à ce que la législation nationale ne porte pas atteinte, ni ne soit appliquée de manière à porter atteinte à cette liberté. La mesure dans laquelle les garanties prévues au présent article s'appliqueront à la police sera déterminée par la législation ou la réglementation nationale. Le principe de l'application de ces garanties aux membres des forces armées et la mesure dans laquelle elles s'appliqueraient à cette catégorie de personnes sont également déterminés par la législation ou la réglementation nationale».

[37] «Toute personne a droit à la liberté de réunion pacifique et à la liberté d'association à tous les niveaux, notamment dans les domaines politique, syndical et civique, ce qui implique le droit de toute personne de fonder avec d'autres des syndicats et de s'y affilier pour la défense de ses intérêts». – acest articol 12 § 1 din Charte des droits fondamentaux de l'Union européenne este acelaşi articol 11 al Convention EDH.

[38] A se vedea detalii la N. HERVIEU, La liberte syndicalâe franchit les portes de l'Eglise, in: Combats pour les droits de l'homme (CPDO): http://combatsdroitshomme.blog.lemonde.fr/ [25. 11. 2012].

2. La position officielle du Patriarcat Roumain par rapport à la décision de la troisième Section de la CEDH

Dans les conditions où la majorité des juges de la troisième section a conclu «qu'il y a eu violation de l'article 11 de la Convention», l'Église Orthodoxe Roumaine, culte légalement reconnu en Roumanie sur la base de son propre statut et en conformité avec la législation interne roumaine, dont le fonctionnement était affecté par la reconnaissance du syndicat des prêtres, a soutenu que l'affaire soit renvoyée devant la Grande Chambre[39] pour être rejugée. Par conséquent, le 9 juillet 2012 le collège de la Grande Chambre a décidé de renvoyer l'affaire devant la Grande Chambre en vertu de l'article 43 de la Convention (à la suite d'une demande formulée par le Gouvernement le 27 avril 2012). La position officielle de l'Église Orthodoxe Roumaine dans cette cause, après la prononciation de la décision, défavorable à la vie religieuse et considérée comme inadéquate par le Patriarcat Roumain, a été exprimée dans un communiqué par le Saint Synode de l'Église Orthodoxe Roumaine, nommé synthétiquement et suggestivement «la vocation sacerdotale a été assimilée à l'action syndicale» et publié par l'Agence de Presse «Basilica» de la Patriarchie[40]. La décision de la troisième Section de la CEDH a été surprenante, le Patriarcat Roumain constatant

> «la connaissance tronquée (insuffisante) par la CEDH du spécifique des relations entre l'État et les cultes en Roumanie et l'ignorance des dispositions de la Constitution de la Roumanie (art. 29), de la Loi des Cultes no. 489/2006 sur la liberté religieuse et le régime général des cultes en Roumanie (art. 8) et du statut pour l'organisation et le fonctionnement de l'Église Orthodoxe Roumaine reconnu par la Décision du Gouvernement no. 53/2008 et publié dans le Moniteur officiel no. 50/22 janvier 2008 – Statut qui énonce clairement l'autonomie et la liberté de l'Église par rapport à l'État»[41].

En même temps, le Patriarcat Roumain a souligné l'importance du droit interne roumain et du droit particulier de l'Église Orthodoxe Roumaine, les prêtres n'ayant pas de relations de travail spécifiques aux employés civiles mais eux, par la consécration, obtiennent la vocation pour la mission ou «service librement assumé aux communautés de croyants» (art. 123 a. 7 du Statut)[42].

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[39] «1. A l'origine de l'affaire se trouve une requête (no 2330/09) dirigée contre la Roumanie et dont le syndicat *Păstorul cel Bun* (le Bon Pasteur) a saisi la Cour le 30 décembre 2008 en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales ("la Convention"). Le président de la Grande Chambre a accédé à la demande de non-divulgation de leur identité formulée par les membres du syndicat requérant (article 47 § 3 du règlement de la Cour)»: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108841#{"itemid":["001-108841"]} [10. 7. 2013].

[40] www.basilica.ro/ro/stiri/hotarare_inadecvata_la_cedo_vocatia_sacerdotala_a_fost_asimilata_cu_actiunea_sindicala, [1. 2. 2012].

[41] Ibidem.

[42] Ibidem.

En plus, le Patriarcat Roumain a souligné un aspect très important, trop peu observé par les juristes qui ont essayé d'aborder cette problématique, la décision de la troisième Section étant discutable de cette perspective aussi. Il s'agit du statut du syndicat qui est contre la Loi des cultes no. 489/2006, mais aussi contre le Statut de l'Église et la législation canonique orthodoxe par le but fixé et par les nombreux objectifs poursuivis pour atteindre ce but[43].

En effet, beaucoup d'entre les objectifs proposés par le syndicat sont incompatibles avec la propre mission sacerdotale des prêtres, avec leur propre vocation; dans le cas des prêtres on ne peut pas parler, par exemple, de l'utilisation de «la pétition, la manifestation et la grève comme moyens de défense des intérêts de ses membres [...]» (pt. 3.2, j., le Statut du syndicat), car cet objectif est contre la Loi des cultes qui reconnait le statut des cultes de «facteurs de la paix sociale»

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[43] Pour être le plus complet possible on mentionne ici le but du syndicat, mais aussi les objectifs, pour l'analyse, tels qu'on les retrouve cités dans la décision définitive de la Grande Chambre de la CEDH: «*Le but* du syndicat du personnel clérical et laïc travaillant dans les paroisses ou dans d'autres structures ecclésiastiques qui relèvent de la juridiction administrative et territoriale de la métropole d'Olténie a été défini librement. Il consiste à représenter et défendre les droits et intérêts professionnels, économiques, sociaux et culturels de ses membres clercs et laïcs dans leurs rapports avec la hiérarchie de l'Eglise et le ministère de la Culture et des Cultes. *Afin d'atteindre ce but, le syndicat*: a) veille au respect des droits fondamentaux de ses membres au travail, à la dignité, à la protection sociale, à la sécurité au travail, au repos, aux assurances sociales, aux aides en cas de chômage, aux droits à la retraite et aux autres droits prévus par la législation en vigueur; b) veille à ce que chacun de ses membres puisse exercer un travail qui corresponde à sa formation professionnelle et à ses compétences; c) veille au respect des dispositions légales relatives à la durée des congés et des jours de repos; d) assure la promotion de la libre initiative, de la concurrence et de la liberté d'expression de ses membres; e) veille à l'application et au respect scrupuleux des dispositions légales concernant la protection du travail et des droits qui en découlent; f) veille à la pleine application des dispositions de la loi n° 489/2006 relative à la liberté religieuse et au régime juridique des cultes, du Statut de l'Eglise orthodoxe roumaine et des saints canons de l'Eglise orthodoxe roumaine; g) négocie avec l'archevêché et la métropole les conventions collectives et les contrats de travail, qui doivent préciser expressément tous les droits et devoirs des clercs et des laïcs; h) assure la protection de son président et de ses représentants pendant leur mandat et après l'expiration de celui-ci; i) veille à être représenté à tous les niveaux et dans toutes les instances de décision, conformément aux dispositions légales en vigueur; j) utilise la pétition, la manifestation et la grève comme moyens de défense des intérêts de ses membres, de leur dignité et de leurs droits fondamentaux; k) assigne en justice les personnes physiques ou morales qui méconnaissent la législation du travail, le droit syndical ou les dispositions de la convention collective signée au niveau de la métropole ou des contrats de travail si les litiges correspondants n'ont pas pu être résolus par la négociation; l) veille au respect et à l'application des dispositions légales relatives à la rémunération et à la garantie de conditions de vie décentes; m) œuvre pour que les clercs et les laïcs puissent bénéficier de l'ensemble des droits dont jouissent d'autres catégories sociales; n) constitue des caisses d'entraide; o) édite et imprime des publications visant à informer ses membres et à défendre leurs intérêts; p) crée et administre dans le respect des dispositions légales et dans l'intérêt de ses membres des organes de culture, d'enseignement et de recherche dans le domaine de l'activité syndicale, des établissements sociaux et des établissements socioéconomiques; r) lève des fonds pour l'entraide de ses membres; s) organise et finance des activités religieuses; ş) formule des propositions pour les élections organisées dans les structures locales de l'Eglise et propose la participation au Saint Synode de l'Eglise orthodoxe roumaine d'un prêtre faisant partie de ses membres; t) demande à l'archevêché qu'il présente lors de l'assemblée des prêtres un rapport sur ses revenus et ses dépenses; ţ) demande au Conseil de l'Archevêché qu'il communique, chaque trimestre ou chaque année, les décisions prises en matière de nominations, de transferts et de répartition des budgets».

(art. 7 al. 1, la Loi des cultes no. 489/2006). En plus, il est inacceptable de mentionner comme objectif pour les religieux

> «le respect des dispositions légales relatives à la durée des congés et des jours de repos» (pt. 3.2, c., du Statut du syndicat), car une telle disposition s'interprète dans le sens que «les jours de samedi et dimanche, le premier et le deuxième jour des Saintes Pâques, de la Naissance de Christ et de la Pentecôte, mais aussi d'autres fêtes légales qui coïncident avec les fêtes religieuses seraient *des jours fériés pour les religieux membres du syndicat*, juste quand les croyants sont les plus nombreux à fréquenter l'église»[44].

Un autre objectif, conformément auquel le syndicat «veille à être représenté à tous les niveaux et dans toutes les instances de décision, conformément aux dispositions légales en vigueur» (pt. 3.2, i., le Statut du syndicat), par lesquelles on sollicite ainsi la représentation des membres du syndicat à tous les niveaux de décision, même au niveau de l'autorité supérieure ecclésiastique au niveau de l'Église Orthodoxe Roumaine (le Saint Synode plénier), en invoquant uniquement la loi civile de l'État, c'est une violation du droit de l'Église de s'organiser et de fonctionner conformément à son propre statut.

Le Patriarcat Roumain souligne la violation de l'autonomie de l'Église, en constatant que le syndicat souhaite de se constituer dans un

> «groupe de pression et d'éluder les voies statutaires de consultation des religieux dans les réunions des diocèses, les conférences administratives mensuelles des prêtres, les cercles pastoraux, les conférences pastorales missionnaires des prêtres semestrielles ou dans les Permanences des Conseils des diocèses, y compris dans le Conseil National Religieux et l'Assemblée Nationale Religieuse de l'Église Orthodoxe Roumaine»[45].

Cette position du Patriarcat Roumain est normale et met en évidence la possibilité statutaire des prêtres de se consulter à travers les diverses réunions ou organismes ecclésiastiques collégiaux, mais on se demande qu'est-ce qui se passe dans le cas où la libre expression des religieux ou des employés laïques de l'Église (art. 10, Convention) mène à des opinions divergentes par rapport à l'autorité religieuse? Bien sûr, il ne s'agit pas de la profession de foi de l'Église ou des normes religieuses morales, mais seulement des aspects, par exemple, du respect de la loi et de la propre législation interne religieuse, sans aucun abus. Dans ce cas, on devrait, avec responsabilité, sans arriver aux instances civiles, poursuivre dans le milieu interne religieux uniquement le bien-être de l'Église et non pas des buts étrangers à celle-ci.

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[44] www.basilica.ro/ro/stiri/hotarare_inadecvata_la_cedo_vocatia_sacerdotala_a_fost_asimilata_cu_actiunea_sindicala, [1. 2. 2012].

[45] Ibidem.

III. L'autonomie des cultes et l'interprétation de la liberté d'association (art. 11, Convention) dans la perspective de l'article 9 de la Convention sur la liberté de religion

La liberté de la pensée, de la conscience et de la religion[46] sont des libertés fondamentales de l'homme, tenant de son propre être et conditionnant toute société démocratique[47]. Ainsi, ces libertés doivent-elles être respectées dans un état qui se prétend être démocratique, ou dans le cas contraire cet état se situe dans la sphère du totalitarisme. Dans ce sens, l'état a l'obligation négative de ne pas limiter le droit de ses citoyens dans la liberté de la pensée, de la conscience et de la religion, ses immixtions dans ces domaines étant permis seulement dans la mesure où elles visent l'élimination de certaines menaces concernant l'ordre, la santé, la morale ou la sécurité publique, mais aussi les droits et les libertés d'autres personnes. Mais l'état a aussi l'obligation positive d'assurer un climat favorable à l'exercice des droits garantis par l'art. 9. Dans la sphère des mesures que l'état doit prendre pour assurer ce climat favorable entre aussi l'obligation de mobiliser ses autorités dans le but d'intervenir dans le cas où, contre une église ou un groupe religieux, on mène une campagne diffamatoire qui se concrétise dans des attaques offensifs et diffamateurs venus de la part d'autres personnes[48].

En ce qui concerne la Convention européenne des droits de l'homme, on peut constater qu'elle respecte la liberté de chaque état membre de l'UE d'organiser ses propres rapports avec „les cultes reconnus"[49], expression fréquemment rencontrée, la CEDH elle-même restant neutre par rapport aux systèmes de relations Église-État imposés dans les différents états de l'UE, mais extrêmement prudente dans le contrôle des effets de l'organisation des cultes[50]. Comme Gérard Gonzalez l'affirme, la liberté religieuse promue par la jurisprudence de la CEDH contribue en grande mesure à uniformiser les politiques d'état en matière religieuse[51], les états membres de l'UE, quoiqu'ils soient confessionnels, laïques ou mixtes, étant sur la voie du respect pour la pluralité des cultes.

Le développement du problème de la liberté syndicale des prêtres, qui vise tous les cultes religieux, par l'implication de la liberté religieuse mais aussi de la

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[46] L. G. LOUKAIDES, The European Convention on Human Rights: collected essays, Boston 2007; J. E. S. FAWCETT, The application of the European Convention on human rights, Oxford ²1987; H. GOLSONG, La Convention Européene des Droits de l'Homme et les personnes morales, in: Université Catholique de Louvain (ed.), Les Droits de l'Homme et les personnes morales, Bruxelles 1970, 15-33.

[47] R. ANGHEL – C. A. ANGHEL, Aspecte referitoare la libertatea credinţelor religioase desprinse din jurisprudenţa Curţii europene a drepturilor omului, in: Analele Universităţii Ovidius Constanţa. Sér. Droit et Sciences Administratives 1 (2006) 359.

[48] Comis. EDH, 14 juillet 1980, no. 8282/1978, *Church of Scientology et 128 de ses fidèles c/Suède*, DR nr. 21, p. 109 dans C. BÎRSAN, Convenţia europeană a drepturilor omului. Comentariu pe articole vol I: Drepturi şi libertăţi, Bucureşti 2005, 704.

[49] I. C. IBAN, La pertinence des cultes reconnus dans les systèmes États/religions dans l'Union européenne, in: RDC 54 (2004) 67-75.

[50] G. GONZALEZ, Convention européenne des droits de l'homme, cultes reconnus et liberté de religion, in: ibidem, 49-65.

[51] Ibidem.

relation entre les cultes et les propres employés (clergé ou laïques) s'impose à nécessité de nos jours, d'autant plus que dans le sein de l'Union Européenne on soutient la garantie par les états membres de la liberté à la religion et de la non-discrimination, le respect de la diversité religieuse et la culture du dialogue religieux. Dans le nouveau contexte européen de l'expansion de l'Union Européenne vers l'Est, comprenant aussi des états majoritairement orthodoxes (la Roumanie et la Bulgarie, à partir du 2007), les états membres, en reconnaissant l'importance de la religion et en respectant le statut des Églises, doivent veiller à l'actualisation des législations pour que tous les cultes puissent bénéficier, en vertu des droits fondamentaux de l'homme, de tous les droits qui s'imposent. Ainsi, le droit des religions s'est-il développé dans le contexte de l'adhésion de nouveaux pays européens, dans les années 2004 et 2007 (la Roumanie et la Bulgarie). L'Union Européenne respecte le statut des Églises et des organisations religieuses, et l'adhésion des nouveaux membres à l'union mène à l'enrichissement des expériences religieuses, en même temps augmentant les besoins religieux qui sont différents au niveau local. En ce qui concerne les relations des cultes avec l'état dans les pays est-européens, celles-ci peuvent être caractérisées par un système favorable au facteur religieux, d'indépendance réciproque et non pas d'une séparation au sens strict. Même si en théorie tous les cultes bénéficient des mêmes droits, compte tenu aussi du nombre de croyants, pourtant, dans le cas de la Roumanie, on reconnait à l'Église Orthodoxe le rôle important dans l'histoire du peuple roumain, sa contribution à la culture et à la spiritualité du peuple. Dans d'autres pays européens aussi, comme la Belgique, entre les cultes légalement reconnus, la pratique nous a montré que l'Église Romaine Catholique, étant majoritaire, elle est regardée comme étant «primus inter pares» entre les autres cultes[52]. Mais la tendance de sécularisation est irréversible, les conséquences étant observables dans l'analyse du droit civil religieux dans les pays de l'ouest de l'Europe, mais aussi dans la vie religieuse et les relations État-cultes dans les pays majoritairement orthodoxes de l'Est. La perte graduelle de l'autonomie des cultes dans certains domaines est un signe de la sécularisation, ce qui est observable aussi dans l'influence du droit du travail, mais aussi dans la tendance de contrôle de l'État sur les cultes en ce qui concerne les procédures ecclésiastiques internes[53].

Alors, dans l'actuel contexte européen, on peut constater que le problème du soulignement du principe de l'autonomie externe de l'Église par rapport à l'État s'impose à être débattu, l'importance du problème des syndicats des prêtres qui ouvre la voie de l'analyse de l'actuelle liberté religieuse en Europe, mais aussi des causes internes ecclésiastiques qui mènent à l'apparition de la tendance de syndicalisation du clergé, il est à réfléchir pour les canonistes et les théologiens. L'autonomie de l'Église par rapport à l'État s'impose d'être analysée attentivement pour en connaître les limites, mais aussi les limites de la

[52] Voir ici R. GEORGES, La nature juridique des traitements du clergé catholique, in: Annales de droit et de sciences politiques (1962) 85-122.

[53] P. De POOTER, De rechtspositie van erkende erediensten en levensbeschouwingen in Staat en maatschappij, Larcier, Bruxelles 2003, 480-575.

compétence de l'État, de ses institutions en rapport avec l'Église. L'approche à cette thématique au niveau international, pendant les dernières années, mais surtout au cours de l'année 2013, a été déterminée par la décision de la Grande Chambre de la CEDH au cas du Syndicat «Păstorul cel Bun» v. la Roumanie, après que la première instance de la CEDH (la troisième Section) ait remis une décision qui n'était pas en concordance avec l'ensemble de la jurisprudence récente de la CEDH.

Lors des manifestations scientifiques auxquelles ont participé des spécialistes, des juristes et des canonistes, on a souligné l'actualité de l'importance due à l'autonomie des cultes et la condamnation de l'intervention de l'État dans l'administration des problèmes internes des cultes, la conclusion, avant la dernière décision de la CEDH (la Grande Chambre) étant que

> «dans ce cas – Păstorul cel Bun – la Cour Européenne a oublié un principe fondamental, qui est énoncé par la Convention: *les articles de la Convention s'éclaircissent les uns les autres.* Par exemple, ce cas a été traité dans le contexte de l'article 11, qui garantit la liberté de s'associer, mais en fait la Convention dit que cet article doit être analysé dans la lumière de l'art. 9, qui parle de la liberté religieuse et de culte, où l'on rencontre la liberté personnelle et collective [...]. L'autonomie des cultes n'est pas seulement un bien pour les cultes, mais aussi un signe de la compréhension des rapports d'équilibre qui existent entre la vie religieuse et la vie de la société»[54].

La prise en considération des fondements juridiques concernant la neutralité de l'État en rapport aux cultes, mais aussi la liberté de religion (art. 9, Convention) et la liberté d'association (art. 11, Convention) ont justifié le ré-jugement du cas susmentionné devant la Grande Chambre de la CEDH, qui a condamné la syndicalisation du clergé, en rétablissant la jurisprudence européenne concernant l'interprétation de l'art. 9 de la Convention.

La cause, le Syndicat «Păstorul cel Bun» c. la Roumanie, implique de nombreuses problèmes procéduraux et non pas de substance, comme le déclare la troisième Section de la CEDH, en constatant en même temps une promotion par la troisième Section du principe de la mise en balance de tous les droits fondamentaux (des intérêts) en jeu (§ 78), en le reprochant au Tribunal de Dolj (Roumanie) qui a violé un tel principe sur les raisons «pertinentes et suffisantes» et à la proportionnalité de l'ingérence, en précisant que:

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[54] P. VLAICU (professeur de droit canon à la Faculté de Théologie Orthodoxe de Cluj-Napoca): www.orthodoxero.eu/media/Documente/Autonomia%20Bisericii%20CEDO.pdf [1. 7. 2013]. Le professeur Patriciu Vlaicu s'est prononcé à la fin du séminaire qui a eu lieu au siège du Conseil de l'Europe de Strasbourg (7 juin 2012), avec le thème «L'autonomie de l'Église dans la jurisprudence récente de la Cour Européenne des Droits de l'Homme». Le séminaire a été organisé par le Centré Européen pour le Droit et la Justice de Strasbourg, l'Université Catholique de Louvain, le Consortium pour la Liberté de Conscience et Religion de Strasbourg et le Centre d'Études Européennes et Recherche «Religion et Société» de la Représentation de l'Église Orthodoxe Roumaine auprès des Institutions Européennes, de Bruxelles.

> «La Cour constate que les motifs invoqués par le tribunal départemental pour justifier l'ingérence étaient *exclusivement d'ordre religieux*. A la différence du tribunal de première instance, les juges qui ont examiné le pourvoi de l'Archevêché n'ont fait référence qu'au Statut de l'Eglise et au besoin de préserver les règles canoniques de prise de décisions pour éviter que la hiérarchie de l'Eglise soit confrontée avec un nouvel organe étranger à la tradition» (§ 77).

Un autre aspect dont la troisième Section s'est prélevé en défaveur de la décision du Tribunal de Dolj a été celui des contrats individuels de travail et de leurs conséquences juridiques du droit du travail (la relation employé-employeur), les réglementations internationales consacrant le droit des employés (non seulement religieux, mais aussi laïques) de s'organiser en syndicats, fait interdit par le droit canonique. Une telle conclusion de la Cour (la troisième Section) par la condamnation de la décision du Tribunal de Dolj (Roumanie) dont les juges «n'ont fait référence qu'au Statut de l'Eglise et au besoin de préserver les règles canoniques de prise de décisions» a mené inévitablement au constat du manque d'approfondissement des arguments par les juges roumains et à l'observation de la violation de l'article 11 de la Convention sur la liberté syndicale[55]. En ce qui concerne la décision de la troisième Section de la CEDH, qui se fonde sur l'invocation et l'analyse non seulement de l'un des arguments invoqués par les parties (la liberté syndicale et donc la violation de l'art. 11 de la Convention) les autres étant inutiles, on se demande, à coté d'autres canonistes et juristes[56], pourquoi n'admettrait-on pas à l'instance roumaine d'appel de fonder sa décision sur un seul argument (l'autonomie des cultes de s'organiser et de fonctionner conformément aux législations particulières, sur la base de la liberté religieuse)?

L'instance européenne n'a pas suffisamment analysé les arguments d'ordre religieux (art. 9, Convention) et les arguments gouvernementaux sur la législation interne non plus[57], sans se pencher profondément sur toutes les pièces pertinentes dans le dossier. Dans ces circonstances, on ne comprend pas comment l'instance européenne (la troisième Section) se demande pourquoi l'instance roumaine d'appel n'a pas tenu compte des intérêts de nature non-religieuse, mais seulement de ceux de nature religieuse, comme la première instance avait initialement procédé ?[58]. Par conséquent, la Cour apprécie la prise en considération de tous les

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[55] Voir ici §§ 87, 88: «En conséquence, en l'absence de "besoin social impérieux" et à défaut de motifs suffisants, la Cour estime qu'une mesure aussi radicale que le rejet de la demande d'enregistrement du syndicat requérant est disproportionnée au but visé et, partant, non nécessaire dans une société démocratique. *Il y a donc eu violation de l'article 11 de la Convention*».

[56] TILKIN, Corpul preoțesc, 50.

[57] Ces argumentes de l'Etat roumain ont été qualifiés comme étant d'ordre religieux et donc insuffisants.

[58] Une telle question de la Cour est pertinente, mais il est difficile à comprendre pourquoi l'instance européenne même, qui plaide pour l'analyse de toutes les pièces pertinentes dans le dossier, ne l'a pas fait dans ce cas, en condamnant l'état roumain pour la violation de l'art. 11 de la Convention.

intérêts[59], religieux et non-religieux, même si dans la décision de la troisième Section on peut observer un accent mis sur l'évaluation et le soutien prioritaire des intérêts non-religieux, ceux-ci étant en concordance avec la discipline canonique de l'Église.

Pour souligner la légitimité du syndicat des prêtres, la troisième Section de la CEDH a invoqué un précédent dans l'Église Orthodoxe Roumaine : le fait que le droit des employés de l'Église à se syndicaliser a été déjà reconnu par les juridictions roumaines:

> «La Cour est consciente du contexte particulier de l'espèce, notamment de la place qu'occupe la religion orthodoxe dans l'histoire et la tradition de l'Etat défendeur. Toutefois, ce contexte ne saurait, à lui seul, justifier la nécessité de l'ingérence, d'autant que le syndicat requérant n'a nullement entendu contester cette place et que le droit des employés de l'Eglise orthodoxe de se syndiquer a déjà été reconnu, au moins à deux reprises, par les juridictions internes (voir les paragraphes 30 et 31 ci-dessus et, *mutatis mutandis, le Parti des Communistes (Nonpeceristes) et Ungureanu c. la Roumanie*, n° 46626/99, § 58, CEDH 2005-I (extraits))» (§ 84).

En effet, dans l'Église Orthodoxe Roumaine ont existé deux syndicats reconnus par la justice, mais ces associations syndicales n'ont pas eu l'approbation de l'autorité religieuse compétente, cette précision de la Cour entraînant ici l'autonomie interne des diocèses et le droit statutaire de l'évêque de donner son accord sur les différentes formes d'association au sein de l'Église ou concernant l'adhésion des religieux aux formes d'association externes à l'Église. Le fait que certains évêques ont manifesté de la tolérance pour ce type d'associations n'est pas relevant, il est certain que l'Archevêché de Craiova, dans la juridiction de laquelle se trouvaient de nombreux prêtres qui ont constitué le Syndicat «Păstorul cel Bun», n'a pas accepté cette forme d'association en syndicat des prêtres et des laïques employés sous contrat de travail au sein du centre diocésain.

IV. Conclusions

La Cour Européenne des Droits de l'Homme (CEDH) s'est prononcée dans un cas qui a entraîné, pour la première fois, l'autonomie religieuse mais aussi la

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[59] Voir ici la cause *Mirolubovs et d'autres c/ la Lettonie*, no. 798/05, 15 septembre 2009, § 87: «A cet égard, la Cour relève le caractère extrêmement sommaire de la décision prise par la Directive du 23 août 2002. La Cour a déjà disposé, dans une situation similaire à celle présente, que, *lorsqu'un conflit interne débine une communauté religieuse, les autorités d'état doivent adopter une approche caractérisée par une sensibilité et délicatesse extrêmes* (la cause *Sviato-Mykhaïlivska Parafiya c/ l'Ukraine*, § 123). Les décisions prises par ces autorités en matière doivent être par conséquent particulièrement bien motivées (pour un exemple pratique, voir la cause *La communauté religieuse grecque de Munich et Bavarie, personne juridique, c./ l'Allemagne* (décision) no. 52336/99, du 18 septembre 2007)», cf. TILKIN, Corpul preoțesc, 50-51.

liberté syndicale, concernant le rapport entre le clergé et l'Église au sein de l'Église Orthodoxe Roumaine. Dans ce contexte, on a posé la question si les prêtres de l'Église Orthodoxe Roumaine ont le droit de s'associer en syndicat ou si la nouvelle association du clergé modifie la manière de fonctionnement de l'Église, en spécial en ce qui concerne la compétence décisionnelle.

La décision de la troisième Section de la CEDH «est un exemple de la tendance de la Cour de se comporter contrairement au principe de la subsidiarité, et aussi du manque de clarté et de cohérence de sa propre jurisprudence»[60], car elle a essayé d'ignorer l'ensemble du droit interne pris en considération par l'instance de recours de Roumanie. La décision de la troisième Section s'est prouvée à être contradictoire à la jurisprudence de la CEDH, son manque de clarté étant donné aussi par certaines confusions du raisonnement par références jurisprudentielles souvent accompagnées par un «*mutatis mutandis*»[61]. La troisième Section contredit sa propre doctrine sur la liberté religieuse, reliant le problème du syndicat des prêtres pas du respect et de la protection de la liberté religieuse, mais par l'ordre publique, de sorte que „sans se poser la question si le non-enregistrement du syndicat se justifie grâce au respect de la liberté religieuse de l'Église, la Section s'est contentée de constater que ce syndicat ne constituait pas une menace pour l'ordre publique et pour la démocratie, et qu'en conséquence il devait être reconnu du point de vue légal"[62]. Fondamentalement faux, la Section se place sur le terrain de l'ordre public, en énonçant que «la Cour peut admettre que la mesure en question tendait à défendre l'ordre public, qui comprend la liberté et l'autonomie des communautés religieuses» (§ 67). C'est une approche nouvelle et sans fondement, ayant des implications dans la perspective théorique et pratique. On ne peut pas soutenir, de la perspective de la Convention, que la source de la liberté religieuse est l'ordre publique[63], mais que la source de l'autonomie des cultes est la liberté religieuse comme «droit prime et autonome au contexte de la Convention»[64].

Mais, après 2008, on constate une préoccupation du Patriarcat Roumain pour le retour des prêtres à la discipline canonique de l'Église, à les appeler à rentrer dans l'esprit de la vie religieuse. Cet appel de l'Église à la discipline est un droit interne de l'Église qui tient à sa discipline canonique, même si on ne mentionne pas de manière expresse quelles seraient les répercussions pour ne pas se conformer à cet appel. En observant en préalable un affaiblissement de la collaboration des hiérarques avec les prêtres et leurs croyants, par certaines tendances cléricales locales étrangères au «bien-être de l'Église», le Synode Permanent a disposé pour l'avenir l'intensification de la communication et de la

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[60] PUPPINCK – POPESCU, Critica hotărârii, 6 (les auteurs mentionnent aussi la contribution de M. Claire de la Hougue, avocat dans le Barreau de Strasbourg).

[61] Ibidem.

[62] Ibidem.

[63] En abordant la cause dans la perspective de l'ordre publique, la Roumanie aurait dû démontrer que le syndicat des prêtres représente une menace pour l'état et la société démocratique (§§ 69 et 76), comme le sont les groupes religieux extrémistes (Refah Partisi contre la Turquie, no. 41340/98, 41342/98, 41343/98 et 41344/98, § 104, CEDH 2003-II.

[64] Ibidem, p. 8.

consultation entre les hiérarques, mais aussi entre ceux-ci et le clergé ou leurs croyants.

On considère qu'il s'agit ici, en fait, d'un conflit interne au sein de l'Église Orthodoxe Roumaine, qui a de nombreuses causes qui peuvent être résolues au niveau synodal. On doit exclure la promotion de la solution de la renonciation pour les religieux ou de la démission du sacerdoce, celle-ci n'étant pas à son tour conforme à la discipline canonique et à la dignité cléricale. Mais on considère que les problèmes internes de l'église peuvent être solutionnés au niveau des organes compétents, en renonçant à l'abus et à la violation par les religieux (soit évêques, prêtres ou diacres) du Statut de l'Église et de la législation canonique. Un conflit interne entre un religieux et l'Église doit être bien documenté du point de vue procédural et analysé avec responsabilité de la perspective canonique pour pouvoir parler de la priorité de l'autonomie religieuse, respectivement du soi-disant droit de rétractation du religieux. En fait, un religieux ne peut pas se retirer par «démission» qu'en se soumettant au renoncement au sacerdoce conformément au droit canon pénal. Mais pour ce type de conflits religieux, la jurisprudence de l'ancienne Commission et de la Cour ont accordé priorité à l'autonomie de l'Église, dans le sens que le prêtre qui n'acceptait pas la discipline religieuse pouvait se retirer, en lui préservant de cette manière sa liberté religieuse[65]. Par conséquent, la Convention considère comme suffisante «la liberté des dissidents de quitter la communauté»[66], le droit à la rétractation visant directement l'article 9 de la Convention, interprété dans la lumière de l'art. 11.

Il est important de respecter l'autonomie de l'Église et la spécificité du fonctionnement et de l'organisation ecclésiastique en rapport avec l'état, l'autonomie visant strictement l'organisation et le fonctionnement interne de l'Église, et non pas les domaines dans lesquels l'état a de la compétence et dans lesquels doit exister un accord bilatéral (ex. l'enseignement théologique d'état). Il faut donc souligner que l'objet du droit particulier de l'Église, fortement invoqué dans le cas des syndicats des prêtres, vise uniquement la réglementation des rapports entre les membres de l'Église, mais aussi entre ses membres et l'autorité religieuse compétente, étant le soi-disant *droit interne*. Mais les rapports de l'Église avec ceux de l'extérieur ou avec l'État, c'est-à-dire le soi-disant *droit externe*, n'étant pas réglementés d'une manière unilatérale par l'Église, mais par accord avec les organismes de l'extérieur (bilatéral), ne peuvent pas faire partie du Droit canon de l'Église, comme le considère bien justement l'érudit canoniste Nicodème Milaš ou d'autres canonistes, car ils entrent dans le domaine de la politique ecclésiastique[67].

Ignorer l'autonomie de l'Église, la discipline canonique, les canons en général et les principes canoniques d'organisation et fonctionnement de l'Église, et je rappelle ici seulement les principes ecclésiologique institutionnel, organique

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[65] Voir Karlsson c/ la Suède, no. 12356/86, dec. 8.9.88, D.R. 57 p. 172; Williamson c/ Le Royaume Uni de la Grande Bretagne, du 18 mai 1995, no. 27008/95.

[66] *Le Saint Synode de l'Eglise Orthodoxe Bulgare c/ la Bulgarie*, § 141.

[67] MILAŞ, Dreptul bisericesc oriental, 12.

et synodal hiérarchique[68], mène naturellement au désordre, à l'injustice, au cléricalisme excessif et à la laïcophobie, aux actes d'indiscipline dans la vie religieuse, ce qui affecte gravement le bon fonctionnement de l'organisme ecclésiastique, par le déséquilibre crée dans les rapports entre les membres de l'Église et non seulement, mais aussi à un déséquilibre concernant les relations État-Église.

Ce déséquilibre, parfois visible, mène soit à des actions injustifiées de l'élément laïque dans l'Église, soit à des actions d'indiscipline du clergé, soit à ce qu'on appelle cléricalisme, c'est-à-dire au placement du clergé au-delà de l'Église en ce qui concerne les actes décisionnels, en menant à l'extrême le principe de l'économie qui, dans certains cas, ne connaît pas de limites. Dans ces conditions, de l'indiscipline et de l'abus au sein de l'Église, dans les rapports entre les membres de l'Église, il existe la possibilité extrême que certains membres du clergé, conscients de leur place et de leur importance dans l'Église, se considèrent au-delà de l'ordre juridique établi par l'application des normes de droit dans la vie religieuse et qu'ils ignorent toute la législation canonique des Synodes œcuméniques, même si c'est par une appréciation absurde de la supériorité de leurs propres décisions par rapport à toute la législation canonique de l'Église. Ce cadre général est favorable à l'apparition de certaines formes d'association (syndicales) des prêtres, non conformes à la législation et à la doctrine canonique orthodoxe, celui-ci étant un problème interne de l'Église qui devrait préoccuper les autorités compétentes ecclésiastiques. C'est importante la décision de la Grande Chambre de la CEDH (le 9 juillet 2013) qui confirme la liberté religieuse et l'autonomie de l'Église par rapport à l'État, mais les problèmes internes ecclésiastiques restent et on ne doit pas les amplifier en les déconsidérant, mais les analyser avec responsabilité et conscience ecclésiale pour le bien-être de l'Église. C'est pourquoi nous souhaitons mettre un avertissement militant pour l'application de la législation canonique, correctement interprétée, dans la vie de l'Église, étant une nécessité donnée par l'organisation autonome de l'Église, qui n'est pas conditionnée par les diverses circonstances relatives au temps et à l'espace.

[68] Le principe qui assure l'équilibre entre la responsabilité de l'Église locale et le principe synodal hiérarchique c'est le *principe de la subsidiarité*.

AUTONOMY OF RELIGIONS: DO WE REALLY NEED A UNITARY FRAMEWORK? THE ILLUSION OF USING HUMAN RIGHTS AS ARBITERS BETWEEN CULTURE AND RELIGION

Radu C a r p, Bucarest

I. The content of the autonomy of religions – human rights and canon law perspectives

The autonomy of Churches is a concept that has been developed in canon law and subsequently in public law all across different Christian religions and countries in Europe. At first sight, it seems that the definition of autonomy is not so different if we compare Orthodox, Catholic or Protestant communities. However, differences are at stake, if we look on how the autonomy is applied in practice. Churches' Statutes define autonomy in different terms and this sometimes collides with laws or even Constitutions.

What makes the issue of the autonomy of religions challenging is that not only individuals but also groups and religious organizations seek protection under human rights provisions and this is not limited to Europe. The explanation is that human rights nowadays are different from natural law, insofar as the importance of community in the lives of individuals is recognized[1]. Autonomy refers not only to individuals, but also to the religious communities. However, this transformation is not without controversy. Religious communities have a freedom of religion under human rights law, but the question arises of who comes first, the individual or the group. In every case the autonomy of religions is challenged, the ground is a right of an individual that collides with the protection of a group of which he or she is a member.

Before describing how the autonomy of religions is protected, we have to answer if it is possible to a have a universal definition of religious autonomy that encompasses all the religious beliefs and national peculiarities. The need to protect traditional Church-State relationships is vital to the protection of autonomy of religions in Europe, while the American way see autonomy as linked with the wall of separation between State and Church. Roland Minnerath believes that the request for autonomy has not been expressed with the same intensity by all Churches or religious organizations. In Europe, unlike America where the first Amendment has never been challenged, there is a differentiated history of Church - State relations that led to identification with the State administration of the Orthodox, Anglican and Lutheran Churches, while the Catholic Church has constantly requested *libertas Ecclesiae*, the freedom of self-government[2]. W. Cole Durham considers that the American and the European model of autonomy are

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[1] J. W. NICKEL, Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights, Berkeley 1987, 8-10.

[2] R. MINNERATH, Church Autonomy in Europe, in: G. ROBBERS (ed.), Church Autonomy: A Comparative Survey, Frankfurt am Main 2001, 384.

different, but nevertheless share a common approach: although in Europe there is less concern about the loss of autonomy that is the result of the State subsidization of religious life, "Europeans share the core concern with Americans of delineating the crucial sphere of autonomy within which religious groups are insulated from all forms of State heterenomy"[3]. From a human rights perspective, autonomy of religions is, according to Merilin Kiviorg,

> "a right to determine, both at the individual and collective level, what one's belief is (*forum internum*) and the ways and importance of the manifestation of it (*forum externum*)"[4].

Autonomy is linked with the source of human rights from a religious perspective, namely human dignity, and therefore it is not conditioned on the concept of humans as rational beings. Even if we consider a certain religious belief as nothing more than retrograde superstition, the group of people sharing this belief is protected by the concept of autonomy[5].

According to Mark Chopko, Church autonomy means

> "the right of religious communities (hierarchical, connectional and congregational) to decide upon and administer their own internal religious affairs without interference by the institutions of government"[6].

Perry Dane considers that "the legal problem of religious autonomy" refers to "the effort by secular law to make sense of religious self-governance, particularly institutional or communal self-governance"[7]. Craig Mousin believes that the autonomy of religions in this sense is vital because it

> "permits religious organizations to define a specific mission, to decide how ministry and ecclesiastical government fulfill their mission and to determine the nature and extent of institutional interaction with the larger society"[8].

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[3] W. C. DURHAM, The Right to Autonomy in Religious Affairs: A Comparative View, ibidem, 686-714.

[4] M. KIVIORG, Religious Autonomy in the ECHR, 133: www.deltapublicaciones.com/derechoyreligion/gestor/archivos/07_10_31_124.pdf [2. 4. 2014].

[5] M. C. NUSSBAUM, Religion and Women's Equality: the Case of India, in: N. L. ROSENBLUM (ed.), Obligations of Citizenship and Demands of Faith: Religious Accommodation in Pluralist Democracies, Princeton 2000, 343.

[6] M. CHOPKO, Constitutional Protection for Church Autonomy: A Practioner's View, in: ROBBERS, Church Autonomy (= note 2), 96.

[7] P. DANE, The Varieties of Religious Autonomy, in: ibidem, 119.

[8] C. MOUSIN, State Constitutions and the Autonomy of Religious Institutions, in: ibidem, 401.

The German perspective on the autonomy of religions is particular. It is based on a provision of the Basic Law, Article 140:

> "religious societies shall regulate and administer their affairs independently within the limits of the law that applies to all".

Relying on this norm, von Campenhausen considers the right of self-determination for Churches as "the third column of the system of State-Church relations of the [German] constitution"[9]. The notion of autonomy covered by this right is very broad, because it is not limited to internal religious affairs. The Federal Constitutional Court has decided that "what is meant by a Church's own affairs, is determined particularly by how the Church itself views its own affairs", therefore "the right to assert autonomy is not restricted to the religious organization itself, but extends to related entities involved in carrying out its tasks"[10]. Even if self-determination of religious communities is the equivalent of Church autonomy from the human rights perspective, the German legal doctrine draws a distinction between self-determination and autonomy. According to Gerhard Robbers, autonomy describes only the competence of State institutions to govern their affairs in a way that is independent from superior State institutions, while religious self-determination is not conferred on the religious community by the State, but is acknowledged by the State as a preexisting feature of a religious community's own, pre-State right[11].

Many European States also include a reference to religious autonomy in their constitutions, but they do not use a definition of autonomy as broad as in the German case. The conclusion of von Campenhausen is that while the borderline between what lies within the range of religious communities' own affairs and those which are in the State's responsibility was disputed in the past, "today it is not difficult to determine the area of [a religious community's] own matters"[12]. One of the purposes of this article is to see whether this is true or not, if the autonomy of religions concept has a single definition across different cultures and religions.

Some acts of worship are a matter of private life, but the majority of religious activities are carried out by groups of believers, therefore freedom of religions is not guaranteed unless religious community as a community of human beings has autonomy. Different religious communities structure their affairs in different ways and some communities are inclined to have a more formal relationship with a State, but even in this case any State interference is accepted only if it is required and accepted or if it can be justified under supra-national instruments. According

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[9] A. v. CAMPENHAUSEN, Church Autonomy in Germany, in: ibidem, 77.

[10] G. ROBBERS, State and Church in Germany, in: IDEM, (ed.), State and Church in the European Union, Baden-Baden 1995, 57; 63.

[11] Obst v. Germany – Third-Party Intervention, Prof.Dr. Gerhard Robbers on behalf of the Church of Jesus Christ of Latter-day Saints: http://www.strasbourgconsortium.org/common/document.view.php?docId=3956 [2. 4. 2014].

[12] CAMPENHAUSEN, 79.

to W. Cole Durham, there is a common model of religious autonomy shared by all religions, both in Europe and in United States: Churches and any religious organizations enjoy a strong protection by the State "in their core 'inner domains': with respect to matters of doctrine, ecclesiastical polity, and core ministry"[13]. Merilin Kiviorg arrives at the conclusion that, from Durham's discussion on the autonomy of religions and from an analysis of how different European countries respect it, "it seems there is a vague common ground on collective religious autonomy in Europe"[14]. Roland Minnerath considers that there is a common model on the autonomy of religions, but only in Europe and not in America:

> "Europe seems to converge towards a model of substantial autonomy of Churches in spite of the extreme variety of their juridical status"[15].

For establishing the content of religious autonomy, canon law experts also made their contribution. As the purpose of this article is not to make an exhaustive research into this matter, only positions from the perspective of the Orthodox Church canon law are presented. For Liviu Stan, recognizing the large autonomy belonging to different moral persons is a mark of a democratic State. In the case of religious organizations, the same rules for recognizing autonomy, valid for all entities, are applied by the State. The organization of all Churches is regulated by norms elaborated by that Church that are called Statutes and approved by the State. The State ensures the autonomy of religions based on the Constitution and on the provisions of a special law by approving these Statutes and other norms elaborated by the Churches. Therefore, religious autonomy is the independence of the Church from the State. Because the State recognizes its autonomy, the Orthodox Church is an international law subject, as other autonomous organizations. From Liviu Stan perspective, autonomy (αὐτός νόμος – government by its own rules), is more than autocephaly (αὐτή κεφαλή – government by its own head). Autocephaly does not have "a clear legal sense". Liviu Stan acknowledges that autonomy is not opposed to autocephaly, but for a long time canon law made no distinction. Both terms have a common ground and differ "only by degree"[16]. For Patriciu Vlaicu, autonomy is "the capacity to govern by own rules". The State recognizes the right of Churches to organize themselves by their own rules, in the framework of legality and the Churches abstain to intervene in the State activities[17]. Constantinos Pitsakis considers that autonomous Churches are Churches that function in sovereign States and aspire to the status of

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[13] DURHAM, 697.

[14] KIVIORG, 136.

[15] MINNERATH, 90.

[16] I. STAN, Despre autonomia bisericească [On the Church autonomy], in: Studii Teologice X, no. 5-6 (Mai – June 1958) 376-393, reprinted in: Biserica şi dreptul. Studii de drept canonic ortodox [The Church and Law. Studies of Orthodox canon law], Sibiu 2012, 98-131.

[17] P. VLAICU, Principiul autonomiei în relaţia Stat – culte [The principle of the autonomy in the Church-State relationship], in: A. LEMENI – F. FRUNZĂ – V. DIMA (ed.), Libertatea religioasă în context românesc şi european [Religious freedom in the Romanian and European context], Bucureşti 2005, 135.

autocephaly but, for different reasons (lack of believers, the status of minority religion in that State, the current state of ecclesiastical development) cannot function as autocephalous Churches. According to Constantinos Pitsakis, there is a difference between formal autonomy (that he called "little autocephaly", an autocephaly that is difficult or even impossible acquire) and different forms of non-formal autonomies, developed inside the Churches[18].

II. Autonomy of religions as part of the freedom of religion guaranteed by Article 9 of the European Convention on Human Rights

The link between autonomy and freedom of religion was not so obvious when the latter became a right acknowledged by the European Convention of Human Rights. Freedom of religion has been seen, by the authors of the convention and initially by the European Court of Human Rights (ECHR – the Court) more as an individual right and not as a right that belongs to religious communities, even if the definition of Article 9 covers both situations. Only in recent years have different Churches and religious communities realized that they may rely upon the provisions of the Convention in order to defend their autonomy. In the majority of cases judged by the Court where autonomy is involved, individuals or religious communities are seeking to clarify their relationship with or within a major Church. The individuals or organizations pretend not to have their fundamental rights protected, whereas the Churches pretend that they cannot assure full protection to these rights without breaking the autonomy that is also recognized as a fundamental right. Freedom of religion is subject to some limitations defined by the same Article 9. Consequently, when the ECHR has to discuss a case, it has to assess whether the autonomy of Churches has been limited or not and, if it is considered to have been limited, to assess if that limitation is prescribed by law, or if it is necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

An analysis of the ECHR cases where the autonomy of Churches is involved shows that up to now the Court has argued constantly in the favor of autonomy, even in cases where the full exercise of fundamental rights of people belonging to Churches has been denied.

It is very intriguing to observe that in a parallel development where the Court has started to argue in the favor of Church autonomy based on Article 9, the justification for the non-applicability of human rights norms to religious organizations began to be elaborated without relying on how the Court developed its jurisprudence. The arguments were based on separation of the State from religious bodies, lack of competence to intervene in religious disputes and respect

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[18] C. PITSAKIS, Autocephalie et autonomie: à propos du développement historique de deux catégories principales dans la structure actuelle de l' Eglise Orthodoxe, in: C. G. FÜRST – R. POTZ (ed.), Autonomie in den Ostkirchen (= Kanon 21), Hennef 2010, 21-42.

for individual and collective religious choices[19]. It has been argued that pluralism requires the recognition of a non-State sphere where religious bodies and individuals are free to apply their own standards in a way that departs from the prevailing societal ethos[20]. In the United States the sense of the autonomy of religions as a barrier to the application of fundamental rights has been developed as early as the Supreme Court decision *Serbian Orthodox Diocese v. Milivojevich* of 1976:

> "for civil courts to analyze whether the ecclesiastical actions of a Church judicatory are in that sense 'arbitrary' must inherently entail inquiry into the procedures that canon or ecclesiastical law supposedly requires the Church judicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question. But this is exactly the inquiry that the First Amendment prohibits; recognition of such an exception would undermine the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of Church tribunals as it finds them"[21].

These arguments could not lead to the conclusion that recognizing the autonomy of religious organizations means to neglect all other human rights that may collide at some point with it. There is no consensus on how to protect human rights when they collide with religious autonomy, but there are very well developed arguments that State Churches or those having the status of public corporations, or Church courts integrated into the legal system, have more responsibilities to protect human rights than other religious organizations[22].

The constant jurisprudence of the Court in favor of religious autonomy has been under attack in recent years, as some cases are referred to the Grand Chamber by individuals and organizations that are not satisfied with the decision of the Court in first instance. Organizations that defend the autonomy of Churches but are not directly linked to any Church or religious community, and States that are doing the same, is a rather new path in Strasbourg. This strategy has proved to be effective, as the intervention of the Grand Chamber in *Lautsi v. Italy* shows. This is the reason why the most challenging cases involving the autonomy of Churches that emerged after the final verdict in *Lautsi v. Italy* - *Sindicatul "Păstorul cel Bun" v. Romania* and *Fernández Martínez v. Spain* - were deferred to the Grand Chamber. In *Sindicatul "Păstorul cel Bun" v. Romania*, a full respect of autonomy of Churches has been recently stated by the Grand Chamber, a

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[19] N. DOE – A. JEREMY, Justifications for Religious Autonomy, in: R. O' DAIR – A. LEWIS (ed.), Law and Religion, Oxford 2001, 421-442; R. MINNERATH, The Right of Autonomy in Religious Affairs, in: T. LINDHOLM – W. COLE DURHAM – B. TAHZIB-LIE (ed.), Facilitating Freedom of Religion or Belief: A Deskbook, Leiden 2004, 291-319.

[20] R. AHDAR – I. LEIGH, Religious Freedom in the Liberal State, Oxford 2005, 334.

[21] Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 712-713.

[22] I. LEIGH, Balancing Religious Autonomy and Other Human Rights under the European Convention, in: Oxford Journal of Law and Religion 1/1 (2012) 3.

verdict that contradicts the first decision. In *Fernández Martínez v. Spain*, the full respect of autonomy is challenged before the Grand Chamber but a verdict has not yet been reached. Even the judges of the ECHR are divided over the issue of Church autonomy. The first cases dealing with the autonomy of Churches were decided with unanimity. In both *Sindicatul "Păstorul cel Bun" v. Romania* and *Fernández Martínez v. Spain* cases, dissenting opinions have been expressed.

Why is the autonomy of Churches increasingly challenged at the level of ECHR? Some years ago, no organization or State intervened as third parties. Now in almost every case related to the autonomy of Churches, organizations or States intervene in the defense of autonomy. This is due to the need to balance the increasing influence of secular organizations. They have a more general strategy followed by individuals or organizations in order to impose a more secular approach at the European level. The secular lobby is to be seen at work every time a new Treaty of the European Union is drafted and every time a Directive or Regulation is discussed. At the level of the ECHR, such a lobby is much more complicated: it is easier to be part of the legislative process than to influence a Court decision. The ECHR is composed of independent magistrates and therefore lobby organizations are not accredited to the ECHR. Consequently, the secular lobby needs to spend more effort in order to be efficient and to challenge the current jurisprudence of the ECHR at the level of the Court itself. Influencing public opinion is not a very effective strategy, for the same reason of the independence of judges. Nevertheless, judges from countries with a secular background tend to favor fundamental rights to the detriment of Church autonomy, whereas judges from countries that acknowledge a strong role for the Churches in the public sphere tend to be more in favor of autonomy. These countries intervene in a direct way, by challenging the decisions of the Court that diminish the role of the Churches autonomy.

How long the ECHR will continue to have a constant jurisprudence on autonomy of Churches is a very complicated question. It depends on the complexity of cases brought before the Court. It also depends on how the Court will interpret the existence of limitations defined by Article 9. Many Constitutions of European countries define the autonomy of Churches in the chapter dedicated to fundamental rights. The approach of the Council of Europe was different: it does not mention the autonomy of Churches as such in the Convention, but the Court has interpreted the Convention as a guarantee of autonomy. What is more important in the long-run, to have a specific text on autonomy, or to have a rich and constant jurisprudence? This is also a very difficult question to answer.

The debate over the autonomy of Churches is not only decided by arguments taken from the Court jurisprudence or from the legal and constitutional frameworks of countries that are involved in the cases brought before the Court. A new approach is to invoke provisions from the EU law that are relevant for the autonomy of Churches, especially the Directive 2000/78/EC of the Council of the European Union of 27 November 2000 establishing a general framework for equal

treatment in employment and occupation[23]. According to the Article 4 of the Directive 78/2000/EC:

> "1. ... Member States may provide that a difference of treatment which is based on [religion or belief] shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.
>
> 2. Member States may maintain national legislation in force [...] or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within Churches and other public or private organizations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos. [...]
>
> Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of Churches and other public or private organizations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organization's ethos".

Another relevant provision for the autonomy of Churches that is part of EU law, but has not been considered so far by the ECHR, is the Article 17 of the Lisbon Treaty, a very clear acknowledgement of the principle of the autonomy of Churches:

> "The Union respects and does not prejudice the status under national law of Churches and religious associations or communities in the Member States".

This approach will develop, as the cases involving the autonomy of Churches become not only disputes between one individual and one Church or within a single Church, but where different countries with different traditions on Churches autonomy intervene.

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[23] For a comment on this Directive, cf. R. CARP, Religion in the Public Sphere: Is There a Common European Model?, in: Journal for the Study of Religions and Ideologies 10, no. 28 (Spring 2011) 100.

In the following a presentation of the most important cases involving the autonomy of Churches judged by the ECHR are presented along confessional lines, in order to see if there is a common approach or if there are differences from one Church to another. Not only Christian Churches are presented, but also Muslim communities.

III. The ECHR jurisprudence on the autonomy of religions

1. Orthodox Churches

1.1. Metropolitan Church of Bessarabia and Others v. Moldova[24]

The case originated in an application against the Republic of Moldova lodged with the European Commission of Human Rights under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms by the Metropolitan Church of Bessarabia (*Mitropolia Basarabiei şi Exarhatul Plaiurilor*) and twelve Moldovan nationals, on 3 June 1998.

On 14 September 1992 the applicant natural persons joined together to form the applicant Church – the Metropolitan Church of Bessarabia – a local, autonomous Orthodox Church[25]. According to its articles of association, it took the place, from the canon-law point of view, of the Metropolitan Church of Bessarabia which had existed before 1944.

The Metropolitan Church of Bessarabia adopted articles of association which determined, among other matters, the composition and administration of its organs, the training, recruitment and disciplinary supervision of its clergy, the ecclesiastical hierarchy, and rules concerning its assets. In the preamble to the articles of association it is affirmed that "The Metropolitan Church of Bessarabia is a local, autonomous Orthodox Church attached to the patriarchate of Bucharest".

With the Patriarchal Act of 19 December 1992, the Romanian Orthodox Church Patriarchate recognized the autonomous Metropolitan Church of Bessarabia as part of its jurisdiction. The new Church became the second Orthodox Church claiming canonical jurisdiction in the territory of the Republic of Moldova.

Nearly one million Moldovan nationals are affiliated to the Church, which has more than 160 clergy. The Metropolitan Church of Bessarabia is recognized

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[24] No. 45701/99, ECHR 2001.

[25] On the history of the Metropolitan Church of Bessarabia, on its reestablishment and the acknowledgement of the Romanian Patriarchate in 1992 and on the events described, see Patriarhia Română, Adevărul despre Mitropolia Basarabiei [The Truth about the Metropolitan Church of Bessarabia], Bucharest 1993. On the roots of the canonical jurisdictional conflict in the territory of Bessarabia and for a detailed account of the current status of the Metropolitan Church of Bessarabia, cf. M.-E. HERGHELEGIU, The Statute of Organization of the (autonomous) Metropolitan Church of Bessarabia, in: Kanon 21 (= note 18), 169-191.

by all the Orthodox patriarchates with the exception of the patriarchate of Moscow[26].

In its application to the Department of Religious Affairs, the Metropolitan Church of Bessarabia argued that its reinstatement was based not only on the provisions of the Constitution of the Republic of Moldova, but also on apostolic c. 34 which allows Churches to organize themselves along ethnic lines. The same application refers also to the can. 2 § 45 of the Second Ecumenical Council of Constantinople and canon 8 §46 of the Third Ecumenical Council of Ephesus which forbids the head of an eparchy to claim jurisdiction over another eparchy, as the Russian Orthodox Church did in Bessarabia in 1812 when it annexed the province, taken from the Principality of Moldova and again in 1944 when it took it from Romania.

According to Monica-Elena Herghelegiu, c. 34, and how we understand the term "ethnos", are crucial in deciding who shall have the canonical jurisdiction over the territory of Bessarabia. The New Testament uses the expression *ta ethne* to describe a group of people with a similar form of culture; today, ethnos is defined as an ethnic group. If we accept that c. 34 refers to ethnic groups, it means that every nation shall have its own Church structure. The Metropolitan Church of Bessarabia argued in fact that the Romanian nation residing in the Republic of Moldova wanted to have its own Church organization, separate from the Church that is under the power of another nation[27].

The Department for Religious Affairs refused to accept the application for accepting the Metropolitan Church of Bessarabia, and the civil proceedings in Moldavian courts were unsuccessful, therefore the applicants appealed this case to the Court. The applicants alleged that the Moldovan authorities' refusal to recognize the Metropolitan Church of Bessarabia infringed their freedom of religion, since only religions recognized by the government could be practiced in Moldova. They asserted in particular that their freedom to manifest their religion in community with others was frustrated by the fact that they were prohibited from gathering together for religious purposes and by the complete absence of judicial protection of the applicant Church's assets.

The Court has decided first that "a Church or ecclesiastical body may, as such, exercise on behalf of its adherents the rights guaranteed by Article 9 of the Convention", so the Metropolitan Church of Bessarabia could be considered as an applicant. It is an important conclusion, since the Court did not have, at that time, many cases dealing with the collective exercise of the freedom of religion. The Court observes that,

> "not being recognized, the applicant Church cannot operate. In particular, its priests may not conduct divine service, its members may not meet to practice

[26] On the canonical disputes of the Orthodox Churches in the Republic of Moldova and how they are related to the relationship between this country and the Russian Federation, cf. R. PREDA, Ortodoxia & ortodoxiile. Studii social-teologice [The Orthodoxy & the Orthodoxies. Social-Teological Studies] (Theologia socialis 10), Cluj-Napoca 2010, 84.

[27] HERGHELEGIU, 185.

their religion and, not having legal personality it is not entitled to judicial protection of its assets".

Therefore, the government's refusal to recognize the applicant Church, upheld by the Supreme Court of Justice's decision, is considered by the Court as an

"interference with the right of the applicant Church and the other applicants to freedom of religion, as guaranteed by Article 9 § 1 of the Convention".

The Moldovan Government argues that it made a limitation on freedom of religion as prescribed by law, based on Article 9 § 2. The Court declared that not all the normative acts are "laws" in the sense of that provision:

"in matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise".

As to the need of the Article 9 § 2 that the limitation on the freedom of religion is be "necessary in a democratic society", the Court states, following the arguments developed in *Hasan and Chaush v. Bulgaria* and *Serif v. Greece* that

"in exercising its regulatory power [...] in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial [...]. What is at stake here is the preservation of pluralism and the proper functioning of democracy, one of the principle characteristics of which is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence [...]. Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other".

Also, according to the Court,

"State measures favoring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement of the freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership. Similarly, where the exercise of the right to freedom of religion or of one of its aspects is subject under

> domestic law to a system of prior authorization, involvement in the procedure for granting authorization of a recognized ecclesiastical authority cannot be reconciled with the requirements of paragraph 2 of Article 9".

The conclusion of the Court is the same as in *Hasan and Chaush v. Bulgaria* that

> "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords".

Therefore, the Court concluced there has been a violation of Article 9. The intervention (or more exactly, the refusal to intervene in the registration process) of the Republic of Moldova authorities has been considered as an infringement on the freedom of religion. The Republic of Moldova was not neutral in a dispute that is basically one of Canon law between the Metropolitan Church of Moldova, part of the Russian Orthodox Church and therefore dependent on the Patriarchate of Moscow and the Metropolitan Church of Bessarabia which was attached to the Romanian Orthodox Church and therefore dependent on the patriarchate of Bucharest[28].

Metropolitan Church of Bessarabia and Others v. Moldova was the first case where the ECHR used the autonomy of Churches in order to solve a conflict that involved an Orthodox Church relying on Article 9.

1.2. Biserica Adevărat Ortodoxă din Moldova and Others v. Moldova[29]

The applicants joined together to form the "True Orthodox Church in Moldova" (*Biserica Adevărat Ortodoxă din Moldova*) and applied for registration by the Government. They considered that the refusal of the State authorities to register the Church was a violation of their right to freedom of religion as guaranteed by Article 9. The Court stated that there was a violation of Article 9. This conclusion was explicitly based on the *Metropolitan Church of Bessarabia v. Moldova* case, namely the fact that the

> "autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords".

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[28] A short historical account of the Metropolitan Church of Moldova and Metropolitan Church of Bessarabia after 1989 is drafted in V. CIORBĂ, Biserica Ortodoxă din Basarabia şi Transnistria (1940-2010) [The Orthodox Church from Bessarabia and Transdniestria (1940-2010)], Chişinău 2011, 275-277.

[29] No. 952/03, ECHR 2007.

1.3. Svyati-Mikhalivska Parafiya v. Ukraine[30]

This case involves, as *Metropolitan Church of Bessarabia and Others v. Moldova*, a Canon law dispute between two Orthodox Churches, ruled by the Kyiv and by the Moscow Patriarchate, that have disputes over jurisdiction in Ukrainian territory[31]. The Canon law dispute has been the origin of a public law dispute, where the Ukrainian authorities were involved. This dispute started as soon as Ukraine became an independent State. When Ukraine applied for membership in the Council of Europe in 1995, Opinion No. 190 (1995) was released. According to this document, Ukraine has promised that:

> "A peaceful solution to the disputes existing among the Orthodox Churches will be facilitated while respecting the Church's independence vis-à-vis the State; a new discriminatory system of Church registration and a legal solution for the restitution of Church property will be introduced".

In 1998, the Report of the monitoring committee of the Council of Europe on "Honouring the obligations and commitments by Ukraine" found that

> "Following accession, the dispute within the three Orthodox Churches in Ukraine, amongst themselves and the State, has not ended [...] complaints are also expressed by the representatives of various confessions regarding the lack of cooperation by the authorities at local level".

This is the context of the case *Svyati-Mikhalivska Parafiya v. Ukraine*, a context that is expressly referred to by the Court in deciding his ruling. The applicant association is a religious group, *Svyati-Mikhalivska Parafiya* (the Parish "Saint Michael") that belongs to the Ukrainian Orthodox Church of the Kyiv Patriarchate. All the members of this parish are part of the Parishioners' Assembly. Initially, in April 1989, this group decided to form a religious association under the guidance of the Russian Orthodox Church, and registered as such with the Religious Affairs Council. In 1992 the Parishioners Assembly adopted a new statute and requested the Ukrainian Orthodox Church (Moscow Patriarchate) to approve it. In 1999 the Parishioners' Assembly decided to withdraw from the jurisdiction and canonical guidance of the Moscow Patriarchate and to accept that of the Kyiv Patriarchate. On 1 January 2000 the Church premises were taken over by clerics and lay people supporting the Moscow Patriarchate. The applicant association decided to amend the statute of the parish, but the State authorities and the Ukrainian courts rejected the registration of these

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[30] No. 77703/01, ECHR 2007.

[31] In Ukraine there are 3 major Orthodox canonical jurisdictions competing with each other: the Ukrainian Orthodox Church-Kyiv Patriarchate, the Ukrainian Orthodox Church (Moscow Patriarchate), and the Ukrainian Autocephalous Orthodox Church. For a detailed account on canonical conflicts in Ukraine, cf. PREDA, 82ss.

amendments because it considered that they contravened the relevant legislation. Following this, the applicant association decided to bring the case to the ECHR.

The Court recalls first that religious freedom is a matter of individual conscience but it also implies the freedom to manifest religion

> "in community with others, in public and within the circle of those whose faith one shares [...]. Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference".

Hasan and Chaush v. Bulgaria and *Metropolitan Church of Bessarabia v. Moldova* are again used in this case to conclude that "the State's duty of neutrality and impartiality" is "incompatible with any power on the State's part to assess the legitimacy of religious beliefs". The Court also reiterates the conclusion of the *Stankov and the United Macedonian Organization Ilinden v. Bulgaria* case, that the list of limitations to the freedom of religion from Article 9 § 2 is exhaustive. These limitations "must be construed strictly and only convincing and compelling reasons can justify restrictions".

The Ukrainian Government defends itself by stating that it has not intervened with the affairs of the applicant association. The refusal of the authorities to amend the statute of the Parish is based on the domestic legislation and on the provisions of this statute; the State had not taken any active steps to force the community to join one Patriarchate or the other.

This is not an argument that the Court may accept, since it "has consistently stated that a refusal by the domestic authorities to grant the status of a legal entity to an association of believers amounts to an interference with the right to freedom of religion under Article 9" and also because "the believers right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention". The first conclusion is taken from *Metropolitan Church of Bessarabia v. Moldova*, the second from *Hasan and Chaush v. Bulgaria*.

A State intervention in a conflict between two Churches is considered by the Court a non-justified interference even in cases where the intervention is very limited. The Court acknowledges the fact that the circumstances of the case "required an extremely sensitive, neutral approach to the conflict on the part of the domestic authorities". The situation is considered by the Court to be one

> "where a religious organization is in apparent conflict with the leadership of the Church to which is affiliated [...] and is obliged to amend its statute and register the amendments or risk being excluded from a legal entity originally created by it".

The refusal of the Ukrainian authorities to register the amendments of the applicant association' statute is considered by the Court as an interference with the right to freedom of religion under Article 9, in the light of Article 11.

The reason is that, by refusing to register these amendments, they

> "restricted the ability of the religious group concerned, which had no legal entity status, to exercise the full range of religious activities and activities normally exercised by registered non-governmental legal entities".

The Court offers in this case a very clear justification why it considers autonomy as directly related to the freedom of religion. In the Court's opinion, religious associations have the freedom to determine how new members are admitted and how existing members are excluded, which is an expression of Church autonomy. The State cannot interfere in "the internal structure of a religious organization" and regarding "the regulations governing its membership" because these are means "to express their beliefs and maintain their religious traditions". Using again *Hasan and Chaush v. Bulgaria* arguments, the Court underlines that

> "the right to freedom of religion excludes any discretion on the part of the State to determine whether the means used to express religious beliefs are legitimate".

The Court arrived at the conclusion that there has been a violation of Article 9.

1.4. Mirolubovs and Others v. Latvia[32]

This case is about a dispute inside the Old Orthodox Church of Latvia. The Old Orthodox Church is a schism inside the Russian Orthodox Church from the middle of the 17th Century. Part of the clergy, led by the Archbishop Avakkum refused to accept the liturgical reforms initiated by the Patriarch Nikon and consequently the old liturgical books and their followers were condemned by the Orthodox Church in 1666. The Old Orthodox Church is divided in third branches. The first is called *popovtsy* ("with priests") which have conserved an ecclesiastical life close to the Orthodox Church, but with their own hierarchy. The second is called *bespopovtsy* ("without priests"). They emerged in the second half of the 18th Century after the death of the priests who were originally attached to the cause of the Old Orthodox Church, and the name is based on the fact that there was no Archbishop who could ordain priests. Because of not having priests, *bespopovtsy* does not celebrate the Eucharist and does not have an ecclesiastical hierarchy. They are ruled by laics that are called "spiritual masters". These rulers conduct Sunday meetings and celebrate baptisms, weddings, funerals, etc. These two branches of the Old Orthodox Church were subsequently divided in obediences. The third branch emerged at the beginning of the 19th Century and it is called *yedinoverstsy* – Old Orthodox Church followers who became part of the Russian Orthodox Church but keeping the rules of the Old Orthodox Church.

[32] No. 798/05, ECHR 2009.

The first Old Orthodox community in Latvia emerged in 1660 in the Daugavpils region, as soon as this Church emerged. From that time, the majority of Old Orthodox believers belonged to the branch of *bespopovtsy*, the Pomorian obedience. Before 1989, Old Orthodox followers that belonged to this obedience called themselves "Church". In 1989 almost all Pomorian obediences united into the "Old Orthodox Pomorian Church of Latvia" with 70.000-80.000 followers (about 3 % of the Latvian population). In Latvia there are 69 Old Orthodox communities, the largest being called RGVD established in 1760, and having the largest Old Orthodox Church building in the world.

In 1984, Father Ivans Mirolubovs became a "spiritual master" of the RGVD and in 1995 he was appointed as the main "spiritual master". In the same year the Old Orthodox Church did not recognize the canonical legitimacy of Father Mirolubovs and declared that he was no longer a "spiritual master". In 1999 Father A.K. and his followers left the RGVD for creating a new community called "The Old Orthodox Pomorian Parish of God Epiphany". In 2001 the Old Orthodox Church confirmed the 1995 sanctions because Father Mirolubovs had invited a priest of the Russian Orthodox Church to celebrate celebrating the Eucharist in common with the RGVD Church. This was considered as "a betrayal of the Pomorian Church". In 2002 the representatives of the Pomorian obediences from Russia, Latvia and Byelorussia that meet in Sankt Petersburg declared that entering into a sacramental communion with the representatives of another confession results in excommunication.

In July 2002 a general meeting of the RGVD where Father Mirolubovs participated took place in the Riga Church; another meeting was organized in the street, just in the front of the Church, Father A.K. being one of the participants in this meeting. The RGVD adopted two declarations, the first declaring the independence of this community from the Old Orthodox Pomorian Church, the second stating that the communion with *yedinovertsy* is not contrary to the canonical rules of the Old Orthodox Pomorian Church. The Religious Affairs Directorate was asked by Father A.K to say if Father Mirolubovs and his followers had changed their confession by the act of sacramental communion with the orthodox. The Directorate for Religious Affairs recognized the decisions took by the street meeting. The RGVD challenged the position of the Directorate in courts. Even if the first instance tribunal nullified the decisions of the Directorate, the Supreme Court finally rejected the demand of the RGVD.

The Latvian legal framework on the Old Orthodox Church is very complex. Before the incorporation of Latvia into the USSR in 1940, there was a law adopted in 1935. According to this law an Old Orthodox Parish could be founded by at least 100 citizens at least 25 years old. In order to obtain legal personality, each community has to register with the competent State authority. The Old Orthodox Church parishes may associate themselves in unions. Each parish would be free to quit such a union if their members decided to do so. This law does not include provisions on how a person or a community could be recognized as "old orthodox". In the period when the law has been applied, this kind of issue did not emerge. After Latvia proclaimed its independence in 1991, the 1935 law did not

reenter into force. In 2007 the Law on the Old Orthodox Pomorian Church was adopted. This law did not refer to the old law on the parishes, but to the "Old Orthodox Church with all its parishes". According to the 2007 law, an Old Orthodox Church parish cannot exist apart from the Church.

Father Mirolubovs and other followers of the RGVD argued before the Court that no public authority could intervene in determining the confessional identity of members of a religious community against their will. The Court decided that the intervention of the authorities in a conflict inside the RGVD, with the result that Father Mirolubovs and his followers were no longer recognized as leaders of that community and were expelled from the Church premises, is contrary to the right to freedom of religion protected by Article 9.

Regarding the question of whether such a limitation could be considered as necessary in a democratic society, the Court reiterated its conclusion from the *Metropolitan Church of Bessarabia and Others v. Moldova* case: "while religious freedom is primarily a matter of individual conscience, it also implies, *inter alia*, freedom to ' manifest [one's] religion' alone and in private or in community with others, in public and within the circle of those whose faith one shares" and that "Article 9 lists a number of forms which manifestation of one's religion or belief may take, namely worship, teaching, practice and observance". It also cited the conclusions of *Hasan and Chaush v. Bulgaria*, *Metropolitan Church of Bessarabia and Others v. Moldova* and *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*:

> "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords".

Because of this principle of autonomy, a State cannot oblige a religious community to admit new members or to exclude other members (*Svyati – Mikhalivska Parafiya v. Ukraine*). According to the Court, Article 9 does not guarantee a right to dissidence inside a religious body; if there is disagreement between a community and a member of that community, the freedom of religion is manifested by the possibility to quit the community. This perspective was also the one used in the case *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*. The Court also affirms, as in *Metropolitan Church of Bessarabia and Others v. Moldova*, that

> "State measures favoring a particular leader or specific organs of a divided religious community or seeking to compel the community or part of it to place itself, against its will, under a single leadership, would also constitute an infringement on the freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities remain or are brought under a unified leadership".

The Court states that, because of the "principle of structural autonomy of religious communities" taken from Article 9, only the most serious reasons may justify a State intervention, and these reasons were not proved in this case. The Directorate of Religious Affairs, by determining the confessional membership of Father Mirolubovs and his followers, against their own opinions, violated its obligation of neutrality. The determination of the confessional membership of a religious community belongs to the spiritual authorities of that community and not to the State.

The main reasoning of the Court in deciding that the State authorities did not have the right to intervene is taken from the historical background of the Old Orthodox Church: this is a religion known for its "structural heterogeneity" and it has been afflicted throughout its history by secessions and schisms. These have been the origin of a number of obediences that were also considered as part of the Old Orthodox Church. The Directorate of Religious Affairs acted wrongly because it did not took into account this peculiarity, in such a sensitive case.

1.5. Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria[33]

In 1949 the communist authorities enacted legislation on religious denominations. Each religious denomination had to apply for registration and approval of its statutes by the Council of Ministers and had to to register its leadership with the Directorate of Religious Denominations. In 1971, the Central Committee of the Bulgarian Communist Party nominated Metropolitan Maxim as Patriarch of the Bulgarian Orthodox Church. After the fall of the communist regime, at the end of 1991 a new government was formed by the Union of Democratic Forces (anti-communist). In 1992 the Directorate issued a decision that the nomination of Maxim as Patriarch has been in violation of its statute and ordered his replacement by an interim council until the election of a new leadership by the Church. Metropolitan Pimen was appointed chair of the interim council. Church clerics presided over by Patriarch Maxim appealed this decision to the Supreme Court, which dismissed the appeal. In 1994, after the Bulgarian Socialist Party obtained a majority of votes, it formed the new government which recognized Patriarch Maxim as the legitimate leader of the Bulgarian Orthodox Church. In 1996, a Church Convention organized by the "alternative Synod" elected Metropolitan Pimen as Patriarch and Inokentiy as Metropolitan of Sofia. Patriarch Pimen applied to the Directorate to register but received no reply. The Supreme Court found that the tacit refusal of the Directorate is unlawful. On the same day as the Supreme Court decision the Directorate granted a request submitted by Patriarch Maxim for registration of amendments in the structure of the Church. Patriarch Pimen passed away in 1999 and Metropolitan Inokentiy was appointed as Chair of the Holy Council, pending the nomination of a new Patriarch.

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[33] Nos. 412/03 and 35677/04, ECHR 2009.

On 1 January 2003 a new Religious Denominations Act came into force and provided the *ex lege* recognition of the Bulgarian Orthodox Church. Metropolitan Inokentiy and its followers applied for registration as Bulgarian Orthodox Church, according to the new law, but this request was rejected by the courts.

The Parliamentary Assembly of the Council of Europe took a position in 2004 against the new Religious Denominations Act stating that:

> "The *ex lege* recognition of the Bulgarian Orthodox Church [...] exempting this institution from the usual registration procedure, which also includes a check on the legitimacy of the leadership, is generally seen as intended to settle the dispute between Maxim and Inokentiy in favor of the former. The alternative synod is effectively barred from registration as a new religious institution".

On the *ex lege* recognition of the Bulgarian Orthodox Church, the Assembly recommends to the Bulgarian authorities

> "to delete this provision outright, thereby subjecting the Bulgarian Orthodox Church to the same registration requirements as other religious communities".

The Court observed that the State action "had the effect of terminating the autonomous existence of one of the two opposing groups". Because participation in the organizational life of the community is a manifestation of one's religion, the Court concluded that "the personality of the religious leaders is of importance to the members of the religious community". The Court reiterates its jurisprudence stating that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society" (*Hasan and Chaush v. Bulgaria*, *Metropolitan Church of Bessarabia and Others v. Moldova*).

The Court considers that the State actions

> "were undertaken in conditions involving genuinely deep division and incompatible claims to legitimacy by two opposing groups of leaders of the Christian Orthodox community in Bulgaria".

These actions included

> "legislation passed with the aim of restoring the unity of the Church and sweeping measures throughout the country enforced by the prosecuting authorities against a large group of clergy members who were seen as their religious leaders by part of the clergy and believers belonging to the Christian Orthodox community in Bulgaria".

According to the Court, the State involvement has not been limited to the recognition of Church leadership. The Court acknowledged that "States enjoy a wide margin of appreciation in...their relations with religious communities", but "while it may be necessary for the State to take action to reconcile the interests of the various religions [...] the State has a duty to remain neutral and impartial in exercising its regulatory power and it its relations with the various religions, denominations and groups within them". Consequently, the State

> "does not need to take measures to ensure that religious communities remain or are brought under a unified leadership. The role of the authorities in a situation of conflict between or within religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other. State measures favoring a particular leader of a divided religious community or seeking to compel the community, or part of it, to place itself under a single leadership against its will would constitute an infringement of the freedom of religion".

There are other cases where the Court has been called to decide on a conflict between different religious communities, but this case is rather different because it started as a political intervention in the freedom of religion during the Communist regime; the State authorities continued to intervene after 1989, favoring one side or another based on political criteria. The same situation could be encountered in *Hasan and Chaush v. Bulgaria*, but this case started only after the breakdown of the communist regime. The case *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria* is based on the strongest bi-partisan political involvement that the Court had to take into consideration, with the risk of being accused of not having an objective position. The Court underlined this peculiarity of the case, by stating that

> "where new parliamentary majorities were formed after elections, the new governments often took action to ensure that the largest religious communities in the country were placed under the control of religious leaders loyal to them".

Every State intervention was not considered by the Court as lacking legitimacy: for example,

> "in 2002 the Bulgarian authorities had legitimate reasons to consider some form of action with the aim of helping to overcome the conflict in the Church, if possible, or limiting its negative effect on public order and legal certainty".

The Court did not accept the view of the Bulgarian government that the Metropolitan Inokentiy and his followers were "persons occupying Churches unlawfully". Patriarch Maxim has not been accepted as Patriarch by some

believers because of "his appointment by the Communist Party in 1971 and his role during the communist period", therefore he cannot claim "legitimacy as the canonical Patriarch". As to the issue of whether the Bulgarian Orthodox Church led by Patriarch Maxim has been validly registered, before and after the entry into force of the Religious Denominations Act, the Court declared that this is "unclear". For the Court, the system of religious communities registration in Bulgaria has been "highly influenced by political considerations", as it has been proved in some previous cases involving this country (*Hasan and Chaush v. Bulgaria*; *Supreme Council of the Muslim Community v. Bulgaria*).

The Court acknowledges that there is no right of dissent from a religious community, having the value of a right guaranteed by the Convention. However, it does not mean that the State authorities have discretion "to take sides in an intra-religious dispute" or to use State power "to suppress one of the opposing groups in the dispute". There is a need to remedy the "unlawful acts of 1992 and the following years", but this cannot justify "the unlawful acts that occurred in the present case", namely "the suppression of the applicants' activities" as an alternative leadership within the Church and their expulsion from temples, monasteries and other Church premises".

Another case from the Court jurisprudence involving Bulgaria is relevant for this case. To underline the idea that pluralism is incompatible with State action forcing a religious community to unite under a single leadership, the Court considers that the argument of the need to protect national identity cannot be used, as it was decided in *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria*, because

> "the national authorities must display particular vigilance to ensure that national public opinion is not protected at the expense of the assertion of minority views".

The intervention of State authorities is considered as affecting the freedom of religion also because it used a legal framework, in particular the 2002 Act that is not in conformity with "the Convention principles of the rule of law and clarity and foreseeability of the law". This is a line of reasoning that the Court did not consider in other cases involving autonomy of Churches. *Ex lege* recognition of a Church cannot be considered *per se* as incompatible with Article 9, but this is the conclusion of the current case, since "its introduction in a time of deep division was tantamount to forcing the believers to accept a single leadership against their will".

1.6. Sotirov and Others v. Bulgaria[34]

This case is related to *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*, while the *de facto* situation is

[34] Appl. 13999/05, 5 July 2011.

actually the same. After the Religious Denominations Act came into force on 1 January 2003, the Church council governing the St. Anastassiy Temple of Varna adopted a decision that this temple recognized the canonical authority of Metropolitan Inokentyi. On the following day, the leader of the "alternative Synod" issued a decision stated that Mr. Popov is parish priest and chairman of the Church council at that temple in Varna. Archimandrite Serafim, having the canonical power of the Varna and Veliki Preslav Eparchy, and some priests under his authority, occupied in May 2003 the Varna temple, claiming that they are the true representatives of the Bulgarian Orthodox Church headed by Patriarch Maxim.

Mr. Popov submitted an application to recover possession of the temple. The Varna Regional Court, starting from the premise that both applicants and defendants belong to the Christian Orthodox community in Bulgaria, concluded that the State was not entitled to intervene in intra-religious matters and the courts were not competent to decide whether or not there had been a deprivation of possessions. The only circumstance when a court may intervene is, according to the Varna Regional Court, when there is a matter of liability other than the liability under canon law.

The Court arrived at the conclusion that this application is inadmissible for several reasons. One reason is that the case is about actions of private individuals and not of State bodies or agents and therefore the complaint is incompatible *ratione personae* with the provisions of the Convention. According to the Court, Article 9

> "does not guarantee to believers a right to choose the religious leaders of the community or to oppose decisions by the religious organization regarding the election or appointment of ministers".

The application was dismissed also because it was introduced before the Court in April 2005, more than 6 months after the final verdict of a Bulgarian court.

Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria is quoted several times by the Court in this case. Even if the application has been lodged at the Court in April 2005, the Court reached his verdict only in July 2011. This is clear evidence that the Court did not want to discuss this case before a final decision in *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria* has been reached.

1.7. Sindicatul "Păstorul cel Bun" v. Romania[35]

In April 2008 35 clergymen and lay staff of the Romanian Orthodox Church, the majority of them Orthodox priests in parishes of the Metropolis of Oltenia, a region in the south-west of Romania, decided to form a trade union called

[35] No. 2330/09, ECHR 2012; Grand Chamber, 9 July 2013.

Păstorul cel Bun ("the Good Shepherd"). In accordance with the Trade Unions Act, they applied for legal personality at the Craiova Court of First Instance and they were successful. Following the Archdiocese's appeal, the Dolj County Court quashed the first-instance judgment. The applicants decided to appeal this case to the Court.

The Court first made a clarification of legal instruments it disposes to judge this case. It is interesting to note that in previous cases, one of 1990 and one of 2008, two trade unions of Orthodox clergy, *Solidaritatea* and *Sfântul Mare Mucenic Gheorghe*, were granted legal personality by the competent Romanian courts. It is also worth mentioning that this is the first case where an Orthodox Church or community is involved, when the Court considers the Directive 2000/78/EC as being part of the relevant norms for deciding a case based on the autonomy of Churches. This Directive has thus far been considered relevant by the Court in such cases, but only in the case of other Christian Churches. This Directive is relevant because it states that

> "Member States may provide that a difference of treatment which is based on [religion or belief] shall not constitute discrimination where...such a characteristic constitutes a genuine and determining occupational requirement, proved that the objective is legitimate and the requirement is proportionate".

However, the Court improperly applied this Directive, relying explicitly on the fifth recital and not on one provision of it, and this led to a wrong conclusion. The Romanian Government argued that the refusal to register the applicant as a union is an interference with the Article 11, but this interference is justified by being prescribed by law, pursuing a legitimate aim and being necessary in a democratic society. The Government said that it has refused to intervene because of the principle of the autonomy of religious communities and it gave as its argument the decisions of the Court in *Dudová and Duda v. The Czech Republic* and *Ahtinen v. Finland*. The Romanian Government made a mistake in his reasoning by stating that

> "the State was required to refrain from interfering in the organization of the Church. This has not been the case, for example, in *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentyi) and Others v. Bulgaria*".

In fact, the Court arrived at the opposite conclusion in that later case:

> "while it may be necessary for the State to take action to reconcile the interests of the various religions and religious groups that coexist in a democratic society, the State has a duty to remain neutral with the various religions, denominations and groups within them".

It was better to quote *Cha'are Shalom Ve Tsedek v. France* where the Court reached the conclusion that States enjoy a wide margin of appreciation in the particularly delicate area of their relations with religious communities.

In this case, European Centre for Law and Justice (ECLJ) submitted observations as a third party. ECLJ in fact supported the Romanian Orthodox Church and consequently the Romanian Government's perspective, stating that

> "by joining a Church, believers and the clergy freely accepted a duty of obedience, which entailed waiving certain fundamental rights and freedoms, including the possibility of forming a trade union".

ECLJ based its position on Directive 78/2000/EC, concluding that "the Church could legitimately prohibit its clergy from forming a trade union if it considered such a body to be harmful to the community".

The Court took into account the fact that priests and lay staff have employment contracts and considered, as in the case *Schüth v. Germany*, that a relationship based on this kind of contract cannot be "clericalised" to the point of being exempted from all rules of civil law. Members of the clergy and lay employees of the Church cannot be excluded from the scope of Article 11. The restrictions imposed by the State on the right to associate in trade unions "are to be construed strictly and can be justified only by convincing and compelling reasons".

The Court had examined the statute of the *"Păstorul cel Bun"* union and had found that they "did not contain any passages that were critical of the faith or of the Church". On the contrary, it specified that the union wished to apply the Statute and the canons of the Church. The Court considered that the union's demands are "related exclusively to defending the economic, social and cultural rights and interests of salaried employees of the Church"; therefore the recognition of the union would "not have undermined either the legitimacy of religious beliefs or the means used to express them". Quoting *Hasan and Chaush v. Bulgaria*, the Court reiterated the fact that

> "the autonomy of religious communities [...] is essential for pluralism in a democratic society [...] the right to freedom of religion [...] excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate".

The Court struck a delicate balance in this case between two kinds of conclusions related to the autonomy of religions:the first is that an employer whose ethos is based on religion may impose special duties of loyalty on its employees and when signing an employment contract employees bound to such a duty of loyalty may accept certain restrictions on some of their rights. This is the conclusion reached by the Court in the case *Ahtinen v. Finland*. The second is that a civil court reviewing a penalty imposed following a breach of such duties cannot refrain from carrying out a proper balancing exercise between the interests at

stake. The principle of proportionality is essential in determining the decision of that civil court. This conclusion is taken from the case *Schüth v. Germany*.

In its decision, the Court relies heavily on the two decisions of the domestic courts that have authorized Orthodox Church employees to join a trade union. Crucial for reaching a decision is the fact that the applicant union is not seeking to challenge the "position occupied by the Orthodox faith in the history and tradition in the respondent State", a perspective that is the same as the Court view. This cannot justify, in the Court's opinion, the interference of the Church. Therefore, the Court admits that there has been a violation of Article 11.

To reach such a decision that is partially a denial of the autonomy of Churches was not an easy task for the Court. Apart of all the decisions related to the autonomy of religions, the case *Sindicatul "Păstorul cel Bun" v. Romania* includes two joint dissenting opinions of Judges Ziemele and Tsotsoria. This is a clear sign that it has been hard to reach a consensus on changing the current jurisprudence on the issue of autonomy. When the Grand Chamber decided to return to this jurisprudence, and reached a different decision on this case than the Court in the first instance did, 4 judges expressed joint dissenting opinions. Judges Ziemele and Tsotsoria considered that

> "this case raises a relatively new issue for the Court as regards the autonomous existence of the religious community in view of a proposal to establish a trade union by some members of that community".

However they considered that some previous cases were relevant for Sindicatul "Păstorul cel Bun" v. Romania: Hasan and Chaush v. Bulgaria; Metropolitan Church of Bessarabia and Others v. Moldova; Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria. Although the other judges considered that the text of the trade union statute was of particular importance, the dissenters arrived at a different conclusion after carefully reading it: the trade union, in applying this statute, "would challenge the traditional hierarchical structure of the Church and the manner in which decisions were taken within it".

The decision of the Court in the case *Sindicatul "Păstorul cel Bun" v. Romania* has been heavily criticized. Grégor Puppinck and Andreea Popescu consider that the Court has acted as a "fourth court" (a court that is part of the hierarchy of internal courts, where there are ordinary, appeal and high court levels), contrary to the principle of subsidiarity. The Court observed only that the union *"Păstorul cel Bun"* is not a danger for democracy and for the public order and therefore it cannot be legally recognized. By doing so, the Court made the link between the Church and public order stronger than the link between the Church and the religious freedom. According to Grégor Puppinck and Andreea Popescu, the Court did not take into account the Church as a sacred institution, but as a private employer, and the priesthood not as a relationship between a priest and his Church, but as an employee.

The latter relationship is considered to be

> "not based on an employment contract but on a shared religious vocation. The employment contract is an accessory, which, indeed, is not immune to civil law. However that is not to say that civil law can or should ignore the specific nature of this contract: the religious specificities of this contract must be comprehended by the civil law and cannot be ignored since no fundamental principle of public order is involved"[36].

By deciding the case on the ground of the "public order" and not on the protection of "the rights and liberties of others", the Court had to prove that the union is a threat to a democratic society, following the jurisprudence it set for extremist movements (*Refah Partisi (Welfare Party) and Others v. Turkey*[37]). The autonomy of religions, considered by the Court in this case as being dependent on public order and not religious freedom, has seen its scope significantly reduced. These authors also relied on the US Supreme Court case *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, a very recent case (2012) where it the "ministerial exception" was affirmed , stating that the provisions of labour law are not applicable to employees of religious bodies, whether members of the clergy or the laity. Grégor Puppinck and Andreea Popescu criticized the Court's lack of reference to Article 17 of the Lisbon Treaty and denial of the applicability of the Directive 2000/78/EC. The conclusion of these authors is that once the union is recognized, the Court cannot force the Church to collaborate with it, unless the sense of the Church and of the priesthood is "entirely distorted, as the Soviets did in Romania with the creation of the ' Democratic Union of Priests' in 1945".

Eric Rassbach and Diana Verm considered that some cases of the US Supreme Court on the autonomy of religions are relevant for the case *Sindicatul "Păstorul cel Bun" v. Romania* and they indicated *National Labor Relations Board v. Catholic Bishop of Chicago* (1979) and also *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*. The fact that in Europe there are established religions, in a way that would be prohibited by the US Constitution does not change the relevance of such an analysis, because the established Churches "still retain a significant measure of autonomy from the apparatus of [the] State, and that level of autonomy has tended to increase over time"[38].

Roger Kiska criticizes the Court perspective on the Statute of the Romanian Orthodox Church. By interpreting the provisions of this Statute to establish that there is no prohibition to establish a union inside the Church, the Court took upon

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[36] ECLJ comments on the ECHR, 3rd section, ruling of January 31, 2012, in the case Sindicatul "Păstorul cel Bun" v. Romania: http://eclj.org/Releases/Read.aspx?GUID=944aed4f-8e96-4590-97d2-866ac6ee87a9&s=res [2. 4. 2014].

[37] Nos. 41340/98, 41342/98, 41343/98, 41344/98, ECHR 2003 - II.

[38] E. RASSBACH – D. VERM, Analysis of Sindicatul "Păstorul cel Bun" v. Romania: http:// www.strasbourgconsortium.org/common/document.view.php?docId=5847 [2. 4. 2014].

itself the role of interpreting the doctrine of that Church, a role that the Romanian courts refused to take on. Roger Kiska considered that

> "in so doing, the Court was usurping the statutory law and organizational integrity of the Orthodox Church in contradiction to its long held position of neutrality towards religious beliefs and internal church structure"[39].

The case *Sindicatul "Păstorul cel Bun" v. Romania* has been appealed to the Grand Chamber, which delivered its decision in July 2013. The importance of the case is revealed by the number of organizations and States asking to intervene as third-parties: the European Centre for Law and Justice, the Orthodox Archdiocese of Craiova, both of which had already intervened in the proceedings before the Court, also the Moscow Patriarchate, Becket Fund, International Center for Law and Religion Studies, the Governments of Moldova, Poland, Georgia and Greece. This case was seen as a fight between secular and non-secular views on the place of religion in the public sphere, a continuation of *Lautsi v. Italy* – when the latter case had been discussed by the Grand Chamber, the number of third-party intervenient was also impressive.

As for the facts, since the case has been deferred to the Court in 2008 new circumstances were added to *de facto* situation. In 2011, in response to an enquiry of the Romanian Orthodox Church, the Ministry of Labour replied that the Labour Code was not applicable to the employment relationship between that Church and members of the clergy, priests of the Archdiocese of Craiova (also members of the trade union) and therefore the Church was not obliged to sign individual employment contracts. Later on in 2011, their employment contracts were replaced with letters of appointment signed by the bishop. In 2012 the Archdiocese of Tomis sought a court order for the dissolution of the *Solidaritatea* trade union. In 2011 the president of the *Sfântul Mare Mucenic Gheorghe* requested its dissolution. The proceedings were still pending at the time the Grand Chamber reached its verdict. Both developments regarding these trade unions were related to the evolution of the case *Sindicatul "Păstorul cel Bun" v. Romania*.

To avoid being accused of superficiality, the Grand Chamber took a different approach than the Court. It examined the practice of European States regarding the legal relationship between a religious community and its clergy. In the majority of cases, the religious community may conclude an employment contract with its ministers, but it is not obliged to do so. In a minority of States, the relationship is

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[39] R. KISKA, The Question of Church Autonomy in Affaire Sindicatul Păstorul cel bun c. Roumanie, http://www.strasbourgconsortium.org/common/document.view.php?docId=5848 [2. 4. 2014]. The comments of Eric RASSBACH, Diana VERM and of Roger KISKA were translated in Romanian and published in Revista de Drept Social 4 (2012), alongside a comment of Gérard TILKIN: http://www.revistadreptsocial.ro/pagina_principala.php?operatie=arhiva_id&arhiva id=69 [2 . 4. 2014]. Cf. also G. ANDREESCU, Observații pe marginea cauzei Sindicatul "Păstorul cel Bun" c. România [Observations on the case Sindicatul "Păstorul cel Bun" v. Romania], in: Noua Revistă de Drepturile Omului 2 (2012) 42-54.

governed by labour law, but members of the clergy are bound by a duty of loyalty towards the religious community that employs them. In other States, the courts determine whether or not the employment relationship can be classified as contractual. With regard to the right to form a trade union, no States formally ban the setting up of trade unions and in some cases this right is expressly conferred.

The conclusion of the Grand Chamber is that, because of the lack of a European consensus,

> "the State enjoys a wider margin of appreciation in this sphere, encompassing the right to decide whether or not to recognize trade unions that operate within religious communities and pursue aims that might hinder the exercise of such communities' autonomy".

Among the opinions of third-party interveners, the most challenging is the one expressed by Becket Fund and International Center for Law and Religion Studies. They consider that the jurisprudence of the United States Supreme Court (*Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission* and *National Labor Relations Board v. Catholic Bishop of Chicago*) regarding the autonomy of religions is relevant for this case.

Before delivering its decision, the Grand Chamber reviewed the principles related to the autonomy of religions that it will apply, resulting from its jurisprudence: first, that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society" (*Hasan and Chaush v. Bulgaria*, *Metropolitan Church of Bessarabia and others v. Moldova*, *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria*), and second that "Article 9 of the Convention does not guarantee any right to dissent within a religious body" (*Mirolubovs and Others v. Latvia*). For reaching a final verdict in this case, the Grand Chamber considered that it is necessary to use all the previous important statements of the Court regarding the autonomy of religions.

The Grand Chamber took a different approach than the one used by the first instance. The main question of the case was whether there was an employment relationship between the members of the trade union and the Church. Answering in the affirmative, the right to form a trade union within the meaning of Article 11 is applicable. The dispute between the union's members and the Church hierarchy regarding the nature of the duties they perform is not the Grand Chamber's task to settle. With regard to determining the nature of this relationship, the Grand Chamber used a Recommendation of the International Labour Organisation (ILO), no. 198 from 2006 concerning the employment relationship. According to this document, the determination of the existence of such a relationship should be guided by the facts relating to the performance of the worker, notwithstanding how the relationship is characterized in any contrary arrangement, contractual or otherwise, that may have been agreed between the parties. The Grand Chamber arrived at the conclusion that the duties performed by the members of the trade union entail many features of an employment relationship, even if they are bound

by a duty of loyalty, based on a personal undertaking. Even if the answer to the question that the Grand Chamber considered relevant is affirmative, it does not lead, in the logical way affirmed by the Grand Chamber itself, to a confirmation of the existence of a right to form a trade union. This approach of the Grand Chamber is contradictory to the case *Sindicatul "Păstorul cel Bun" v. Romania*.

According to the Grand Chamber, the refusal to register the union constituted State interference with the exercise of the rights guaranteed by Article 11, but this interference pursued a legitimate end under Article 11 § 2, namely "the protection of others, and specifically those of the Romanian Orthodox Church". In the Grand Chamber's opinion, this interference was also "necessary in a democratic society". This conclusion was the result of the analysis of the Statute of the Romanian Orthodox Church adopted in 2007 and approved by a Government decision in 2008[40]. According to the Grand Chamber,

> "the principle of the autonomy of religious communities is the cornerstone of the relations between the Romanian State and the religious communities recognized within its territory, including the Romanian Orthodox Church"[41].

This Church

> "has chosen not to incorporate into its Statute the labour law provisions [...] a choice that has been approved by a Government ordinance in accordance with the principle of the autonomy of religious communities".

One conclusion of the Grand Chamber was not taken from any previous case on autonomy of religions:

> "respect for the autonomy of religious communities recognized by the State implies, in particular, that the State should accept the right of such communities to react, in accordance with their own rules and interests, to any dissident movements emerging within them that might pose a threat to their cohesion, image or unity. It is therefore not the task of the national authorities to act as the arbiter between religious communities and the various dissident factions that exist or may emerge within them".

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[40] Government Decision no. 53/2008, in: Monitorul Oficial no. 50 of 22 January 2008.

[41] On the autonomy of religions in Romania, cf. R. CARP, The autonomy of religious denominations in Romania: canonical issues, constitutional and legal framework, and the application of principles in some recent cases, in: Kanon 21 (= note 18), 257-266. For an updated Romanian version of this contribution, see IDEM, Religie, politică & statul de drept. Secvențele unei acomodări [Religion, politics & Rule of Law. Sequences of an Accomodation], Bucharest 2013, 64-79. For a comment on the constitutional provisions regarding the autonomy of religions, cf. IDEM, Religia și normele dreptului public. O interpretare constituțională [Religion and Public Law Norms], in: IDEM – I. STANOMIR, Limitele Constituției. Despre guvernare, politică și cetățenie în România [The Limits of the Constitution. On Governance, Politics and Citizenship in Romania], Bucharest 2008, 154-163.

It is one of the strongest definitions of autonomy of religions delivered by the Court. According to the Grand Chamber, the State's refusal to register the trade union is in accordance with its duty of neutrality under Article 9. This statement is not based on facts, since the State did not have the power to intervene in the procedures related to granting legal personality to the trade union, but only courts which are independent of State authorities.

The trade union had not requested permission from the archbishop and that was, in the Grand Chamber's view, a serious impediment to obtaining legal personality. The domestic courts compensated for this omission by obtaining the opinion of the Archdiocese of Craiova.

Taking into consideration the Statute of the Romanian Orthodox Church, the Court observed that union members are not prohibited from forming an association that pursues aims compatible with the Church's Statute and "does not call into question the Church's traditional hierarchical structure and decision-making procedures". Their members are

> "free to join any of the associations currently existing within the Romanian Orthodox Church which have been authorized by the national courts and operate in accordance with the requirements of the Church's Statute".

Therefore, the ban from being member of a trade union does not mean necessarily that they cannot exercise the right to association conferred by Article 11. The Court decided that there had been no violation of Article 11, a decision opposed to the one reached in first instance. 6 judges voted against (Spielmann, Villiger, López Guerra, Bianku, Møse and Jäderblom) and expressed a joint opinion dissenting in part. They offered as an argument the International Labour Organisation (ILO) Convention no. 87 on Freedom of Association and Protection of the Right to Organize, an international instrument that had also been mentioned in the Grand Chamber decision; it was mentioned, but had not been used as an argument. According to this Convention, the acquisition of legal personality by workers' organizations cannot be subject to conditions that would undermine that right. These 6 judges did not agree that the decision not to register the trade union was a proportionate or necessary measure for preserving the autonomy of the Romanian Orthodox Church. They also argued, as the first instance did, that the union's statute provides for full application of the ecclesiastical rules, including Church statutes and canons. In the opinion of these judges, the union's demands were limited to protecting its members' professional, economic, social and cultural rights and interests. The registration of a trade union cannot be refused solely on its programme provisions, but only "in cases of serious threats or if the programme goals are incompatible with democratic principles or are manifestly unlawful". This conclusion was taken by the judges after a careful examination of the Court's jurisprudence on Article 11.

In the opinion of these judges, there is no contradiction between granting the right to associate in a trade union and respecting the autonomy of the Church, because

> "even after registration, the union's members would still have remained within the administrative structure of the Church and subject to its internal regulations, which imposed special duties on them as members of the clergy".

The potential exercise of the right to strike is not an argument for not allowing legal personality, because this right is not absolute and is subject to some limitations. The judges also used another argument of the first instance court: the fact that Romanian courts had already recognized the right of Church employees to form trade unions. Despite the new developments regarding the two unions that were already recognized, there was no reason to conclude "that the existence of these two unions has in any way undermined the autonomous operations of the Romanian Orthodox Church". As to the comparative law perspective used by the Grand Chamber in its decision, the judges had a different perspective: none of the European models examined excluded members of the clergy from the right to form trade unions[42].

2. Catholic Churches

2.1. Rommelfanger v. The Federal Republic of Germany[43]

Maximilian Rommelfanger was a doctor at a hospital run by a Catholic foundation in Essen. According to a clause of his employment contract, the employment relationship was governed by the guidelines established by the Federal Organisation of Catholic Relief Bodies in Germany. Among these rules, there is the duty of loyalty towards the employer and the requirement that professional duties have to be performed based on Christian principles.

In 1979 Mr. Rommelfanger and other 15 people, including a doctor from the same hospital, signed an open letter to the chief editor of *Stern* magazine where they expressed criticism related to the abortion legislation adopted in 1976. In 1980, Mr. Rommelfanger's employerinformed him that his contract would be terminated because of signing that open letter. Mr. Rommelfanger appealed this decision, but the Federal Labour Court and the Federal Constitutional Court rejected the reasons of the applicant. He challenged these decisions to the Commission, stating that Article 10 had been violated.

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[42] On both decisions of the Court and of the Grand Chamber in the case Sindicatul "Păstorul cel Bun" v. Romania, cf. the paper of I. M. CONSTANTINESCU "Le problème juridique actuel des syndicats du clergé dans l' Eglise Orthodoxe Roumaine" in this volume.

[43] Appl. no. 12242/86, 6 September 1989.

The Commission found that the fact of having accepted in an employment contract a duty of loyalty to the Church limited the employee's freedom of expression without depriving him of the protection of Article 10. When the employer is an organization based on values indispensable to the performance of its functions, its freedom of expression also enjoys the protection of Article 10. A State that ensures a reasonable relationship between the rights of the employer and an employee satisfies the requirements of Article 10. According to the Commission, the obligation to abstain from statements on abortion contrary to the Church's position is not an excessive obligation, because this issue is very important for the Church. Therefore, the Commission concluded that there was no State interference in Mr. Rommelfanger's exercise of the freedom of expression guaranteed by Article 10.

2.2. Fernández Martínez v. Spain[44]

Jose Antonio Fernández Martínez was employed as a teacher of Catholic religion in a state-run school under a renewable one-year contract. Under the Agreement of 1979 between Spain and the Holy See, the Bishop of the diocese has to confirm every year the renewal of his employment. According to the Code of Canon Law used by the Catholic diocese of Cartagena,

> "the Ordinary [of the diocese] has the right to appoint or approve teachers of religion and, if religious or moral considerations so require, the right to remove them or to demand that they be removed" (c. 805).

In 1996 a local newspaper published an article about the "Movement for Optional Celibacy" for priests. The article included also a comment of Fernández Martínez and a photo showing him, together with his wife and their five children, attending a gathering of this movement. The members of this movement were urging the ecclesiastical authorities to introduce optional celibacy and calling for the Church to allow laity to elect priests and bishops. Several months later, in 1997 the Vatican authorities granted Fernández Martínez a dispensation from celibacy, at his request. The document stipulates that he is barred from teaching Catholic religion in public institutions, unless the local bishop decides otherwise. Consequently, the Diocese of Cartagena informed the Ministry of Education that it would not approve the renewal of his contract for the 1997-1998 school year. Fernández Martínez contested this decision. The Murcia Employment Tribunal upheld the applicant's appeal, but the Murcia High Court of Justice upheld the appeal formulated by the Ministry of Education, the Education Authority for the Region of Murcia and the Diocese of Cartagena. The Constitutional Court rejected the *amparo* appeal of the applicant and therefore he appealed this case to the

[44] No. 56030/07, ECHR 2012.

Court, alleging a violation of Article 8 regarding the right to private and family life.

In this case third-party comments were received from the European Centre for Law and Justice (as in the case *Sindicatul "Păstorul cel Bun" v. Romania*) and the Spanish Episcopal Conference. ECLJ fully agreed with the position of the Catholic Church and has stressed the special nature of posts where the employer is a religious entity, the employee's being bound by "heightened duty of loyalty". It uses, as in *Sindicatul "Păstorul cel Bun" v. Romania*, the provisions of the Directive 2000/78/EC which established that differences in treatment on religious grounds are admissible.

The Court offered first the framework to solve this case: "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus at the very heart of the protection which Article 9 affords" (*Hasan and Chaush v. Bulgaria*),

> "the principle of religious autonomy prevents the State from obliging a religious community to admit or exclude an individual or to entrust someone with a particular religious duty" (*Svyati-Mikhalivska Parafiya v. Ukraine*).

The Court observes that under Spanish law the notion of autonomy of religious communities is supplemented by the principle of State's religious neutrality (Article 16 §3 of the Constitution). Therefore, the State cannot intervene regarding the celibacy of priests. This obligation of neutrality is not unlimited, however, as it was confirmed by the Constitutional Court in examining the request of Fernández Martínez. The limitation takes the form of the court's review possibility. According to the Court, there is a "bond of trust" that has been broken and therefore the contract cannot be renewed. That bond

> "gives rise to certain specific features that distinguish teachers of Catholic religion and ethics from other teachers who [...] are employed in the context of a neutral legal relationship between an authority and an individual".

Therefore it is not "unreasonable to impose a heightened duty of loyalty on religious education teachers". By not renewing the contract of Fernández Martínez, "the ecclesiastical authorities were merely discharging their obligations that stemmed from the principle of religious autonomy".

In the Court's opinion, Fernández Martínez must have or should have been aware, on signing his contract of employment, of the particularities of his employment relationship and of the Bishop's right to decide whether or not to propose candidates, in accordance with c. 805, a conclusion that is expressly based on the case *Ahtinen v. Finland*.

The Court used Directive 78/2000/EC for concluding that

> "the special nature of the professional requirements imposed on the applicant stemmed from the fact that they were established by an employer whose ethos was based on religion or belief".

Besides his duty of loyalty towards the Catholic Church, Fernández Martínez had, according to the Court, a duty of "reserve and discretion" because "the direct recipients of his teaching were minors, who by nature were vulnerable and open to influence". In reaching this conclusion, the Court relied on the case *Dahlab v. Switzerland*.

The Court set the rule that "the requirements of the principles of religious freedom and neutrality prevent it from going further in the assessment of the necessity and proportionality of the decision not to renew" the contract because the circumstances that motivated this refusal to renew were of "a strictly religious nature." The role of the Court must then "be limited to verifying that the fundamental principles of the domestic legal order or the dignity of the applicant have not been infringed". Thus once it is established that the applicant did have access to a domestic court, the role of the European Court must be limited to verifying that the fundamental principles of the domestic legal order or the dignity of the applicant have not been infringed, and that the disputed decision has a strictly religious nature. If these two conditions are met, then the Court is incompetent to rule on the necessity and the proportionality of the decision of the Church. The Court's practice of self-restraint also applies to domestic courts because it stems directly from Articles 9 and 11 of the Convention. Because of this judgment, national judges cannot rule on such an internal Church matter without violating the principles of religious freedom and neutrality.

The Court rejects the application stating that there has been no violation of Article 8. One judge (Saiz Arnaz) did not agree with this conclusion and wrote a partly dissenting opinion. This opinion is based on the fact that the article published in the local newspaper does not include any critical remarks about the Church's doctrine attributed to the applicant personally and therefore "a situation that the diocese had originally regarded as compatible with the teaching of religion ceased to be so when it became public knowledge, or more precisely when it was reported in a newspaper".

The applicant wanted the Court and implicitly the European system of protecting human rights to arbitrate a conflict of values between Catholicism and part of contemporary Western culture, as well as between Church and State. According to Grégor Puppinck, the Court has acted with prudence and self-restraint in *Fernández Martínez v. Spain* and has recognized the incompetence of human rights as an arbiter of a strictly religious matter[15].

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[15] G. PUPPINK, European Court of Human Rights: a significant victory for the freedom of the Church: http://www.strasbourgconsortium.org/common/document.view.php?docId=5908 [2. 4. 2014].

Fernández Martínez lodged an appeal to the Grand Chamber in September 2012. The decision is still pending[46].

Before the Grand Chamber, third-party interveners are the Chair for Law and Religions of the Université Catholique de Louvain and the American Religious Freedom Program of the Ethics and Public Policy Center. They consider that, in compliance with the Directive 2000/78/CE, most European countries have adopted anti-discrimination legislation providing exemptions where religious characteristic constitute genuine and determining occupational requirements of a particular job[47]. Even if in the cases regarding religious autonomy the Court has emphasized that States have a greater margin of appreciation,

> "there is broad European consensus respecting religion teachers: Churches have latitude to order their relations with their clergy and to decide who teaches their faiths"[48].

The Chair for Law and Religions of the Université Catholique de Louvain and the American Religious Freedom Program of the Ethics and Public Policy Center also rely in their arguments upon the "ministerial exception" doctrine, developed by the US Supreme Court case *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, as the third-party interveners did in *Sindicatul "Păstorul cel Bun" v. Romania*.

2.3. Schüth v. Germany[49]

Bernhard Josef Schüth is an organist in the choir of the Catholic Parish Saint-Lambert in Essen. His employment contract dates from 1984 and it provides that any serious breach of the Church's principles constituted a material ground for termination of contract without notice. In 1994 he divorced his wife. In 1997 the parish informed him that, by having an extra-marital relationship with another woman, who was expecting his child, he had breached his duty of loyalty under Article 5 of the Catholic Church's Basic Regulations for ecclesiastical service, and his contract would end as of 1 April 1998. The applicant contested this decision and finally the Federal Labour Court concluded that there enough reasons for applying the above-mentioned Rules.

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[46] About the autonomy of religions in Spain, cf. J. MARTÍNEZ-TORRÓN, Church autonomy and religious liberty in Spain, in: ROBBERS, Church Autonomy (= note 2), 345-348.

[47] See L. VICKERS, Religious Freedom, Religious Discrimination, and the Workplace, Oxford 2008, 214.

[48] European Court of Human Rights, Grand Chamber, Case of Fernández Martínez v. Spain (Application no. 56030/07), Written comments of third-party interveners, Chair for Law and Religions of the Université Catholique de Louvain and the American Religious Freedom Program of the Ethics and Public Policy Center: http://www.strasbourgconsortium.org/common/document.view.php?docId=6050 [2. 4. 2014].

[49] No. 1620/03, ECHR 2010.

According to these Rules,

> "Catholic employees are required to respect and comply with the basic principles of the Catholic Church's religious and moral precepts. The example of personal life led in conformity with those principles is seen as important in particular for employees who perform pastoral, catechistic or educational duties, or who have a canonical mandate (*missio canonica*). [...] Employees shall refrain from any hostile attitude towards the Church. They shall not undermine, by their personal way of life or professional conduct, the credibility of the [Catholic] Church and of the institution for which they work".

As in other cases involving the autonomy of religions, the Court declared that in this case the Directive 78/2000/EC was applicable. In the case of Germany, at the time when this case was judged by the Court, the Directive had been transposed into national law by enacting the General Equal Treatment Act of 2006, but the European Commission sent a formal notice in 2008 that this law has not been correctly transposed. In 2009, following the lack of answer of the German Government, the European Commission sent a reasoned opinion which emphasized that the protection against discriminatory dismissal had not been transposed in the German legislation. Bernhard Josef Schüth argued before the Court that, by signing an employment contract with the Church, he had not completely renounced his private life. He argued that in 1983, when he signed the contract, he didn't know that at some point he would divorce from his wife. He alleged that the duty of loyalty towards the Church did not apply to him because, even if music plays a particular role, he takes part in the liturgy as any other believer. He also alleged that the Rules entered into force 10 years after he signed his employment contract, therefore these Rules cannot be a legal reason for his dismissal. Another argument of Schüth is that his profession of Catholic musician is very difficult to exercise outside the Catholic Church.

The Court observed that he is not complaining about a State intervention, but of the lack thereof, against the employer's intervention in his private life. The Catholic Church, even if it does have the status of public legal personality in German law, it is not a State authority. The Court quotes again the conclusion reached in *Hasan and Chaush v. Bulgaria*, namely that

> "the autonomy of religious communities [...] is essential for pluralism in a democratic society...the right to freedom of religion [...] excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate".

The Court agreed that, given the specialized nature of his work as a Church musician, he "had only limited opportunities of finding another job". In its reasoning the Court relied heavily on a decision taken by the Federal Constitutional Court in 1985 regarding the validity of the Church's dismissal of

employees who didn't respect the duty of loyalty. In this decision the Constitutional Court affirmed that, because of the constitutional guarantee of autonomy (Article 137 § 3) a Church may oblige its employees, by the provisions of the employment contract, to respect moral and dogmatic rules. It does not mean however that the legal status of a Church employee could be "clericalised". The labour relationship based on civil law does not transform itself in an ecclesiastical status that refers to all the aspects of the employee's private life. The Court fully accepted this argument, even if it differed from the conclusion it had reached in *Rommelfanger v. Germany*, that the contractual limitation of the right to private life by the Catholic Church is not contrary to the rights guaranteed by the Convention, if this limitation is accepted by the employee. The Court concluded that it has been a violation of Article 8.

According to W. Cole Durham and David M. Kirkham, in this case the Court established some criteria in order to determine the correct balance between legitimate interference of the State and the protection of the autonomy of religions, criteria that will be used in other similar cases:

- voluntary assumption of obligations of loyalty to the hiring institution;
- the range of alternative employment available to the dismissed employee;
- the importance attached to the conduct in question by the religious community (or other belief, ideological or ethos society);
- the nature of the employment and its place in carrying out the mission of the organization;
- the effect of continued employment on the credibility of the religious community in affirming and living by its teaching;
- whether less drastic measures might suffice;
- the right of a religious community to independence in its own affairs;
- the family and privacy rights of the discharged individual[50].

[50] W. C. DURHAM – D. M. KIRKHAM, European Court Issues Rulings in Two German Church Employment Cases: www.strasbourgconsortium.org/common/document.view.php?docId=6054 [2. 4. 2014].

3. Protestant and Neo-Protestant Churches

3.1. Dudová and Duda v. The Czech Republic[51]

Eva Dudová and Zdenek Duda had worked since 1993 as priests of the Czechoslovak Hussite Church in Křemz and in Ceske Budějovice – Rožnov respectively. Their labour relationship was expressed by decrees of the Plzeň diocese Council from January 1993. In July 1993 they asked for a suspension of their ecclesiastical service. The Council informed them that their request was rejected. In 1994 they opened a case in the courts against the Archbishop of the Ecclesiastical Administration of the Czechoslovak Hussite Church's diocese of Plzeň. The tribunal of Plzeň rejected the case; the action against the Central Council of the Czechoslovak Hussite Church was also rejected by the Prague 6th district tribunal and subsequently by the Prague municipal court. The applicants applied to the Constitutional Court, which in 1997 decided that the ordinary courts had infringed the right to have a hearing by an independent and impartial tribunal. From the applicants' perspective, the ordinary courts only partially applied this decision of the Constitutional Court and they did not decide whether the termination of their employment relationship was valid or not.

The applicants alleged before the Court that Article 6 § 1 stating that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal" had been violated. They affirmed also that Article 9 had been violated since they could not exercise the activity of priests of the Czechoslovak Hussite Church.

From the Court's perspective, the Plzeň tribunal was right in deciding that the cases where a priest and a Church are involved are excluded from the competence of civil law tribunals. The Prague 6th district tribunal and Prague municipal court were also right in deciding that this kind of relationship is governed only by the Church's Statute. The Court took into consideration the fact that the Prague 6th district tribunal and Prague municipal court decided that the Church had violated its Statute because the employment relationship should be ended by the diocesan Council and not by the Central Council. This conclusion did not affect, in the Court's view, the lack of competence of the Czech courts in deciding the validity of this relationship or the nullity of its termination. Therefore, Article 6 § 1 has not been violated. As for the alleged violation of Article 9, the Court rejected it, stating that the applicants had the opportunity to allege such a violation before the domestic courts but they did not do so[52].

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[51] Appl. 40224/98, 30 January 2001.

[52] About the autonomy of religions in the Czech Republic, cf. J. R. TRETERA, Church autonomy in the Czech Republic, in: ROBBERS, Church Autonomy (= note 2), 633-644. For a comment of this case, cf. LEIGH, 9.

3.2. Perry v. Latvia[53]

Robert Perry is a pastor belonging to *Morning Star International*, a federation of Christian Protestant communities from the United States. In 1997 he came to Latvia and established a community that belongs to this federation, *Rita Zvaigzne* (Morning Star). Mr. Perry had a residence permit and in 2000 he asked the Nationality and Migration Directorate for a renewal of it. His request was rejected by the Latvian authorities. He challenged this decision in Latvian domestic courts, which rejected his case. The applicant appealed the case to the Court, alleging a violation of Article 9.

The Court reiterated that religious freedom implied freedom to "manifest one's religion" alone and in private, or in community with others, in public and within the circle of those whose faith one shared. Relying on the cases of *Metropolitan Church of Bessarabia and Others v. Moldova*, *Kokkinakis v. Greece* and *Larissis v. Greece*, the Court affirmed that Article 9 enumerated different forms of manifesting religions or beliefs and in particular the right to try to convince the others. Willing to live for a certain period in Latvia, the applicant exercised his rights according to Article 9.

The Court observed that no provision of Latvian law in force had entitled the Nationality and Migration Directorate to use the renewal of a residence permit as a pretext for prohibiting a foreign national from performing religious activities in Latvia.

Relying on *Hasan and Chaush v. Bulgaria*, The Court reiterated that religious communities existed universally in the form of organised structures and abided by rules which were often seen by followers as being of divine origin. Accordingly, religious ceremonies had sacred value for believers if they were conducted by ministers empowered for that purpose in compliance with such rules. The personality of these ministers is important for every active member of the religious community and their participation in the life of the community is a peculiar manifestation of religion, so it enjoys the protection of Article 9.

The Court concluded that the interference with the applicant's right to freedom of religion had not been "prescribed by law" and that there had therefore been a violation of Article 9.

3.3. Ahtinen v. Finland[54]

Seppo Ahtinen was employed by the Evangelical Lutheran Church as a parish priest. In September 1998 the Cathedral Chapter decided to transfer him to another parish, more than 100 kilometers from his home. He did not consent to the transfer and he lodged an appeal with the Supreme Administrative Court, which invited the Cathedral Chapter to make observations. According to the Cathedral Chapter, there is an old tradition that a parish priest could be transferred to another

[53] No. 30273/03, ECHR 2007.
[54] No. 48907/99, ECHR 2008.

parish with or without his consent if the transfer is in the interests of the Church. Also according to this tradition, there is no appeal against a transfer decision, very similar to what happens in the armed forces. According to the Church Rules of Procedure adopted by the Synod, the Cathedral Chapter may appoint a qualified member of the diocese to perform the functions of a parish priest.

In 1999 the Supreme Administrative Court upheld the Cathedral Chapter decision. The applicant complained before the Court that he had not been properly heard and that there is a violation of Article 6.

According to the Court, the transfer of parish priests is a matter within the discretion of the Cathedral Chapter, a factor that argues against of the existence of a right protected by Article 6.

The Court concluded that the Evangelical Lutheran Church "has the right to administer its own affairs" and "it is independent in matters such as the appointment of its priests and the latter's service". When accepting ecclesiastical employment, parish priests are aware of the possibility that they may later be transferred to another post. In deciding that Article 6 is not applicable because of the autonomy of religions, the Court specifically relied on the case *Dudová and Duda v. The Czech Republic*.

3.4. Obst v. Germany[55]

Michael Heinz Obst is a member of the Church of Jesus Christ of Latter-day Saints (Mormons) residing in Germany and, since 1986, director for Europe of the Department of Public Relations of this Church. The Mormon Church is recognized in Germany as having public law personality. In 1993 he spoke with his spiritual director and affirmed that he had a sexual relationship with a woman other than his wife. Later on that year his superior dismissed the applicant from his job. He challenged this decision in the domestic courts. The Federal Labour Court decided in 1997 that the Mormon Church requirements regarding the duty of fidelity in marriage are not contradictory to the legal rules. According to this decision, marriage is particularly important for any religion and the Fundamental Law of Germany also gives protection to marriage. The dismissal of the applicant was considered necessary for preserving the credibility of the Mormon Church.

The applicant appealed his case to the Court, complaining about a violation of Article 8. The Mormon Church decided to apply for third-party intervention from the Federal Republic of Germany and its application was written by Gerhard Robbers. The main arguments were the following:

- there was no interference with Obst's right to family life, as Article 8 protects only the existing family and the dismissal by the Church did not violate the family life of the applicant, but was a consequence of his own destruction of his family by his adulterous conduct;

[55] No. 425/03, ECHR 2010.

- the requirement to refrain from adultery – being in line with the Church's views and clearly articulated employment requirements – was not an unreasonable demand, because of the crucial importance of this issue for the Church. Fostering marital fidelity is one of the essential tasks of the Church, in the same category as the exercise of charitable functions, the later argument being successfully invoked in *Rommelfanger v. Federal Republic of Germany*;

- the exact contents of the requirements of loyalty and personal worthiness of Church employees cannot be determined by State law. They must be left to the free decision of the Churches themselves. Any State definition of these obligations would involve a violation of the obligation of the State to remain neutral in matters of religion;

- it must remain within the free and autonomous decision of the Church what the loyalty and worthiness obligations of the Church are, and how Church discipline is maintained, particularly in the Church employment setting[56].

Relying on *Rommelfanger v. Federal Republic of Germany*, the Court observed that the applicant was not complaining about a State intervention, but about a lack of State intervention in protecting his private life against the interference of his employer. Another case used by the Court is *Hasan and Chaush v. Bulgaria* for stating that "Article 9 must be interpreted in the light of Article 11 of the Convention, which safeguards associative life against unjustified State interference".

The Court observed that the Federal Labour Court based its decision on the Federal Constitutional Court decision from 1985 that was also taken into consideration in *Schüth v. Germany*. According to the Court, the conclusions reached by the Federal Labour Court, namely that the applicant had not been subjected to unacceptable requirements, did not appear to be unreasonable. Relying specifically on *Ahtinen v. Finland*, the Court concluded that because the applicant had grown up inside the Mormon Church, he had to be aware when signing his employment contract of the importance of marital fidelity for his employer. The Court applied in this case the Directive 78/2000/EC for concluding that the peculiar nature of professional requirements imposed on the applicant resulted from the fact that there was established by an employer an ethos based on religion or belief. The Court concluded that there had been no violation of Article 8.

The difference between the outcomes of the Court in *Schüth v. Germany* and *Obst v. Germany* is a clear indicator, according to Ian Leigh, of how the Court will approach similar cases in the future: "by carefully weighing the impact on both the

[56] Obst v. Germany – Third-Party Intervention, Prof. Dr. Gerhard Robbers on behalf of the Church of Jesus Christ of Latter-day Saints (= note 11).

religious organization and the employee"[57]. This impact is strongly connected with article 8 § 2 of the Convention which allows restrictions on the right to respect private life in the interests of the rights and freedoms of others (the freedom of religions, in these cases) where it is prescribed by law and necessary in a democratic society. The Court found that the domestic court in *Obst v. Germany* had carried out this proportionality exercise, while in *Schüth v. Germany* it had failed to do so.

4. Muslim communities

4.1. Hasan and Chaush v. Bulgaria[58]

After 1989 the democratization process started in Bulgaria and some members of the Muslim community challenged the leadership of their religious organization. They considered that Mr. Gendzhev, Chief Mufti, and the members of the Supreme Holy Council had collaborated with the communist regime. In 1992 the Directorate of Religious Denominations declared the election of Mr. Gendzhev in 1988 as Chief Mufti null and void. He challenged this decision before the Supreme Court but his appeal was rejected. The National Conference of Muslims elected Fikri Sali Hasan as Chief Mufti and approved a new Statute of the Religious Organization of Muslims in Bulgaria. The Directorate registered the statute and the new leadership. In 1994 the supporters of Mr. Gendzhev held a national conference where he was elected as President of the Supreme Holy Council.

At the end of 1994, parliamentary elections took place in Bulgaria and the Socialist Party obtained a majority. As a result, the attitude of the authorities shifted in favor of the organization led by Mr. Gendzhev. The Directorate wrote a letter in January 1995 to Mr. Hasan urging him to postpone the national conference scheduled on that month. He announced that he agrees several days later. The Directorate issued a decision stating that, based on Decree R-12 issued by the Deputy Prime Minister, it had registered a new leadership of the Bulgarian Muslim community including Mr. Gendzhev. In February 1995 the newly registered leadership of the Muslim community entered the premises of the Chief Mufti's Office in Sofia and seized all documents and assets belonging to the rival religious organization.

The applicants lodged an appeal against the Decree R-12 with the Supreme Court, but the appeal was dismissed in July 1995. The organization led by Mr. Hasan held a national conference in March 1995 and in June 1995 submitted a petition to the Council of Ministers requesting the registration of the new statute and leadership of Muslims in Bulgaria, as adopted by the March conference. Receiving no answer, Mr. Hasan and his followers appealed to the Supreme Court.

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[57] LEIGH, passim.
[58] No. 30985/96, ECHR 2000.

Although the Supreme Court declared the tacit refusal unlawful, the Government refused to register the statute and the leadership.

The parliamentary elections from 1997 and the replacement of the Socialist Party by the Union of Democratic Forces brought about, as did the previous shift of Government, new developments in this case. The Directorate urged the two rival leaderships of Mr. Hasan and of Mr. Gendzhev to negotiate a solution. Both organizations agreed to hold a unification conference. At this conference, Mr. Hasan was elected as the leader of the organization and this was registered by the Directorate. However, Mr. Gendzhev appealed the Government's decision to the Supreme Administrative Court but his appeal was rejected.

Hasan and Chaush, secretary at the Office of the Chief Mufti, applied to the Court alleging that the forced replacement of the leadership in 1995 and the events up to the unification conference organized in 1997 constituted a violation of Article 9.

Before examining the case, the Court made an assessment of the autonomy of religions not based on previous jurisprudence. This was the first case when a religious community had alleged a violation of Article 9, and therefore the Court was obliged to state some general principles. The validity of these principles has not thus far been challenged and thus in almost every case related to the autonomy of religions the Court underlines the following reasons developed in *Hasan and Chaush v. Bulgaria*:

> "The Court recalls that religious communities traditionally and universally exist in the form of organized structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention.
> Where the organization of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associative life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organization of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organizational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable".

The interference of the Government in the religious life of the Muslim community was severely criticized by the Court. It stated that the Government, by the Decree R-12 and by the decision of the Directorate from February 1995 has changed the leadership and the statute of this community, and no reasons were given for this intervention. Furthermore, there was no explanation why preference was given to the leaders elected at the national conference organized in 1994 by Mr. Gendzhev and his followers. The acts of the Government were "more than acts of routine registration or of correcting past irregularities". Their effect was to favor one faction of the Muslim community. Therefore, the whole situation amount to an interference with the internal organization of the Muslim community, contrary to Article 9.

4.2. Supreme Holy Council of the Muslim Community v. Bulgaria[59]

The applicant in this case is the Supreme Holy Council of the Muslim Community led by Mr. Gendzhev. The circumstances are the same as in *Hasan and Chaush v Bulgaria*. Despite the decision of the Court that was taken in 2000, the division of this community continued, and in some towns separate assemblies elected their leaderships and were in dispute. Mr. Gendzhev challenged before the Court the organization of the 1997 unification conference, as he had challenged it without success in domestic courts.

In resolving this case, the Court relied heavily on the principles it set forth in *Hasan and Chaush v Bulgaria*. As Mr. Gendzhev contested the mediation of the Government, the Court agreed that States have a duty to secure religious tolerance and that discharging it may require engaging in mediation. Neutral mediation between groups of believers would not amount to State interference with the believers' rights under Article 9, but "the State authorities must be cautious in this particularly delicate area". The Court considered that the allegation of the applicant that some mayors and political figures participated in the selection of delegates to the 1997 unification conference "does not appear implausible". The fact that the Directorate continued to insist on unification even after the withdrawal of the leaders of the applicant organization was considered by the Court a wrong decision. The Directorate could have adopted another attitude: it "could have noted the failure of the unification effort and expressed readiness to continue assisting the parties through mediation, if all concerned so desired". Relying on *Serif v. Greece*, the Court recalled that

> "the role of the authorities in a situation of conflict between or within religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other".

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[59] No. 39023/97, ECHR 2004.

According to the Court, the Bulgarian Government has not proved whether the aim of restoring legality and remedy injustices "could not be achieved by other means, without compelling the divided community under a single leadership". Therefore, the Bulgarian authorities "went beyond the limits of their margin of appreciation under Article 9 § 2" and the Court concluded that there was a violation of Article 9.

This Court decision was released in 2005, 5 years after *Hasan and Chaush v. Bulgaria*. In fact, it is an appeal against the latter. What remains valid from that decision is only the statement of some principles that has proven to be very effective in other cases related to the autonomy of religions. It is a very clear example that the main prerogative of the Court should be the establishment of principles that are useful for the interpretation of the Convention and that may help in reaching a unitary jurisprudence.

IV. Conclusions

Some conclusions can be drawn from the cases where ECHR examined the autonomy of religions:

1. Article 9 has been drafted essentially to protect the freedom of religion of the individuals, and not of Churches or other religious communities in particular. As religious organizations have increasingly learned to use human rights instruments in a professional way, new cases have emerged before the Court where the autonomy of religions is involved and the Court jurisprudence has shifted to consider relevant both aspects of the freedom of religion.

2. The Court does not accept any intervention by State authorities, whatever the reason, in the internal life of the Churches or religious organizations. Even the effort to mediate between different factions inside a Church or a religious community (as in the case *Supreme Holy Council of the Muslim Community v. Bulgaria*) is considered incompatible with the autonomy of religions. The State has a "duty of neutrality" and can intervene only in limited circumstances. The Court has been very unwilling so far in accepting the limitations on the freedom of religion prescribed by paragraph 2 of Article 9.

3. The Court is very careful in assessing the legal framework when protecting the autonomy of religions, taking into account the Statutes and other internal regulations of the Churches and religious communities. The Court makes no difference between Canon law rules and domestic rules, either laws or Constitutions.

4. There is no difference whatsoever between cases related to Orthodox, Catholic, Protestant and Neo-Protestant Churches, or Muslim communities from the Court's perspective. Many cross-references are made: a principle established in one case involving an Muslim community is used in other cases related to all Christian Churches, conclusions from cases on Orthodox communities are used in cases where Catholic or Protestant individuals are involved, etc. The Court is interested in the content of autonomy of religions from the perspectives of different Churches, but this does not lead to a differentiated application of the autonomy concept.

5. There are differences among European States in guaranteeing the autonomy of religions in laws and Constitutions. The Court deals with a comparative perspective only in extreme circumstances, where all other arguments have good reasons to be and are challenged by the parties, as in the case *Sindicatul "Păstorul cel Bun" v. Romania.*

6. The conflicts of canonical jurisdiction related to the Moscow Patriarchate were at the origin of three cases related to the Orthodox Church: *Metropolitan Church of Bessarabia and Others v. Moldova*, *Svyati – Mikhalivska Parafiya v. Ukraine*, *Mirolubovs and Others v. Latvia*. These cases involved countries that were all included once upon a time in the Soviet Union: Republic of Moldova, Ukraine and Latvia. Nevertheless, these cases are different: while in *Metropolitan Church of Bessarabia and Others v. Moldova* a large number of the members of a religious community decided to belong to another Orthodox Church, in *Svyati – Mikhalivska Parafiya v. Ukraine* and in *Mirolubovs and Others v. Latvia* the Court had to solve a conflict of less intensity.

7. Canonical jurisdiction is also at stake in two other cases related to the Bulgarian Orthodox Church: *Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) and Others v. Bulgaria* and *Sotirov and Others v. Bulgaria*. The Court had to solve a conflict whose origin was during the Communist regime, when the Orthodox Church had enjoyed a privileged place in comparison with other religions. The Bulgarian Government, especially when the Socialist Party was in power, had the illusion that even in a pluralist environment it could assume all the privileges given to the Orthodox Church leaders by the former regime. It is striking that the same happened with the Muslim community, as *Hasan and Chaush v. Bulgaria* shows.

8. The case *Sindicatul "Păstorul cel Bun" v. Romania* opens a very intriguing perspective: why a demand to organize a trade union, that emerged inside an Orthodox Church, was so opposed by that Church and why this has not happened inside another Christian community? Are the

Canon law differences the answer? The fact that Catholic and Protestant Churches rely on many organizations that are affiliated with them could explain why such a demand has not given way to a conflict that the civil law courts are called to examine? These are questions will receive an answer if the Court is confronted with other cases where the foundation of a union inside a religious community is at stake.

9. In dealing with the autonomy of religions, the Court increasingly uses not only Canon law provisions, laws or Constitutions, but also EU instruments, like the Directive 78/2000/EC or international instruments, like Recommendation of the International Labour Organisation (ILO) no. 198 from 2006 concerning the employment relationship or ILO Convention no. 87 on Freedom of Association and Protection of the Right to Organize, and even supra-national documents with less legal value, like the Report of the monitoring committee of the Council of Europe on ' Honouring the obligations and commitments by Ukraine' or decisions of the domestic Constitutional Courts, like the German Federal Constitutional Court decision of 1985 regarding the validity of dismissal by the Church of employees that didn't respect the duty of loyalty. This is far beyond how the Court understood the defense of human rights few years ago. This approach is a very useful development, as human rights evolve in time. However, it leads to some questions that remain to be examined by the Court: for example, what happened, as in *Schüth v. Germany*, if a Directive is not well implemented by a State: in this case could the Directive be considered as an argument by the Court, having the same value as all other legal instruments?

10. Third-party interveners have recently started to rely in their arguments on the US Supreme Court jurisprudence, especially with the "ministerial exception" doctrine, holding that the provisions of labour law are not applicable to employees of religious institutions, whether members of the clergy or the laity. This was the case in *Sindicatul "Păstorul cel Bun" v. Romania* and also in *Fernández Martínez v. Spain* where the Chair of Law and Religions of the Université Catholique de Louvain and the American Religious Freedom Program of the Ethics and Public Policy Center were third-party interveners before the Grand Chamber. In *Sindicatul "Păstorul cel Bun" v. Romania* the Court did not mention in its verdict such a reasoning, and the decision of the Grand Chamber in *Fernández Martínez v. Spain* is still pending. The Court until now has not used the US Supreme Court view on the autonomy of religions, but is under constant pressure to do so.

11. All the cases on religious autonomy related to Catholic or Protestant and Neo-Protestant Churches except one (*Perry v. Latvia*) have dealt with one individual challenging the content of his "duty of loyalty" towards the

Church or a religious organization as employer. In all these cases, except *Schüth v. Germany*, this duty was acknowledged by the Court and therefore Churches were recognized as having full autonomy in establishing the content of the employment relationship. The Court arrived at a different conclusion in *Schüth v. Germany* by relying on a decision of the Federal Constitutional Court that, although recognizing the legality of such a "duty of loyalty", affirmed that the legal status of a Church employee could be "clericalised". Did the Court rely on a decision of a domestic court because Directive 78/2000/EC was not well implemented by Germany or because it considers that decision to be relevant *per se* in this case? In the latter case, are there limitations to the "duty of loyalty" that the Court may define in future cases?

12. A very old Muslim community in Europe, that of Bulgaria, addressed the Court on the issue of religious autonomy. What about other Muslim communities, especially new ones, composed by migrants? Are they reluctant to address to the Court? Or is the lack of causes related to these communities explained by the fact that State authorities do not want to intervene in their internal organization?[60]

Human rights are a system of values that evolves with the dominant culture, and it is impossible that they remain outside conflicts between culture and religion. The autonomy of religions, being an expression of the freedom of religion, cannot have the same content over time. The fact that the Court has given a constant meaning to this concept does not change that conclusion. It is an illusion and a wrong attitude to use human rights as a means to condemn the position of Christian Churches on issues such as respect for life and family, human dignity, abortion, etc. Because the autonomy of religions is part of fundamental rights, such an attitude contradicts the very essence of the need to protect these values. However, in mediating the conflicts between a dominant culture and religion, human rights have a limited usefulness. These conflicts are natural and are beneficial both for affirming the fundamental religious values and for showing the nature and the limits of that culture.

Autonomy of religions collides, as the Court's jurisprudence shows, with other human rights. It is nothing exceptional, since all rights collide between them. This collision is in many cases resolved in favor of the autonomy of religions, because it is considered to be a voluntary restraint of human rights. Being an employee of the Church it means that you have renounced voluntarily the right to associate in trade unions or to participate in public life.

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[60] The Court could decide in a case where the autonomy of religions in the case of a Muslim community is at stake, but this refers to a country that is member of the Council of Europe, but is not located on the territory of Europe-Azerbaijan. This case involves the claim of a mosque in Baku to appoint its own leaders without government interference (Juma Mosque Congregation and Others v. Azerbaijan, no. 15405/04 – application admitted by the Court).

Is it necessary to have a definition of autonomy of religions that encompasses all the different religious peculiarities? As the Court' s jurisprudence shows, such a definition is not necessary because its content may vary over time. The lack of a definition given by the Court that can be used in all the circumstances is not a vulnerability, but rather shows the capacity to adapt in many different situations.

To envisage a unitary and unified perspective on the autonomy of religions is a pure utopia, as the religions, in order to resist, should have added value to any dominant culture they encounter. The key for the successful accommodation and survival of a religion to any secularized environment is to affirm the fact that the autonomy of religions is part of a fundamental right that needs to be protected as much as any other human rights.

UN DIRITTO PARTICOLARE NEL SISTEMA GIURIDICO ITALIANO PER LA SACRA ARCIDIOCESI ORTODOSSA D'ITALIA E MALTA, AI SENSI DELLA LEGGE N° 126/2012

Vittorio P a r l a t o, Urbino

1. Premessa

Innanzi tutto va precisato che per legge speciale o particolare non si deve intendere necessariamente un privilegio, giacché dovremmo qualificare gran parte della normativa degli Stati moderni, ed in specie di quello italiano, come normativa privilegiaria.

In questo non va vista un violazione del *principio di uguaglianza*, principio ormai assunto in tutti gli ordinamenti giuridici statali moderni, giacché esso non può essere disgiunto dal *principio di ragionevolezza* che prevede normative differenti per realtà diverse.

Certo questa disparità di trattamento non potrà determinare una difformità dei singoli nella dignità sociale e nell'esercizio dei diritti fondamentali attribuiti ai cittadini dalle Carte costituzionali. Non c'è insomma violazione del principio d'uguaglianza quando il trattamento differenziato non tocca il patrimonio giuridico dei singoli che può sintetizzarsi nella facoltà di professare la fede in forma individuale ed associata, esercitare il culto pubblico, far propaganda religiosa.

Il moderno uso del diritto, che si prefigge una funzione di indirizzo e di promozione delle scelte di comportamento dei consociati e dei gruppi, esige norme differenziate. Legge speciale, legge particolare, non significa dunque *privilegio*, bensì attenzione a realtà sociali differenti.

Così se il principio d'uguaglianza, di matrice illuminista, impone il divieto di discriminazioni a motivo delle scelte religiose che trovano giustificazione nell'arbitrio e nella discrezionalità di chi esercita la funzione legislativa, il principio di ragionevolezza legittima situazioni giuridiche differenziate ed è funzionale ad un ideale di giustizia i cui motivi informatori e determinanti vanno ricercati in più elementi, la ponderata combinazione dei quali determina una normativa differente per natura, contenuti e quantità[1].

Lo Stato moderno adotta una legislazione sempre più varia ed articolata in relazione alle differenti esigenze dei vari gruppi e fenomeni sociali introducendo, proprio in considerazione della specialità presentata da ciascuno di essi, differenziazioni di trattamento, eccezioni, previsioni particolari; si moltiplicano così le leggi che sottraggono intere materie o gruppi di rapporti alla disciplina generale, costituendo micro-sistemi con proprie ed autonome logiche.

Lo Stato italiano, laico, non si presenta come agnostico[2], ma pluralista, pluriconfessionale e neutrale, ed è anche consapevole della sempre crescente presenza

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[1] Sul tema V. PARLATO, Le intese con le confessioni acattoliche: i contenuti, Torino 1996, 36-39.
[2] Ibidem, 165.

della pluralità di realtà religiose nella società italiana cui ritiene opportuno, se non doveroso, assicurare, entro certi limiti, specifici diritti di libertà religiosa individuale e collettiva, non solo sul piano formale, ma anche sostanziale, così da giustificare una collaborazione per realizzare tali diritti. La Repubblica italiana riconosce alle confessioni religiose, ed in specie a quelle con cui stipula o ha stipulato un intesa, la rappresentanza esclusiva dei diritti e degli interessi dei loro fedeli, come anche prevede la possibilità di aiuti economici indiretti.

Questo riconoscimento di gruppi esistenti fuori dall'ordinamento dello Stato, che si sono autocreati e autoregolati o comunque esistenti, determina l'elaborazione, da parte della gius-pubblicistica, della categoria concettuale di *autonomia istituzionale* che si concretizza nella caratteristica propria degli ordinamenti costituitisi da sé e la cui normazione è rilevante rispetto ad un ordinamento sovra-ordinato, quale è quello statale; questa *autonomia istituzionale*, più che una qualità come la sovranità, o un potere come l'autonomia privata, può essere meglio vista come una relazione che si pone tra ordinamenti primari, non derivati, i quali si riconoscono legittimi portori di valori e competenti a regolare specifiche materie di comune interesse o che interferiscono le une nell'ordinamento dell'altro.

L'art. 8, III comma, della Costituzione italiana prevede che le leggi regolatrici dei rapporti con ogni singola confessione di minoranza siano emanate "*sulla base di intese* con le relative rappresentanze".

La promulgazione di leggi per le singole confessioni acattoliche sulla base di intese, come quella in oggetto con l'Arcidiocesi ortodossa d'Italia, quali piccoli concordati, hanno determinato un pluralismo normativo, esaltando la funzione del diritto speciale, a tutela di esigenze minoritarie, rispetto al diritto comune, ed hanno dilatato l'operatività del sistema pattizio. Le intese, rispetto alla legge di cui stanno alla base, sono una condizione di legittimità costituzionale, un *presupposto autorizzativo*, diretto a inserire un limite al potere discrezionale del potere legislativo, il quale per non eludere la garanzia costituzionale è obbligato, ove voglia legiferare nei confronti di quella confessione, ad attenersi all'intesa trasformandone il contenuto in legge, senza modifiche.

Tale legge non potrà essere sospesa, modificata, derogata o abrogata, se non in esecuzione di nuove intese con la confessione religiosa interessata; questa legge, ancora, è garantita da qualsiasi legge ordinaria; il legislatore potrà derogarla unilateralmente solo tramite l'abrogazione del succitato art. 8, III comma della Costituzione.

Parte della dottrina sostiene che le intese siano atti bilaterali che la Costituzione colloca in un ordinamento che non è quello statale, né quello internazionale, ma in un ordinamento che viene creato di volta in volta dall'incontro della volontà statale con quella di ogni singola confessione stipulante[3]. Io ritengo che sono legge di diritto interno dotate di una particolare robustezza perché hanno alla base un accordo tra lo Stato e l'ente esponenziale di

[3] Cf. F. FINOCCHIARO, Diritto ecclesiastico, Bologna, 1997, 138.

entità, istituzioni, cui è riconosciuta un'autonomia istituzionale nei termini sopra descritti.

L'intesa in oggetto, come ogni altra intesa, però non è un trattato internazionale, e la legge che ne immette il contenuto nell'ordinamento italiano non è una *legge di esecuzione*, ma una *legge di approvazione*; comunque una legge rafforzata, i cui due soggetti, Stato italiano e Arcidiocesi, hanno determinato il contenuto con un accordo formale: l'intesa, sottoposto all'approvazione del Parlamento, senza possibilità di modifica[4].

II. L'intesa del 2007 e la legge di approvazione n. 126 del 30 luglio 2012

La Sacra Arcidiocesi Ortodossa d'Italia e Malta[5] è una metropoli del Patriarcato Ecumenico, è dotata di un proprio Statuto; è persona giuridica italiana per il DPR 16 luglio 1998 ed ha una fitta rete di interazioni con realtà socio-economiche italiane e con le presenze diplomatico-consolari greche[6].

Va subito notato che l'intesa, stipulata nel 2007, con la *Sacra Arcidiocesi Ortodossa d'Italia ed Esarcato per l'Europa meridionale*, nome proprio dell'Arcidiocesi al momento della stipula dell'intesa, fa espresso riferimento all'appartenenza al Patriarcato Ecumenico dell'Arcidiocesi stessa, infatti si dice che

> "l'Arcidiocesi, fondata dal Patriarcato Ecumenico di Costantinopoli, quale erede storica delle antiche metropolie istituite dal medesimo Patriarcato Ecumenico nella penisola italiana fin dal primo millennio, è organizzata secondo le norme del proprio statuto".

L'Arcidiocesi si pone come l'ente esponenziale di una struttura diocesana estesa in Italia e a Malta; ovviamente la normativa riguarda il rapporto con lo Stato italiano. Essa è stata istituita il 5 novembre 1991, con Tomo patriarcale e sinodale del Patriarcato Ecumenico di Costantinopoli, la sede è a Venezia[7]; la chiesa di San Giorgio dei Greci ne è la cattedrale; ha cura pastorale dei fedeli di origine greca dimoranti da decenni in Italia, ormai cittadini italiani, ed anche di quanti, come studenti in Università italiane, vivono temporaneamente nella Repubblica[8]; essi sono canonicamente dipendenti dal Patriarcato costantinopolitano[9],

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[4] L'intesa, come ho detto, viene immessa nell'ordinamento dello Stato attraverso una *legge di approvazione*, non attraverso una *legge di esecuzione* come i trattati internazionale ed i concordati con la Santa Sede, soggetto anch'essa di diritto internazionale.

[5] Il 25 aprile 2005 le fu aggregato il territorio di Malta, separandolo dal territorio dell'Arcidiocesi di Gran Bretagna.

[6] Sull'istituzione dell'Arcidiocesi e relativi tomi patriarcali cf. P. STAVROPOULOS, L'Arcidiocesi greco-ortodossa d'Italia, in: V. PARLATO – G. B. VARNIER (ed.), Principio pattizio e realtà religiose minoritarie, Torino 1995, 409s.

[7] Venezia dal 1573 al 1805 era la sede del metropolita di Filadelfia, cui erano affidate le comunità greco-ortodosse delle coste italiana e dalmata.

[8] Dal 1996 è guidata dall'arcivescovo Gennadios Zervós. Per tutto quanto attiene la comunione delle chiese ortodosse e la loro presenza in Italia fino alle ultime modifiche, rinvio al V. PARLATO,

o se riconoscono tali[10]. Questi fedeli ortodossi fino al 1991 erano stati affidati al Metropolita d'Austria che era anche esarca per l'Italia e l'Ungheria. L'intesa è stata approvata con la legge 30 luglio 2012, n. 126: *Norme per la regolazione dei rapporti tra lo Stato e la Sacra arcidiocesi ortodossa d'Italia ed esarcato per l'Europa Meridionale, in attuazione dell'art. 8, terzo comma, della Costituzione*[11].

III. L'intesa, atto pubblico, a base di una legge statale come fatto inusuale negli Stati dell'Europa orientale a forte maggioranza ortodossa

Tra gli elementi caratterizzanti la realtà dell'Europa orientale va annoverata l'intima connessione tra le confessioni tradizionali e i gruppi etnici, nonché la possibile speciale tutela giuridica riconosciuta alle chiese ortodosse nazionali.

Alle confessioni di minoranza speciale protezione è spesso riconosciuta da trattati internazionali, nei quali quelle confessioni sono state l'oggetto della tutela, ma non i soggetti stipulanti gli accordi. Tali sono, ad esempio, il Protocollo di Londra del 1830 e il Patto di Londra del 1884 a tutela della Chiesa cattolica nel nascente Regno di Grecia[12], come anche il Trattato di Sèvres del 1920 e il Trattato di Losanna del 1923 dove si garantisce la minoranza greco-ortodossa ed il Patriarcato Ecumenico in Turchia[13].

Le Chiese d'Oriente tra storia e diritto. Saggi, Torino 2003, 71s; IDEM, Le chiese ortodosse in Italia, oggi, in: Aequitas sive Deus. Studi in onore di Rinaldo Bertolino, Torino 2011, 972-985 e IDEM, La legge 126/2012 relativa ai rapporti tra Italia e Sacra Arcidiocesi Ortodossa d'Italia e Malta, in: Stato, Chiese e pluralismo confessionale 36 (2012): http://riviste.unimi.it/index.php/statocchiese/article/viewFile/2570/2801.

[9] Art. 2, I comma dello Statuto.

[10] Nel ventennio dalla sua fondazione, l'Arcidiocesi, oltre alle preesistenti comunità, chiese-confraternite e parrocchie (Barletta, Brindisi, Genova, Milano, Napoli, Roma, Trieste, Venezia), ha istituito nuove parrocchie, nonché alcuni monasteri. Altre parrocchie sono in corso di formazione. Tutte le nuove parrocchie vengono fondate in base ad uno statuto uniforme, già approvato dal Patriarcato Ecumenico. Dipendono dall'Arcidiocesi suddetta anche la Parrocchia – appartenente al Patriarcato di Georgia – di Sant'Andrea apostolo in Roma (edificio già di proprietà della chiesa greco-ortodossa) e la Parrocchia di Santa Sofia, appartenente alla chiesa ucraina, presso Chiesa cattolica della Madonna delle Grazie a Marcianise (CE). – Notizie sulla diaspora greco-ortodossa in Italia nei secoli passati sono rinvenibili in G. MORI, Ortodossia e intesa con lo Stato italiano: il caso della Sacra Arcidiocesi Ortodossa d'Italia ed Esarcato per l'Europa meridionale, in: Quaderni di diritto e politica ecclesiastica 2 (2007) 399s.

[11] In Suppl. ordinario n. 168 alla Gazzetta Ufficiale della Repubblica Italiana 7 agosto 2012, n. 183, in vigore dal 22 agosto 2012.

[12] Sui trattati internazionali relativi alla Chiesa romano-cattolica e sulle ragioni storico-diplomatiche di quegli accordi cf. I. PETRITACHIS, La situación de la Iglésia católica romana en Grecia, in: La Institucíon concordatária en la actualidad, Salamanca 1971, 455-464.

[13] L'art. 40 afferma che: "Ils [les ressortissants turcs] auront notamment un droit égal à créer, diriger et contrôler à leur frais toute institutions charitables religieuses ou sociales [...] avec le droit d'y faire librement usage de leur propre langue et d'y exercer librement leur religion". Per il patriarca Bartolomeo I questa norma garantisce al patriarcato anche uno status 'ecumenico' che trascende quello di capo di una piccola chiesa ortodossa in Turchia, cosa non condivisa dal governo turco. Cf. BARTOLOMEO I, Incontro al mistero. Comprendere il cristianesimo oggi, Magnano 2003, 174; 292 e 301.

Per quanto attiene alle chiese di maggioranza, in alcuni casi, come in Grecia, la normativa relativa alla chiesa nazionale *epicratousa* (dominante), anche se formalmente statale è il risultato di precedenti accordi informali tra rappresentanti dello Stato e della Chiesa ortodossa[14]; così è avvenuto anche per l'ultima legge sulla libertà religiosa in Romania, nella quale si garantisce uno speciale posizione alla Chiesa ortodossa romena, essa è vista quale autore morale di quel testo legislativo che *de iure* e *de facto* crea un sistema giuridico di privilegio per la Chiesa ortodossa romena (BOR)[15].

Anche in Russia la nuova normativa sulle religioni garantisce in modo preminente la Chiesa ortodossa russa[16]; su pressioni del patriarcato di Mosca la Legge fondamentale della Federazione Russa del 1° ottobre 1997, riconosce lo "speciale contributo dell'ortodossia alla storia della Russia, alla formazione e allo sviluppo della spiritualità e della cultura russa"[17].

Anche in questi casi, come detto sopra, Legge privilegiaria non significa dunque *privilegio* inteso come ingiustificato vantaggio, bensì attenzione a realtà sociali differenti. La particolare attenzione nei confronti delle religioni di maggioranza che tanto hanno contribuito all'identità nazionale e culturale di quelle popolazioni appare giustificata alla luce della concezione tipicamente mediorientale che postula un'intima connessione tra identità nazionale e fede professata, per cui ogni popolo si distingue anche per la religione o rito seguiti, cui fa riscontro la tesi che vuole il cattolicesimo latino ed il protestantesimo professati e professabili da fedeli non orientali, in quanto espressioni di altra civiltà e di altra comunità politica. A questo si aggiunge la rilevanza numerica e sociale del cristianesimo ortodosso.

IV. I contenuti, rilevanza del diritto canonico ortodosso

Lo statuto dell'Arcidiocesi italiana rinvia al diritto canonico delle chiese ortodosse ed in particolare a quello, integrato con norme particolari, proprio del Patriarcato Ecumenico e successiva normativa generale o specifica per l'Arcidiocesi in oggetto. L'Arcidiocesi è non un *quid separatum*, né una struttura autonoma dal punto di vista del diritto canonico ortodosso, ma una diocesi appartenente ad una chiesa autocefala, quale il Patriarcato Ecumenico, con cui ha

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[14] PARLATO, Le Chiese d'Oriente, 139-41.

[15] G. GRIGORIȚĂ, Lo statuto giuridico della Chiesa ortodossa romena secondo la legge n. 489/2006 riguardante la libertà religiosa ed il regime generale dei culti, in: G. CIMBALO – F. BOTTI (ed.), Libertà di coscienza e diversità di appartenenza religiosa nell'Est Europa, Bologna 2008, 111-149.

[16] Cf. anche G. CODEVILLA, Stato e Chiesa nella Federazione Russa. La nuova normativa nella Russia postcomunista, Milano 1998; IDEM, Laicità dello Stato e separatismo nella Russia di Putin, in: A. G. CHIZZONITI (ed.), Chiese, associazioni, comunità religiose e organizzazioni non confessionali nell'Unione europea, Milano 2002, 148s. e 157s.

[17] C. CARDIA, Principi di diritto ecclesiastico, Tradizione europea e legislazione italiana, Torino 2005, 100.

un rapporto organico di dipendenza. Il Tomo patriarcale di erezione dice espressamente che l'Arcidiocesi è

> "sottoposta alle dirette dipendenze canoniche del nostro santissimo Trono Ecumenico, apostolico e patriarcale, ed a questo facente riferimento, secondo l'ordine e le condizioni delle altre Sacre Arcidiocesi metropolitane della nostra giurisdizione patriarcale"[18].

Va notato che altro è la Chiesa ortodossa in Turchia (arcivescovato di Costantinopoli) chiesa locale o nazionale, altro è il Patriarcato Ecumenico, indissolubilmente legato a quella sede arcivescovile, ma istituzione sovranazionale e spirituale con credenti di molte nazionalità[19], dimoranti in più Stati, da cui dipendono una pluralità di metropolie sparse nel mondo, una delle quali è quella italiana.

1. Il potere di certificazione attribuito all'Arcidiocesi

Questa intesa, come le altre già convertite in legge, innanzi tutto garantisce diritti e situazioni soggettive, individuali e collettive, già previste dalla Costituzione, i cui articoli vengono anche richiamati, quasi a voler dire che molto di quanto viene aggiunto trova fondamento e giustificazione nell'attuazione nelle stesse disposizioni costituzionali.

Lo Stato garantisce all'individuo la libertà di adesione alle formazione sociali come diritto pubblico soggettivo, e la non rilevanza nell'ordinamento statale dell'appartenenza ad una di esse; né rilevanza viene data all'uscita volontaria o all'espulsione; c'è insomma una rinunzia all' esercizio della giurisdizione statale nei rapporti regolati da quelle organizzazioni, alle quali viene appunto riconosciuta un'autonomia istituzionale; e per converso, alla non recezione nel diritto statuale, di qualifiche o squalifiche interne alle formazioni stesse. Al tempo stesso lo Stato non sindaca l'attività legislativa, amministrativa e giudiziaria di organi confessionali, la loro competenza, la retta applicazione di normative religiose, neppure su esplicita richiesta di un soggetto leso, quasi si ponesse come giudice d'appello di provvedimenti ecclesiastici.

Quello che in questa sede voglio rilevare è che all'Arcidiocesi è attribuito *in primis* un potere di certificazione in più campi. Così all'art. 3,V comma, si riconosce, all'Arcidiocesi il potere di certificazione in merito allo *status* di ministro di culto in ordine a specifiche facoltà.

> "Ai fini dell'applicazione del presente articolo e degli articoli 4, 5, 6 e 9 l'Arcidiocesi rilascia apposita certificazione delle qualifiche di appartenenza canonica al proprio clero".

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[18] Il documento è riportato in STAVROPOULOS, L'Arcidiocesi, in: Principio pattizio, 412.
[19] BARTOLOMEO I, Incontro al mistero, 240.

In sostanza spetta all'Arcidiocesi certificare chi siano i ministri di culto abilitati alla cura pastorale dei militari, dei ricoverati in ospedali e dei carcerati, a celebrare matrimoni civilmente riconoscibili, ad illustrare la religione cristiano-ortodossa nelle scuole, art. 7[20].

Ma il potere di certificazione si estende anche alla qualifica di fedeli dell'Arcidiocesi, presupposto necessario per godere di diritti, facoltà, situazioni soggettive in genere, attribuite dalla legge in oggetto.

Il potere di certificazione rileva anche per la personalità giuridica di altri enti[21] connessi alle finalità dell'Arcidiocesi stessa, sia in ordine al loro riconoscimento, sia alla loro soppressione.

2. Il riconoscimento degli enti ortodossi

L'art. 14 tratta del riconoscimento di nuovi enti ortodossi e, al comma 2, prevede che:

> "Il riconoscimento della personalità giuridica ad un ente ortodosso è concesso su domanda di chi rappresenta l'ente secondo gli statuti e previa delibera motivata dall'Arcidiocesi. Alla domanda deve essere, altresì, allegato lo statuto dell'ente stesso".

Anche in questo caso la delibera favorevole dell'Arcidiocesi è *condicio sine qua non* – in modo da garantire il collegamento giuridico con la normativa confessionale di cui l'ente è espressione – per l'attribuzione della personalità giuridica, così come previsto negli Accordi di Villa Madama per gli enti ecclesiastici cattolici e nelle singole intese con le altre confessioni[22].

Alcune considerazioni: il diritto canonico delle chiese ortodosse non conosce l'istituto della personalità giuridica, per cui non si può parlare di enti giuridici canonico-ortodossi, ma solo di realtà autonome approvate nell'ambito della

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[20] Tutte queste attività sono a carico economico dell'Arcidiocesi.

[21] Gli enti già riconosciuti sono: la Chiesa e confraternita dei SS. Pietro e Paolo dei Nazionali Greci in Napoli riconosciuta da re Carlo di Borbone (Statuto approvato con Sovrana risoluzione, di Re Carlo di Borbone, il 20 febbraio 1764; riconosciuta come persona giuridica italiana il 13 luglio 1887, n. 3942, serie 2; cf. M. TEDESCHI [ed.], Dalla restaurazione al consolidamento dello Stato unitario, Milano 1981, 274); la comunità dei greci ortodossi in Venezia, riconosciuta come persona giuridica dalla Repubblica di Venezia (Sovrane concessioni del 28 novembre 1498, del 4 ottobre 1511, dell'11 luglio 1526, il regolamento attuale fu approvato con decreto luogotenenziale del 10 maggio 1917, n. 850; questo regolamento è reperibile nel volume G. B. VARNIER [ed.], Dall'età giolittiana ai giorni nostri, Milano 1982, 57s); la comunità greco-orientale di Trieste, già riconosciuta, con Sovrani e graziosissimi rescritti dell'Imperatore Giuseppe II, nella qualità di Signore di Trieste (Rescritti del 9 agosto 1782 e del 7 marzo 1784, notificati con Decreti guberniali alla Nazione greca di rito orientale stabilita in Trieste e Decreto del Governo austriaco del 28 novembre 1888), come Nazione e Confraternita greca. L'ente ha personalità giuridica, quale ente di culto, di nazionalità italiana, la parrocchia ha il titolo di S. Nicola. A queste si aggiungono le comunità di Genova (Unione degli ortodossi Elleni di Genova, Parrocchia di San Nicola e dell'Annunciazione).

[22] Rinvio sul punto a PARLATO, Le intese con le confessioni acattoliche, 86s.

Arcidiocesi. Gli enti riconoscibili – esemplificati nella parte finale del I comma di detto articolo – sono:

> "diocesi, decanati o vicariati, comunità, parrocchie, monasteri e confraternite, costituiti nell'ambito dell'Arcidiocesi, aventi sede in Italia, i quali abbiano fine di religione o di culto, solo o congiunto con quelli d'istruzione, assistenza e beneficenza".

L'enumerazione ampia comprende una pluralità di realtà alcune identificabili con analoghe strutture della chiesa cattolica (i decanati o vicariati sono vicariati foranei), altre come le comunità indicano forme di vita associata non ben definibile; quanto a nuove diocesi va detto che nel Patriarcato Ecumenico, di cui l'Arcidiocesi fa parte, non esistono diocesi suffragane. Forse, in modo implicito, la normativa prevede la futura possibilità di erezione di nuove diocesi (cioè arcidiocesi) in Italia da parte del Patriarcato Ecumenico cui far attribuire la personalità giuridica, come entità territoriali nell'ambito della stessa Arcidiocesi, questo ai soli effetti civili. Ai comma III e IV si stabiliscono le modalità:

> "3. Sulla base della documentazione ad essi fornita, i competenti organi statali verificano la rispondenza dell'ente, di cui è richiesto il riconoscimento della personalità giuridica, al carattere confessionale e ai fini di cui al comma 1.
> 4. L'ente non può essere riconosciuto se non è rappresentato giuridicamente e di fatto da un cittadino italiano o di un paese dell'Unione europea avente domicilio in Italia".

Interessante è la qualifica attribuita a questi enti: il V comma stabilisce che:

> "Gli enti ecclesiastici dell'Arcidiocesi, che hanno la personalità giuridica nell'ordinamento dello Stato, assumono la qualifica di enti ecclesiastici appartenenti all'Arcidiocesi civilmente riconosciuti",

col che si vuole precisare che non sono enti ortodossi *tout court*, ma enti facenti capo a quella Arcidiocesi ortodossa, forse per non precludere la possibilità di altre leggi che regolino i rapporti con diocesi di altre chiese ortodosse autocefale in Italia. Particolarmente importante mi sembra l'art. 17, relativo alla gestione degli enti appartenenti all'Arcidiocesi, esso recita:

> "1. La gestione ordinaria e quella di straordinaria amministrazione degli enti ortodossi appartenenti all'Arcidiocesi civilmente riconosciuti si svolgono sotto il controllo della stessa Arcidiocesi e senza ingerenza da parte dello Stato, delle regioni e degli altri enti territoriali".

La norma prevede due principî: il primo dice che la gestione ordinaria e straordinaria gli enti dell'Arcidiocesi si realizza sotto il controllo dell'Arcidiocesi

stessa; il secondo esclude qualsiasi ingerenza delle autorità italiane centrali o periferiche.

Dicevo che la norma è importante perché molti enti ortodossi già riconosciuti civilmente, e preesistenti all'istituzione della Arcidiocesi, si auto-regolano in base alle loro norme statutarie, al di fuori di controlli diocesani. Tali enti assimilabili a confraternite o a fondazioni erano comunque retti da consigli laicali o misti, ma nei quali il ruolo del clero locale e soprattutto del metropolita d'Austria e poi d'Italia era, ed è, limitatissimo; non so se la norma consentirà una revisione degli statuti. Sicuramente la disposizione varrà per gli enti più recenti e i nuovi. Invero l'art. 4, comma V, dello Statuto dell'Arcidiocesi prevede sì che:

> "Il metropolita ha la responsabilità a) della custodia del patrimonio ecclesiastico rappresentando [...] l'Arcidiocesi in tutte le questioni relative alla proprietà dei beni stessi di fronte ad ogni autorità italiana sia amministrativa che giudiziaria; b) di ogni questione a carattere giudiziario dell'Arcidiocesi, in cui può essere rappresentato tramite un suo delegato ufficiale".

Ma la norma, a parer mio, riguarda i beni dell'Arcidiocesi, come tale, e non quelli degli enti preesistenti giuridicamente riconosciuti. Il secondo principio fa salva la gestione ecclesiastica da interferenze statali o pubbliche, garantendo l'indipendenza nelle scelte di carattere patrimoniale e nell'utilizzo dei redditi.

3. Le attività culturali e scolastiche

Si prevede anche, come nelle altre leggi di approvazione delle precedenti intese, che soggetti designati dall'organizzazione confessionale, in specie dall'Arcidiocesi[23], "possano rispondere alle eventuali richieste provenienti dagli alunni o dalle loro famiglie o dagli organi scolastici, in ordine allo studio del fatto religioso e delle sue implicazioni"[24].

Come nelle altre leggi di approvazione d'intesa viene garantito, nell'Articolo 8, all'Arcidiocesi il diritto d'istituire liberamente scuole di ogni ordine e grado e istituti di educazione. Ovviamente l'istituzione delle suddette scuole dovrà avvenire "nel rispetto della normativa vigente in materia di parità scolastica e di diritto allo studio e all'istruzione". Certo la disciplina dei controlli statali sarà più tenue se la scuola istituita non richiederà specifici riconoscimenti statali, come avviene per le scuole della primissima infanzia.

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[23] Con oneri finanziari a carico dell'Arcidiocesi.

[24] Art. 11, comma 4. La formula è uguale in tutte le intese, salvo in quella con l'Unione delle Comunità ebraiche italiane si parla invece di "studio dell'ebraismo".

4. Gli aiuti economici

È attribuito un regime tributario favorevole, quale quello concesso alle altre istituzioni ecclesiastiche di confessioni regolate da una legge sulla base di intesa; si riconosce la deducibilità per donazioni all'Arcidiocesi[25] e la partecipazione al riparto dello 0,8% dell'IRPEF, anche per scelte non espresse.

Questi aspetti tributari e finanziari sono, a parer mio, i punti più innovativi e qualificanti rispetto all'attuale regime giuridico, oltre al fatto di un riconoscimento giuridico e politico della Arcidiocesi stessa, da parte della Repubblica italiana, e della sua conformità ai principî fondanti dello Stato.

Con la legge di approvazione dell'intesa c'è un riconoscimento che – in base ad un'interpretazione discutibile, ma determinante, attuata prevalentemente da organi di governo regionali – permette di ottenere altri benefici, quali contributi, erogazioni e situazioni giuridiche soggettive a favore della loro attività pastorale[26].

5. La collaborazione tra le due istituzioni

a) Tutela del patrimonio artistico

Come nelle altre intese si parla del patrimonio artistico e culturale, così l'articolo 11 recita:

> "La Repubblica italiana e l'Arcidiocesi si impegnano a collaborare per la tutela e la valorizzazione dei beni afferenti al patrimonio storico e culturale ortodosso".

Il patrimonio storico e culturale greco-ortodosso è particolarmente rilevante dal punto di vista artistico, ma soprattutto per la memoria storica della civiltà

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[25] Art. 20 "Deduzione agli effetti IRPEF. 1. La Repubblica prende atto che l'Arcidiocesi si sostiene finanziariamente mediante offerte volontarie. 2. A decorrere dal periodo d'imposta in corso alla data di entrata in vigore della presente legge, le persone fisiche possono dedurre dal proprio reddito complessivo, agli effetti dell'imposta sul reddito delle persone fisiche, le erogazioni liberali in denaro, fino all'importo di euro 1.032,91, a favore dell'Arcidiocesi, degli enti da essa controllati e delle comunità locali, per i fini di culto, istruzione, assistenza e beneficenza".

[26] Art. 21. "Ripartizione della quota dell'otto per mille del gettito IRPEF. 1. A decorrere del periodo d'imposta in corso alla data di entrata in vigore della presente legge, l'Arcidiocesi concorre con i soggetti e secondo le modalità previste dalla normativa vigente alla ripartizione della quota pari all'otto per mille dell'imposta sul reddito delle persone fisiche. La Repubblica prende atto che l'Arcidiocesi utilizzerà le somme devolute a tale titolo dallo Stato per il mantenimento dei ministri di culto, per la realizzazione e la manutenzione degli edifici di culto e di monasteri, per scopi filantropici, assistenziali, scientifici e culturali da realizzarsi anche in paesi esteri. 2. L'attribuzione delle somme di cui al comma 1 è effettuata sulla base delle scelte espresse dai contribuenti in sede di dichiarazione annuale dei redditi, nel cui modulo l'Arcidiocesi è indicata con la denominazione: 'Sacra Arcidiocesi ortodossa d'Italia ed Esarcato per l'Europa Meridionale'. 3. Per quanto riguarda le quote relative alle scelte non espresse dai contribuenti, l'Arcidiocesi dichiara di partecipare alla loro ripartizione in proporzione alle scelte espresse, destinando le relative somme esclusivamente per iniziative di cui al comma 1". – In materia cf. E. VITALI, Note in tema di applicazione dell'otto per mille, in: Studi in onore di Giovanni Barberini, Torino 2009, 470-471.

bizantina di cui massimamente Venezia, con meriti e demeriti, è stata la testimone per secoli. La Chiesa di S. Giorgio, a Venezia, con gli edifici adiacenti, territorialmente delimitati, durante il periodo del dominio turco nei territori bizantini, divenne per i greci della diaspora una seconda patria, salvaguardando così la cultura e l'unità di un popolo.

Si può dire che Venezia, insieme al Patriarcato Ecumenico di Costantinopoli e ai monasteri del Monte Athos, seppe preservare la tradizione e la cultura bizantina e trasmetterla alla nascente nazione greca nel secolo XIX[27].

È questo della Chiesa greco-ortodossa in Italia un patrimonio culturale di valore inestimabile e non solo per la nazione greca, ma costituisce anche un dato storico imprescindibile per la conoscenza della politica attenta alle vicende e alle popolazioni del mediterraneo orientale effettuata dagli Stati italiani pre-unitari e da altre città, come Trieste, oggi parte dello Stato italiano[28].

b) Rilevanza dei matrimoni celebrati con rito cristiano ortodosso

Ai sensi dell'art. 9, I comma, si riconoscono effetti civili ai matrimoni celebrati davanti ai ministri di culto dell'Arcidiocesi "in possesso della cittadinanza italiana, a condizione che il relativo atto sia trascritto nei registri dello stato civile, previe pubblicazioni nella casa comunale". Ai commi successivi si dànno ulteriori norme.

> "2. Coloro che intendono celebrare il matrimonio secondo quanto previsto dal comma 1 devono comunicare tale intenzione all'ufficiale dello stato civile al quale richiedono le pubblicazioni.
> 3. L'ufficiale dello stato civile, dopo avere proceduto alle pubblicazioni e accertato che nulla si oppone alla celebrazione del matrimonio secondo le vigenti norme di legge, ne dà attestazione con un nulla osta che rilascia ai nubendi in duplice originale.
> 4. Il nulla osta, oltre a precisare che la celebrazione sarà svolta secondo il rito ortodosso e ad indicare il comune scelto dai nubendi per la stessa celebrazione, deve, altresì, attestare che ad essi sono stati spiegati dal predetto ufficiale dello stato civile i diritti e i doveri dei coniugi, attraverso la lettura dei relativi articoli del codice civile.
> 5. Il ministro di culto davanti al quale ha luogo la celebrazione del matrimonio allega il nulla osta, rilasciato dall'ufficiale dello stato civile, all'atto di matrimonio che egli redige in duplice originale subito dopo la celebrazione. I coniugi possono rendere le dichiarazioni che la legge consente che siano espresse nell'atto di matrimonio.

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[27] Sul tema rimando a R. D'ANTIGA, La comunità greco-ortodossa di San Giorgio in Venezia, in: G. DEL FERRO (ed.), Presenze ebraico-cristiane nelle Venezie, Vicenza, 1993, 83s; M. I. MANUSSACAS, Introduzione storica, in: Istituto Ellenico di Studi Bizantini e Post-Bizantini di Venezia (ed.), Guida al museo di Icone e alla chiesa di San Giorgio dei Greci, Venezia 1992.

[28] In quella città, esiste una comunità greco-ortodossa, con chiesa, già riconosciuta fin dal 1752.

6. Entro cinque giorni dalla celebrazione il ministro di culto di cui al comma 5 deve trasmettere per la trascrizione un originale dell'atto di matrimonio all'ufficiale dello stato civile del comune del luogo in cui è avvenuta la celebrazione.
[...]
8. Il matrimonio ha effetti civili dal momento della celebrazione, anche nel caso in cui l'ufficiale dello stato civile, che ha ricevuto l'atto, non abbia eseguito la trascrizione entro il prescritto termine".

Credo che il principio secondo cui il ministro di culto possa celebrare il matrimonio di tutti quanti hanno avuto l'attestazione che nulla si oppone alla celebrazione del matrimonio secondo le vigenti norme di legge italiane, indipendentemente dalla fede professata dai nubenti, valga anche per la celebrazione matrimoniale qui prevista, in assenza di qualsiasi sanzione legislativa comminante la nullità in caso di inosservanza della presunta limitazione. In sostanza è l'autorità, centrale o periferica, dell'Arcidiocesi che decide della capacità matrimoniale dei nubenti in merito alla fede professata e loro posizione ecclesiale.

Ricordo che, come nella chiesa romano-cattolica, in quelle ortodosse si riconosce l'esistenza di un matrimonio regolato dal diritto canonico ortodosso che può esistere senza alcuna rilevanza civile.

c) Ulteriori fattispecie

Altre forme di collaborazione sono quelle di cui all'art. 13, ai sensi del quale, nel quadro della pianificazione delle radiofrequenze, si deve tener conto delle richieste presentate dalle emittenti gestite dagli enti facenti parte dell'Arcidiocesi, operanti in ambito locale.

All'art. 24 si prevede che per le *Norme di attuazione* di detta legge le autorità competenti tengano conto delle esigenze fatte loro presenti dall'Arcidiocesi e avviino, se richieste, opportune consultazioni.

Nell'art. 26, infine, si stabilisce che, al termine del decimo anno dalla data di entrata in vigore della legge, le parti sottopongono a nuovo esame il contenuto della legge. Ma anche prima di detto termine, se una delle parti ravvisasse l'opportunità di apportare modifiche al testo, le parti dovranno procedere d'accordo. È ovvio che le materie oggetto di intese trasformate in legge non potranno più essere regolate unilateralmente dallo Stato, senza un accordo bilaterale ai sensi dell'art. 8, III comma, della Costituzione.

Un'ultima clausola di salvaguardia per la condizione giuridica dell'Arcidiocesi è data dall'ultimo comma del citato art. 26 – clausola presente anche nelle precedenti intese – dove si prescrive che, in occasione della presentazione di disegni di legge relativi a materie che coinvolgano rapporti

dell'Arcidiocesi con lo Stato, dovranno essere promosse previamente le intese del caso[29].

6. I controlli statali

A tutela della collettività e dello Stato stesso nella legge si prescrivono forme di controllo in merito alla capacità giuridica e d'agire degli enti ecclesiastici ed in specie ai poteri dei loro rappresentanti legali, attraverso l'obbligatoria iscrizione nel Registro delle persone giuridiche[30]. per garantire così la certezza dei rapporti giuridici si prevede altresì che:

> "Ogni mutamento sostanziale nel fine, nella destinazione del patrimonio e nel modo di esistenza di un ente ortodosso dell'Arcidiocesi, civilmente riconosciuto, acquista efficacia civile mediante riconoscimento con decreto del Ministro dell'interno"[31].

Anche la permanenza o il venir meno di persone giuridiche confessionali deve avvenire sotto la sorveglianza dello Stato, specie per la devoluzione dei loro patrimoni e redditi al momento della loro cessazione. Altra norma importante, come quelle precedenti rinvenibili nelle altre intese, è l'art. 20, V comma, in forza del quale:

> "L'Arcidiocesi trasmette annualmente, entro il mese di luglio dell'anno successivo a quello di esercizio, al Ministero dell'interno, un rendiconto

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[29] Art.17: "1. Gli enti ecclesiastici dell'Arcidiocesi, civilmente riconosciuti, devono iscriversi nel registro delle persone giuridiche".

[30] "2. Nel registro delle persone giuridiche, oltre alle indicazioni prescritte dalle norme vigenti in materia, devono risultare le norme di funzionamento e i poteri degli organi di rappresentanza dell'ente. 3. L'Arcidiocesi e i suoi enti civilmente riconosciuti devono chiedere l'iscrizione nel registro delle persone giuridiche entro due anni dalla data di entrata in vigore della legge di approvazione della presente intesa. Decorsi tali termini gli enti interessati possono concludere negozi giuridici solo previa iscrizione nel registro delle persone giuridiche".

[31] Per CANONICO, Nuove leggi per vecchie intese, n. 30 del 2012, non è chiaro se l'obbligo di iscrizione riguardi anche i nuovi enti; io credo che trattasi di norma generale che assoggetta tutti gli enti alla medesima disciplina, indipendentemente dall'epoca del riconoscimento, la sanzione è prevista dalla stessa norma sopra citata: "gli enti interessati possono concludere negozi giuridici solo previa iscrizione nel registro delle persone giuridiche". Per i nuovi enti si applicheranno le regole che già sono utilizzate per tutti gli altri ecclesiastici, di nuova istituzione. La norma tutela i soggetti aventi causa con questi enti; va rilevato che la mancata iscrizione ha, come conseguenza, la non opponibilità ai terzi che non ne fossero a conoscenza delle limitazioni dei poteri di rappresentanza, cf. G. CASUSCELLI, Nozioni di diritto ecclesiastico, Torino 2009, 208s. Sugli ultimi temi trattati rinvio a PARLATO, Le intese con le confessioni acattoliche, 140s. – Art. 18, commi II, III. "2. In caso di mutamento che faccia perdere all'ente dell'Arcidiocesi uno dei requisiti prescritti per il suo riconoscimento, il riconoscimento stesso è revocato con decreto del Ministro dell'interno, sentita l'Arcidiocesi. 3. La notifica dell'avvenuta revoca dell'erezione di un ente da parte dell'Arcidiocesi determina la cessazione, con provvedimento statale, della personalità giuridica dell'ente stesso".

relativo all'utilizzazione delle somme di cui al comma 1 e ne diffonde adeguata informazione"[32].

Questa prescrizione va vista come controllo su fondi quali il gettito IRPEF, che non diviene di proprietà ecclesiastica, ma è dato allo Stato o a singole chiese e confessioni religiose per scopi prefissati dalla normativa generale e della legge di approvazione di ciascuna intesa.

Riferite alla tutela degli interessi statali, come dei privati, e alla certezza dei rapporti giuridici possono essere viste quelle norme che prevedono la cittadinanza italiana o di un paese dell'Unione europea avente domicilio in Italia per i rappresentanti degli enti e la cittadinanza italiana per i ministri di culto abilitati a celebrare matrimoni religiosi trascrivibili nei registri dello stato civile.

[32] Tale rendiconto deve comunque precisare: "a) il numero dei ministri di culto cui è stata assicurata l'intera remunerazione e di quelli ai quali è Stata assicurata un'integrazione; b) l'ammontare complessivo delle somme di cui al comma 1 destinate al sostentamento dei ministri di culto nonché l'ammontare delle ritenute fiscali su tali somme; c) gli interventi operati per altre finalità previste dall'articolo 19 e dal comma 1 del presente articolo". Sulle precedenti intese cf. PARLATO, *Le intese con le confessioni acattoliche*, 146s.

IL DIALOGO TRA LE CHIESE E LE RELIGIONI PER LA COSTRUZIONE DI UNA SOCIETÀ DEMOCRATICA IN ALBANIA

Gaetano D a m m a c c o, Bari

I. Chiese e religioni nell'Albania contemporanea. Necessità di alcune precisazioni

Il 17 giugno 2013 i Vescovi albanesi, in occasione delle elezioni politiche che si sarebbero celebrate il successivo 23 giugno, hanno rivolto un appello al Paese, nel quale hanno invitato tutti i cittadini a "prendere parte alle elezioni come occasione di partecipazione attiva alla vita pubblica del Paese". L'appello (che ha anche altri precedenti con riferimento ad altri momenti politicamente e socialmente più drammatici per la vita del paese dopo la caduta del comunismo all'inizio del 1992) è importante per una serie di considerazioni: proviene da tutti i vescovi; è rivolto ai cattolici e a tutti gli uomini di buona volontà; richiama l'attenzione sulla necessità di esercitare i diritti di voto; denuncia possibili criticità (come brogli, compravendita di voti, minacce, ricatti).

L'appello dei vescovi, sul quale torneremo più in là, risponde al ruolo che la chiesa cattolica ha voluto assumere di fronte alle sfide poste dall'evoluzione della società civile. Inoltre, esso manifesta la volontà di assumere un impegno a beneficio della società civile, ma soprattutto descrive le caratteristiche della missione della chiesa albanese, dei suoi vescovi e dei suoi sacerdoti che ha una peculiarità nel forte legame con la storia del popolo albanese. La religione è sempre stata considerata in Albania un elemento indispensabile per dare senso e significato alla vita del popolo, poiché è sempre stata strettamente congiunta con l'elemento che da sempre distingue il DNA del popolo albanese, e cioè l'albanesità. L'espressione "Feja e shqiptarit eshte shqiptaria" ("La fede dell'albanese è l'albanesità"), coniata nel XIX secolo da Pashko Vasa (intellettuale albanese e governatore ottomano del Libano), esprime il forte sentimento che unisce questo popolo fiero, come terreno di coltura di ogni espressione di vita. La religione in questo quadro culturale assume storicamente un differente e peculiare rilievo, essendo un elemento che si congiunge fortemente, non potendosene fare a meno, all'albanesità. Pertanto, se l'albanesità unisce il popolo, la religione da senso e significato alla vita delle persone.

Per comprendere la missione della Chiesa albanese, dunque, occorre collocarla in questo peculiare sistema culturale. Ciò non significa che per l'albanese la religione è un quadro di indifferenza e che l'appartenenza a una religione è sostanzialmente indifferente e fungibile. Del resto, è prova del contrario la prolungata persecuzione nei confronti delle religioni e delle chiese, e specialmente nei confronti della chiesa cattolica, che ha devastato il paese durante l'esperienza comunista (dal 1944 al 1990). Si è anche detto, con una certa approssimazione e per sottolineare il rapporto di indifferenza con la religione, che nell'arco della loro storia movimentata gli albanesi sono passati facilmente da una religione all'altra, diventando così cattolici, ortodossi o musulmani a seconda

degli interessi del momento storico. Ma, in realtà questo giudizio confonde la necessità storica, che ha costretto a comportamenti forzati per la sopravvivenza, con il senso di appartenenza, che esprime una forte radicazione- Ad esempio, durante la feroce dominazione ottomana nel sud ortodosso del Paese mentre la parte femminile aveva conservato la fede ortodossa, la parte maschile, per necessità esistenziale, era "diventata" musulmana (in tal modo evitava, tra l'altro, la coscrizione obbligatoria e il pagamento delle tasse, onere molto esoso che comportava come riscossione anche una specie di *ius in corpore* specie se il materiale pagamento era effettuato da donne o ragazzini). Soprattutto, ogni analisi si deve collocare all'interno del valore e del significato che assume per la cultura albanese (e balcanica in generale) la Nazione, basata su un'idea di prevalenza dell'etnia e di tutti gli elementi di cui essa si compone(lingua, religione, tradizione, regole giuridiche), nella prospettiva di garantire la permanenza nel tempo della "identità", cioè della vita delle persone e dei gruppi. Ciò non diminuì il senso di appartenenza religiosa né il valore della distinzione (tra cattolici, ortodossi, musulmani, bektashi), ma favorì il consolidarsi di una cultura della tolleranza e della coabitazione interreligiosa insieme con la caratterizzazione sociale e pubblica delle religioni.

In questo quadro, la missione della chiesa cattolica (ma fatte le debite differenze egualmente si deve dire anche per le altre religioni, e specie per quelle storicamente insediate nel Paese) non è limitata solo alla sua dimensione cultuale, ma si estende ai problemi esistenziali nel concreto delle relazioni comunitarie e claniche, nell'intento di dare risposte idonee ai problemi di vita. In questo senso, la missione spirituale, che è missione principale, è strettamente congiunta con la missione comunitaria e, in questo senso, si è albanese-cattolico o albanese-ortodosso o albanese-musulmano o albanese-bektashi; e non si può non esistere se non come albanese-cattolico o albanese-ortodosso o albanese-musulmano, o albanese-bektashi, ecc. Questo carattere identitario è stato molto bene evidenziato durante il Simposio internazionale del 1999, svoltosi a Tirana sul tema "Il Cristianesimo nei secoli", e in specie nella relazione di mons. Zef Simoni relativa al tema "I fedeli cattolici sono un elemento della nazione, ricco di valore e di storia".

Un secondo punto che si deve sottolineare riguarda il "cambiamento", che ha interessato in diversi modi anche la Chiesa all'indomani della caduta del regime comunista. La presenza e l'intensa attività della Chiesa Cattolica dalla caduta del comunismo (avvenuta definitivamente nel 1990) fino ad oggi trae ispirazione da numerosi elementi, che oggi ne fanno una chiesa martire (costruita con il sangue dei martiri di oltre cinquanta anni di inaudite persecuzioni e violenze), una chiesa di popolo (essa conserva tradizione e albanesità integrandosi pienamente con il popolo), una chiesa conciliare (al Concilio Vaticano II la chiesa albanese si è avvicinata con un salto storico trentennale a causa della condizione del Paese, ma ha subito iniziato con umiltà un suo cammino di revisione), una chiesa missionaria (poiché si trova in un territorio di confine, in un contesto plurale, in una società spinta verso la modernità, con scarsità di mezzi e di persone).

Un terzo punto riguarda le leggi di riferimento. Il riferimento è a una legislazione statale di disciplina della libertà religiosa assolutamente nuova e discontinua rispetto al recente passato del Paese. L'Albania è passata quasi istantaneamente a una disciplina di tutela della libertà di religione, provenendo da una legislazione di dura persecuzione ed emarginazione, prodotta da uno Stato che ha dichiarato la propria struttura atea, sia nei fatti poiché ha dato vita a politiche persecutorie e distruttive, sia nel diritto, perché ha istituito con la costituzione del 1967 l'ateismo di stato, caso unico al mondo.

Infine, non si deve sottovalutare il fatto che il diffuso processo di globalizzazione, che ha interessato in modo pieno e diretto l'Albania, ha favorito l'accentuazione dei quei fenomeni di nazionalizzazione e localizzazione, sia nella sua dimensione positiva, come necessario recupero dell'individualità e dell'identità, sia nella sua dimensione negativa come accentuazione di manifestazioni autocertificative dei conflitti, specialmente quelli interni. Non v'è dubbio che il processo di globalizzazione influisca sulla produzione giuridica di leggi e di precedenti giurisprudenziali che hanno dovuto combinare, non sempre con successo, tradizione e innovazione.

II. Le incertezze della politica e il ruolo delle chiese

Il 20 febbraio del 1991 ufficialmente cade il regime comunista albanese, che aveva imperversato per decenni, dopo che per oltre un anno numerose manifestazioni spontanee di protesta (scioperi della fame, incontri segreti, agitazioni studentesche, demolizione delle statue del regime, eccetera) in tutto il paese avevano messo in ginocchio il potere. Per tutti gli atti di protesta, vale il ricordo di una delle prime manifestazioni, cioè quella di Scutari, dove un prete, Don Simon Jubani, il 4 novembre del 1990 ebbe il coraggio di celebrare l'Eucarestia nel cimitero della città. Alla messa partecipò una grande folla (circa 50mila scutarini, contro cinquemila poliziotti), composta da cattolici e musulmani, che l'autorità di polizia non ebbe il coraggio di affrontare. Un atto religioso assolutamente rivoluzionario, anche perché proibito, che riunì in nome di Dio persone di fede diversa e anche persone senza fede.

Tuttavia, l'immagine più emblematica della acquisita libertà resta l'approdo della motonave Vlora nel porto di Bari nel mese di agosto del 1991. Nel comune sentire, la caduta di uno dei regimi più crudeli e più oppressivi è rappresentata con un evento espressione di libertà. La fuga della motonave da Durazzo a Bari è il primo caso di evasione di massa alla ricerca della libertà. Infatti, la ricerca e il desiderio della libertà hanno guidato questa reazione collettiva ai cinquanta anni di dittatura, che ha avuto il merito di portare all'esterno, verso l'Europa, l'insopprimibile bisogno di libertà e democrazia. Infatti, anche il bisogno di democrazia si è manifestato come la conquista di uno *status* e di una dignità, sebbene anche a causa della mancanza di esperienza storica la ricerca di una esperienza democratica è stata inizialmente nominale e orientata dagli antichi valori contenuti nella tradizione albanese, a cominciare dal "Canun". Vale la pena

di ricordare che la prima grande manifestazione studentesca del dicembre del 1990 avvenuta nel campus universitario (sembra che i partecipanti non solo studenti fossero più di 100mila), sebbene causata dalle continue interruzioni di corrente elettrica che non consentiva agli studenti l'uso delle stufette elettriche per scaldarsi dal gelo di un inverno molto freddo, fu sostenuta dalla parola "democrazia": più elettricità e più democrazia.

Non si può, tuttavia, negare che la società uscita dall'esperienza comunista, di cui si avvertivano ancora le profonde ferite, in questa fase iniziale cercava di imitare i modelli formali di democrazia occidentale per convenienza, avendo assoluto bisogno degli aiuti economici occidentali. L'Albania, infatti, comincia ad aderire ai vari consessi e accordi internazionali, pur non avendo lo spessore e i contenuti di una democrazia. Ad esempio nel novembre del 1992 sottoscrive un Accordo con la Comunità economica europea circa gli scambi e la cooperazione commerciale ed economica; nel giugno del 1991 aderisce alla CSCE (diventata nel dicembre 1994 OSCE); nel febbraio del 1992 ratifica la Convenzione Internazionale Sui Diritti Dell'infanzia; nell'ottobre del 1991 aderisce al Patto Internazionale relativo ai diritti civili e politici del 1966. L'adesione alla CSCE è stata una circostanza molto importante, poiché l'Albania ha dovuto soddisfare quattro condizioni di accesso (esse sono: libere elezioni, convertibilità della moneta, libero mercato e libertà religiosa9 e mettere mano a una serie di atti legislativi di rottura con il passato e di passaggio verso un sistema democratico. In questa prospettiva e con riferimento al tema specifico della libertà religiosa, l'Albania ha dovuto predisporre nel 1991 una legge costituzionale (la nr. 7491, composta di 42 articoli) con cui ha garantito ai cittadini l'esercizio dei diritti umani fondamentali (il diritti di libertà, di espressione del pensiero, di appello, di elettorato, di organizzazione, eccetera), riconoscendone il valore intrinseco, e nel far questo ha annullato tutte le norme precedenti.

La transizione post-comunista e le novità legislative imposte dal nuovo scenario internazionale offerto al Paese consentirono la ricomparsa in regime di libertà delle religioni, che ripresero a ricostruire la propria organizzazione e la propria presenza sociale, e delle pratiche religiose, che seppur in forma clandestina e molto nascosta nonostante i rischi erano sopravvissute durante il comunismo. Ma v'è di più: con riferimento alla religione cattolica, si procedette alla formalizzazione dei rapporti con la Santa Sede e il 7 settembre 1991 si assiste alla ripresa dei rapporti diplomatici con l'apertura della Nunziatura Apostolica in Albania e dell'Ambasciata albanese presso il Vaticano.

Se da un lato il Paese cercava una strada in uno scenario del tutto nuovo, Tuttavia, non si può non rimarcare il fatto che questo sforzo fu accompagnato da notevoli difficoltà in una prolungata situazione di caos e di incertezza. Manifestazioni di piazza, violenze accompagnarono il difficile cammino del Paese che affrontò due tornate elettorali nel 1992 e nel 1996, problematiche anche a causa dei brogli denunciati, dei disordini sociali e dei ripetuti collassi economici. Quelle elezioni videro l'affermazione del primo partito democratico fondato all'indomani della caduta del comunismo. Ma soprattutto, nel 1996 il Paese fu

devastato dal collasso delle piramidi finanziarie[1], che generò grandi e incontrollate proteste popolari, le quali fecero precipitare il paese nell'anarchia fino a metà del 1997, causando circa 2.000 morti. Bande armate si impossessarono del Paese, che era spaccato e fuori controllo. Una forte ondata emigratoria si riversò sull'Italia. L'ONU intervenne con l'Operazione Alba. Il 24 luglio 1997 Berisha diede le dimissioni dal suo secondo mandato e fu proclamato lo stato d'emergenza. In tutto questo cambiamento turbolento, oltre alla politica cambiarono anche alcuni tratti identificativi del Paese: il processo di urbanizzazione (in pochi anni Tirana passa da 250 mila abitanti a oltre 1 milione), una consistente migrazione interna spinsero il Paese verso la modernità e richiesero un notevole cambiamento di mentalità tanto repentino quanto problematico.

Il richiamo, seppur veloce ai cambiamenti violenti e strutturali imposti al Paese si è reso necessario per comprendere meglio il ruolo che ebbero a svolgere nella situazione emergenziale della chiesa cattolica e anche delle altre confessioni religiose, che riscoprono la vocazione popolare e l'impegno a pacificare il Paese. Per televisione, attraverso la radio e la carta stampata la Chiesa albanese (per essa l'Arcivescovo Rroc Mirdita) e altri capi religiosi musulmani, ortodossi e bectashi rivolgono un appello al Paese, invitando tutti a comportamenti di pace e non di distruzione, di armonia, riconciliazione, tolleranza, dialogo. Qualche mese più tardi nel giugno del 1997, in occasione delle nuove elezioni seguite all'ennesima crisi di governo, ancora un forte appello dei vescovi albanesi, i quali riprendendo i numerosi appelli fatti durante le fasi più critiche invitarono alla partecipazione politica, dovere e onore allo stesso tempo per contribuire "alla realizzazione di un processo elettorale libero, corretto ed onesto". Il documento della Conferenza episcopale albanese richiamava l'insegnamento della "Gaudium et Spes", "che spiega molto bene l'impegno e il ruolo della Chiesa nei processi politici di paesi e di società in cui si trova" (documento), indicando la via dell'autonomia e dell'indipendenza tra chiesa e stato, specificando in cosa consiste la missione della chiesa tra la gente, esprimendo

> "un giudizio morale, anche sulla situazione politica, quando lo richiede il diritto fondamentale dell'uomo, oppure la salvezza delle anime, utilizzando

[1] Nel gennaio del 1997 la maggior parte delle imprese finanziarie fallirono. Un terzo delle famiglie albanesi persero i loro risparmi. Questa fu la causa di molte proteste popolari a Tirana e in tutte le città meridionali del paese. Molte persone indirizzarono le loro richieste al governo, che, nonostante prima del crollo avesse assicurato la legittimità delle operazioni finanziarie, non assunse nessuna responsabilità, giustificandosi con il fatto che si trattata di investitori privati. La drammaticità della situazione fu accresciuta quando molti civili, specie nell'Albania meridionale, aprirono i depositi militari di armi impadronendosene. Fu proclamatolo stato di emergenza, ma ciò non servì a evitare il clima da guerra civile con assalti a edifici pubblici, stazioni di polizia, edifici governativi. Il 4 di marzo quattro città del sud erano nelle mani dei ribelli e di bande armate, che giunsero infine alla capitale, mentre nel nord imperava la più assoluta anarchia. La situazione divenne ancor più complicata per l'intervento nella lotta di diversi gruppi di trafficanti, che animarono scontri armati che finivano con decine di vittime, ribelli e civili. In questa contingenza riprese l'emigrazione verso l'Italia, contrastata dalla Marina Militare Italiana con azioni che portarono al tragico naufragio della "Kater I rades" nello stretto di Otranto. Nel mese d'Aprile l'ONU, su richiesta dei politici albanesi, mandò in Albania 7.000 soldati italiani facenti parte dell'Operazione "Sunrise", per ristabilire l'ordine nel paese.

tutti i mezzi che sono in armonia con il Vangelo e con il bene di tutti, secondo il momento e la situazione" (GS 76)[2].

La chiesa albanese, quindi, sembra avere piena consapevolezza non solo della delicatezza della situazione, ma anche del compito che è chiamata a svolgere e della sua missione all'interno del Paese insieme con le altre religioni per il bene dei cittadini. In ciò, sebbene non manchino errori, dimostra quella maturità che deriva dalla solidità della sua tradizione e, soprattutto, dal martirio sperimentato. Essa dimostra anche di aver tratto buoni frutti dalla storica visita di Giovanni Paolo II nel mese di aprile del 1993, vissuta come un momento di incontro con il capo della Chiesa universale, di incontro con la gente, di confronto con le autorità e i poteri, di incontro con le altre religioni. La visita fu, in realtà, un momento significativo di recupero di una identità. Tra l'altro, il Papa in quella storica visita nel confermare la fede di una chiesa martire e sofferente, consegnò un messaggio che allo stesso tempo era una via da seguire: tutelare la libertà religiosa, come fonte di ogni libertà, e la fede, poiché

> "da tale libertà, quando essa è correttamente usata, non v'è da temere alcun disordine sociale. La fede sincera, infatti, non divide gli uomini, ma li unisce, pur nelle loro differenziazioni. Niente come la fede ci ricorda che, se abbiamo un unico Creatore, siamo anche tutti fratelli! La libertà religiosa è così un baluardo contro i totalitarismi e un contributo decisivo all'umana

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[2] Vale la pena di riprodurre le parti più consistenti di questo interessante messaggi: "Riteniamo che esistano alcune cose che devono essere chiare per ogni elettore, e che, tramite il suo voto, deve cercare di realizzare:

1. L'unità dell'Albania nel pluralismo. L'unità si realizza attraverso il progresso del pluralismo in tutti gli aspetti, che ha come scopo la promozione del bene comune. Con il risveglio delle coscienze, l'eliminazione dei pregiudizi ed il rafforzamento del sentimento dell'unità, possiamo combattere le divisioni, le separazioni, le vendette e le distruzioni, che non portano nient'altro che l'autosterminio di un popolo. Detto più chiaramente, siamo per un'Albania unita, che tutti devono costruire e godere, con uno sforzo continuo per il suo progresso.

2. I modi per realizzare il pluralismo sono stati definiti chiaramente nella Dichiarazione di Helsinki (Atto finale della Conferenza per la Sicurezza e la Collaborazione in Europa, 1975), nel Documento di Vienna (1986), nella Carta di Parigi (21 novembre 1990): documenti ormai conosciuti e accettati quasi da tutti.

3. Come Chiesa, siamo per una campagna elettorale senza odio e divisioni, senza inganni e disprezzi, ma nella tolleranza e nell'armonia, che ha come scopo la presentazione chiara del programma. Su questo punto i mass media devono svolgere un ruolo importante.

4. Per quanto riguarda le elezioni, noi vogliamo che esse siano libere e coscienti.

Quindi, la nostra posizione come Chiesa non è legata a partiti. Essa non si schiera da parte di alcun partito, incoraggiando, allo stesso tempo, tutti i fedeli cattolici a partecipare attivamente alle votazioni, votando secondo coscienza per le persone che, secondo la loro convinzione, siano adatte e capaci di portare il Paese fuori dell'attuale situazione di grave crisi.

In conclusione, vogliamo far conoscere che questa è la posizione ufficiale della Conferenza Episcopale, in quanto organo superiore della Chiesa Cattolica in Albania. Qualsiasi altra dichiarazione già fatta o che si farà non in conformità con questa è soltanto un'opinione personale".

fraternità. La vera libertà religiosa rifugge dalle tentazioni dell'intolleranza e del settarismo, e promuove atteggiamenti di rispettoso e costruttivo dialogo"[3].

Si può dire che l'impegno della chiesa albanese nella ricorrente caotica situazione sociale e politica è sempre stata ispirata alla tolleranza, alla convivenza fraterna, al dialogo, alla testimonianza di vita. Le religioni costituiscono i soggetti di garanzia del processo di assestamento che, dopo il caos dei primi tempi dopo la caduta del comunismo, prende forma sia dal punto di vista istituzionale sia con riferimento alle garanzie di libertà delle persone. Allo stesso tempo le religioni, e in particolare la Chiesa cattolica d'Albania, ricostruiscono la loro presenza, gli statuti, la vita interna, l'organizzazione strutturale, attuando un vero e proprio processo di rifondazione, reso necessario dalla soppressione di ogni loro veste giuridica durante il precedente regime[4]. In questo quadro di libertà, entrano nel paese "nuove religioni", quelle protestanti, anche sulla scorta dell'esperienza maturata a cavallo tra gli anni venti e trenta, quando si realizzò un tentativo di penetrazione[5].

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[3] Altri brani dei discorsi del Papa sottolineano il valore della testimonianza, della rinascita, della libertà religiosa come bene condiviso e di progresso umano: "Quella del vostro popolo è stata una vera sconvolgente tragedia sotto i rigori dell'oppressione comunista. Terribile era, in effetti, l'immagine della vita umana nei regimi totalitari come quello che voi avete conosciuto, nel quale si privava l'uomo di uno dei suoi diritti più fondamentali: la libertà del proprio giudizio e della propria azione; la libertà di coscienza. Privazione, questa, che non di rado ha assunto carattere di indicibile brutalità" (n. 2). "Voi avete riacquistato la libertà in maniera praticamente incruenta. Siete risaliti quasi miracolosamente da un baratro di tirannia e di morte. Quando pareva ormai spegnersi ogni ragionevole motivo di fiducia, è spuntata l'alba della liberazione. È rinata la vita. È riemerso il coraggio di esistere, si è accesa nuovamente la luce della speranza" (n. 3). "La libertà religiosa [...] non è solo un prezioso dono del Signore per quanti hanno la grazia della fede: è un dono per tutti, perché è garanzia basilare d'ogni altra espressione di libertà. Essa tocca l'uomo nell'intimo, in quel sacrario inviolabile che è la coscienza, dove l'essere umano si incontra col Creatore ed acquista piena consapevolezza della propria dignità. Da tale libertà, quando essa è correttamente usata, non v'è da temere alcun disordine sociale. La fede sincera, infatti, non divide gli uomini, ma li unisce, pur nelle loro differenziazioni. Niente come la fede ci ricorda che, se abbiamo un unico Creatore, siamo anche tutti fratelli! La libertà religiosa è così un baluardo contro i totalitarismi e un contributo decisivo all'umana fraternità. La vera libertà religiosa rifugge dalle tentazioni dell'intolleranza e del settarismo, e promuove atteggiamenti di rispettoso e costruttivo dialogo".

[4] Il ruolo delle religioni tradizionali – mussulmani Sunniti e Bektashi, ortodossi e cattolici – è centrale nello sviluppo del Paese e nella creazione discreta di una nuova dirigenza indipendentista, tanto che i loro leader vengono indicati come garanti del processo costituente.

[5] È il caso della Chiesa evangelica, che nel 1922 apre a Korça una missione evangelica, diretta da missionari americani, e nel 1923 tenta di beneficiare pienamente del decreto per l'acquisto della personalità giuridica civile da parte delle confessioni religiose. Tuttavia, nel 1933, dopo dieci anni di presenza, a causa della politica zoghista di rafforzamento autoritario dello stato e di occupazione di tutti gli ambiti civili, di cui il rafforzamento della scuola pubblica in danno delle private è un esempio, la giovane scuola di Korça viene chiusa.

III. Il rapporto con lo stato

Dialogo e tolleranza costituiscono un metodo di coabitazione delle religioni in Albania come risposta ai bisogni di un Paese che vive in una condizione di duratura precarietà, ma nella costante ricerca dell'affermazione della propria identità. Il dialogo, che nasce anche dalla tolleranza, caratterizza anche la Chiesa cattolica albanese e si sviluppa in più direzioni. Esso è praticato con lo Stato, con la società civile, con le altre religioni, all'interno stesso della Chiesa e risponde a differenti obiettivi, pur sempre a tutela della dignità della persona umana. Il dialogo con lo Stato non è stato (e non è) facile, sebbene si sia sempre mosso su una base di reciproca disponibilità, diversamente motivata. L'obiettivo del dialogo con lo Stato risponde sia a un'esigenza di garanzia della Chiesa e dei suoi diritti sia a un'esigenza di farsi mediatore delle istanze dei cittadini a difesa dei diritti fondamentali della persona umana. Inoltre, esiste anche un ulteriore interesse al dialogo della Chiesa cattolica con lo Stato e la società civile finalizzato alla collaborazione per il consolidamento del processo democratico e per una politica di pacificazione e di tutela dei diritti. La situazione istituzionale dopo la caduta del comunismo, nonostante la delicatezza che derivava dalla ricerca del recupero di una propria identità nazionale e le immaginabili difficoltà legate anche alla arretratezza accumulata, disegnava un quadro istituzionale che a fatica cercava di stabilizzarsi. Anche le confessioni religiose tradizionali erano soggetti sociali impegnati nella ricostruzione di una presenza organizzata nel paese. Si affacciarono anche religioni "nuove" in quanto non appartenenti a quelle confessioni religiose che storicamente risultano presenti nel Paese, che iniziarono un'intensa opera di penetrazione e di proselitismo utilizzando la mediazione degli aiuti economici e sociali e dell'impegno religioso.

Un primo spinoso problema riguarda la ricostruzione delle proprietà e la disciplina dei beni. Si tratta, evidentemente, di problemi creati dalle politiche repressive e distruttive del regime comunista e dittatoriale, che aveva proceduto alla requisizione di tutti i beni mobili, immobili, materiali e immateriali di proprietà delle religioni, e quindi anche della chiesa cattolica. L'avvento della democrazia, del resto, ha anche lo scopo di ridisegnare un sistema di diritti e doveri anche sotto forma di restituzione di ciò che fu violentemente tolto. La restituzione dei beni ecclesiastici (sia degli immobili sia dei suoli), confiscati a cominciare dal 1967 durante il precedente regime, è ancora oggi operazione non completata e non facile anche a causa dei numerosi passaggi di cui questi beni sono stati oggetto e delle trasformazioni intervenute col tempo. L'istituzione dell'*Agenzia per la restituzione e il risarcimento della proprietà*, alla quale vanno presentate le richieste relative alla restituzione dei beni confiscati, munite della necessaria documentazione attestante l'antico possesso del bene, ha il merito di individuare un procedimento che ha l'obiettivo di pervenire a una chiarezza di situazione. Si deve osservare, tuttavia, che la procedura e la raccolta delle prove documentali si presenta astrattamente come un'operazione non difficile, ma nella pratica sovente è stato difficile reperire i documenti necessari per attestare la proprietà ed era egualmente difficile ottenere la prova giudiziale per una serie di

motivi (inesperienza e inadeguatezza dei giudici, legittime aspettative di coloro che abitavano gli immobili, ecc.). L'Agenzia inizia la sua attività nel 1991 e ha tempo per l'esame delle domande fino alla fine del 2011 (secondo quanto previsto dall'art. 24 della Legge n. 9235 del 29.7.2004), ma esistono a tutt'oggi ancora alcune pendenze. Lo stato nel corso degli anni dal 1991 al 2005 non sempre ha emanato provvedimenti specifici riguardanti le proprietà delle confessioni religiose, come era accaduto nel 1967 quando il regime stabilì una specifica previsione per le proprietà delle religioni (*Decreto Nr. 4263, del 11.04.1967: Articolo 2: I beni immobili di comunità religiose, fatta eccezione per gli edifici in cui si trovano, passano di proprietà dello Stato*), ma ha provveduto in via ordinaria emanando una serie di leggi di carattere generale, che riguardavano indirettamente la chiesa cattolica e le altre confessioni religiose, poiché soggetti rientranti nella generale categoria dei proprietari espropriati[6]. In sostanza non vi è stata nessuna legge specifica di restituzione alle confessioni religiose delle proprietà e dei beni, pur essendo stati numerosi gli incontri sia con l'Agenzia per la restituzione della proprietà sia con l'Ufficio statale dei culti.

Se, dunque, l'atteggiamento del governo non ha inteso isolare la situazione peculiare della Chiesa e delle confessioni religiose, diversamente ha operato la magistratura, quando è stata richiesta di intervenire dalle singole confessioni religiose. Così, ad esempio, esistono alcune decisioni dei giudici sulla restituzione dei beni alle confessioni religiose, come quella della Corte costituzionale d'Albania del 25 gennaio 2010.

Un problema a parte è costituito dalle reliquie e dai documenti storici a suo tempo sequestrati e entrati a far parte del patrimonio artistico e storico della nazione. Tipico è il caso delle icone, che costituiscono patrimonio culturale della nazione secondo la legge del 1994 (Beni culturali mobili e immobili 1994; Esclusione delle confessioni religiose dalle imposte locali sugli immobili e sui trasferimenti di proprietà 2002) anche in considerazione della peculiarità di una tradizione iconografica che, sulla scorta di numerosi pittori anonimi del sec. XII e XIII, trova una sua strada nel sec. XVI con Onofri. Un notevole passo, di rilevanza giuridica e politica, si compie con l'Accordo economico-fiscale fra la Santa Sede e la Repubblica d'Albania, firmato nel dicembre del 2007 presso l'Ufficio del Ministro delle Finanze a Tirana, che si colloca nell'ambito dell'Accordo generale del 2002 e stabilisce il quadro giuridico del trattamento tributario delle istituzioni ecclesiastiche, che sono riconosciute come persone giuridiche senza scopo di

[6] Tra i provvedimenti che si riferiscono indirettamente alla Chiesa cattolica e alle altra confessioni e affrontano in generale il problema delle proprietà: la disciplina dell'Agenzia per la restituzione e il risarcimento della proprietà (Testo coordinato 2004), la Legge per la proprietà della terra del 1991, la Legge per la protezione della proprietà privata del 1991, la legge sul Passaggio senza indennizzo delle proprietà agricole del 1995, la Privatizzazione di edifici statali del 1992, la legge sulla Restituzione e compensazioni per beni espropriati del 1993. Fanno eccezione rispetto alle altre provvidenze normative di carattere generale, perché contengono uno specifico riferimento, spesso solo astratto, alle confessioni religiose le Provvidenze per i boschi di proprietà religiosa del 2005, la legge sulla Restituzione alle confessioni religiose delle proprietà agricole confiscate del 1995, la Restituzione o l'indennizzo per la confisca delle proprietà agricole delle confessioni religiose avvenute nel 1945, la Restituzione beni espropriati alle comunità mussulmane del 2010.

lucro. L'accordo regola in particolare lo 'status' fiscale degli enti della Chiesa cattolica in Albania, l'amministrazione contabile di dette strutture e il sistema contributivo-previdenziale del personale religioso e laico non albanese a loro servizio.

Tuttavia, al di là delle singole e specifiche questioni economiche e finanziarie, il salto di qualità nel rapporto istituzionale è segnato dall'Accordo generale firmato nel marzo del 2002 tra Santa Sede e Repubblica d'Albania "nel comune desiderio di rafforzare e di promuovere, in spirito di amicizia, le relazioni già esistenti tra di esse, e con l'intento di regolare, di comune accordo, lo statuto giuridico della Chiesa cattolica in Albania". L'Accordo contiene anche una previsione specifica relativa alle proprietà sequestrate in passato alla Chiesa e agli ordini religiosi, impegnando il governo albanese impegnato a ripristinare le proprietà della Chiesa cattolica (Articolo 8). Il valore dell'Accordo consiste non solo nel contenuto specifico delle materie trattate, ma anche nella sua storica portata di carattere generale tra Chiesa e Stato albanese. Esso, inoltre, è una specie di spartiacque insieme con la Costituzione della Repubblica d'Albania, che, decisamente avviata verso un'esperienza democratica di rottura con la sua storia del secondo dopoguerra, consente al Paese di imboccare decisamente la via del riconoscimento della libertà religiosa. Come si legge nel *Rapporto sulla libertà religiosa in Albania* del 2004[7], "dopo decenni di devastante e oppressivo ateismo comunista" anche se si registra "fra gli strascichi del regime marxista" il permanere di "una diffusa secolarizzazione", la libertà religiosa costituisce un dato acquisito per il popolo albanese.

IV. La peculiare struttura della costituzione del 1998 e i diritti fondamentali della persona umani

La Costituzione d'Albania, approvata nel 1998 e confermata da referendum popolare, è stato l'atto finale di un percorso molto travagliato iniziato dopo la caduta del regime con la legge Costituzionale numero 7491 del 1991, abrogativa

[7] Nel Rapporto sulla libertà religiosa in Albania del 2004 si legge: "Dopo decenni di devastante e oppressivo ateismo comunista, con la nuova Costituzione la libertà religiosa è sostanzialmente rispettata dalle forze politiche al potere anche se, fra gli strascichi del regime marxista, permane una diffusa secolarizzazione. Dati recenti forniti dal Comitato statale per i Culti conteggiano in 28 i gruppi musulmani – alcuni dei quali stranieri – attivi, mentre le associazioni cristiane ammonterebbero a 42, incluse alcune missioni di mormoni, alle quali è necessario aggiungere i testimoni di Geova e gli adepti del culto baha'i. Le relazioni fra le varie comunità sono buone e nessuna denominazione religiosa gode di uno statuto speciale, ma i tre grandi gruppi religiosi – musulmano, cristiano-ortodosso e cattolico – hanno un riconoscimento di personalità giuridica. Non esiste obbligo di registrazione per i gruppi religiosi, ma il Comitato mantiene un archivio di quelli che si rivolgono allo Stato per ottenere degli aiuti. Non vi sono notizie di difficoltà per ottenere lo status di associazione no-profit, mentre permangono gli obblighi fiscali anche per i gruppi religiosi. Nel Paese sono attive 14 scuole religiose con circa 2.600 studenti, mentre nelle scuole statali non è previsto l'insegnamento religioso. È ancora da completare la restituzione alle comunità religiose delle proprietà confiscate nel 1967 dal regime comunista di Enver Hoxha". I dati sull'appartenenza religiosa in Albania distribuirebbero la religione nel seguente modo: Religious Musulmani (compresi Bektashi) 38,8%, Cristiani (ortodossi e cattolici) 35,4%, Agnostici 25,6%, Altri 0,2%.

del sistema precedente, continuato con legge sui Diritti e Libertà dell'Uomo del 1993, proseguito con una prima proposta del 1994. Dopo sei anni di tensioni per le divergenze e i conflitti politici che hanno attraversato il Paese (anche accompagnate da violente manifestazioni) specie nel primo quinquennio degli anni novanta del secolo scorso, il testo definitivo, composto di 183 articoli, venne definitivamente approvato nel mese di ottobre del 1998. L'assoluta discontinuità con il regime dittatoriale è ravvisabile nel fondamento giuridico della costituzione, che consiste nella scelta di garantire e tutelare i diritti e le libertà fondamentali della persona umana. L'art. 3 contiene esplicitamente una sorta di elenco dei principi che sono "il fondamento dello Stato", tra i quali sono menzionati "la dignità dell'uomo, i suoi diritti e libertà, [...] il pluralismo, l'identità e l'eredità nazionale, la convivenza religiosa, nonché la comprensione degli albanesi verso le minoranze". E' fatto obbligo allo Stato rispettare e tutelare questi principi. Inoltre, il successivo art. 9,1 sancisce la formale e solenne accettazione dei principi internazionali di tutela della libertà di coscienza e di religione, così come sono stabiliti sia nella Dichiarazione Universale dei diritti dell'uomo del 1948 sia, soprattutto, nella Convenzione Europea dei Diritti dell'Uomo. Conseguentemente, la nuova Carta costituzionale risponde anche ai criteri fissati dal Consiglio d'Europa per i Paesi che intendono far parte di questo organismo. Inoltre, proprio per la storia peculiare del popolo albanese e delle sua "famiglie", allo stesso tempo si colloca in continuità con la tradizione e le esperienze giuridiche, che hanno caratterizzato la Nazione albanese fin dai suoi inizi medioevali.

Nella previsione costituzionale albanese la tutela della libertà religiosa, che costituisce un impegno di modernizzazione culturale e giuridica, si congiunge strettamente alla tutela della cultura della convivenza, non potendosi ignorare che la storia d'Albania è caratterizzata nei suoi lunghissimi secoli da pluralismo religioso e convivenza pacifica. Pertanto, i principi giuridici e la disciplina costituzionale sono evidentemente influenzate dalla storia del Paese e dalla particolare cultura della convivenza, che ha favorito lo sviluppo dell'Albania nei secoli, precisando che la cultura della convivenza presenta allo stesso tempo luoghi e spazi propri e quasi esclusivi delle singole religioni, ma allo stesso tempo è stata capace di creare processi di integrazione solo quando si è trattato di conseguire obiettivi comuni ritenuti superiori e quando si è trattato di difendere o affermare l'albanesità. Si può dire che anche il sistema delle relazioni delle religioni con lo Stato da un lato si ispira a concetti moderni (quali laicità, dialogo, valore della libertà, tutela della libertà religiosa, tutela dei diritti fondamentali della persona) dall'altro risente anche di dinamiche storiche tipiche della storia del Paese. Una prima significativa innovazione introdotta dalla Carta costituzionale è contenuta nel preambolo, in cui emergono tre punti, che possono essere considerati allo stesso tempo una linea programmatica e la riscoperta dei valori tradizionali. Il primo elemento consiste nel riconoscimento del valore dello stato di diritto, che si dimensiona sulla tutela delle libertà fondamentali della persona: infatti, i due principi sono strettamente congiunti nella formula del preambolo. Il secondo elemento, che costituisce una assoluta discontinuità con il regime comunista degli anni di piombo, è dato dal richiamo alla fede in Dio e ai valori

universali. Si tratta di due fonti (o forse si tratta della stessa fonte) valoriali con carattere normativo alle quali si orienta la vita delle comunità albanesi. Esse, nella espressione di un pluralismo esistenziale, traggono dalla fede e dai valori, il senso e il significato della loro esistenza. Infine, il terzo elemento è costituito dall'identità e dall'unità, valori strettamente congiunti, che individuano il *DNA* del popolo albanese. Del resto, anche i vescovi hanno spesso richiamato questi valori specie nei momenti di maggior tensione, come è accaduto nell'appello durante le varie competizioni elettorali.

La Costituzione disciplina il profilo della tutela della libertà religiosa all'interno di un contesto di pluralismo religioso, che consente di distinguere e separare dallo Stato le comunità religiose, alle quali riconosce il diritto di essere indipendenti e di ottenere la personalità giuridica. Formalmente in questo pluralismo e nella distinzione di ruoli si può cogliere lo spazio per il dialogo e la cooperazione verso obiettivi comuni. Si tratta di una svolta di grande importanza, che ha anche un valore programmatico, nella misura in cui la precettività difetta. Infatti, non sempre nell'esperienza quotidiana si trova pedissequa applicazione di questi principi, sia per la novità di questa impostazione sia per le difficoltà materiali, dettate anche dalla politica e dal perdurare di una concezione gerarchico-autoritaria dello Stato.

La Costituzione contiene anche l'affermazione del principio di laicità dello Stato, formula non nuova per l'Albania, che in qualche modo era già contenuta nello Statuto del 1913, sebbene con contenuti non paragonabili all'attuale caratterizzazione culturale e all'attuale dimensione del principio. Il principio di separatezza dei fini tra stato e comunità religiose, le quali sono anche riconosciute come ordinamenti giuridici originari, e di distinzione dei soggetti agisce nel riconoscimento dell'importanza che le religioni hanno per il Paese, tanto che nell'art. 10.2 si "garantisce la libertà della loro esposizione nella vita pubblica". Inoltre, il principio di laicità, così come emerge dall'articolo 10 della costituzione, non consiste solo nella "neutralità religiosa" dello Stato, anche nel senso che non esiste una religione ufficiale, che possa condizionare la vita del paese ma anche nel riconoscimento che proprio la "reciproca indipendenza" consente a entrambi i soggetti di "concorrere" per "il bene di ognuno e di tutti" (punto 4). Si tratta, quindi, di una laicità cooperativa e concorrente, che ha come punto di arrivo il bene della persona umana, di ogni persona non solo dei cittadini albanesi, come si comprende facilmente dal disposto dell'art. 16, circa il riconoscimento dei diritti umani, come bene di tutte le persone. Infine, l'art. 24, che disciplina la libertà di coscienza e di religione, si inserisce nella logica della disciplina della Convenzione Europea e della Carta di Nizza del 2000 ed esalta, specie nel punto 3, la prevalenza dei diritti personali anche su quelli della comunità confessionale. La particolare previsione costituzionale consente di dire che, proprio in virtù del principio di laicità, le confessioni religiose rivestono un duplice ruolo, poiché da un lato sono riconosciute come formazioni interne alla società albanese (art. 10.3), perfettamente integrate nella vita e nella storia del Paese (e per questo tutte le comunità religiose sono eguali), da altro lato le comunità religiose in quanto soggetti indipendenti hanno uno statuto esterno allo stato, come soggetti giuridici

che si muovono in un sistema giuridico internazionale. Il pieno rispetto della libertà religiosa personale è sancita nella previsione dell'art. 24. 3 ("Nessuno deve essere ostacolato o costretto a partecipare alla vita di una comunità religiosa o alle sue pratiche, cosi come a rendere pubbliche le proprie convinzioni o la propria fede"), che tutela nel modo più ampio possibile la persona umana in una duplice direzione: come principio "negativa", nel senso che la forza del principio non consente di giustificare ostacoli o costrizioni alle scelte religiose della persona umana, sia anche come principio "positivo", nel senso che la Costituzione pone l'obbligo allo Stato e a tutti i componenti della società di garantire il diritto ad avere convinzioni personali e una propria libera fede.

Vale la pena di sottolineare che i principi costituzionali, ai quali si è fatto cenno, si muovono nel solco della tradizione culturale albanese medioevale e moderna, poiché riconoscono l'esistenza del pluralismo religioso e del pluralismo dei culti in un territorio nel quale la religione di maggioranza è l'Islam. Non si può non riconoscere che questo dato storico-culturale recepito dal punto di vista giuridico in un atto solenne come la Carta costituzionale costituisce un elevato parametro di civiltà. Ciò, dal punto di vista giuridico e sociale conferisce all'ordinamento albanese una capacità di autostabilizzazione sociale, che, tra l'altro, ha evitato all'Albania la devastazione di guerre etnico-religiose, non rare nella storia dei Balcani.

La caratterizzazione pluralista della costituzione albanese, che risponde anche a una eguale condizione verificabile nell'esperienza, è anche alla base del *Comitato Statale per i culti*, istituito nel 1999 sia per affrontare tutte le questioni aperte tra Stato e Comunità religiose sia, e in particolare, per realizzare le trattative per la stipula di accordi di cooperazione con le confessioni religiose, ai sensi dell'art. 10 della Costituzione.

Tra il 2002 e il 2006, non senza difficoltà e recriminazioni, si portano a risoluzione alcune delle questioni più rilevanti del rapporto tra Stato e Chiesa Cattolica. In qualche misura le trattative e le decisioni concordate finiscono per rinviare alla legislazione ordinaria, che in qualche modo ne è influenzata, pur non essendo in linea generale la legge ordinaria specificamente rivolta alle comunità religiose, conservando un carattere generale e risolvendo casi comuni all'interno dei quali si considerano anche le questioni religiose.

Una tappa importante sulla strada del pluralismo religioso si realizza nel 2009, quando lo Stato stipula gli accordi che riguardano Sunniti, Bektashi, Cristiano-ortodossi. Anche in questo caso agli accordi e alle trattative segue una legislazione ordinaria di supporto destinata soprattutto alla risoluzione delle questioni più rilevanti, come quella delle proprietà dei beni, create dalla legislazione della dittatura comunista. Per tutte le confessioni religiose, comunque, resta un punto fermo circa le procedure per il riconoscimento della personalità giuridica civile, per la quale è necessario un provvedimento dichiarativo, costituito da un Decreto del Tribunale di Tirana. La logica concordataria, cioè utilizzare lo strumento degli accordi per definire le questioni generali con le confessioni religiose, si estende anche alle cosiddette "nuove" religioni, cioè diverse da quelle

storiche, come ad esempio la Chiesa evangelica d'Albania (*Vëllazëria Ungjillore e Shqipërisë, VUSH*) con cui iniziano trattative dal 2005.

V. Quale democrazia? Quale contributo della Chiesa cattolica?

L'esperienza albanese, come del resto quella dei Paesi balcanici, dimostra la necessità di ripensare il concetto di democrazia e i peculiari assetti (anche costituzionali) attraverso i quali essa opera e si mostra. Se si vuol comprendere quale nesso lega lo sviluppo sociale, l'organizzazione della società, le forme di partecipazione e i principi solennizzati nella Carta costituzionale in tutti i Balcani, si deve comprendere la peculiarità del percorso democratico che quei Paesi stanno compiendo a far data dalla caduta dei sistemi dittatoriali del comunismo. Nella pratica esistenziale esistono gli elementi che consentono di individuare una democrazia, che assume categorie proprie di quelle culture, sicché non è possibile pensare a facili procedimenti di omologazioni o a superficiali raffronti tra democrazie occidentali e democrazie balcaniche per rispondere alla domanda sull'esistenza oppure no dell'insediamento del processo democratico.

Nell'esperienza albanese il concetto di democrazia ruota intorno al modo di interpretarne gli elementi essenziali ricollegati alla tradizione, ai valori popolari e allo spirito di adattamento del popolo, che ha sperimentato cinquecento anni di oppressione. Per questo, perché si realizzi il processo democratico non è sufficiente provvedere a insediare le istituzioni, a realizzare le elezioni, a dare spazio al libero mercato. La democrazia si misura anche con la qualità di una convivenza democratica alla quale concorrono tutte le persone e i soggetti sociali che si coinvolgono nell'esperienza. In questa prospettiva, pertanto, si deve riconoscere che la Chiesa cattolica ha svolto (e svolge) un ruolo peculiare e importante nel processo democratico del Paese, specie dopo la caduta del comunismo, che ha contribuito a far cadere con la testimonianza di vita e il martirio dei fedeli. Al pari delle altre comunità religiose, e forse più delle altre comunità religiose, la Chiesa cattolica è stata profondamente toccata dall'esperienza del martirio, durante il quale non è mai venuta meno la volontà di ricostruire ciò che si andava distruggendo nella consapevolezza che vi era un disegno divino sul Paese più forte del male che lo stava travagliando.

In questa direzione risulta convincente la lettura dei messaggi della Conferenza Episcopale Albanese del 1977 e del 2013, nei quali si percepisce come la Chiesa mostri di aver compreso i problemi essenziali della democrazia albanese e per questo diventa protagonista non per fare scelte di campo a favore di questo o di quel partito, ma per difendere i valori di libertà, di democrazia e di dignità umana, che corrono rischi di affievolimento a causa dei problemi legati anche alla lunga transizione democratica. Nei due messaggi sono contenute indicazioni concrete per l'esercizio della partecipazione democratica e per combattere con essa corruzione e degrado. Sono fortemente presenti il richiamo con toni costruttivi al dialogo, al rispetto degli avversari politici, al dialogo alla tolleranza, alla riconciliazione e l'invito a difendere nei programmi elettorali i valori umani più

elevati. Particolarmente interessante nel messaggio del 2013 la profonda preoccupazione per i ritardi ingiustificati nel processo d'integrazione con l'Ue, ritenendo che essa costituisce l'unica via percorribile per il futuro del popolo.

Il contributo della Chiesa cattolica al processo di insediamento della democrazia non è costituito solo dall'impegno della gerarchia. Importante è il contributo culturale e formativo, che trova un deciso impegno nelle attività delle parrocchie e ancor più nel consistente impegno degli ordini religiosi (come ad esempio i Gesuiti, i Francescani, i Salesiani e le numerose congregazioni femminili) che dal momento della caduta del regime comunista hanno sostenuto la rinascita della società albanese oltre che con aiuti di varia natura anche con l'organizzazione di corsi di formazione, di corsi di avviamento al lavoro, momenti di aggregazione, corsi di formazione religiosa, avviamento di piccole esperienze imprenditoriali, sostegno alle posizioni più povere, riuscendo a creare ponti tra la rinascente società albanese e soggetti privati di altre nazioni, specialmente italiani. Non minore è stato anche lo sforzo di dialogo con le altre religioni che erano egualmente impegnate nell'opera di ricostruzione. Tra le iniziative che meritano di essere menzionate sul fronte della formazione universitaria, di particolare interesse è l'attività della università cattolica (NSBC) intitolata a Madre Teresa di Calcutta, inaugurata nel 2005, presente con i suoi qualificati corsi di laurea.

Si deve osservare che le religioni, e in particolare della chiesa cattolica, hanno sempre operato per lo sviluppo sociale e politico del Paese guardando alla sua collocazione in un contesto più ampio, che per le religioni cristiane era l'Europa e per le religioni islamiche era il contesto del mondo arabo-islamico (che ha favorito la ripresa dell'Islam e la costruzione delle moschee) e del mondo turco, storico riferimento dell'islam albanese. Grazie al tenace impegno delle religioni, la politica albanese ha riscoperto, seppur con notevole fatica, un diverso livello di dignità, guardando oltre i conflitti personali, locali e virulenti che riguardavano la gestione di un potere concepito come asservito agli interessi e finalizzato all'accaparramento degli aiuti economici provenienti dall'estero. La Chiesa cattolica ha mostrato sempre chiara consapevolezza che il suo impegno religioso non poteva trascurare la crescita del processo democratico e la formazione umana di persone che avevano avuto il coraggio di conservare tradizioni e fondamento religioso, ma avevano dovuto confrontarsi improvvisamente con un livello di progresso troppo avanzato. La Chiesa ha dovuto individuare e interpretare il proprio ruolo consapevole che la costruzione della società in Albania doveva tener conto delle specificità della transizione democratica del Paese, in cui rimangono molti problemi del passato e notevoli sfide, pur essendo molto forte il desiderio del popolo di progredire e raggiungere in fretta i livelli di sviluppo delle società europee con cui si progetta l'integrazione. Di questa consapevolezza si è anche discusso in un recente convegno organizzato a Tirana nel mese di settembre del 2011 dalle Commissioni "Giustizia e Pace" dell'Europa in rappresentanza di 23 Paesi. Il meeting dal titolo *"Le relazioni inter-religiose e interculturali - opportunità e sfide per la nostra solidarietà. Un contributo albanese alla costruzione dell'Europa"*, al quale hanno partecipato anche i rappresentanti delle comunità musulmana, ortodossa, cattolica,

protestante e Bektashi, si è concluso con un documento finale in cui si dichiara che

> "il ruolo della religione nella società moderna albanese non è ancora completo, ma le comunità religiose sono consapevoli del loro ruolo nella costruzione di una nuova società in Albania. Anche se ci possono essere alcune tensioni e difficoltà, l'atteggiamento che le comunità religiose hanno dimostrato fino ad oggi, caratterizzato dal rispetto reciproco, dal sostegno reciproco e dal sottolineare valori comuni quali la dignità della persona umana, dovrebbe fornire una base solida da cui partire per continuare ad affrontare queste sfide".

VI. Il dialogo interreligioso come strumento di sviluppo democratico

Il Dialogo interreligioso, nella duplice direzione interna con le altre confessioni ed esterna anche con le altre Chiese europee e specie italiana nell'esperienza albanese ha precedenti storici importanti, e in questo senso appartiene in qualche modo al patrimonio storico albanese[8]. L'importanza del dialogo tra le religioni in Albania è stata ufficialmente sottolineata dalla Santa Sede, che per il tramite di papa Benedetto XVI ha indirizzato un messaggio a Sua Beatitudine Anastas, primate della chiesa autocefala ortodossa d'Albania, il venerdì 4 dicembre 2009, in occasione della visita che il primate ha fatto in Vaticano. Il Papa nella circostanza ha detto che sottolinea che "Da quando ha ottenuto la libertà, la Chiesa Ortodossa di Albania è stata in grado di partecipare con frutto al dialogo teologico internazionale cattolico-ortodosso". Inoltre, non ha mancato di attestare che "le fraterne relazioni fra cattolici e ortodossi" costituiscono un modo con cui si "offre ispirazione all'intero popolo albanese" e soprattutto sono la dimostrazione di "come sia possibile per i cristiani vivere in armonia le relazioni tra cristiani in Albania dimostrano come sia possibile vivere in armonia". Nel messaggio si può osservare l'esistenza di un legame ancor più solido e profondo tra un impegno tipicamente religioso (il dialogo teologico) e un impegno chiaramente civile (la convivenza in armonia), come punto di riferimento per l'intero popolo albanese. Tra le iniziative che sono sorte per dare maggior forza al dialogo interreligioso la costituzione nell'ottobre del 2009 del "Consiglio interreligioso nazionale"[9], che riunisce le principali comunità religiose del Paese

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[8] Il precedente storico è costituito dall'adozione nel 1920 dello Statuto *di Lushnja*, in conseguenza del quale fu istituito un *Alto Consiglio* (*Këshilli i Lartë*), destinato ad esercitare per 3 anni il potere esecutivo, composto da persone elette dal Parlamento e dai rappresentanti delle quattro religioni del Paese (cattolici, musulmani, ortodossi e Bektashi). La particolarità del Consiglio consisteva nel fatto che esso in questa composizione mista, laica e religiosa, era espressione di un pluralismo socio-religioso e rappresentava l'unità dell'Albania, che all'indomani della liberazione dalla dominazione ottomana, aveva iniziato un percorso di libertà democratica.

[9] "Religion for peace – Europa" nel dare la notizia ha precisato che la nascita del Consiglio interreligioso è "il frutto di un processo di dialogo portato avanti da alcuni anni". I membri fondatori sono l'arcivescovo Anastasios, capo della Chiesa ortodossa di Albania, Selim Muca, capo della

ed è "frutto della buona volontà delle persone" delle diverse fedi presenti nel Paese alla ricerca delle ragioni dell'unità. Tutte le iniziative di carattere interreligioso (come ad esempio la *fondazione della Società biblica interconfessionale* e la creazione del *Comitato per le relazioni interconfessionali*) dimostrano l'importanza di sforzi strutturali orientati a promuovere la reciproca comprensione e la concreta cooperazione, non solo fra cattolici e ortodossi, ma anche fra cristiani e mussulmani e bektashi. Le autorità civili sono consapevoli dell'importanza di queste iniziative per lo sviluppo del Paese e per questo attestano l'interesse nazionale con la partecipazione ufficiale ai momenti topici, come ad esempio l'atto inaugurale del Consiglio interreligioso. In questa circostanza, il Presidente della Repubblica d'Albania, Bamir Topi, nel suo discorso di apertura, ha sottolineato che il dialogo interreligioso è "il volto della tolleranza". Non v'è dubbio che queste iniziative oltre a rivestire un carattere essenzialmente religioso, poiché riguardano direttamente le religioni coinvolte, costituiscono l'attestazione di una possibile pacifica convivenza come elemento di crescita e benessere di tutti gli albanesi. Non si deve dimenticare che l'attuale dialogo tra le religioni trova la sua origine nella storia unitaria degli albanesi, che ancora oggi celebrano insieme le diverse festività religiose, partecipano insieme ai diversi pellegrinaggi, celebrano molti matrimoni misti e realizzano attività culturali in comune. Le relazioni interreligiose sono una peculiarità dell'Albania e costituiscono in qualche misura una sorta di modello da studiare, come è stato fatto, ad esempio, durante il "Forum Regionale sul Dialogo inter-religioso nel sud-est d'Europa, svoltosi a Tirana e durante la riunione di fondazione del "Forum di Albania per l'Alleanza delle civiltà", in cooperazione con l'Unesco. Il tema del rapporto tra intercultura e dialogo interreligioso interessa anche le istituzioni europee tanto che il Comitato dei Ministri del Consiglio d'Europa ebbe a organizzare nel settembre del 2012 a Durazzo uno specifico incontro sul tema "dialogo interculturale e diversità religiosa" con l'intento di sollecitare nei giovani la conservazione di valori comuni e la loro trasmissione, considerando l'impatto dei genitori nell'educazione dei figli, l'interazione tra la famiglia e gli educatori, i rapporti intergenerazionali. Inoltre, il meeting ha esaminato come il radicamento nelle religioni della solidarietà e dei valori fondamentali possono unire i giovani nella promozione di comprensione e rispetto reciproco.

Il dialogo interreligioso, dunque, oltre alle finalità intrinseche, costituisce uno strumento per l'insediamento dei valori della democrazia, come pace e tolleranza, che favoriscono lo sviluppo delle persone e delle società e sostengono il processo di integrazione.

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comunità musulmana, mons. Rrok Mirdita, presidente all'epoca della Conferenza episcopale albanese, e Haxhi Dede Reshat Bardhi, capo della "World Bektashi Headquarters".

CLOSING OF THE PROCEEDINGS
IL RUOLO DEL DIRITTO PARTICOLARE

Raffaele C o p p o l a, Bari

1. Avevo da poco assunto la direzione del Centro di Ricerca "Renato Baccari", intitolato al mio compianto Maestro, quando mi raggiunse, nel mese di dicembre dello scorso anno, una telefonata dell'amico George Gallaro in cui mi chiedeva dagli Stati Uniti, a nome della Società per il diritto delle Chiese orientali, la disponibilità ad organizzare, insieme con Padre Lorenzo Lorusso, il presente congresso internazionale su "Leggi particolari e questioni attuali nelle Chiese".

Le difficoltà non erano trascurabili, specialmente di carattere economico e logistico, ma mi venne subito alla mente ciò che scriveva il compianto Padre Salvatore Manna, nel contesto del grande congresso di Bari del 1991, parlando dell'etimologia del termine "Puglia": cioé che l'antica radice della sua centralità richiama una terra "senza porte", specialmente nei confronti dell'Oriente.

Che questa sia la vocazione della nostra regione e specialmente del capoluogo è comprovato dal fatto che il 9 gennaio del corrente anno avevo già sciolto la riserva e, insieme con i miei collaboratori (in particolare l'avv. Francesco Patruno), davo inizio a questa iniziativa del Centro di Ricerca appena costituito. Essa mi ha ricondotto indietro di ventidue anni, facendomi rivivere, in qualche modo, il clima dello storico "Incontro fra canoni d'Oriente e d'Occidente" e successivamente, sulla scia di questo avvenimento da più parti definito ineguagliabile, degli approfondimenti compiuti sotto la guida di Péter Erdö dieci anni dopo, a Budapest, sul tema "Territorialità e personalità nel diritto canonico ed ecclesiastico".

Ambedue questi congressi internazionali, di cui sono stati pubblicati i poderosi volumi di atti (nel secondo tenni un'*impossibile* relazione su "Personalità e territorialità nel diritto interconfessionale"), si svolsero a diverso titolo sotto l'egida delle due grandi Società del diritto canonico, latino ed orientale, ponendo le basi, come ho scritto nella presentazione dell'odierno congresso, di un atteso ritorno nella Città e nell'Università, che avevano dato origine a tale imponente movimento di pensiero con l'ambizione di offrire, in ultima analisi, un contributo determinante alla maggiore comprensione fra gli uomini e, quindi, alla pace.

Tutto avrei pensato tranne che, nella cornice o sullo sfondo del congresso appena celebrato, potesse esserci una gravissima e pericolosa crisi internazionale, come quella siriana che fa impallidire i numerosi conflitti armati, che non di rado insanguinano le regioni del Vicino e del Medio Oriente dove, insieme con le Chiese cattoliche di rito bizantino, vivono pure quelle di rito alessandrino, antiocheno, armeno e caldeo.

Ieri al pari di oggi, come dimostrano la partecipata veglia di preghiera e la giornata di digiuno indette dal Santo Padre Francesco, seguite anche da moltitudini di non credenti e di appartenenti ad altre religioni (in prima linea i musulmani), l'unico strumento è dato dal dialogo politico fecondo e fraterno, a cui

deve fare da supporto la mobilitazione e la riorganizzazione delle Chiese e delle religioni, in spirito di carità e di comprensione reciproca.

2. Direi che, mentre i precedenti congressi sopra menzionati tentavano, rispettivamente, la dimostrazione di un effettivo patrimonio giuridico comune alla Chiesa latina e alle Chiese orientali ed un bilancio del diritto canonico e della canonistica di fronte al nuovo millennio, questo XXI congresso internazionale della Società per il diritto delle Chiese orientali, che vorrei non fossero mai più in balia delle guerre, ha realizzato il più concreto obiettivo di offrire un quadro analitico e costruttivo secondo le molteplici denominazioni di queste nobili Chiese, con particolare attenzione alle questioni più interessanti ed attuali.

Dopo le calibrate, importanti distinzioni fra "teoria" e "pratica" della legislazione particolare, abbiamo toccato con mano ed apprezzato l'apporto offerto dalle religioni e dalle Chiese all'edificazione della democrazia in Albania e, via via, i problemi della Chiesa *sui iuris* siro-malabarese, della Chiesa ortodossa cipriota (a livello costituzionale), i caratteri del Monastero di San Giovanni in Patmos, della Chiesa maronita, di quella ortodossa russa, delle Chiese melkita e rumena e, continuando nell'ordine, delle circoscrizioni ecclesiastiche bizantine in Italia e della Chiesa *sui iuris* bizantina-rutena; eppoi il diritto particolare della Chiesa *sui iuris* ucraina, le tematiche della diaspora o della coterritorialità e dell'incerta applicazione delle dottrine sui diritti umani; infine le peculiarità dell'Arcidiocesi ortodossa d'Italia e Malta nel sistema giuridico statale, come del diritto privato dei monaci ortodossi in territorio ellenico, nonché le attribuzioni dei sindacati dei chierici nella Chiesa ortodossa in Romania.

Elementi interessanti e assolutamente non secondari è stato possibile trarre dai progetti di ricerca di taglio storico-giuridico presentati da esponenti delle nuove leve di studiosi, fra cui la dott.ssa Patrizia Piccolo di Bari, ai quali si aggiungono alcune comunicazioni, senza peraltro corrispondere, almeno finora (con eccezione della Piccolo), all'intento degli organizzatori di rinnovare, attraverso gli uni e le altre, la pregressa esperienza di apertura e di comparazione con il diritto canonico d'Occidente. Mi auguro che ciò possa avvenire per il tramite delle comunicazioni future, che, come da programma, devono pervenire entro il 31 ottobre prossimo alla prof.ssa Carmela Ventrella.

Il nostro congresso è stato anche occasione d'incontro tra cultura, storia e tradizione. Abbiamo visitato mercoledì sera la Cattedrale di Bari ed il suggestivo succorpo, che, come i rotoli di *Exultet* del suo archivio, parlano di Oriente non meno dei luoghi legati alla memoria di San Nicola (Basilica e museo), che abbiamo appena percorso in modo inusuale, lungo le tre dimensioni del tempo (passato – presente – futuro), che, come sostiene S.E. Mons. Cacucci, "si intrecciano e si condizionano a vicenda".

3. Il variegato panorama del diritto particolare delle Chiese d'Oriente, che si snoda davanti ai nostri occhi con contributi di diversa ampiezza e consistenza, offre all'indagine dell'osservatore non superficiale importanti elementi di

valutazione in merito al rapporto dialettico tra Chiesa universale e Chiese particolari, in specie tra diritto universale (anche costituzionale) e diritto particolare tanto nella visione della Chiesa latina quanto di quella ortodossa, passando attraverso gli ordinamenti giuridici delle Chiese orientali cattoliche. Non entrerò dettagliatamente nel merito dei singoli contributi, ma ne interpreterò a mio modo le linee generali nell'ottica della comparazione interna a Chiese o a denominazioni confessionali meno lontane di tutte le altre dalla Chiesa cattolica o ad essa addirittura incorporate.

Per abito mentale sono portato ad una sistemazione unificante, più attento alle convergenze che alle differenze, segnatamente quando esiste una tradizione giuridica comune, costituita in questo caso dai sacri canoni dei primi secoli della Chiesa; essi danno vita ad un *corpus* che, per il mondo ortodosso, non può subire mutazione veruna se non attraverso un Sinodo "ecumenico", autorità suprema della Chiesa (Grigorită).

Per converso nella Chiesa cattolica l'autorità suprema è data dal Vescovo di Roma, dotato di giurisdizione immediata ed universale, molto al di là dunque del ruolo e della funzione, che non da oggi le Chiese ortodosse pur gli riconoscono, relativi soprattutto alla testimonianza della vera fede, per un ufficio di moderatore (*primus inter pares*) dell'intera comunità interecclesiale.

Principalmente per la Chiesa cattolica l'immutabilità, salvo l'intervento moderatore dell'*epieikeia*, è riconducibile esclusivamente in capo a diritto divino, naturale e positivo, che risulta così situato al vertice delle norme positive e ordinarie, per quanto risalenti nel tempo esse possano essere, dando vita ad un'inesauribile tematica, che costituisce un *unicum* nel concerto delle esperienze giuridiche di tutti i tempi. Si va dal concetto stesso di diritto divino al rapporto fra diritto divino e codificazione canonica, dalla sua giuridicità all'eventuale canonizzazione, interpretazione ed applicazione, dalla sua positivizzazione e formalizzazione alla relazione con la costituzione della Chiesa ed alla compenetrazione tra diritto divino e dottrine generali del diritto canonico (Fedele, Lombardía, Hervada, Berlingo', Coppola).

Ma il nostro congresso internazionale è stato pensato come il luogo privilegiato in cui il pluralismo disciplinare, a prescindere dalle differenze fin qui evidenziate, si manifesta all'interno delle Chiese sorelle attraverso la vigenza di diritti particolari, di per sé obbliganti in certi tempi ed in certi luoghi, che segnano anche il campo del progresso della legislazione delle singole Chiese ortodosse, non infrequentemente mediante interventi dell'autorità statale, in accordo e mai contro il *corpus canonum* della Chiesa ortodossa estesa per tutto l'universo, con cui occorre mantenere l'unità dottrinale, canonica e cultuale.

In questo senso, considerato che la molteplicità delle fonti pone sempre il problema della loro gerarchia, il ruolo del diritto particolare non è dissimile, *mutatis mutandis*, nelle varie latitudini dell'unica Chiesa di Cristo, ivi comprese la Chiesa latina e quelle Chiese che, nel volgere dei secoli, hanno ritrovato l'unità con Roma, la quale ne ha rispettato le diverse tradizioni e perciò dotate, specialmente dopo il nuovo codice dei canoni delle Chiese orientali cattoliche, di propri riti liturgici, di discipline e gerarchie proprie. Non l'autocefalia o

l'autonomia delle Chiese ortodosse, in definitiva, ma un interessante *status sui iuris*, di cui in questa sede abbiamo rivisitato gli elementi necessari e sufficienti, dati sostanzialmente da una stabile comunità di fedeli, una legittima gerarchia ad essa preposta, inoltre dal riconoscimento, perfino solo tacito, di detto *status* da parte del vescovo di Roma o del Concilio "ecumenico" (Mori, Salachas).

4. In questo senso ancora, come abbiamo visto nel corso dei lavori, il diritto particolare ha svolto e svolge un ruolo di notevole peso nell'esistenza della Chiesa o delle Chiese: da un lato esso assicura una puntuale applicazione della legislazione universale, che non può contraddire, completandola ed adattandola in relazione alle esigenze in concreto manifestatesi nelle varie circostanze; dall'altro è fattore così pregnante di evoluzione di tutto l'ordinamento che, almeno nella Chiesa cattolica, "non poche norme e istituti di carattere universale sono nati in sede locale, soprattutto ad opera dei concili particolari" (Feliciani).

Ancor più decisa la visione della teologia ortodossa, secondo cui l'autentica comunione comprende in se stessa gli aspetti fondamentali dell'*unità* e della *libertà*, chiamando in causa l'ecclesiologia trinitaria. La tensione fra autonomia ecclesiastica e sinodalità, espressa dal famoso can. XXXIV Apostolico (Rodopulos), conduce al principio secondo cui le Chiese locali, attraverso il loro modo di essere diverso e diversificato, danno vita alla realtà stessa dell'unità della Chiesa, diffusa per l'intero universo, nella misura in cui sono in comunione fra loro. Parallelamente il codice del postconcilio, promulgato da Giovanni Paolo II, ha consentito spazi sempre maggiori all'autonomia delle singole diocesi e degli episcopati, favorendo lo sviluppo delle legislazioni locali ed attenuando, di conseguenza, l'accentramento della vita ecclesiale, proprio delle epoche precedenti il Concilio Vaticano II.

Un altro fattore di temperamento della staticità dell'unico *Corpus canonum*, per giunta nell'attesa indefinita del futuro santo Concilio panortodosso, oltre che nella compiutezza del principio di "totalità" della Chiesa particolare, potrebbe vedersi nel ricorso non circoscritto (ma contrario ad ogni abuso) al criterio di *oikonomia*. Esso, pur differenziandosi dal concetto di *aequitas canonica* (Müller), si avvicina infatti al complesso degli strumenti di flessibilità della norma accolti dal diritto canonico della Chiesa latina e da quello delle Chiese orientali cattoliche, che è inutile in questa circostanza enumerare, ma che rimandano ai compiti propri dei Pastori di tener conto della salvezza delle anime, in quanto legge suprema della Chiesa, in cui risiede principalmente anche l'essenza della *oikonomia* ortodossa (Gefaell).

Il tema non è stato affrontato *ex professo* in questa sede congressuale. Sembra peraltro, come ben messo in luce da un chiaro autore nella sua relazione critica al richiamato congresso internazionale del 1991, in margine allo specifico contributo su *Oikonomia ed aequitas canonica*, che possa essere ritentata una rilettura, in chiave occidentale, del concetto di *oikonomia*, in tutta la ricchezza di contenuti elaborati dell'esperienza disciplinare della cristianità d'Oriente, facendo riferimento all'esigenza di commisurare, duttilmente, gli interventi autoritativi

della Chiesa alla stessa "mutevole realtà" del "rapporto comunitario generale": non più quindi *solo* in diretta ragione dell'interesse spirituale del soggetto agente, ma in ragione dell'utilità, beninteso sempre spirituale, dei confratelli nella fede (Bellini).

In tale direzione paiono muoversi, con qualche attenuazione o criticità, anche i contributi anteriori e successivi in ordine di tempo, come può ricavarsi dalla bibliografia specifica ed aggiornata sull'argomento, rinvenibile nel quinto volume del Dizionario generale di diritto canonico, a cura dell'Università di Navarra.

5. Una forte differenza con la visione cattolica è ravvisabile, proprio ed anche alla luce nei contributi del nostro congresso, nel modo di concepire la laicità dello Stato da parte delle Chiese orientali, soprattutto di tradizione greca. E' vero che le radici della laicità sono individuabili proprio dal I al IV secolo e, successivamente (sino al 1054 d.C.), si sono sviluppate nel senso della sinfonia fra *sacerdotium* ed *imperium*, fra potere religioso e potere secolare tanto in Occidente quanto in Oriente (Pitsakis, Baccari, Ventrella).

Ma, mentre da alcune relazioni sembra talvolta quasi riecheggiare il concetto particolare di potestà, come desumibile dal codice denominato *Epanagogé* (Ricapitolazione della legge), che verrebbe attuata per disposizione divina in una *diarchia*, cioè nelle persone del Patriarca e dell'Imperatore, l'interpretazione del dualismo cristiano di vincoli e funzioni porta oggi la Chiesa cattolica a ritenere che, non potendo darsi autonomia delle realtà terrene se non nei riguardi delle competenze ecclesiastiche (mai dell'ordine morale), è il *popolo* – ecco la novità da evidenziare – che deve decidere liberamente i modi più consoni di organizzare la vita politica, non potendo essere la Chiesa-istituzione, le altre confessioni o ideologie ad assolvere il compito di indicare quale sia l'ordinamento politico-sociale da scegliere (Benedetto XVI).

Per converso lo Stato veramente laico non può considerare la religione alla stregua di un sentimento individuale, da confinare esclusivamente nella sfera privata, come sembra emergere, salve le zone di esenzione, dalla discussa laicità francese, che costituisce un modello poco seguito nel contesto europeo. I regimi unionisti (con Chiese di Stato) sono in declino nel nostro continente, quanto meno nelle forme originali. Le forme più accreditate sono quella del coordinamento, cioè del *regime convenzionale ecclesiastico-statale*, nonché quella della *separazione degli ordini distinti*, che peraltro non esclude il sotto-modello, che ho più volte chiamato *cripto-convenzionale*.

Desidero concludere questa parte sostanziale, riallacciandomi ad un brano molto significativo, frutto di uno studio comune, che compare nella lettera ai congressisti del Card. Francesco Coccopalmerio, Presidente del Pontificio Consiglio per i testi legislativi (www.congressoslec.com). Dopo avermi inviato affettuosi complimenti per l'originalità del taglio dei lavori dell'alta assise scientifica, tanto più perché l'attenzione è caduta sui problemi maggiormente interessanti e di attualità, egli afferma che la diversità sul piano del progresso della legislazione particolare delle Chiese ovvero degli statuti interni di ciascuna Chiesa

autocefala, come le altre differenze sul terreno dogmatico e rituale, non pongono in ombra le convergenze, che possono realizzarsi con il mondo ortodosso dall'angolo visuale dell'*unica* Costituzione divina della Chiesa e della spinta verso una *coesione organica*, di cui sia legittima garante la Gerarchia propria, qualunque sia la forma o il grado di "indipendenza"giuridica.

Ringrazio la Società per il diritto delle Chiese orientali di aver scelto, per la seconda volta, la sede di Bari e chi vi parla per l'organizzazione di un congresso (caso unico nella sua storia); i Padri della Basilica "San Nicola", in particolare il Priore, Padre Lorenzo Lorusso, che mi ha affiancato nel quotidiano lavoro; il Vescovo di Bari, S.E. Mons. Francesco Cacucci, che ha offerto la collaborazione dell'Ufficio comunicazioni sociali dell'Arcidiocesi di Bari-Bitonto; il Gen. Gennaro Vecchione, il quale ha comandato fino al 9 settembre la Legione Allievi della Guardia di Finanza, chiamato a dirigerne i reparti speciali in Roma; l'Ordine degli Avvocati di Bari per aver attribuito 24 crediti complessivi e 3 crediti per ogni seduta dei lavori congressuali in vista della formazione professionale; l'ENEC (Associazione internazionale per le relazioni con il Vicino Oriente) ed il suo Presidente prof. Michele Loconsole, responsabile del nostro Ufficio stampa; l'Associazione nazionale ex Allievi della "Nunziatella" – Sezione Puglia, di cui sono alla guida insieme con il suo stimato Segretario, avv. Marco Grattagliano; l'Associazione ONLUS "Apulia", massimamente il cap. Leonardo D'Elia, che, oltre i meriti, è fra i miei più fedeli estimatori; i collaboratori universitari, in particolare l'avv. Francesco Patruno, l'avv. Claudio D'Amato e l'avv. Angelica Loiacono; il gruppo dei collaboratori amministrativi del Dipartimento di giurisprudenza (Giovanni Ambrosi, Michele Tricarico e Giuseppe Mola), che, come sempre, mi sono stati vicini in ogni momento; infine, ma non da ultimo, la Banca Popolare di Puglia e Basilicata, da considerare a pieno titolo lo sponsor ufficiale del Centro di Ricerca "Renato Baccari" per lo studio del diritto canonico e del diritto ecclesiastico italiano nel contesto europeo.

Permettetemi di ricordare, in conclusione del presente intervento, il convegno di studi su "L'editto di Costantino 1700 anni dopo", seconda iniziativa del nostro Centro di Ricerca, svoltosi dall'11 al 12 aprile nell'aula magna "Aldo Moro", in cui si è fra l'altro celebrato il famoso Concilio convocato da Costantino a Nicea nel 325 d.C.; abbiamo voluto, perciò, rappresentare questo importante congresso internazionale con l'icona di quel primo Concilio ecumenico secondo una moderna rielaborazione di scuola russa, che ha attratto l'attenzione di tutti voi.

Ma in quel convegno rievocativo della figura del Santo Imperatore, tale ritenuto dalle Chiese d'Oriente, aveva preso parte, portando un indirizzo di saluto, S.E. Massimo Vari, amato genero del prof. Renato Baccari, tornato alla casa del Padre all'alba del 18 giugno 2013. Massimo è stato, fra l'altro, Vicepresidente della Corte costituzionale, Consigliere dello Stato Città del Vaticano, nonché membro della Corte dei conti europea di Lussemburgo e Sottosegretario di Stato presso il Ministero dello sviluppo economico con delega alle telecomunicazioni nel Governo Monti. Principalmente è stato un giurista ed un uomo probo, da me frequentato familiarmente sin dagli anni della giovinezza, proteso a combattere strenuamente l'incombente *diritto della forza* in vista della tutela della persona

umana, del dialogo, del bene comune e della comunione fra i popoli. Addito a tutti il suo fortissimo senso del dovere, unito alla fede nel Signore, che, attraverso la Sua opera provvidenziale, guida la storia dei popoli.

Dichiaro chiuso il XXI congresso internazionale della Società per il diritto delle Chiese orientali, svoltosi a Bari sotto la protezione di San Nicola dal 10 al 13 settembre 2013.

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